New York State Bar Association

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NYSBA

# 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.