The New York Times Company

David McCraw
Vice President and
Assistant General Counsel

620 Eighth Avenue
New York, NY 10018
tel 212.556-4031
fax 212.556-4634
mccraw@nytimes.com

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VIA ELECTRONIC DELIVERY

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

Re: Section 207.64 – Uniform Civil Rules of the Surrogate's Court

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposed revisions to 22 NYCRR § 207.64 of the Uniform Civil Rules of the Surrogate's Court. As in the past, I write on behalf of various news organizations that have concerns about the limitations that Section 207.64 imposes on access to court records by journalists and the public.[1] We have now had an opportunity to review the changes proposed in your memorandum of April 21, 2015. We greatly appreciate that the drafters have responded positively to several of the suggestions we made in our prior submissions, and it is clear that the drafters have given serious attention to the issue of public access while trying to address the legitimate concerns about privacy raised by others. Nonetheless, we believe the proposed changes still unduly limit public access.

As set out in my letter of October 14, 2014 to Judge Czygier, it remains our position that the laws and processes applicable to sealing in other courts are equally applicable to the Surrogate's Court and should be employed there. They provide a time-tested mechanism for allowing sealing in extraordinary cases while protecting the public's right of access. But, if that position is not accepted by the Office of Court Administration (and without commenting on the constitutionality of the rules even after changes), we nonetheless think further changes in the proposed rules are required.

[1] The news organizations include the publishers of the following publications, all of which regularly cover the New York courts: The New York Times, the Daily News, the New York Post, the New York Law Journal, The Wall Street Journal, Newsday, the Albany Times Union, and the Gannett Company's six daily newspapers in New York State as well as The Associated Press.

First, we ask the drafters to address a serious ambiguity contained in proposed subdivision (b) of Section 207.64. It reads:

> The officers, clerks and employees of the court shall not permit a copy of any of the following documents to be viewed or taken by any other person than [certain enumerated parties] or by order of the court or written permission of the Surrogate or Chief Clerk of the court.[2] The standard for the grant of such permission in a contested matter shall be the same as required under 22 NYCRR 216.1 and applicable law . . .

The ambiguity arises from the term "contested matter." Does the term refer to (a) a case in which there is a dispute between parties in the underlying matter (and therefore there is likely to be active litigation) or (b) the situation where a party chooses to contest a request for documents from a member of the public?

If (a) is intended, the rule is silent on what standard should be employed in uncontested matters. It cannot be that there is no means for seeking access to newsworthy but uncontested cases.

If (b) is intended, the rule fails to delineate the process by which a "contest" over the release would become ripe. Is a party notified of the request and then required to make a motion since the party seeking the sealing would have the burden of persuasion under settled law? What is the process and timing of such notice? What happens if a party does not respond to the notice?

We suspect that the drafters intended (b), but in either case the provision needs to be clarified. Depending on how the provision is redrafted, a procedural provision may be required.

Second, we were pleased to see the reduction in the categories of documents that would be subject to Section 207.64, and we applaud the drafters for incorporating new rules requiring redaction of certain personal information rather than resorting to wholesale sealing of documents. Nonetheless, as we stated in our October 14, 2014 letter, we do not believe the firearms inventory should be subject to the provisions of Section 207.64. The fact that the deceased happened to own certain firearms does not fit into any of the generally recognized categories of private information.

Finally, we again ask that the term "sealing" be used in the rules. We understand that OCA purposely tried to avoid use of the term. We are concerned, however, that avoidance of the term will only engender confusion about what body of law applies to any access motion that may be brought.

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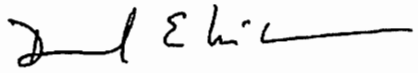
[2] There appears to be a drafting error here The text reads that the "officers, clerks and employees shall not permit a copy [of the documents] to be viewed or taken . . . by order of the court or written permission.. . . ." The text should read "*except* by order of the court or written permission . . ."

Thank you again for the opportunity to comment on the latest proposal. We have appreciated the willingness of OCA and the drafters to engage with us and listen to our concerns throughout the past few months.

Sincerely,



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