



COMMITTEE ON COURTS OF APPELLATE JURISDICTION

CYNTHIA F. FEATHERS, Esq.

Co-Chair
P.O. Box 2021
Glens Falls, NY 12801
(518) 223-0750
FAX: (518) 338-0175
cfeathers@appealsny.com

DENISE A. HARTMAN, Esq.

Co-Chair
230 Schoharie Turnpike
Athens, NY 12015
(518) 755-4137 (cell)
hartman@mhcable.com

COMMITTEE ON COURTS OF APPELLATE JURISDICTION

**RECOMMENDATION FOR UNIFORM RULES
GOVERNING OMISSION AND REDACTION OF SENSITIVE
INFORMATION FROM COURT FILINGS**

March 25, 2013

The Committee on Courts of Appellate Jurisdiction recommends that the New York State Bar Association urge the adoption of one uniform set of rules governing the omission or redaction of sensitive or confidential information for all civil and criminal cases, applicable in the trial courts and in the appellate courts.

In recent years the expansion of e-filing programs and the scanning of appellate records and briefs have resulted in a trove of electronic documents that are now available on the Internet. Two recent court system initiatives regarding the omission or redaction of sensitive or confidential information from such documents have raised serious concerns among the Committee's members.

First, in November 2012 the Office of Court Administration called for public comment on a proposal by the Chief Administrative Judge's Advisory Committee on Civil Practice to add a new subdivision (e) to 22 NYCRR 202.5, governing omission and redaction of "personal identifying information" from papers filed in civil cases in the Supreme and County Courts. The comment period was to close on January 22, 2013, but was extended to May 7, 2013.

Second, on January 10, 2013, before the comment period on the OCA Advisory Committee's proposed trial court rule closed, the Court of Appeals adopted amendments to § 500.5 of its rules, governing omission and redaction of "confidential and sensitive material" from papers filed in that court. The Court of Appeals rule became effective on February 1, 2013.

The separate approaches taken by the OCA Advisory Committee and by the Court of Appeals differ significantly. For example, the OCA proposal lists nine categories of sensitive data, among which are insurance or financial account numbers, computer password or computer access information, and electronic signature or unique biometric data. However, not all these types of information are listed in the Court of Appeals rule, which requires the omission of all “sensitive material” including but not limited to eleven types of information, such as the names of children and their schools, and the names of employers.

The OCA proposal and Court of Appeals rule are inconsistent with one another as well as with more limited kinds of information specified in Federal Rule of Civil Procedure 5.2(a) and recommended in the 2004 report of Chief Judge Kaye’s Commission on Public Access to Court Records. When the Commission recommended that court case records that are filed or maintained in electronic form should be made available to the public on the Internet to the same extent that paper records are available to the public at the courthouse, it recognized that court records can contain information that, if disclosed on the Internet, could be accessed and used for identity theft to the injury of the persons who are the subject of those records. The Commission therefore recommended that a limited class of sensitive or confidential data be omitted or redacted from documents filed in the courts.

At least six entities are empowered to make redaction rules concerning state court records: the Chief Administrative Judge for the trial courts, the four Departments of the Appellate Division for themselves and the Appellate Terms, and the Court of Appeals. Many stakeholders’ work will be affected by these rules: judges and justices, the clerks and court system personnel who must accept documents for filing and check them for compliance, the attorneys and litigants who must make the omissions and redactions and pay significant costs of compliance, and court records managers and information technology personnel who will make e-filed or scanned documents available to the public on the Internet.

Inconsistent rules at each level of the court system will result in needless work and expense for all stakeholders and will mean that documents presented in records to appellate courts will often differ from the documents that were presented to the trial courts. Furthermore, requiring the omission or redaction of an open-ended category of “sensitive data” or an extensive defined list of sensitive items will prove extraordinarily burdensome and expensive for attorneys and litigants.

For these reasons, we urge the New York State Bar Association to adopt the position that there should be one set of rules governing omissions and redactions of confidential and sensitive material from court records, applicable to both civil and criminal matters, in all the courts of the Unified Court System. Such uniform rules should be limited in scope and adopted after all stakeholder groups have the opportunity for consultation and comment. Because more and more un-redacted, e-filed court documents are going on the Internet daily, we urge that steps to develop such uniform rules be taken with due alacrity.

Summaries of the divergent proposed and existing rules governing omission and redaction of confidential and sensitive information are provided in the following pages.

**The OCA Advisory Committee on Civil Practice Proposal
to Add a New Subdivision (e) to 22 NYCRR 202.5**

The Chief Administrative Judge's Advisory Committee on Civil Practice has recently proposed amendment of 22 NYCRR § 202.5 (Uniform Civil Rules for Supreme and County Court), requiring redaction of confidential personal information prior to filing papers in civil matters. The comment period on the proposed rule expires May 7, 2013. The OCA Advisory Committee proposed these rules after observing that court papers increasingly are accessed on the internet, personal identifying information is of growing interest to identity thieves, and practitioners are aware of federal and state laws limiting disclosure of sensitive personal data. It noted that New York lacks court rules specifically addressing protection of sensitive personal information in civil court papers.

The Committee's proposal defines "confidential personal information" by using a closed list and expressly excepts matrimonial actions and Surrogate's Court proceedings from the rule's purview. The proposed rule places responsibility for compliance on the parties, requiring that they "omit or redact" the following "confidential" personal information:

- (1) a social security number;
- (2) a date of birth, except a person's year of birth;
- (3) a mother's maiden name;
- (4) a driver's license number or a non-driver photo identification card number;
- (5) an employee identification number;
- (6) a credit card number;
- (7) an insurance or financial account number;
- (8) a computer password or computer access information or
- (9) electronic signature data or unique biometric data.

New York Court of Appeals
Rule 500.5

The Court of Appeals recently adopted rules regarding the omission or redaction of “confidential” and “sensitive” information, effective February 1, 2013. Section 500.5 of the Court’s rules now provide that, to the extent possible, confidential information subject to a statutory proscription against publication shall be omitted or redacted from public documents, and where such information must be included and cannot be redacted, the cover of the document filed shall clearly indicate that it contains confidential material.

Under subdivision (d), the Court’s new rules also require omission or redaction of other “sensitive material”:

To the extent possible, sensitive material, even if it is not subject to a statutory proscription against publication, shall be omitted or redacted from public documents. Information of this type includes, but is not limited to:

- (1) social security numbers,
- (2) taxpayer identification numbers,
- (3) financial account numbers;
- (4) full dates of birth;
- (5) exact street addresses;
- (6) e-mail addresses;
- (7) telephone numbers;
- (8) names of minor children;
- (9) names of children's schools;
- (10) names of employers;
- (11) other information that would identify a person whose identity should not be revealed (e.g., a victim of a sex crime).

Recommendations of the Commission on Public Access to Court Records (2004)

In 2002 former Chief Judge Judith Kaye appointed a Commission on Public Access to Court Records to examine the sometimes competing interests of privacy and open access to information in court case files. The Commission issued its report in February 2004 recommending that “[p]ublic court case records in electronic form should be made available to the public by the Uniform Court System remotely over the Internet” to the same extent that paper records are available to the public at the courthouse. The Commission observed, however, that in light of the potential for harm to privacy interests and the personal security of individuals who are involved in judicial proceedings that may be occasioned by public disclosure of certain narrow categories of information, such information should not be referred to in court papers and therefore should not become public without leave of court.

Accordingly, the Commission recommended that no public court case records, whether in paper or electronic form, should include social security numbers, financial account numbers, names of minor children, and full birth dates of minor children—similar to the four categories of confidential data set forth in FRCP 5.2(a). It therefore recommended that, without leave of court, no public court case records whether in paper or electronic form, should include the following information:

- (1) Social Security numbers
- (2) financial account numbers
- (3) names of minor children
- (4) full birth dates of any individual

It further recommended that to the extent that these identifiers are referenced in court filings, Social Security numbers should be shortened to their last four digits; financial account numbers should be shortened to their last four digits; the names of minor children should be shortened to their initials; and birth dates should be shortened to include only the year of birth. Finally, it recommended that the responsibility for ensuring compliance with these recommendations should lie with the filing attorneys or self-represented litigants.

(In addition, it recommended that the Uniform Court System determine how to protect at risk individuals such as victims of domestic violence and stalking from being identified and located by use of their home and work phone numbers and addresses in public court records.)

**Federal Rule of Civil Procedure 5.2(a):
Privacy Protection for Filings Made in the Federal Courts**

FRCP 5.2 provides:

(a) **REDACTED FILINGS.** Unless the court orders otherwise, 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 may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

(b) **EXEMPTIONS FROM THE REDACTION REQUIREMENT.** The redaction requirement does not apply to the following:

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Rule 5.2(c) or (d); and
- (6) a pro se filing in an action brought under 28 U.S.C. §2241, 2254, or 2255.

(c) **LIMITATIONS ON REMOTE ACCESS TO ELECTRONIC FILES; SOCIAL-SECURITY APPEALS AND IMMIGRATION CASES.** Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

- (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;
- (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
 - (A) the docket maintained by the court; and
 - (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) **FILINGS MADE UNDER SEAL.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) PROTECTIVE ORDERS. For good cause, the court may by order in a case:

- (1) require redaction of additional information: or
- (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.