Comments of the Boston Bar Association's Criminal Law, Delivery of Legal Services and Family Law Sections on Proposed New Supreme Judicial Court Rule 1:24, Personal Identifying Information
(10/13/15)

In response to an invitation for comments from the Supreme Judicial Court (SJC) Standing Advisory Committee on the Rules of Civil and Appellate Procedure, the Boston Bar Association's Criminal Law, Delivery of Legal Services, and Family Law Sections reviewed proposed new rule, SJC Rule 1:24, Personal Identifying Information.

1) Members of the Criminal, Family Law and Delivery of Legal Services Sections were generally supportive of the new rule but had varying views on the sanctions element in Section 9 whereby the court "may impose sanctions for noncompliance where appropriate." All noted that the rule did not include any commentary on this section, that it was not part of the interim rule, and that it did not contain any standard for sanctioning.

2) Members of the Delivery of Legal Services Section agreed with the sanctioning authority and felt that it would effectively deter against the harm of unnecessary disclosure and/or have punitive effect for errors. However, the Section noted that adding guidance to the rule or adding a comment might help to clarify the type of cases to which the rule applies. The Section devised the following sample language:

   > "In determining the issue of sanctions, the court may consider whether the violation of this rule was knowing, whether harm to privacy interests or financial interests has occurred or is likely to occur from the improper disclosure, and the nature and amount of information improperly disclosed."

   This type of instruction makes clear the court has discretion and can decide whether to issue sanctions based on all the circumstances, but does not officially create a high standard and does not mandate graduated sanctions.

3) Members of the Family Law Section expressed concerns that by allowing for the possibility of sanctions simply by the motion of any party, pro se parties or unhappy attorneys could take advantage of the rule by filing for sanctions over innocent clerical redacting errors. It recommended adding a standard for sanctions or permitting them as part of a graduated process. Members recommended a standard of "willfully, intentionally, or with gross disregard for the intent of this rule." Alternatively, permitting sanctions at the end of a graduated process would give parties the opportunity to correct mistakes before facing sanctions. For example, if the court or any party determines that a filed document was not redacted in accordance with the rule, the court shall require the responsible party to correct the redaction and refile the document. If the party refuses to refile the document or fails to correctly redact it, then the court may impose sanctions on

the filing party. Another alternative recommendation is to put the burden on the parties and require the person/entity concerned to draft a notice to the offending "filer," similar to a Superior Court Rule 9 motion, and allow them an opportunity to reply/correct their error.

4) In addition, members of the Family and Criminal Law Sections had some concerns about Section 6, which excepts certain personal identifying information in criminal and youthful offender cases including the defendant's social security number, driver's license number, state-issued identification card number, or passport number, or the defendant's parent's birth name. Members of the Criminal Law section stated that social security numbers, in particular, are not typically available in criminal proceedings. Members of the Criminal Law and Family Law Sections suggested that the personal identifying information of accused defendants in criminal cases is also worthy of protection. Family Law Section members were concerned that these exceptions had the potential to subject individuals involved with the criminal justice system to identity theft or other harms after their cases have been resolved. Members of both sections suggested that Section 6(a) be either deleted or modified to prevent such harm. The BBA takes no position in these comments on issues related to online court access.

5) Members of the Criminal Law Section raised concerns that search warrants, and applications therefor, frequently contain private information that could later become available, after the end of the impoundment period. Although that is currently the case, it was felt that to leave that policy in place would be in conflict with the intent of these proposed changes. It was pointed out that while a judge may later order redactions to a warrant or application, no such opportunity is available if no charges are ultimately filed, or if the warrant does not issue. It was suggested that a requirement be added that the applying office be required to submit a copy of the application, affidavit and related materials, redacted in accordance with this Rule, when the warrant is sought or returned, which copy would then be publicly filed while the version containing personal identifying information remains impounded. This would be consistent with the procedure contemplated by the 2015 Amendments to Trial Court Rule VIII, Uniform Rules of Impoundment Procedure, Rules 3(e) & 8(c). The BBA takes no position on the subject of redacted search warrants.

6) Furthermore, members of the Criminal Law Section suggested that dates of birth be considered personal identifying information, inasmuch as they, too, can be used to perpetrate identity theft. It was noted that the cognate Federal rules (Civil Rule 5.2 and Criminal Rule 49.1) both require redaction of month and day of birth-dates in circumstances in which the rules do not provide an exemption from the redaction requirement.