MEMORANDUM

TO: The Office of Court Administration

FROM: New York City Bar Association

DATE: December 4, 2013

RE: Comments on proposed adoption of 22 NYCRR § 207.64 of the Uniform Rules for Surrogate's Court

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Attached please find the New York City Bar Association's comments on OCA's proposal to adopt a new rule to the Uniform Rules for Surrogate's Court, 22 N.Y.C.R.R. § 207.64 ("Proposed Rule"), which would limit public access to certain documents containing confidential personal identifying and financial data ("CPI").

The first attachment is a report by our Trusts, Estates and Surrogate's Courts Committee, which represents the City Bar's position in support of the Proposed Rule. It also includes two recommendations for OCA's consideration. The second attachment contains the separate comments of our Communications and Media Law Committee, which present a different view.

In a previous submission to OCA regarding a proposal to redact CPI from court filings, the City Bar expressed its view that, consistent with 22 N.Y.C.R.R. §216.1, the sealing of court records should be guided by the general principle that sealing should be no broader than necessary to protect the threatened interest. We believe that this principle also should be considered by the Surrogate's Court in implementing the "not to be unreasonably withheld" provision of the Proposed Rule.

Thank you for soliciting public comments and for your consideration. We are pleased to support the Proposed Rule and if we can provide any further information, please do not hesitate to contact us.

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Trusts, Estates and Surrogate's Courts Committee

COMMENTS ON PROPOSED ADOPTION OF 22 NYCRR §207.64 OF THE UNIFORM RULES FOR SURROGATE'S COURT, RELATING TO SECURE FILING OF CERTAIN DOCUMENTS IN SURROGATE'S COURT

THE PROPOSED RULE IS APPROVED WITH SUGGESTIONS

BACKGROUND

The Office of Court Administration has invited comments on the proposal of its Surrogate's Court Advisory Committee to adopt a new rule to the Uniform Rules for Surrogate's Court. The new rule, 22 NYCRR § 207.64 ("Proposed Rule"), would limit public access to certain documents containing confidential personal identifying and financial data (Confidential Personal Information ["CPI"]). The New York City Bar Association submits the following comments relevant to the proposed adoption of the Proposed Rule.

The City Bar supports the Proposed Rule. However, we also make two recommendations: the first is to clarify certain language, and the second is to add a new sub-section to the Proposed Rule that would impose a requirement on the practitioner to redact certain identifying information when filing papers with the court. We have recommended a redacting requirement because, as a practical matter, we feel that the Proposed Rule might not offer sufficient protection. With the burden being only on the court's staff to oversee and monitor the restricted public access to documents containing CPI, there is still a risk that some CPI will inadvertently be made available to parties not entitled to access it, thereby negating the original intention of the Proposed Rule. This redaction requirement would supplement the court's oversight and further minimize the chances that improper information is ever disseminated to the public. Given the already overtaxed circumstances of many courts, this change will help ensure compliance with the spirit and purpose of the Proposed Rule, while not causing a further burden on the courts.

Moreover, we believe that the language of the Proposed Rule should be expanded beyond "estates" to "proceedings" in order to include all Surrogate's Courts proceedings, which can involve trusts and other matters, as well as estates. Additionally, the Committee believes that the phrase "their counsel" following "persons interested ~~in the estate of the decedent, as defined by SCPA 103 (39)~~ in the proceeding", and "counsel for any Federal, State or local government agency" in the Proposed Rule should be further clarified. In its current form, an ambiguity exists as to who would qualify as "counsel" (only counsel of record, for instance?), particularly in the context of a "Federal, State or local government agency". In addition, since Article 17 and 17-a guardianships are specifically referenced in the Proposed Rule, we recommend that Article 81 guardianships be similarly specifically referenced.

DISCUSSION

The Proposed Rule represents a reasonable and necessary balance between two compelling state interests: the transparency of judicial proceedings, and the privacy rights of individuals. Common law notions of judicial transparency must now consider the dangers posed by identity theft. The Proposed Rule is acceptable not only because it appropriately balances these competing interests, but also because it provides a mechanism whereby the Surrogate or the Chief Clerk could render written permission to vary its application on the showing of reasonable grounds.

The Committee acknowledges that the fair and impartial administration of justice rests on the firm foundation of transparency in the judicial process. Nevertheless, technological developments present novel threats to that other compelling interest, the individual's right of privacy. A potential identity thief needs only to have access to a person's financial account numbers or social security number to compromise or damage credit ratings, to steal personal property, and to inconvenience the persons and institutions affected. Societal costs are another factor to be considered in policing and remedying the effects of identity theft.

In 2004, the New York Commission on Public Access to Court Records reported to Chief Judge Judith Kaye on its findings with regard to the dangers of unfettered public access to confidential identifying and financial information in court filings. It concluded that identity theft was a sufficiently compelling reason to justify limited access to such personal information. The report was used as a guideline for various courts around the State as they developed individual restrictions to court records. For example, estate tax returns have long been withheld from public disclosure. Furthermore, many courts have accepted filings only upon the redacting of information such as social security numbers. Indeed, the Proposed Rule is a response to the many differing standards applied piecemeal by the courts so as to impose a uniform standard applicable across the state. The Report to the Chief Judge provided in pertinent part:

> ...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, that information should not be referred to in court papers and therefore should not become public without leave of court. This policy should apply equally to court case records that are filed or maintained in paper or electronic form.

The Report recommended that "[w]ithout leave of court, no public court case records, whether in paper or electronic form, should include the following information in full: (1) Social Security numbers, (2) financial account numbers, (3) names of minor children, and (4) full birth dates of any individual."

The Surrogate's Court Committee notes that limitations on access to such information have long been accepted in Federal courts. The Federal Rules of Civil Procedure §5.2 recognizes the necessity of securing such confidential information. The section provides in pertinent part:

> Rule 5.2. Privacy Protection For Filings Made with the Court.
> (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.

FRCP § 5.2 was adopted in compliance with the E-Government Act of 2002, Public Law 107–347. Section 205(c)(3) of that statute requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." As is apparent, FRCP § 5.2 goes further than the E-Government Act of 2002 in regulating paper filings even when they are not converted to electronic form. An additional feature of the Federal rule relevant to our present concern is the burden placed on the parties rather than the courts to make the proper redactions before filing their papers. The clerk is not required to review documents filed with the court for compliance with the Federal rule.

The Committee notes that another proposed New York rule (22 NYCRR §202[5][e]) regarding redacted filings has a similar privacy protection goal, except that it is applicable to court filings other than in Surrogate's court proceedings and matrimonial actions. This rule has yet to be promulgated but it is noteworthy in that it places the burden on the parties filing papers with the court to redact confidential financial information.

The Committee recommends such a formulation be added to the Proposed Rule for certain future filings, if only as a safeguard to the full realization the rule's intent when documents may escape individualized scrutiny and be shown to unauthorized persons. A suggested modification of the Proposed Rule would be as follows.

SUGGESTIONS

Suggested additions to the Proposed Rule are underlined below:

207.64 Public Access to certain Filings

(a) The following documents may be viewed only be persons interested ~~in the estate of the decedent, as defined by SCPA 103 (39)~~ in the proceeding, or their counsel; the

Public Administrator or counsel thereto; counsel for any Federal, State or local governmental agency; or by court personnel; except upon written permission of the Surrogate or Chief Clerk of the court which shall not be unnecessarily withheld:

(1) All papers and documents in proceedings instituted pursuant to Articles 17 or 17-A of the SCPA;

(2) All papers and documents in proceedings instituted pursuant to Article 81 of MHL;

(3) Death certificates;

(4) Tax returns;

(5) Documents containing social security numbers;

(6) Firearms Inventory; and

(7) Inventory of Assets.

(b) 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 a financial-account number, a party or nonparty making the filing shall redact:

(1) the social-security number;

(2) the taxpayer-identification number; and

(3) all characters except the last four digits/characters of the financial-account number.

Committee on Trusts, Estates & Surrogate's Courts[1]
Sharon L. Klein, Chair

December 2013

[1] This report was prepared by a subcommittee consisting of Michael Ryan (Chair), Alexis Gruttadauria, Vlad Portnoy and Laura Twomey.

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The Committee on Communications and Media Law ("Communications Committee") of the New York City Bar Association ("Association") appreciates the valid concerns about identity theft raised by the Office of Court Administration's Surrogate's Court Advisory Committee ("Advisory Committee") and the Association's Trusts, Estates and Surrogate's Courts Committee ("Surrogate's Courts Committee").

Nevertheless, the Communications Committee strongly objects to the Advisory Committee's Proposed Rule 207.64, which subverts the long-settled, constitutionally-protected presumption that court proceedings and court documents are open to the public. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 715 (1980) ("It has, of course, long been the law in this State that all judicial proceedings, both civil and criminal, are presumptively open to the public."); *Mosallem v. Berenson*, 76 A.D.3d 345, 348-50 (1st Dep't 2010). Accordingly, the Communications Committee urges the Association to oppose the adoption of the Proposed Rule, and respectfully objects to the Surrogate's Courts Committee's recommendation to endorse and extend the Proposed Rule.

Our courts have long recognized the general rule, grounded in common law and constitutional principles, that the public has a qualified right of access to the records of judicial proceedings. *E.g.*, *Gryphon Dom. VI, LLC v. APP Int'l Fin. Co., B.V.*, 28 A.D.3d 322 (1st Dep't 2006). Public access serves several important interests, including facilitating informed discussion of governmental affairs, serving as a check on the integrity of the judicial process, and promoting the public perception of fairness. *E.g.*, *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 437 (1979) ("Justice must not only be done; it must be perceived as being done."). These "principles apply equally to civil proceedings." *Danco Labs, Ltd. v.*

Chemical Works of Gedeon Richter, Ltd., 274 A.D.2d 1, 6-7 (1st Dep't 2000) ("'in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases'" (quoting *Gannett Co. v DePasquale*, 443 U.S. 368, 386-387 n.15 (1979)).

These principles also apply fully to Surrogate's Court proceedings and guardianship proceedings, where public oversight is essential to ensuring that New York's most vulnerable citizens are protected under the law. *Cf. In re Marshall*, 824 N.Y.S.2d 755, 13 Misc. 3d 1203(A), 2006 N.Y. Slip Op. 51677(U) (Sup. Ct. N.Y. Cty. Aug. 29, 2006) (granting access to filings in an Article 81 guardianship proceeding pertaining to Brooke Astor); Benjamin Weiser, *The Last Days of Bruce Llewellyn*, N.Y. Times (May 9, 2010), *available at* http://www.nytimes.com/2010/05/09/nyregion/09bruce.html ("The Llewellyn case, as shown through interviews and court records unsealed at the request of The New York Times, serves as a primer on the myriad complications that can occur when a person, in this case a once-powerful and influential person, loses the ability to fully articulate his needs.").

Although Surrogate's Court and guardianship proceedings may regularly involve sensitive information, "the Legislature chose not to create a presumption that [such] matters are protected from public scrutiny." *Marshall*, 2006 N.Y. Slip Op. 51677(U) at *3. Indeed, Article 81 of the Mental Hygiene Law provides the same standard for public access to those guardianship proceedings as that found in Rule 216.1 of the Uniform Rules, which governs court records generally. *See* N.Y. Mental Hyg. Law § 81.14(b) ("The court shall not enter an order sealing the court records in a proceeding under this article, either in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof."); *id.* Law Revision Commission Comments ("The standard for closing the hearing or sealing the records is the same as that in section 216.1 of the New York Code of Rules and Regulations.").

The public would not, and should not, tolerate an entirely secret system of justice for guardianship proceedings. As Chief Justice Burger explained, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572 (Burger, C.J.); *see also Gannett*, 443 U.S. at 429 (Blackmun, J., concurring in part and dissenting in part) ("Secret hearings – though they be scrupulously fair in reality – are suspect by nature." (internal quotation marks omitted)).

The Advisory Committee purports "to balance the public's right of access with the court's obligation to safeguard confidential personal information." But the Proposed Rule completely undermines the public's right of access by flouting Rule 216.1 and denying wholesale access to all filings in certain cases (guardianship proceedings) and entire categories of other records in all Surrogate's Court cases, except to select "interested" persons.

Conditioning access to court files on a finding of "interest" is antithetical to our Nation's long-standing history of public access. As the Supreme Court explained,

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice,

> American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.

Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597-98 (1978) (citations and footnotes omitted); *cf. Huminski v. Corsones*, 396 F.3d 53, 83-84 (2d Cir. 2005) ("You cannot foster an appearance of fairness thereby boost[ing] community trust in the administration of justice, unless any member of the public—not only members of the public selected by the courts themselves—may come and bear witness to what happens beyond the courtroom door." (citations and quotation marks omitted)). Although the Advisory Committee suggests there is no dispute that access to Surrogate's Court records "should be afforded to all persons *interested*," the law is clear that access should be afforded to *all persons*.

The law is equally clear that members of the public and the press who wish to access court records are presumptively entitled to do so, without having to establish that filings are being "unreasonably withheld" or, in the Surrogate's Courts Committee's revised formulation, "unnecessarily withheld." Rather, "[t]he strong presumption in favor of openness places the burden on the party seeking to seal records and close hearings to show that the public's right of access is outweighed by competing interests." *Marshall*, 2006 N.Y. Slip Op. 51677(U) at *3; *see also, e.g.*, *Mosallem*, 76 A.D.3d at 349; *Coopersmith v. Gold*, 594 N.Y.S.2d 521, 529-30 (Sup. Ct. Rockland Cty. 1992); *cf. Anonymous v. Anonymous*, 263 A.D.2d 341, 346 (1st Dep't 2000) ("even if this particular controversy did not implicate a public interest, [i]t is desirable that the trial … take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." (quotation marks omitted)).

The Proposed Rule's confidential treatment for all forms of select categories of documents, no matter the information contained therein nor the particular circumstances at hand, also goes far beyond any justifiable protection against the risk of identity theft. Not all financial information warrants sealing on privacy or any other grounds, and the redaction of partial account numbers can suffice to prevent the risk of identity theft. *See Marshall*, 2006 N.Y. Slip Op. 51677(U), at *7 ("Information about the AIP's personal finances … does not have the same privacy protections," and "the court does not find any of the information concerning the AIP's finances that is likely to be revealed at the trial of this action must be protected by a sealing order"). As the First Department has made clear, "neither the potential for embarrassment or damage to reputation, nor the general desire for privacy, constitutes good cause to seal court records." *Mosallem*, 76 A.D.3d at 351. The Communications Committee thus knows of no basis in law or logic for the wholesale exclusion of public access to any Firearms Inventory, Inventory of Assets, Tax Returns or Death Certificates, as envisioned by the Proposed Rule.

The Proposed Rule further contravenes public access to court records by restricting access to documents solely because they contain Social Security numbers. The "failure to target precise areas where redaction should occur" violates both Rule 216.1 and the well-settled principle that any sealing must be no broader than necessary to protect the threatened interest. *See Danco Labs Ltd.*, 274 A.D.2d at 8. Any legitimate interests in confidentiality should be dealt with by court-approved redactions and not a blanket sealing.

For these reasons, the Communications Committee respectfully urges the Association to oppose the Proposed Rule.

Respectfully submitted,

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