



NEW YORK
CITY BAR

COMMITTEE ON TRUSTS, ESTATES &
SURROGATES COURTS

JOHN OLIVIERI

CHAIR

1155 AVENUE OF THE AMERICAS
NEW YORK, NY 10036
PHONE: (212) 819-8200
FAX: (212) 354-8113
jolivieri@whitecase.com

KERRY O'ROURKE PERRI

SECRETARY

1155 AVENUE OF THE AMERICAS
NEW YORK, NY 10036
PHONE: (212) 819-7918
FAX: (212) 354-8113
kperri@whitecase.com

February 17, 2016

Hon. Renee R. Roth
Chair, Surrogate's Court Advisory Committee
Office of Court Administration
25 Beaver St., Suite 1170
New York, NY 10004

Re: Proposed amendment of 22 NYCRR § 207.64, relating to omission or redaction of confidential personal information papers filed in Surrogate's Court.

Your Honor:

I write on behalf of the Trusts, Estates and Surrogate's Courts Committee of the New York City Bar Association. We submit this letter as a comment in support of the proposal in the January 2016 Report of the Surrogate's Court Advisory Committee to amend 22 NYCRR § 207.64.

Section 207.64 of the Uniform Rules of Surrogate's Courts was adopted in February 2014 and limits public access to certain documents containing Confidential Personal Information ("CPI") including: all documents in Surrogate's Court Procedure Act Article 17 and 17-A proceedings, death certificates, tax returns, documents containing social security numbers, Firearms Inventory, and Inventory of Assets. Under this Section, such documents can be viewed only by persons interested in the estate or their counsel, the Public Administrator or counsel thereto, counsel for any federal, state, or local government agency, or court personnel. Other persons can view the records upon written permission of the Surrogate or Chief Clerk.

This Section was adopted primarily to address the risk of misuse for illegal purposes of the personal identifying and financial information contained in many Surrogate's Court documents.

The Surrogate's Court Advisory Committee has proposed an amendment to this section in an effort to balance the need for public access to records and the risk of enabling personal and financial information in court records to be utilized for identity theft or other illegal misuse. This proposed amendment would change the rule in two significant ways: (i) the method for protecting the information is different; in the current rule, information is protected by limiting access to documents containing sensitive information, whereas, in the Proposal further protection is provided by mandating counsel's redaction in any document in advance of filing with the court sensitive information falling under the definition of CPI; and (ii) the categories of sensitive

information have been more precisely defined as the Proposal sets forth a narrow definition of CPI which includes tax payer ID numbers, Social Security Numbers, employer ID numbers, and financial account numbers. The amendment continues to prohibit viewing or copying by the public of certain documents including death certificates, tax returns, firearms inventories, and papers in Art. 17 and 17-a proceedings. However, the proposed amendment would allow access (a) without the need for court permission to a party to the proceeding or their counsel, the Public Administrator or counsel thereto, court personnel, or counsel for any federal, state, or local government agency; or (b) upon court order or written permission of the Surrogate or Chief Clerk. The amendment clarifies that the rule shall not preclude disclosure or copying of any index of filings maintained by the court, and any determination regarding access to any filings may be the subject of a motion for clarification or reconsideration.

In summary, the Proposal would amend section 207.64 by (1) requiring parties to redact certain CPI from Surrogate's Court documents; and (2) continuing to prohibit viewing or copying of certain documents (death certificates, tax returns, firearms inventories, papers in Art. 17 and 17-a proceedings), except (a) by parties to the proceeding or their counsel, the Public Administrator or counsel thereto, court personnel, or counsel for any federal, state, or local government agency; or (b) upon court order or written permission of the Surrogate or Chief Clerk. Under the Proposal, the standard for granting written permission in a contested matter would be identical to that used for sealing court records under 22 NYCRR§ 216.1.

For the reasons indicated below, we support the Proposal.

EXPLANATION OF THE PROPOSAL

As mentioned above, the Proposal would amend Rule 207.64 by adding part (a) and revising part (b) as follows:

~~Section 207.64 [The following documents may be viewed only by persons interested in the estate of the decedent, as defined by SCPA § 103(39), or their counsel; the Public Administrator or counsel thereto; counsel for any Federal, State or local governmental agency; or court personnel; except upon written permission of the Surrogate or Chief Clerk of the court which shall not be unreasonably withheld]~~ Omission or Redaction of Confidential Personal Information; Public Access to Certain Filings

(a) Omission or Redaction of Confidential Personal Information.

(1) Except as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, 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 ("CPI") means:

- i. the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof; and

ii. other than in a proceeding under Article 13 of the SCPA, a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof.

(2) The court sua sponte or on motion by any person may order a party to remove CPI from papers or to resubmit a paper with such information redacted; order the clerk to seal the papers or a portion thereof containing CPI in accordance with the requirement of 22 NYCRR §216.1 that any sealing be no broader than necessary to protect the CPI; for good cause permit the inclusion of CPI in papers; order a party to file an unredacted copy under seal for in camera review; or determine that information in a particular action is not confidential. The court shall consider the pro se status of any party in granting relief pursuant to this provision.

(3) Where a person submitting a paper to a court for filing believes in good faith that the inclusion of the full CPI described in paragraph (1) of this subdivision is material and necessary to the adjudication of the proceeding before the court, he or she may apply to the court for leave to serve and file, together with a paper in which such information has been set forth in abbreviated form, a confidential affidavit or affirmation setting forth the same information in unabbreviated form, appropriately referenced to the page or pages of the paper at which the abbreviated form appears.

(4) When served with objections or a request for an inquiry or examination under SCPA 2211 or 1404 that specifies a request for particular unredacted documents previously filed in the proceeding with respect to which the objection or request for inquiry or examination relates, the party who originally served and filed the redacted document shall serve (but not file) an unredacted version upon all parties interested in the proceeding or such portion of it to which the objection or request for inquiry or examination relates.

(b) Public Access to Certain Filings

The officers, clerks and employees of the court shall not permit a copy of any of the following documents to be viewed or taken by any other person than a party to the proceeding, or the attorney or counsel to a party to the proceeding, the Public Administrator or counsel thereto, counsel for any Federal, State or local governmental agency, or court personnel, or by order of the court or written permission of the Surrogate or Chief Clerk of the court. The standard for the grant of such permission in a contested matter shall be the same as required under 22 NYCRR 216.1 and applicable law:

- (1) all papers and documents in proceedings instituted pursuant to Articles 17 or 17-A of the SCPA;
- (2) death certificates;
- (3) tax returns;

(4) ~~[documents containing social security numbers;~~

~~(5)]~~ Firearms Inventory; and

~~[(6) Inventory of Assets]~~

(5) Documents containing information protected from disclosure under other provisions of Federal or State law such as HIPAA for medical information, job protected services reports, material obtained from a state mental hygiene facility under MHL 33.13, and records involving alcohol or other substance abuse under 42 CFR 2.64. These examples are not intended to be exclusive.

This rule shall not preclude disclosure or copying of any index of filings maintained by the court. Any determination by the court regarding access to any filings may be the subject of an appropriate motion for clarification or reconsideration.

OBSERVATIONS

It has been common practice that documents filed in court have presumptively been public records and accessible to anyone in the Courthouse. However, a new challenge is how to protect the privacy and confidentiality of sensitive personal information as court records become increasingly available electronically and widely accessible to the general public simply by accessing the Internet. The Proposal, by adopting a specific rather than broad definition of protected CPI, balances the preservation of access to information with the increasingly common misuse of CPI for identity theft.

In addition to the protection of CPI, the Proposal is a step toward uniformity among New York courts. The Proposal contains similar redaction requirements to that of 202.5(e) of the Uniform Civil Rules of the Supreme and County Courts, which require all civil filings in New York to have the confidential personal information of litigants redacted to mitigate the potential for identity theft. The impetus and necessity for such an update to section 207.64 stems from the open access concepts advocated by the press, coupled with the updated rules adopted for other courts in New York. It is important to strike a balance between these two considerations in a world where identity theft has become such a threat. The amount of personally identifiable information easily available on the Internet will only increase with the availability of online technology to enable more convenient filing.

Courts are now scanning and posting paper files, and e-filing is much more widely used. Clients today can assume that any personal information submitted to the court may eventually be accessible on the Internet unless it is protected by sealing or redaction. While the rules place the responsibility for the redactions on those submitting papers, and not on court personnel, the additional burden for lawyers does not outweigh the benefit to clients of having CPI protected from abuse. It is not administratively efficient to place the burden on court personnel to ensure that documents do not contain CPI before posting them to the Internet or otherwise allowing public access. The volume of filings make it unrealistic to place this responsibility with court

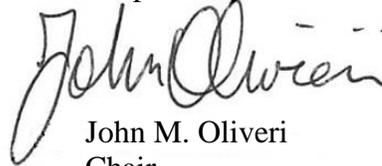
personnel; rather, the responsibility lies with the lawyers to protect their clients CPI by ensuring the information in the document is redacted or sealed.

As a final measure, the Proposal allows the court sua sponte (or on motion of "any person"), to order a party to resubmit a paper with CPI redacted; to direct the clerk to seal all or a portion of papers containing CPI; to permit a party to file an unredacted paper under seal for in camera review; or to determine that information in a particular action is not confidential.

RECOMMENDATION

For all of the foregoing reasons, we recommend that the Proposal be adopted.

Respectfully,

A handwritten signature in black ink, appearing to read "John Oliveri". The signature is written in a cursive, flowing style with a large initial "J".

John M. Oliveri
Chair