WESTCHESTER COUNTY CLERK

Timothy C. Idoni
County Clerk

December 3, 2012

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

Re: Proposed Repeal of 22 NYCRR §202.5-b(d)(3)(iii) relating to e-filing of documents in "secure" status

Dear Mr. McConnell,

We are grateful for the opportunity provided by Judge Prudenti to offer public comment on a proposed repeal of 22 NYCRR § 202.5-b(d)(3)(iii), the section of the consensual electronic filing rules which creates the category of "secure" documents.

This section currently authorizes an electronic filer using the New York State Courts Electronic Filing System (NYSCEF) to designate a filing as "secure" unless it is one of eight prohibited document types (Affirmation/Affidavit of Service, Notice of Pendency, Cancellation of Notice of Pendency, Bill of Costs, Proof of Service, Request for Judicial Intervention, Release of Lien, and Satisfaction of Judgment). The result of the "secure" designation is to restrict online access to the secured filing to the attorneys or pro se litigants in the case who have consented to electronic filing. The general public is also given access to the filing at a designated terminal in the courthouse or the County Clerk's Office.

The Office of the Westchester County Clerk strongly supports the proposed complete elimination of the "secure" document designation from the rules and therefore the NYSCEF System.

Our Experience with NYSCEF

Westchester County began accepting electronically filed tax certiorari cases via the Filing by Electronic Means (FBEM) System in 2008. However, participation in the consensual program was low due to concerns about the FBEM system and resistance to change on the part of the local tax certiorari bar. In 2009, Westchester County was named as a county in which electronic filing would become mandatory. After that legislation was passed, Westchester County began to work actively with the Office of Court Administration to launch mandatory electronic filing.

In January of 2011, commercial division eligible cases were the first cases for which the requirement to commence electronically became mandatory in Westchester County. Since that time, the mandatory program has grown to include torts (mandatory as of March 2011), all commercial cases including breach of contract and consumer credit cases (mandatory as of June 2011), and foreclosure, tax certiorari and small claims assessment review cases (mandatory as of January 2012). Currently over seventy percent of all Supreme Court actions are commenced electronically in Westchester County as only Article 78, election law, matrimonial and mental hygiene cases are excluded from the mandatory program. We are currently planning the expansion of our program to include voluntarily e-filed matrimonial actions in 2013. With over sixteen thousand cases commenced electronically via the NYSCEF System in Westchester County in 2011, electronic filing is now a significant part of our daily operation.

Our Concern with the Secure Designation

The Office of the Westchester County Clerk began to raise concerns about the secure designation in 2009 when our project team began meeting with our partners in the courts and from the E-Filing Resource Center. The concerns raised at that time were three-fold:

- The County Clerk's Office underlying computer systems were built to recognize a case as sealed or public. The search feature of these systems, Westchester Records Online, was used by both customers outside of the office and staff within the office. The structure of the system did not provide for the ability to view a document if you were in the office but not outside of the office, as was required by the e-filing rules with respect to secure documents.

- The County Clerk's Office had made great strides in providing online access so our customers did not have to travel into the office to do their work, but could instead work from a home or office. Bringing customers back into the office was a step backwards in achieving our goals.

- The County Clerk's Office felt that the secure designation would provide filers with a false sense of security and would encourage the inclusion of information in a filing which would not have otherwise been included in a publicly available document.

At that time, the Office of Court Administration issued a letter directing the County Clerk not to make secure documents available via Westchester Records Online. As a result, our internal systems were modified to accommodate the direction of the Office of Court Administration.

Practical Problems with the Secure Designation

By June of 2011, the secure designation was causing problems in our office. Local title searchers who had been using Westchester Records Online to complete title searches from their home or office for the last few years began to experience limited access to images of documents such as Notices of Pendency. We had to inform them that they would need to travel into our office to view these images which had been secured by the filer.

At that time, the Office of the Westchester County Clerk had one new computer station which provided access to the NYSCEF System so that customers could file documents and view secure documents. It became common for this station to have customers waiting to use it. As a result, our staff had to scramble to equip all public terminals in our Legal Division with access to secure filings. We now have five terminals which provide access to secure documents.

At one point in June we realized that one of our staffers who proof-reads liens had been going out to the NYSCEF terminal to view these images as his security settings prevented him from viewing these documents in Westchester Records Online. We have had to give this staffer an increased security clearance in order to perform work which never required this clearance in the past.

New York State Identity Theft Law and the E-Filing Rules

In addition to the negative impact on our operations, we also have a legal concern that there is a conflict between the New York State Identity Theft Law and the E-Filing Rules.

Section 96-a of the Public Officers Law states, in relevant part: Prohibited conduct. 1. Beginning on January first, two thousand ten the state and its political subdivisions shall not do any of the following, unless required by law: (a) Intentionally communicate to the general public or otherwise make available to the general public in any manner an individual's social security account number.

However, Uniform Rule 202.5-b states, when discussing secure information: "The document will, however, be available for public inspection at the Office of the County Clerk unless sealed by the court."

We remain extremely concerned that any "secure" document with a social security number which the County Clerk makes available on the NYSCEF terminal in our office will constitute a violation of the Public Officers Law.

Support for the Proposed Amendment

We strongly support the proposed amendment to the rules which will eliminate the secure designation.

We understand that when the electronic filing program began in 1999, placing information on the internet was a much newer concept. And it is likely that the "secure" designation was created by administrative rule in response to nervousness about a new method of accessibility of public records. However, online access to services and records is now commonplace and banking and brokerage relationships are often carried out entirely via the internet. Filers understand that records have become increasingly accessible and many have come to expect that accessibility when they need to obtain records.

Further, the authority to determine the level of public access to a public record should not be held by a filer, nor controlled by the Office of Court Administration through administrative rule. The authority to determine the level of public access to a public record belongs with the County Clerk who also bears the burden, pursuant to Section 96-a of the Public Officers law.

Conclusion

Thank you for the opportunity to provide public comment on a proposed change to 22 NYCRR § 202.5-b(d)(3)(iii), the section of the consensual electronic filing rules which creates the category of "secure" documents.

Sincerely,

Timothy C. Idoni
Westchester County Clerk

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TO: John W McConnell

FROM: Elizabeth Larkin, Cortland County Clerk

RE: Comments on Repeal of 22 NYCRR 202.5-b(d)(3)(iii) relating to filing of documents in "secure" status

And

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

I, as County Clerk, applaud the repeal of 202.5 (d) (3) (iii) and am very pleased with the proposed 202.5(e). When Judge Prudenti was made aware of public documents restricted from view because the documents had been tagged as "secure" she attempted to remedy the problem by naming certain public documents that could not be secured. These documents, however, must be made public at the county clerk's office. This put an undo burden of scrutinizing documents before they were made public by the clerk. This rule was meant to protect people by not revealing confidential information, but instead it has caused much confusion.

The proposed rule 202.5 (e) is very clear, to the point, and leaves little room for interpretation. The responsibility of not submitting confidential information on public document is clearly stated as the responsibility of the parties submitting the papers and the type of information that is confidential is also clearly stated.

I commend Judge Prudenti and her staff for clarifying this issue and for clearly setting guidelines for filers.

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January 17, 2013

Comments on Proposal to Repeal 22 NYCRR Section 202.5-b(d)(3)(iii)

The NYCLA Supreme Court Committee reviewed the Office of Court Administration ("OCA") proposal regarding 22 NYCRR Section 202.5-b(d)(3)(iii) relating to "secure" electronic filing at its meeting on January 8, 2013. As noted below, both the Committee and the NYCLA Civil Court Practice Section voted on the proposal, with differing outcomes.

The Committee voted against repeal of 22 NYCRR Section 202.5-b(d)(3)(iii) relating to secure electronic filing by a vote of 7-6, with 11 abstaining. E-filing a document in "secure" status renders it unavailable for public inspection online through the NYS Electronic Filing System (except to counsel of record and self-represented parties in the case), but such "secure" documents remain available for public inspection on a computer terminal at the office of the County Clerk[1].

A lively debate took place regarding the value of secure electronic filing to litigators. Many agreed with OCA's position that the secure e-filing option gave filers a false sense of security, resulting in the inadvertent filing of secure information without proper redaction. Conversely, proponents of secure e-filing felt that the intermediate step between Internet-searchable papers and filing papers under seal afforded by secure e-filing was a feature worth keeping. One reason given for maintaining the secure status was to ease the burden on attorneys, who might be confronted with a filing, such as a late night submission, only to realize that a document, such as an exhibit, was produced to the attorney technically under a confidential (perhaps overbroad) designation. Under standard confidentiality agreements, there is a time frame set for determining confidentiality designations, which may not align conveniently with, or resolve prior to, required or urgent motion filings. The availability of the secure designation has been used by practitioners, in their professional discretion, as a stop-gap measure in order to facilitate a required filing, with notice to the producing side, with the details for whether to completely shield the document from public view to be determined shortly thereafter.

For many a mundane case, as a practical matter, the public is not vying to view the details of such filings at the clerk's office. Further, as the New York State court system is more restrictive in allowing documents to be sealed, maintaining the secure status will allow documents that might be sealed in federal court to be filed in the state court as secure, and with some modicum of effective protection in most cases. Additionally, it is unclear from the proposal to what extent lawyers are currently using the "secure" status, and to what effect – in other words, it is unclear

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

on what exactly OCA is basing the proposal to repeal the secure status. To the extent necessary to clarify the limited protection of the "secure" status, that might be remedied by a pop-up reminding the e-filer that documents filed as secure are not sealed and are still available for viewing by the public at the clerk's office. As the New York County Lawyers' Association exists in large part to foster the interests of lawyers, the Committee believes that the Association should make known the view of lawyers on the Committee who believe that the existence of the "secure" status palpably benefits the practicing attorney and the interests of parties. Accordingly, the Committee voted narrowly against the repeal of secure e-filing.

The Civil Court Practice Section reviewed this OCA proposal at its January 15, 2013 meeting. The Section undertook an in-depth discussion of both OCA's report and the Supreme Court Committee's preliminary report to the Section as to the discussion and outcome of the Committee's meeting. The Section's members noted that the correct usage of "secure" e-filing was largely to protect the very same information that OCA's newly proposed rule, Section 202.5(e), now requires to be redacted. For other "secure information" such as trade secrets, and as OCA itself noted in its report, "secure" e-filing gives a false sense of security because, without a sealing order, such information is available for inspection at the office of the County Clerk. Whether anyone is looking to view these documents, the fact that they are available for public inspection likely will work to undermine any "confidential" status wishfully ascribed to them. What is left to protect in any continuing usage of "secure" e-filings mainly is its noted *illegitimate* usage, i.e., the practice of attorneys to attempt to secure e-filings where personal "secure information," in fact, is not involved.

After this discussion, by a vote of 11-0, with two abstaining, the Section unanimously voted in favor of repeal of 22 NYCRR Section 202.5-b(d)(3)(iii), as proposed by OCA.

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January 18, 2013

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

Dear Mr. McConnell:

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

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

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

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

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

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

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

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

Respectfully submitted,

Henry J. Kennedy,
President

Timothy K. Beeken,
Chair, Rules Committee

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January 17, 2013

VIA E-MAIL AND FEDEX

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

Dear Mr. McConnell:

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

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

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

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A. About Courthouse News Service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. <u>The Burden To Redact Is Appropriately Placed On The Filing Party</u>

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

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

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

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

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

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

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

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

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

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

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

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

E. Conclusion

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

Very truly yours,

Rachel Matteo-Boehm
On Behalf of Courthouse News Service

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

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

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January 18, 2013

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

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

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

Dear Mr. McConnell:

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

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

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

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

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

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

Very truly yours,

ANTHONY J. LAMBERTI
AJL/vr