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Supplemental comments on proposed adoption of 22 NYCRR  
§ 202.5(e), relating to redaction of confidential personal information in  
papers filed in civil matters

May 7, 2013

The New York City Bar Association submitted comments in January on the proposed rule governing redaction of personal confidential information in court papers filed in civil matters. We now write to call attention to the impact of the proposed rule regarding guardianship matters under Article 81 of the Mental Hygiene Law. As we describe below, there is need in these filings to provide extensive confidential personal information (CPI), and the requirement of redaction would impede how those most involved in the guardianships fulfill their responsibilities. As the concerns are similar to those in matrimonial matters, for which special considerations are already acknowledged as necessary regarding CPI and court file access, special considerations also are necessary in guardianship proceedings<sup>1</sup>

**A Brief Overview of Mental Hygiene Law Article 81 Guardianship Proceedings**

Mental Hygiene Law Article 81 (Article 81) guardianship proceedings are often brought by a petitioning family member, friend, or institution out of concern for an Alleged Incapacitated Person's (AIP) functional limitations that affect their ability to care for themselves and/or their property. The Guardianship Petition must allege sufficient facts concerning the AIP's inability to care for themselves (i.e., to handle activities of daily living, such as bathing, shopping, cleaning, laundry; to obtain medical or dental treatment; to be safely discharged to the community from a health care facility) or manage their property (to remain free from financial abuse; to pay rent and other bills; to manage assets) in order to reach a threshold for a judge to sign an Order to Show Cause.

In the Order to Show Cause, the Court appoints a Court Evaluator, who acts as the "eyes and ears" of the Court. The Court Evaluator investigates the allegations made in the petition, meets with the AIP, determines the AIP's need for counsel, gathers information about the assets available to the AIP, and places the information resulting from his or her investigation in a written report to the Court. Since many of the persons who are the subjects of Article 81 proceedings are elderly persons who wish to remain in their homes, or return to their homes,

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<sup>1</sup> These comments are submitted by the Association's Committee on Legal Problems of the Aging.

accurate and complete financial information is key to helping the Court determine whether there are enough resources to allow the AIP to remain in or return to the community. The Court Evaluator makes a recommendation as to whether, in his or her opinion, the AIP needs a guardian of the person or property.

If the Court determines, after presentation of evidence by the Petitioner during a hearing, that there is sufficient evidence, apart from the report of the Court Evaluator, to show that the AIP is incapacitated, the Court will order that a guardian be appointed for the benefit of the AIP.

Typically, the appointed Guardian uses the Court Evaluator's report as a "road map" to identify problems, to know what assets need to be marshaled and/or located or recovered, and to assist the Guardian in caring for the (now adjudicated ) Incapacitated Person (IP). If the Court Evaluator has done a thorough job, the Report generally contains detailed financial information vital to the Guardian's ability to safeguard and marshal assets. This is especially important when an IP's assets need to be recovered or prevented from being removed from the State; that is when time is of the essence.

It appears that the proposed rule would require redaction of the aforementioned financial information.

### **Concerns with Respect to the Proposed Redaction Guidelines**

Mental Hygiene Law Article §81.07(a)(5) states the following with regard to the information that must be included in a petition for the appointment of a guardian: "if powers are sought with respect to property management for the alleged incapacitated person, specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management." In some cases it would not be possible to comply with the rule without referring to account numbers.

By statute, the Petition is released only to the AIP and Court Evaluator. However, under the proposed rule, if the financial and other required information is redacted from the Petition, the Court Evaluator would need to contact the Petitioner to obtain such information and complete his or her investigation. In addition, during the investigation itself, additional financial accounts or creditor accounts may be identified, protected from loss, recovered by taking immediate action, or identified as being subject to recovery. The requisite account or creditor information would also need to be included in the Court Evaluator's report to the Court and can be crucial for, among other things, cross examination and determining the amount of the Guardian's bond.

In addition, attention must be paid to Article 81 guardianship accountings, which must give on an annual basis, a thorough and highly detailed picture of the finances of the Incapacitated Person, including account numbers. Certainly when accountings are required in the context of Surrogate's Court, complete financial disclosure is also required of the fiduciary, including full account numbers. In Article 81 matters, such disclosure is required to promote accountability on the part of the guardian, who is a fiduciary, to assist in the prevention of possible fraud on the part of a guardian, and to provide a means of comparison between accountings from year to year.

If the proposed rule were to be adopted in its present form, Article 81 proceedings would be in many respects impeded. The ability of the Court Evaluator to act quickly to preserve the assets of the AIP could be at risk. The efficiency of the Court Evaluator to properly report back to the Court could be hampered, and the utility of the Court Evaluator's report for the Guardian could be reduced. Investigations would take more time and, in contested matters, a trial could not be conducted in a timely manner. On the other hand, we agree that the extensive CPI that is generated in these proceedings must be protected.

### **In Conclusion**

Guardianship proceedings, by their nature, raise similar concerns to matrimonial matters, for which there already is special treatment for CPI and court file access. Hopefully, the concerns raised in guardianship proceedings can be accommodated by court rule, but in any event access to CPI in guardianship proceedings should be limited to appropriate parties. We are happy to work with you to further address this important issue.