

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

# NEW YORK CITY BAR

## Comments of the New York City Bar Association on Proposed Rule for Redaction of Personal Identifying Information

The New York City Bar (“City Bar”)<sup>1</sup> greatly appreciates the opportunity to comment on the proposed adoption of 22 N.Y.C. R.R. §202.5(e), a rule aimed at preventing the unnecessary disclosure of personal identifying information in papers filed in civil matters (the “Proposed Rule”).

The City Bar strongly supports the Proposed Rule, subject to the suggestions, comments and questions set forth below and indicated in the black-lined version of the Proposed Rule attached to this report as Exhibit “A”. In particular, we applaud the Advisory Committee for proposing a court rule rather than a statutory amendment and for adopting a “closed” rather than open-ended definition of protected confidential personal information (“CPI”). We also commend the Advisory Committee for excluding Surrogate’s Court cases and for excepting the last four digits of account numbers in consumer credit transaction cases.

### 1. The Proposed Rule Should Apply to Civil Court Proceedings.

The Advisory Committee comments to the Proposed Rule speak of amending Rule 202.5, which governs papers filed in the Supreme and County Courts. We assume a similar rule will be adopted for the New York City Civil Court, given that the majority of actions arising out of consumer credit transactions, which are the subject of subdivision (3) of the Proposed Rule, are filed in the Civil Court.

In this regard, however, the City Bar urges that the Proposed Rule should not serve to override or undercut the efficacy of Chief Clerk Memorandum 172 (“CCM-172”), issued by the

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<sup>1</sup> This report was authored by the City Bar’s Council on Judicial Administration and incorporates certain comments received from the City Bar’s Civil Court Committee and Committee on Communications and Media Law.

Chief Clerk of the New York City Civil Court. CCM-172 requires the clerk to redact social security numbers from any document filed with the New York City Civil Court. The City Bar, therefore, recommends that the terms “court rule” and “administrative court directive” be added to the “as otherwise provided” language in subdivision (1) of the Proposed Rule, as is reflected in our black-line of the Proposed Rule.

2. Definition of Confidential Personal Information and Redaction Requirements.

Although the City Bar’s Council on Judicial Administration’s 2010<sup>2</sup> Report recommended allowing parties to file partially redacted CPI under certain circumstances without a court order, the City Bar is now prepared to support the Proposed Rule on this point. We recognize the Advisory Committee’s concerns about subjectivity, potential ancillary litigation and that filing even partially redacted CPI can contribute to identity theft. Because the Proposed Rule gives courts discretion to permit unredacted or partially redacted filings of CPI for good cause, the City Bar believes there is a mechanism – though, admittedly, with some costs attached – for addressing the presumably rare case in which it is necessary to file unredacted partial CPI.

The City Bar, however, suggests deleting “a mother’s maiden name” from the definition of CPI. In some segments of our community (notably those composed of persons of Latin American descent), it is common to use both the father’s and mother’s last name. This could lead to inadvertent violations of a rule that prohibits the use of a maiden name.

We suggest also that the terms “computer access information” and “electronic signature data” in the definition of CPI (bracketed in our mark-up of the Proposed Rule) are imprecise and should either be eliminated or clarified. For example, the former term could encompass a simple

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<sup>2</sup> Report Recommending A New York State Court Rule Requiring That Sensitive Information Be Omitted Or Redacted From Documents Filed With Civil Courts, dated February 2, 2010.

instruction that users should log-on to a network by entering their user name and password. We are not certain what the latter term means.

The City Bar urges the Office of Court Administration (“OCA”) to take the measures necessary to ensure that any sealing of documents containing CPI pursuant to the Proposed Rule be in accordance with the requirement of 22 NYCRR §216.1 that any sealing must be no broader than necessary to protect the threatened interest. The City Bar, therefore recommends that the Proposed Rule incorporate a direct reference to this requirement, as is shown in our black-line of the Proposed Rule.

Finally, the City Bar urges OCA to make special efforts to protect unrepresented and unsophisticated litigants from the risk of identity theft. These efforts could include

- The placement in the Clerk’s offices of posters in English and other languages commonly spoken in New York City which explain the Proposed Rule, what redaction is and how to carry it out.
- Posting such explanatory information on OCA’s website and on other websites, such as LawHelp.
- Issuance of an Advisory Notice to encourage judges to inform litigants about the risks of including unredacted CPI in court filings.

3. Waiver by a Party Filing His or Her Own CPI.

The City Bar recommends that the waiver provided for by subdivision (4) of the Proposed Rule should be limited to only the specific CPI filed unredacted and not under seal and that the waiver apply only to that case or proceeding. For example, if a litigant files papers that include his or her social security number, there is no reason that should also waive the protection of the Proposed Rule with respect to that person’s bank account number. Similarly, there is no good reason for a person to be denied the protection of the Proposed Rule in a different case

merely because of what might have been an inadvertent disclosure in a previous case. Clearly, the risk of identity theft is heightened with each additional disclosure of a person's CPI.

We also suggest the inclusion of language in subdivision (4) of the Proposed Rule that allows for the retroactive cure of inadvertent waiver. A waiver is generally defined as the intentional relinquishment of a known right. Gilbert Frank Corp. v. Federal Insurance Co., 70 N.Y. 2d 966, 968 (1988). If a person (or his/her attorney) inadvertently files CPI, courts and court personnel should readily permit that information to be redacted to the extent reasonably practicable and "forgive" any mistaken "waiver."

We have incorporated recommended changes to subdivision (4) of the Proposed Rule that reflect these recommendations.

January 22, 2013

## Exhibit A

### § 202.5 Papers Filed in Court

(e) Redaction of Personal Identifying Information. (1) Except in a matrimonial action or a proceeding in surrogate's court or as otherwise provided by law ~~or~~, court rule, court order or administrative court directive, and whether or not a sealing order is or has been sought, and where not waived under subdivision 4 of this section, the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information means: (i) a social security number; (ii) a date of birth, except a person's year of birth; (iii) ~~a mother's maiden name~~; (iv) a driver's license number or a non-driver photo identification card number; (viiiiv) an employee identification number; (viiivv) a credit card number; (viiivi) an insurance or financial account number; or (viiivii) a computer password [or computer access information]; or (ixviii) [electronic signature data or] unique biometric data.

(2) The court sua sponte or on motion by any person may order a party to remove confidential personal information from papers or to resubmit a paper with such information redacted; order the clerk to seal the papers or a portion thereof containing confidential personal information in accordance with the requirement of 22 NYCRR §216.1 that any sealing must be no broader than necessary to protect the CPI; ~~rules promulgated by the chief administrator of the courts~~; for good cause permit the inclusion of confidential personal information in papers; or determine that particular information in a particular action is not confidential.

(3) The redaction requirement does not apply to the last four digits of the relevant account number(s), if any, in an action arising out of a consumer credit transaction, as defined in subdivision (f) of section one hundred five of the civil practice law and rules and in such an action in the event the defendant appears and denies responsibility for the identified account, the plaintiff may without leave of court amend his or her pleading to add full account or confidential personal information by (i) submitting such amended paper to the court on written notice to defendant for in camera review or (ii) filing such full account or other confidential personal information under seal in accordance with rules promulgated by the chief administrator of the courts.

(4) A party ~~waives the protection of this rule as to the party's who files his or her own confidential personal identifying information by filing it~~ without redaction and not under seal. waives the protection of this rule as to that confidential personal information in the court proceeding at issue. Such a party may, however, seek the retroactive redaction or sealing of such information.