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 UNIFIED COURT SYSTEM
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A. GAIL PRUDENTI
 Chief Administrative Judge

JOHN W. McCONNELL
 Counsel

MEMORANDUM

November 22, 2013

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed adoption of 22 NYCRR § 202.5(e) (Uniform Civil Rules for Supreme and County Court), relating to redaction of confidential personal information in papers filed in civil matters.

Following two rounds of public comment, the Advisory Committee on Civil Practice has proposed a revised amendment of 22 NYCRR § 202.5(e), relating to the redaction of confidential personal information ("CPI") in papers filed in civil matters (Exhibit A). As set forth in its accompanying memorandum (Exh. B), the Advisory Committee's revisions to its original proposal are intended to ensure greater consistency with the redaction requirements set forth in section 500.5 of the Rules of the Court of Appeals (Exh. C).

Persons wishing to comment on the Advisory Committee's revised redaction proposal should e-mail their submissions to OCARule202-5-ecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than January 27, 2014.**

The previous requests for public comment made in connection with the Advisory Committee's initial redaction proposal, and the public commentary received thereon, are available at <http://www.nycourts.gov/rules/comments/index.shtml>.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. The issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the court system.

EXHIBIT A

Proposal

§ 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 a proceeding pursuant to article 81 of the mental hygiene law or 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 means: (i) social security numbers; (ii) taxpayer identification numbers; (iii) financial account numbers; (iv) full dates of birth; (v) exact street addresses; (vi) telephone numbers; (vii) names of minor children; (viii) names of children's schools; (ix) names of employers or (x) other information that would identify a person whose identity should not be revealed (e.g., victim of a sex crime).

(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 rules promulgated by the chief administrator of the courts; for good cause permit the inclusion of confidential personal information in papers; may order a party to file an unredacted copy under seal for in camera review 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.

EXHIBIT B

Advisory Committee on Civil Practice to the Chief Administrative Judge
9/13/2013- Final

Rule Proposal

Redaction of Personal Identifying Information in the Filing of Papers in Civil Proceedings (except matrimonial or Surrogate's court proceeding)
(22 N.Y.C.R.R. 202.5 (e) (new))

The Committee recommends that Rule 202.5, the rule governing papers filed in the Supreme Court and the County Court (22 NYCRR 200 et. seq.) be amended to require that certain personal identifying information be redacted prior to filing. The Committee believes that frequently there are cases with filed papers involving myriad sensitive personal information including, but not limited to, social security numbers and other numerical identifiers which, if revealed, increase the risk of identity theft, fraudulent use or disclosure in violation of state or federal law. The Committee urges the adoption of this proposal to further the protection of that information. As the court system enters the electronic age, courthouse papers are increasingly accessed by internet services and personal information is of increasing interest to identity thieves. Further, the Committee believes that by necessity practitioners are aware of the risks associated with revealing sensitive personal information and have access to all state and federal laws concerning identity theft issues. Proceedings in Surrogate's Court, matrimonial actions and proceedings pursuant to Article 81 of the Mental Hygiene Law are excepted because these are specialized areas of practice which require their own rules.

The New York Court of Appeals has adopted Rule 500.5, which sets the standard for redaction in papers submitted electronically on appeals to that Court. However, there are no court rules addressing specifically the protection or confidentiality of sensitive personal information in civil court papers at the trial court or intermediate appellate court levels. There are certain specific statutes which do address particular information and certain information may be presumptively sealed by statute. (*Compare, e.g.,* Mental Health Information - N. Y. Mental Hygiene Law § 33.14 (Sealing of records pertaining to treatment for mental illness) with HIV Information - N. Y. Public Health Law § 2785 (Court authorization for disclosure of confidential HIV related information)).

Generally, personal information is increasingly subject to protection by law (See Public Officers Law § 96-a (g) (eff. Jan. 1, 2010; added L. 2008, c. 279) and General Business Law § 399-dd (6) (eff. Jan. 3, 2009; added L. 2008, c. 279)). However, in New York, court papers are presumptively public once filed with the county clerk or the clerk of court. Court records are presumptively open. *See, e.g., Nixon v. Warner Communications*, 435 U. S. 539 (1978); *Danco Laboratories, Ltd. v. Chemical Workers of Dedeon Richter, Ltd.*, 274 A.D.2d 1, 711 N.Y.S. 2d 419 (1st Dept. 2000). The Federal Courts have implemented Rule 5.2 of the Federal Rules of Civil Procedure (28 USCA 5.2) to address protection of privacy in federal cases.

This proposal defines “confidential personal information” by using the closed list adopted by the Court of Appeals in its Rule 500.5, except as to e-mail addresses. It also clearly provides that the rule applies “[e]xcept... as otherwise provided by rule or law or court order.” The proposed rule expressly excepts matrimonial actions, proceedings in Surrogate’s court and proceeding pursuant to Article 81 of the Mental Hygiene Law from the purview of the rule.

This proposal places the responsibility of compliance squarely on the parties by requiring that “the parties shall omit or redact” confidential personal information. The measure omits e-mail addresses from the closed list because e-mails are routinely attached as exhibits in civil actions in trial courts and omitting the e-mail addresses from such exhibits would eliminate important and relevant information. The proposal does not allow for the inclusion of “limited or partial” confidential information and the Committee rejects this approach as too subjective, unnecessarily opening the door to ancillary litigation and possible disclosure of such information.

The proposal makes clear that the court has, *sua sponte* or in response to a motion, discretion to order redaction or sealing under the Rule 216.1 (22 NYCRR § 216.1) standard. Also, the proposal adopts a “good cause shown” standard by which the court might, upon a finding of good cause vary the provisions of the rule. In addition, the proposal expressly provides that the court has discretion to order redaction and replacement of information in papers filed previous to enactment and if the court deems it necessary, under the standard of Rule 216.1, to order the offending paper sealed. The court may order a party to file an unredacted copy under seal for *in camera* review. Further, the proposal allows the court to “look back” in the case and order redaction of papers already filed in a pending action upon motion or *sua sponte*.

The measure allows the plaintiff to include the last four digits of the defendant’s account number, if any, in an action arising out of a consumer credit transaction . If the defendant appears and denies responsibility for that account, the court may review plaintiff’s amended paper in-camera or, if filed under the standard of Rule 216.1, under seal.

The proposed rule change is not intended to disturb the current strong presumption in the law favoring open access for the public to court records that are not confidential. The Committee unanimously recognizes the importance of transparency in the third branch of government and the necessity of maintaining the public right to open court records. The Committee supports the preservation of the established standard in Rule 216.1 requiring a finding of good cause before court records are ordered sealed.

The Committee believes that F. R. Civ. P. Rule 5.2 has provided guidance as a privacy measure for federal cases, but is quite limited in scope, protecting only four specified items of information, and fails to provide the bench with sufficient discretion to order redaction. The Committee recommends that New York lead the way in state practice by enacting a broader rule designed to correct the current practice whereby far too revealing personal information is included or attached to papers for filing in the state courts.

EXHIBIT C

**COURT OF APPEALS STATE OF NEW YORK
PART 500. RULES OF PRACTICE
(22 NYCRR Part 500)**

§ 500.5 Confidential and Sensitive Material: Sealing and Redaction.

(a) Documents under seal are not available for public viewing.

(b) Any cases or materials sealed by a court or otherwise required by statute to be sealed shall be sealed in the Court of Appeals. In cases that are sealed in their entirety, each document filed shall clearly indicate that it is filed under seal. In cases where some documents are sealed, such sealed documents shall be reproduced in a separate volume that shall clearly indicate that it is filed under seal.

(c) To the extent possible, confidential information subject to a statutory proscription against publication shall be omitted or redacted from public documents. Where such information must be included and cannot be redacted, the cover of the document filed shall clearly indicate that it contains confidential material.

(d) To the extent possible, sensitive material, even if it is not subject to a statutory proscription against publication, shall be omitted or redacted from public documents. Information of this type includes, but is not limited to: social security, taxpayer identification or financial account numbers; full dates of birth; exact street addresses; e-mail addresses; telephone numbers; names of minor children; names of children's schools; names of employers; or other information that would identify a person whose identity should not be revealed (e.g., a victim of a sex crime).

(e) Any party may request that papers not sealed below be sealed in this Court. Such requests shall be by an original and one copy of a motion pursuant to section 500.21 of this Part, with proof of service of one copy on each other party.