



Legal Aid Society
OF THE DISTRICT OF COLUMBIA

MAKING JUSTICE REAL

Laura M.L. Wait
Assistant General Counsel
Superior Court of the District of Columbia
500 Indiana Avenue, N.W., Room 6715
Washington, D.C. 20001

November 28, 2016

Via Electronic Mail to Laura.Wait@dcsc.gov

Re: Comments to Proposed Amendments to Superior Court Rules of Civil Procedure

Dear Ms. Wait:

The Legal Aid Society of the District of Columbia (“Legal Aid”) respectfully submits these comments to the proposed amendments to the Superior Court Rules of Civil Procedure. Legal Aid is D.C.’s oldest and largest general civil legal services organization. Since 1932, Legal Aid lawyers have been making justice real in individual and systemic ways for persons living in poverty in the District. We have a special interest in working with the Court on promoting access to justice for District residents, including persons who engage the court as self-represented litigants. These comments reflect that perspective.

Rule 5.2 – Redaction of Information in Court Filings

Proposed Rule 5.2 (Privacy Protection for Filings Made with the Court) is new. Although modeled on Federal Rule of Civil Procedure 5.2 (as adopted in 2007), it contains a significant departure from subsection (a) of the federal rule addressing redacted filings. It also differs substantially from the current practice regarding privacy redactions in Superior Court Civil Rule 5(f). For the reasons stated below, we believe that the departure from the federal rule and current practice with regard to financial account numbers and the names of minors is unwarranted and recommend that the court adopt the federal rule version of subsections (a)(3) (minors’ initials) and (a)(4) (financial account numbers) of Rule 5.2.

A. Redaction of Financial Account Numbers

Legal Aid recommends that proposed Rule 5.2(a)(5) regarding the redaction of financial account numbers in court filings be revised to provide that filers should retain the last four digits of the financial account number for any account at issue in the case. This is especially important in the debt collection actions that are placed on the Wednesday liquidated debt calendar in the Small Claims branch and on the Friday debt collection calendar in the Civil Actions division, established under Rule 40-III.

Under the proposed rule, filers would be *required* to redact the entirety of “any financial account number” unless the content of the redaction would not be self-evident. In that case only, filers would be directed to include only the last four digits of the account number. In debt collection cases and in other cases involving financial accounts, it will generally be self-evident that a redaction is of a financial account number. For example, the number will usually appear after some reference to an account with a bank or other financial institution. Therefore, the practical result of the proposed amendment is that filers would be required to redact the entirety of financial account numbers in most cases. By contrast, Superior Court Civil Rule 5(f)(1)(D) currently states that “only the last four digits [of a financial account number] should be used.”

Full redaction of financial account numbers in the context of debt collection cases is especially problematic because this information is necessary for defendants and their lawyers to identify the account at issue, to compare the allegations with their own records, and to differentiate the account at issue from any other accounts that the consumer may have had with the same creditor. In fact, the Federal Trade Commission has recommended that states require debt collection complaints to include the last four digits of the financial account number at issue in the case in order to provide adequate notice of the claim to consumers, allowing them to meaningfully respond to the complaint.¹ The proposal to require full redaction of financial account numbers will make it more difficult for consumers to assess the merits of the claim and their potential defenses. The federal rule on which the proposed rule is based simply provides that filers “may include only . . . the last four digits of [a] financial-account number.” *See* Fed. R. Civ. P. 5.2.

The comments to the proposed amendments note the intent to protect the privacy of the parties involved and prevent identity theft. However, the specific privacy concerns noted in the comments are limited to the disclosure of portions of social security numbers, dates of birth, and taxpayer identification numbers. The comments also note that such numbers are not necessary for adjudication of Civil Division cases. In debt collection cases, however, the proper identification of the financial account at issue may be critical to preparing to defend the case. In the Small Claims branch, for example, defendants are required to participate in mediation on their first court appearance. Having the last four digits of the account number in advance would assist defendants in identifying the account at issue, especially where the plaintiff is a debt buyer with whom the defendant had no prior relationship. Moreover, in most debt collection cases, the financial account at issue is already closed, so any privacy rationale for requiring full redaction is outweighed by the practical needs of the parties and the Court to have relevant factual information relating to the cause of action.

B. Redaction of Names of Minors

The proposed rule also rejects the federal rule approach to substitution of minors’ initials for the full name of the minor. Federal Rule 5.2(a) states that filings containing the name of an individual known to be a minor “may include only . . . the minor’s initials.” Similarly, Superior

¹ FEDERAL TRADE COMMISSION, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION at 17 (2010), *available at* <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf>.

Court Civil Rule 5(f)(1)(B) currently states that “only the initials of [a] child should be used in any public filings.” By contrast, the proposed rule would require filers to redact the *entirety* of a minor’s name and would allow for substitution of a minor’s initials only if the content of the redaction is not self-evident.

Substitution of the initials of a minor for the full name—rather than full redaction, as set forth in the proposed rule—promotes clarity in court filings, particularly where more than one minor is referred to in the filing. In the typical case, use of initials does not undermine the child’s or the family’s privacy interests. As with financial account numbers, the comment to the proposed rule does not identify identity theft concerns with regard to minors’ initials.

In rare cases, it may be prudent to redact a minor’s name without substituting initials. As we read Federal Rule 5.2(a), however, including the initials is encouraged but not mandatory. Conversely, where there is a reason to reveal a minor’s full name in a court filing, the proposed rule (like the federal rule) states that the “court may order that a filing be made under seal without redaction.” Proposed Rule 5.2(d).

Rule 23 – Allocating Cy Pres Funds to Support Legal Services

The proposed amendments to Rule 23 regarding class actions include a new comment explaining generally that cy pres funds may be distributed to support the non-profit provision of pro bono legal services. The District of Columbia Access to Justice Commission has submitted comments urging the Civil Rules Committee to codify a baseline percentage of funds for allocation to legal services and specifically proposes that the Committee adopt a provision requiring that 50% of cy pres funds be awarded to legal services providers. The Commission’s comments describe the critical need for resources to increase the capacity of the legal services network in the District of Columbia so that indigent individuals facing legal crises have the benefit of counsel.

Legal Aid strongly supports the D.C. Access to Justice Commission’s proposal and adopts the comments of the Commission on this important issue.

Rule 40-III – Scheduling Initial Hearings in Civil Debt Collection Cases

Current Superior Court Civil Rule 40-III addresses cases involving collection of a liquidated debt and cases involving recovery of damages as a subrogee (in either category seeking amounts greater than the Small Claims jurisdictional limit). Such cases are placed on a special consent calendar (often referred to as the debt collection calendar) presided over by a magistrate judge. The proposed amendments would make only non-substantive changes to Rule 40-III.

Legal Aid recommends that Rule 40-III be further amended so that these consent calendar cases are scheduled for initial hearings at the outset of the case, consistent with the way initial hearings are scheduled in all other civil actions. More specifically, Legal Aid recommends that Rule 40-III be amended to state that an initial scheduling conference should be scheduled as soon as practicable after the filing of a complaint. Under the current rule, the initial scheduling

conference is not scheduled until after the defendant files a response to the complaint. By contrast, under Superior Court Civil Rule 16(b), the initial scheduling conference in most other civil division cases is scheduled without regard to the filing of a response to the complaint. That rule states: “In every case assigned to a specific calendar or a specific judge, the court must hold an initial scheduling and settlement conference as soon as practicable after the complaint is filed.”

Setting an initial scheduling conference after the filing of a complaint—and allowing a defendant the opportunity to appear in court even if she has not filed an answer—has significant access to justice implications for unrepresented litigants. For defendants who lack the means or sophistication to effectively participate in the court process and who may not understand that they need to file a responsive pleading (or how to properly do so), being able to physically come to court is an important opportunity to obtain basic information about the case and connect with legal resources. Those resources include legal services attorneys who regularly appear at the call of the Friday calendar and are available to provide same-day assistance to eligible litigants. These access to justice implications are even more significant given the court’s recent adoption of improved default notices that not only notify defendants of the issuance of a default, but also state the date and time of any initial scheduling conference and encourage the defendant to appear. Legal Aid has observed the effectiveness of these improved default notices on the foreclosure calendar, including in cases where defendants were not properly served with the complaint but nonetheless appeared at the initial scheduling conference because they received the court’s notice in the mail.

The current Rule 40-III, which prevents the court from scheduling an initial scheduling conference in a civil debt collection or subrogation case unless and until the defendant files a response to the complaint, deprives defendants of the above-described opportunities to engage in their case and connect with much-needed legal assistance. Treating these cases differently from other civil cases with respect to the scheduling of initial hearings works a unique disadvantage on defendants with debt collection matters, without justification and contrary to the strong policy preference for cases to be resolved on the merits rather than by default.

Our proposed revision to proposed Rule 40-III(e) is as follows:

(e) INITIAL SCHEDULING CONFERENCE.

As soon as practicable after the filing of ~~any defendant's response to~~ a complaint covered by this rule, the court must notify the parties to appear for an initial scheduling conference. If all appearing parties so consent, the case, including all claims therein, may be assigned to the magistrate judge calendar. If the parties have thus consented, the magistrate judge will ascertain the status of the case, rule on any pending motions, explore the possibilities for early resolution through settlement or alternative dispute resolution techniques, and determine a reasonable time frame for bringing the case to conclusion. After consulting with the attorneys for the parties and with any unrepresented parties, the magistrate judge will schedule future events in the case.

Thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Chinh Le", with a long horizontal flourish extending to the right.

Chinh Le
Legal Director
Legal Aid Society of the District of Columbia