

Committee on Media Law

Comments on Proposed Amendment to 22 NYCRR § 202.5(e)

Media #2

January 21, 2013

NEW YORK STATE BAR ASSOCIATION, COMMITTEE ON MEDIA LAW

The Committee on Media Law of the New York State Bar Association (the “Committee”) submits the following comments in opposition to the proposed amendment to 22 NYCRR § 202.5(e) (the “Amendment”) that would require the redaction of various pieces of information from court filings and empower the courts to order filings to be sealed if such redactions are not made. In short, while the Amendment is motivated by legitimate concerns about the potential for identity theft, the scope of required redactions sweeps far too broadly and the Committee respectfully suggests that a more-targeted Amendment would attain the same goals without compromising the public’s right to attend and understand court proceedings and the media’s ability to inform the public about court proceedings and public records.

The Committee’s primary objection to the Amendment is to the requirement that dates of birth be redacted as confidential information. The use of dates of birth, including month and day, is critical to the media’s ability to distinguish between people with similar or identical names when reviewing public records including court files in order to produce accurate reporting and avoid misidentifications. Often dates of birth are the only indication of a party’s age in the court records, and the age of a party is often highly relevant to coverage of cases. For example, when reporting on a personal-injury award, it is critical to know the age of the plaintiff to appreciate the nature of the award – a \$10,000 award to a 20-year-old plaintiff for loss of future wages is obviously quite different that the same award to an 80-year-old plaintiff.

Moreover, individuals do not treat dates of birth as confidential information – they are provided in countless, routine interactions between members of the public, both socially and commercially. *See, e.g., Paul P. v. Farmer*, 227 F.3d 98, 106 (3d Cir. 2000) (recognizing that disclosure of dates of birth “does not implicate a privacy interest”). For example, people provide their dates of birth to the public through social media and also whenever they offer identification to complete a commercial transaction. In addition, dates of birth are available to the public through various public records, such as voting registration records. Finally, the Committee is aware of no evidence that links the availability of dates of birth directly to identity theft, without access to actual confidential information such as financial account numbers or social security numbers. Indeed, the New York data-breach law does not include dates of birth in its definition of private information. *See* N.Y. Gen. Bus. Law § 899-aa; *see also* Justin M. Schmidt, Note, RFID and Privacy: Living in Perfect Harmony, 34 Rutgers Computer & Tech. L.J. 247, 264 -272, n.115 (2007) (“Information such as names, age, birth dates, etc. is not PII because multiple people can have these information characteristics.”). Put simply, the disclosure of dates of birth without other information does not present an identity-theft risk. *See Dayton Newspapers, Inc. v. Dep’t of Veteran Affairs*, 257 F. Supp. 2d 988, 1005-06 (S.D. Ohio 2003) (“The VA does not discuss the date of birth issue in its Memoranda other than to lump it in with ‘name’ and ‘social security number’ and the like in its general classification of information that ‘directly identifies’ individuals. The Court does not

agree that dates of birth ‘directly’ identify individuals. On their own, dates of birth are practically irrelevant. Dates of birth are only helpful in identifying individuals where other identifying information is already known, and the date of birth can be used to narrow the choices.”).

The Committee believes that birthdates (i.e., month and day) should not be included in the definition of “confidential personal information” in the proposed Amendment., but is aware that the New York State Bar Association in 2006 promulgated E-Filing Recommendations that called for limited redaction of birthdates in court filings. In the event that birthdates are not removed from the category of “confidential personal information” subject to complete redaction under the proposed Amendment, the Committee urges the adoption of partial redaction recommended by the New York State Bar Association, such as the redaction of the day, but not the month or year of birth.

Similarly, there is no basis to conclude that disclosure of mothers’ maiden names without disclosure of actual sensitive information could facilitate identity theft. In addition, both dates of birth and family history (which would disclose a mother’s maiden name) are commonly discussed in court papers, and mandatory redaction of that information would both raise practical issues and impair the public’s constitutional right of access to those proceedings and records. Accordingly, the Committee strongly recommends that dates of birth and mothers’ maiden names be removed from the Amendment should the Amendment be acted upon.

The Committee further objects to the requirement that the remaining numbers identified in the Amendment be redacted in their entirety. As the Commission on Public Access to Court Records found in its 2004 Report to the Chief Judge, social security numbers and financial account numbers need only be redacted in part to safeguard against identity theft.¹ Redacting all but the last four digits of such numbers, as is commonly done, is sufficient and the Committee recommends revising the Amendment accordingly. Allowing the inclusion of partial numbers would enhance the public’s understanding of the records, for example by allowing readers to distinguish between different accounts being discussed in a filing in a fraud or corruption case involving numerous accounts. Indeed, the Amendment itself appreciates this concern by allowing inclusion of the last four digits of account numbers in certain cases, but there is no legitimate basis not to extend this requirement to all cases.

Finally, the Committee objects to the language in the Amendment that appears to empower courts to order the complete sealing of filings where the required redactions are not made. Such sealing would contravene Rule 216.1, which only allows for sealing as necessary to be effective but no broader, and the constitutional and common law rights of access, which similarly demand that sealing be no broader than necessary. The Committee proposes that, to the extent the Amendment is acted upon and the courts are advised to direct sealing where redactions are not made, the language be revised to empower courts to direct the clerk to redact the records or require that the filing party refile the records with the mandated redactions.

For these reasons, the Committee opposes the Amendment as worded and would propose the alternate wording discussed above if the Amendment is to go forward.²

Chair of the Committee: Lynn Oberlander, Esq.

¹ The Commission on Public Access to Court Records also found that the month and day of birth could be redacted, leaving the year of birth unredacted. For the reasons provided *supra*, the Committee believes that month and day of birth also should be left unredacted.

² Victor A. Kovner did not participate in these Comments.