

**NJSBA Comments on the
Supreme Court Special Committee on
Public Access to Court Records Report**

March 21, 2008

Introduction

The New Jersey State Bar Association supports many of the recommendations contained in the Supreme Court Special Committee (“Committee”) on Public Access to Court Records Report, hereafter referred to as “Report.” In preparing to comment on the Report, the State Bar Association’s Board of Trustees received and considered comments and recommendations from our Elder Law Section, Family Law Section, Individual Rights Section, Judicial Administration Committee and Taxation Section.

The New Jersey State Bar Association believes that more open access to court records is justified. At the same time, however, we support the suggestion that certain categories of records/information must be withheld from public disclosure. These records should include Social Security numbers, drivers’ license numbers, insurance policy data, license plate numbers, and financial and credit card information. The New Jersey State Bar Association further recommends that three categories of court records be exempted from public access - Family Part case records, guardianship/conservatorship records and certain medical records, and property appraisal reports not used at trial. The State Bar believes that records considered non-confidential in paper form should also be considered non-confidential in electronic form. The New Jersey State Bar Association also supports the Committee’s recommendation that a mechanism be created to challenge a court determination that a record is confidential. Finally, the New Jersey State Bar Association supports the establishment of a public access information system that would be devised and maintained by the judiciary, rather than selling such information to companies known as “data aggregators”, as suggested in the Report.

Confidential Personal Information

Regarding section 3.2.3 (Special Treatment for Confidential Personal Identifiers – Implementation Issues) the New Jersey State Bar Association has concerns regarding the ability of the judiciary, particularly in light of budget cuts, to implement this provision. Implementation of a policy limiting access to personal identifiers presents special problems and is of critical importance. It appears that the judiciary may lack the resources to redact personal identifiers from the countless millions of pages of existing records. Additionally, the judiciary may lack the staffing necessary to review and redact public records prior to distribution to a requester. Consequently, the New Jersey State Bar Association agrees that access to existing records containing confidential personal identifiers, as a matter of necessity should remain unchanged, and any efforts by the judiciary to treat personal identifiers confidentially must be prospective, for new records only.

The New Jersey State Bar Association has the following additional comments:

- The Report is deficient in not recommending that the judiciary tell parties that information they provide is likely to be disseminated by data aggregation companies (unless the Court deems otherwise) and perhaps published somewhere on the Internet. We, therefore, recommend that the judiciary provide notice to the public of this fact.
- The Report offers no remedy to individuals who are harmed by errors in data, incomplete records, or misinterpretation of information by data aggregation companies. The judiciary should publish corrections and updates, and data aggregation companies who purchase information should be held to a duty of care that their records are accurate and current.
- As guardians of a public trust, the judiciary bears responsibility for maintaining and providing access to sensitive information about individuals. The judiciary should not continue as a passive custodian of records, because of the possibility that information may be misused or inaccurate. It should acknowledge its responsibility as “publisher” of these records.
- The judiciary should develop a “know your rights” brochure for litigants, warning about Internet publication and explain how to remove sensitive information from the public domain.
- The judiciary should call attention to the practices of data aggregation companies who compile data bases of information about people, using court records and other publically available information, used for many purposes including the compilation of credit ratings.

Family Practice

The New Jersey State Bar Association reviewed extensive comments from family law practitioners and recommends that all Family Part case records should be considered “exempt” (as defined in the Report) except the Judgment of Divorce (without the Property/Matrimonial Settlement Agreement of the parties annexed thereto) and any post-judgment orders¹ (except Domestic Relations Orders, which shall also be exempt), unless the release is ordered upon a motion by an interested party, for which good cause is shown for the release of the records upon clear and convincing evidence.

By this action, the New Jersey State Bar Association is not suggesting that we close public court records. However, public access to the courts and court records is far different than “publishing” the vast majority of family related court records over the

¹ The Statement of Reasons sometimes attached to post-judgment orders should also be exempt from public access given the often detailed financial and personal information contained therein.

Internet. Requiring someone to travel to a courthouse and request documents is far less daunting than permitting anyone with anonymity and access to a computer to retrieve thousands of matrimonial pleadings over the Internet.

Committee Recommendation #1 treats as confidential certain Confidential Personal Identifiers (“CPIs”). In Committee Recommendation #5, the Report places the burden on the attorneys and litigants to ensure that CPIs are redacted from all court documents. Attorneys and litigants will now have to certify at the commencement of every case that CPIs will not be included in any document filed with the court. The Report specifically exempts court staff from any responsibility in the redaction of court records. The Report, however, does not address the consequences that befall the attorney and/or client who fails to redact. This leaves open the possibility of liability for damages, ethics breaches, malpractice actions and sanctions.

Practically speaking, very few matrimonial pleadings do not contain CPIs. The initial pleadings require a Confidential Litigant Information Statement and a Certification of Insurance Coverage. Both documents request the most personal of information ranging from Social Security numbers, mother’s maiden name, and all insurance information including coverage and policy numbers. Tax returns, bank account records, credit card statements and Social Security Earnings History Statements are just some of the documents routinely provided in matrimonial pleadings in order for the court to fairly and adequately address the issues to be decided. The Report fails to address the cost factor involved in redacting all of the CPIs that appear on these documents. Certainly, this is not work that can be delegated to staff in light of the potential liability caused by the attorney certification. The time and cost involved in the exercise or redaction may very well cause litigants to either pay more in legal fees or present a less than comprehensive position to the court in order to avoid submission of these documents.

Moreover, the redaction of this information does not necessarily protect individuals from identity theft. For example, the last four digits of a credit card or Social Security number provide sufficient information to many telephone inquiries by financial institutions.

Committee Recommendation #9 of the Report recognizes that Family Part matters should be viewed differently, and therefore, recommends that certain documents involving children should be protected. The recommendation does not go far enough, however, and fails to appreciate how Family Part matters are decided. Issues of custody and parenting time are so interwoven with equitable distribution and support that it would be impossible to redact the information only as it relates to children. Matrimonial pleadings often recite allegations regarding a child’s mental and physical health, special needs and personal preferences. These issues are relevant as to a parent’s earnings capacity and/or financial contributions during the marriage. Under the proposed recommendations, children will be able to access their parent’s divorce proceedings or the divorce of a classmate with no more than a click of a mouse. The potential harm to children is immeasurable.

The Report also fails to recognize the privacy rights of third parties to a Family Part action. Employers, business associates, family members, child care providers, neighbors and teachers are all relevant parties to a Family Part action. They, however, have no control over the information being filed with the courts. Employers and business associates have a strong interest in making sure offers of employment, benefits and the like are not publicly distributed, yet there is no protection against this information being disseminated.

Committee Recommendation #10 exempts the Family Part Case Information Statement from access. The New Jersey State Bar Association wholeheartedly agrees with this recommendation. In Family Part actions, however, the Case Information Statement and other sensitive documents are regularly attached to motions. The definition of "court record" makes it clear that motion papers and attachments are publicly accessible. There is an inherent conflict here which must be resolved and clear direction must be provided so that judges reviewing the matter have all documents necessary to make a fair ruling and the opposing party will not be in a position to possibly exploit the situation by attaching exempted documents from the motion papers. The New Jersey State Bar Association is concerned as well that we possibly could be facing of tsunami of applications for protective orders and sealing of records without consistent procedures in place. The additional caseload that addressing these issues could bring would no doubt be burdensome.

The New Jersey State Bar Association believes that there are additional court records that must be added to the list of confidential records set forth in proposed Rule 1:38-2:

Domestic Relations Orders (DROs) – Orders for the assignment or retirement benefits or deferred compensation require the participant's and alternate payee's full name, address, date of birth and Social Security numbers.

Notices of Equitable Distribution – The application to distribute assets after a default has been entered in a matrimonial action requires full financial disclosure.

The New Jersey State Bar Association is also concerned that the proposed recommendations seem to support a two-tiered system of justice. Wealthier litigants, fearful of public disclosure, may opt for private adjudication while those without the funds will not be able to protect their privacy. There are real questions as to whether litigants will compromise their legal positions for fear that information required to be viewed by the court is far too sensitive to be made publicly available.

The New Jersey State Bar Association encourages the Court to consider the New York model which seals essentially all family law records except the names of the parties and the nature of the action. In the committee's attempt to balance the advantages of an open public access system against the rights of individuals to privacy and protection from harm in using the system, individual rights prevailed. But, no right-minded parent wants his or her child to have access to matrimonial proceedings online. Neighbors, classmates and school personnel should not be able to read about the most

personal aspects of someone's life for purely prurient reasons. Prospective employers will be able to access past earnings, marital history and medical history. Mere allegations published on the Internet will be readily accessible and will create negative consequences, financial and otherwise for a family. The list of potential harm caused by the publication of Family Part court records is endless.

The position taken by the New Jersey State Bar Association with respect to the Report does not prohibit interested parties from obtaining any Family Part documents. Rather, it shifts the burden to the interested party to show by clear and convincing evidence that need for release of the documents. More importantly, it notifies the litigant that someone is seeking access of these records.

Elder Law Practice

A person's individual right of privacy should outweigh the public's interest to know about the specifics of litigation. In a guardianship/conservatorship context, the privacy concerns are many. Guardianship/conservatorship pleadings involve financial disclosure of the incapacitated person's assets, attaching required medical records to evidence incapacity, and listing numerous personal identifiers in the verified complaint.

The New Jersey State Bar Association disagrees with the Report's conclusion under section 3.3.1. that financial information in a guardianship/conservatorship matter not be exempted. Our concern is the aforementioned prevalence of identity theft in our society, especially by those who prey upon incapacitated and elderly individuals. The potential harm with the release of the financial and personal information of such individuals is frightening.

As a result, the New Jersey State Bar Association recommends that all guardianship/conservatorship records and name change application records should be considered "exempt" (as defined in the Report) from disclosure via Internet posting or via public access terminal postings except for the final judgment of incapacity of final order of name change, unless upon a motion by an interested party, for which good cause is shown for the release of said records to the interested party upon clear and convincing evidence.

Moreover, the Report does not address the disclosure of medical information via physician reports regarding incapacity. Although it is questionable whether the courts or attorneys are a covered entity under the Health Insurance Portability and Accountability Act (HIPAA), the proposed public disclosure of otherwise protected health care information contradicts HIPAA's purpose of safeguarding electronic health care information.

The New Jersey State Bar Association is supportive of the Federal Social Security regulations under 20 C.F.R. § 402.100 related to withholding of records due to invasion of personal property. 20 C.F.R. § 402.100(a) allows the Social Security administration to withhold records about individuals if disclosure would constitute a clearly unwarranted invasion of their personal privacy. 20 C.F.R. § 402.100(b) states

that “in deciding whether to release records to you that contain personal or private information about someone else, we weigh the foreseeable harm of invading a person’s privacy against the public interest in disclosure.” 20 C.F.R. § 402.100(c) gives examples of frequently withheld personal information including home addresses, ages, Social Security numbers, medical information, benefits received, and other personal information the SSA maintains.

Similarly, with regard to an application for name change, a great deal of personal information must be disclosed, by applicants, which, if made available online, could be used by unscrupulous individuals to the detriment of the applicant.

The New Jersey State Bar Association does not believe that all privacy concerns can be properly addressed by redacting all confidential information. Placing this burden on attorneys would cause an unnecessary increase in litigation expenses due to the attorney’s time involved in reviewing and editing documents. Attorneys would also be less likely to disclose needed personal information in pleadings, and litigants may be unwilling to proceed with a necessary court proceeding if they are aware that their personal information would be available to anyone who has Internet access.

An interested party is permitted, under current court rules, to obtain Surrogate Court records upon a showing of good cause. The gatekeeper is the Surrogate Court, and we believe the Surrogate should continue to function in this capacity.

Tax Court Practice

Section 3.3.1 of the Report considers whether appraisal reports should be subject to public access even if not used by a judge to decide the tax appeal. The majority of the Supreme Court’s Special Committee concluded that the appraisal reports should be subject to public disclosure. The New Jersey State Bar Association strongly disagrees with the conclusion and the reasoning expressed by the majority.

The pursuit of a fair and uniform local property tax assessment is a right provided by the New Jersey Constitution. Disclosure of pre-trial appraisal reports will have a real and potentially severe chilling effect on this right for income-producing property owners. Property value for tax assessment is often determined by an expert appraiser’s use of an income approach. Under the income approach, appraisers typically rely heavily on the subject property’s sensitive and proprietary financial information, including the property’s actual income, expenses, leases and rent rolls. If appraisal reports submitted to the Court in advance of trial are disclosed, the competitors of the tax appeal litigant can gain access to confidential information even if the data was never used by the judge for any decision-making purpose. A competitor armed with this information will have inappropriate access to, among other data, the lease termination dates and rental terms. The competitor can then, with an unfair advantage, solicit the tenant(s) at the most opportune time and with a more competitive rate.

The New Jersey State Bar Association believes that the Committee mistakenly assumes that the appraisal reports submitted by litigants prior to trial are commonly

used by Tax Court judges to facilitate settlement. The majority relies on this assumption to justify the public disclosure of the appraisal reports, implying that the public should have access to the documents that the Court used to resolve the appeal. However, the judge's pre-trial use of the appraisal reports to facilitate settlement occurs in only a small minority of tax appeals. In almost all instances, the reports are never reviewed by the judge, and the parties are able to settle the appeal without the judge's input.

As the Report itself notes at Section 3.3, the public's right to inspect records is not absolute, and countervailing policy considerations may overcome the presumption of access for certain types of records. The Report further notes that the records can be shielded from public access pursuant to statutes, court rules and case law. Such laws have already weighed the public's right to access verses the individual's right to confidentiality and concluded that proprietary financial information should not be subject to public disclosure. For example, the Open Public Records Act, N.J.S.A. 47:1A-1.1, exempts from public disclosure "proprietary commercial or financial information obtained from any source" and "information which, if disclosed, would give an advantage to competitors." Similarly, in the property tax field, the Tax Court's discovery rulings have precluded public disclosure of the same proprietary financial information submitted pursuant to N.J.S.A. 54:4-34.

The New Jersey State Bar Association also has concerns that the fear of disclosure may have the same chilling effect on residential property owners, who have legitimate privacy concerns relating to the interior of their homes.

The New Jersey State Bar Association also reviewed the February 4, 2008 correspondence from the Honorable Joseph C. Small, P.J.T.C., to Chief Justice Rabner and Associate Justices, and strongly concurs with the Tax Court judges' recommendations against disclosure of pre-trial appraisal reports. We share the judges' concerns regarding the detrimental effect that this could have on practice in the Tax Court.

Finally, some of our members are appraisers who raised these issues with the Southern New Jersey Chapter of the Appraisal Institute. The Appraisal Institute Chapter responded with strong opposition against subjecting their appraisal reports to public disclosure. In particular, the appraisers point out that under the Uniform Standards of Professional Appraisal Practice ("USPAP"), appraisers are required to maintain the confidentiality of certain information used to prepare their reports. The proposed rule creates the dilemma that an appraiser will be forced to choose between using proprietary business information that is critical to their analysis, or disregarding it in order to comply with their legal and ethical obligations to protect the client's financial data from competitors. A rule putting the appraisal expert in this conflicting position is inappropriate.

In addition, the New Jersey State Bar Association questions whether the practice of pre-trial appraisal exchange should continue, particularly out of concern over public disclosure. Currently, however, the Rules of Court and the Tax Court's standard pre-trial Orders require submission of appraisal reports in advance of trial. The Supreme

Court Special Committee majority position would, therefore, put the attorney in a similar position as the appraiser – follow the rule and subject your client’s proprietary business information to public disclosure or ignore the Court’s procedural rules. A rule putting the attorney in this untenable position is inappropriate.

For all of the foregoing reasons, the New Jersey State Bar Association respectfully, but strongly urge that the Report recommendations be revised to exempt from public disclosure those appraisal reports that are filed but not entered into evidence.

Conclusion

The New Jersey State Bar Association is sensitive to the enormous task that the New Jersey judiciary has undertaken in preparing this Report for comment. Achieving the proper balance between privacy interests and public access to court records is a difficult task. The New Jersey State Bar Association is pleased to be able to endorse most of the Report. As with any undertaking as complex and broad in scope as this, serious issues are likely to arise which require thorough resolution before the Report can be formally adopted. We are confident that our contributions will help in this process. We also strongly encourage that the Court, in order to safeguard the interests of the courts, the bar and the public, request that any revised Report be published for public comment allowing another opportunity for the New Jersey State Bar Association and others to provide additional comment in an effort to adopt the most efficacious policy possible.