Privacy and Litigation: Two Mutually Exclusive Concepts

By
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I. Identity Theft Is Easy

It's no wonder that identity theft is popular with the criminally minded. It can take place in the privacy of one's own home, away from the dangers of pain and violence sometimes meted out by crime victims and law enforcement personnel. If the thief is not a complete sociopath, he or she need not be discouraged by protestations of the victim or knowledge of the consequences caused by the nefarious activity. And the information needed to pull off this crime requires minimal effort to gather.

If the information cannot be collected remotely by e-mail scams, such as a fake bank communication asking for information, known as "phishing," other direct methods are fairly nonconfrontational. These include activities such as dumpster diving for bank account and wage statements (which some people still throw away without shredding), "shoulder surfing" to spy on account and pin numbers, mail box theft (for those credit card access checks and pre-approved credit card offers), and change of address forms (to delay alerting the victim that rogue credit card charges are being made or bad checks are being issued).[1] Sophisticated crooks have ways of mining information from third parties who have it legitimately, and artists among them use such information in their check, credit card and passport counterfeiting operations. Yes, the opportunities are endless. Public court records is the rich data source that will be discussed here. Social security numbers are the most common type of information stolen for identity theft, and they are included in pleadings for both

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1 Federal Trade Commission, Fighting Back Against Identity Theft, available at http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/; United States Department of Justice, Fraud Section, Identity Theft and Identity Fraud, available at http://www.usdoj.gov/criminal/fraud/websites/idtheft.html.

bankruptcy and matrimonial cases. It has been a long time public policy to have open court records, and these records have become more easily available through electronic court resources. Federal legislation has both required public disclosure of records but has also regulated the disclosure of the most private personal information. Attorneys may proactively protect their clients by encouraging states to follow the lead of Congress to safeguard personal information.

The most popular tool of identity theft is a Social Security number, and most people have become aware of the need to protect it. Unfortunately, Social Security numbers are found all over pleadings filed in matrimonial cases, as they are in bankruptcy cases. So are various bank account and credit card numbers. Since the usual reason for identity theft is to gain access to someone else's credit, one might ask why a thief would want the Social Security number or account number of a bankrupt person. For that matter, many people going through a divorce are not in a particularly sound financial place either. Nevertheless, credit is frequently available to a person who has filed even a chapter 7 case. There are creditors who will finance the purchase of consumer goods for someone who has filed for bankruptcy, reasoning that other creditors have been discharged, and another chapter 7 discharge will not be available for eight years.[2] This type of debtor is arguably a much better risk to the creditor. There would understandably be a high interest rate, which is no problem for the identity thief, who does not intend to pay for the goods anyway. Another motivation might be for the thief to obtain a job in the victim's name, using the stolen Social Security number, with the result that income could be taxed to the victim. The thief might obtain a driver's license in the victim's name, with the thief's picture, of course, which could be useful in an arrest, albeit not to the victim when the bail jumping warrant is executed.

Divorce clients who still have a workable credit rating could have financial grief compounding the personal anguish. This comes in the form of an unpleasant surprise when the thief obtains credit cards, or uses existing account numbers, and runs up charges in the victim's name. The thief could obtain bank loans,

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[2] See 11 U.S.C. '727(a)(8).

open a checking account and pass bad checks, or obtain other goods and services, including medical or utility services, in the victim's name. All of this can occur because of the availability of information appearing in public court records.

II. What the Feds Do to Safeguard Information

The public availability of court records has long been the policy of both state and federal courts, and it is this transparency that enhances fairness and public trust in our system of justice. Secret judicial proceedings are inherently deemed untrustworthy, and they have historically been a means for punishing those politically unacceptable to those in power. Opening judicial proceedings helps to keep them fair, and it allows citizens to observe and monitor the workings of its system of justice. A few exceptions exist where the sensitive nature of the proceedings and the privacy rights of individuals involved override the public's right to know what is happening in court. These include the identity of rape victims, juvenile proceedings, and matters involving civil commitment or guardianship of those suffering from mental or developmental disabilities.[3] Many similar sensitive matters may arise in matrimonial actions as well, and these can be dealt with on a case-by-case basis, such as by the sealing of medical records. Sealing should be used only under extraordinary circumstances, but alternative measures may be used to protect personal identifiers and financial information while maintaining the integrity of the process. The attorney must first be vigilant as to what should not appear in a public record and then take action to protect it.

When all court records were kept on paper, as is still the case in some states, recovery of information meant physically going to the courthouse to look it up. Most people were not willing or able to take the trouble. Thus, information filed with the court was not readily accessible to the general public. Now that court records are increasingly being filed and kept electronically, members of the public who are merely nosy or who have nefarious motives can access the information filed, greatly increasing the possibility of identity theft.

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[3] See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975).

Some states have taken action to limit the personal financial information that appears in publicly accessible court records.[4] Congress and the federal courts have become more active in preserving the private information of individual litigants, and these safeguards might be useful to keep in mind in state court filings to avoid making any information public that is not absolutely necessary.

The PACER[5] system, originally a dial-up service, came into being for the federal courts in 1990, and access became available via the internet in 1998.[6] Users can access dockets in particular cases without burdening their own or court staff. The cost of the system was supported by the users, currently $.08 per page paid through an account set up by the user. This cost is minimal compared to the cost of sending someone to the courthouse to check on a case file. Electronic filing and case management, plus electronic access to court records, are of substantial benefit to users of the system and have greatly enhanced the courts= ability to deal with their case loads. While use was mainly intended for government agencies and attorneys, many users have been entities that package the information and sell it to others, such as credit rating agencies and news entities following trends and high profile cases. Approximately 70 percent of usage relates to bankruptcy matters.[7]

The E-Government Act of 2002[8] was intended both to facilitate public access to court information and to regulate some matters that could arise on account of this availability. The law included mandates that court websites provide case filing and docketing information, and encouraged courts to improve the process by allowing viewing of the documents themselves, notably court decisions in text searchable format, through links. By now these access methods are generally available. Documents

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4 For a compilation of state laws limiting the use of personal identifiers, see the various databases on the National Conference of State Legislatures's website, available at http://www.ncsl.org. See also Anna Ferrari, New York Law Limits Use and Disclosure of Employees= Personal Identifying Information, MONDAG BUSINESS BRIEFING, Dec. 4, 2008.

5 Public Access to Court Electronic Records.

6 Peter W. Martin, Online Access to Court Records B From Documents to Data, Particulars to Patterns, 53 VILL. L. REV. 855 (2008).

7 Id. at 867.

8 Pub. L. No. 107-347, 116 Stat. 2899 (2002).

under seal are not included. Some courts continue to move toward even greater remote information gathering capabilities, providing access to transcripts of proceedings and audio recordings.[9]

One provision of the E-Government Act of 2002, section 205(c)(3), mandated that the United States Supreme Court establish rules relating to protecting the privacy and security of certain information. By its rule making process, the Court responded with Federal Rule of Civil Procedure 5.2, Federal Rule of Criminal Procedure 49.1, Federal Rule of Appellate Procedure 25(a)(5), and Federal Rule of Bankruptcy Procedure 9037. Interim policies established by The Judicial Conference of the United States mandated redaction of personal identifiers in court documents effective December 1, 2003, and the official rules became effective December 1, 2007. In general, the rules require that the following information be redacted from both electronically and paper filed documents: Social Security and taxpayer identification numbers (except for the last four digits), birth date (except for the year), minors= names (except for initials), and financial account numbers (except for the last four digits). Some information may be available by search at the courthouse but not over the internet on the PACER system, and some may be entirely unavailable. The need to protect jurors= identities and that of certain actors in the criminal justice system is obvious.[10] Other personal and financial information that is so much a part of the bankruptcy and matrimonial litigation process must also be protected.

Section 107 of Title 11 of the United States Code provides that bankruptcy records are generally public, except that a court may seal or limit access to certain confidential business information, scandalous or defamatory information, or information that "would create undue risk of identity theft or other unlawful in-

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9 The Supreme Court of the United States website contains free access to all Supreme Court oral arguments beginning with the October 2006 Term. Audio recordings may be purchased from the Motion Picture, Sound, and Video Branch of the National Archives for oral arguments dating back to 1955 "through the immediately preceding October Term."

10 Caren Myers Morrison, Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records, 62 VAND. L. REV. 921 (2009).

jury to the individual or the individual's property."[11] The issue is also addressed by Federal Rule of Bankruptcy Procedure 9037.[12] The Committee Notes to Rule 9037 point out several aspects of the rule that should be noted by attorneys and other filers. One is that the clerk is not required to review documents for compliance with the rule. It would be impossible for court clerks to scrutinize every document filed in a bankruptcy case to make sure all of the data required to be redacted is indeed redacted. Furthermore, clerks are not authorized to change documents filed with the court.[13] Documents are accepted and filed as is. Second, the rule does not affect matters subject to discovery. If a party thinks information should not be revealed to the party attempting to discover it, it is necessary to request a protective order. Third, a party may waive the protection of the rule by filing

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[11] 11 U.S.C. '107 Public access to papers, provides:

(a) Except as provided in subsections (b) and (c) of this section and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may B

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or

(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

(c)(1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:

(A) Any means of identification.

(B) Other information contained in a paper described in subparagraph (A

[12] Rule 9037 Privacy Protection For Filings Made with the Court, provides that personal identifying information such as social security numbers, birth years, names of minors, and bank account numbers may be limited in court filings subject to certain excemptions in order to avoid identity theft and other hardships. *See also* 11 USC § 342(c)(1) relating to inclusion of the last four digits of Social Security numbers in notices required by bankruptcy law.

[13] See FED. R. BANKR. P. 5005; FED. R. CIV. P. 5. *See also*, 11 USC § 342(c)(1) relating to inclusion of the last four digits of social security numbers in notices required by bankruptcy law.

a document that includes the party's own protected information.[14] For example, if a claimant has an account with the debtor and files a proof of claim with the claimant's account number, the protection is waived.[15] However, something filed by mistake could be removed from the public record by motion to the court.[16]

Under section (e) of Rule 9037, a party can file an unredacted version of a document under seal and file the redacted version as part of the public record.[17] Section (f) also provides for the filing of a reference list of sealed unredacted documents.[18] Documents under seal or those that are required to be stored separately are not popular with clerks= offices, and these devices should be used sparingly and only for non-routine matters. A court-ordered provision for destruction or expungement after a period of time, or if the matter can be made public after a period of time, would be considered helpful.

The same can be said for trial exhibits. These can contain information that should not be part of the public record, and they do not become part of the record unless entered into evidence. With the permission of the court, it might be appropriate to redact trial exhibits as well as other documents that become part of the court record.[19] Alternatively, the court might allow withdrawal of exhibits that have been entered into evidence, although they would have to be returned as part of the record if an appeal ensues. In my court we frequently inform parties that we will hold exhibits until the appeal period expires, at which time they will be destroyed unless the party submitting them picks them up, provided no notice of appeal is filed. This arrangement is put on the record so there are no surprises, especially if a party needs to keep an original document used as an exhibit.

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14 FED. R. BANKR. P. 9037(g).

15 See In re Prempro Prods. Liab. Litig., No. MDL 403CV1507-WRW, 2006 WL 751299, at *1 (E.D. Ark. Mar. 20, 2006).

16 See Astley v. Lawson, No. 89-2806, 1991 WL 7162, at *8 (D.D.C. Jan. 11, 1991); see also Martin Luther King, Jr., Inc. v. CBS, Inc., 184 F. Supp. 2d 1353, 1364-65 (N.D. Ga. 2002).

17 FED. R. BANKR. P. 9037(e).

18 FED. R. BANKR. P. 9037(f).

19 See FED. R. BANKR. P. 9037 advisory committee's note; see also Archer v. Darling, No. 09-cv-01988-PAB-KMT, slip op. at 2 (D. Colo. Oct. 20, 2009).

Because Social Security numbers have been used for many years to identify individuals for reasons other than to pay taxes or collect benefits, it is necessary to a certain extent that parties to a bankruptcy case be advised of these numbers. Accordingly, Social Security and taxpayer identification numbers appear on the notice of the first meeting of creditors sent out by the bankruptcy court.[20] However, a redacted version is filed, and this is what is viewable by the public. Disseminating this information to the creditor body would not, in most cases, create an opportunity for identity theft because most creditors would have the number anyway. What happens after the notice goes to creditors is another matter. I have been made aware of one municipal creditor, ostensibly as a public service, posting the notice on the courthouse bulletin board. Other creditors with even less benign motivations might do something else with the information. However, there is not much that we can do about that.

III. Sanctions for Disclosure of Protected Information

Neither the federal rules nor the statute provide for sanctions when a party files a document that contains another's protected information. That is good from an attorney's self interest standpoint, but not much help for a client whose information has been lifted from court records and misused.

There are only a few cases dealing with privacy concerns since these rules have been in effect. In *French v. American General Financial Services (In re French),*[21] the plaintiff/debtor was not able to recover from a creditor that had filed a proof of claim in her bankruptcy case without redacting her Social Security number and date of birth on the attachments. The court authorized the redaction after the information had been public for about two weeks, and the debtor then filed an adversary proceeding to recover damages under a variety of theories. The court held that 11 U.S.C. '107 was intended to address the operation of the court, not private parties, and violation of that section

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[20] See FED. R. BANKR. P. 2002(a)(1).

[21] 401 B.R. 295 (Bankr. E.D. Tenn. 2009). *See also*, In re Lentz, 405 B.R. 893 (Bankr. N.D. Ohio 2009) (no private right of action for violating procedural privacy rules).

did not create a private right of action between parties. If Congress intends to create a private right of action, it must do so explicitly, and such an action does not appear and cannot be inferred from this statute.

Similarly, Rule 9037 does not create a private right of action. The remedy provided for is to remove the protected information from public view, and this was done. Cancellation of the debt or disallowance of the proof of claim are not included in the remedy, and this was denied by the court. Likewise, no private right of action was created for violation of the privacy provisions of the Gramm-Leach-Bliley Financial Modernization Act[22] which was aimed at financial institutions with respect to protection of their records and was enforceable by regulators, not individuals. Nor was the Paperwork Reduction Act,[23] which incorporates portions of the E-Government Act of 2002, availing for the same reason.

The general bankruptcy statute allowing courts to enter orders necessary to carry out the provisions of Title 11, section 105, did not provide the debtor with sanctions against the creditor. Finally, the *In re French* debtor attempted to recover from the creditor for violation of privacy under Tennessee law. The court held that while case files are a public record, this does not make them "publicity."[24] Furthermore, such records are available only to those who seek them out, either by having a PACER account or by coming to the courthouse. As for the claims for intentional and negligent infliction of emotional distress, the creditor's conduct was not so outrageous and outside the bounds of decency, nor did the debtor plead severe mental injury and a causal connection, to support the claims.[25]

A similar result occurred in *Newton v. ACC of Enterprise Inc., et al (In re Newton)*,[26] where the court held that a private right of action was not created by privacy regulations, and "publicity" must be directed to the public at large. Even with the availability of electronic court records, the information is not disseminated to the general public. In short, courts are aware that

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22 Pub. L. 106-102, sec. 501 (1999).

23 44 U.S.C. '' 3501-3520 (2006).

24 401 B.R. at 318.

25 Id. at 319-20.

26 2009 WL 277437 (Bankr. M.D. Ala.) (slip copy).

the general policy is to make court records public, and while privacy is protected, it does not override the general policy.[27]

In the Eastern District of Wisconsin, where I work, there is an informal practice of removing non-compliant documents from public view as soon as a motion to restrict viewing is filed. The motion could be filed by a party in interest, by the United States Trustee, or it could be sua sponte if someone in the clerk's office notices and alerts chambers. The document is not removed from the docket or claims register, thus protecting deadlines and other substantive rights of the filer. An ex parte order is issued requiring the filer to replace the document with a redacted document. While an order to show cause and contempt powers would be available for filers that repeatedly violate the rights of debtors or other parties, most filers immediately file the redaction because the mistake was inadvertent. Other courts may have similar local rules or informal procedures.

IV. Safeguarding Clients' Personal Information

Start by being aware that personal information in court records, disclosed unnecessarily, can cause your client harm if used improperly by those having access. It could even cause harm to your client's children if their Social Security numbers are revealed. As for your client's soon-to-be-former spouse, there is no reason to cause him/her financial trouble down the road by unnecessarily revealing private information, especially if the former spouse has financial obligations to your client, and you get blamed for it. Encourage opposing counsel to do the same. If someone makes an inadvertent disclosure, move to redact and ask the court to order it.

Encourage your state to enact restrictions similar to the federal model, as many states have done or are considering doing.[28] If following the federal model runs afoul of state requirements in

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[27] Cf. State v. Baron, 769 N.W.2d 34 (Wis. 2009) (state identity theft statute, which punishes the unauthorized use of another individual's personal identifying information in order to harm the individual's reputation, was not unconstitutional free speech violation when the defendant used personal identifying information, the person's name, by accessing the victim's e-mail account, to disseminate private e-mails to harm his reputation, resulting in the victim's suicide).

[28] See, e.g., Mo Sup. Ct. R. 122.02; Cal. Ct. R. 1.20(b)(2).

pleadings or otherwise, move the court for permission to redact your filings. If the court denies permission, at least you tried. If enough litigants move for permission to restrict information disclosed in filings, the repeated requests are bound to catch the attention of the rule-making authorities.

I used to tell my divorce clients, and sometimes bankruptcy debtors, that there are all sorts of things people can do to each other that are really rotten and not the least bit illegal. In the divorce context, sometimes the inclination is to make sure the rest of the world knows how bad the opposing spouse is, and if bad things happen to him/her, so much the better. But cooler heads must prevail. The domino effect of not doing the right thing can be staggering. Protecting personal identifiers, even when not required to, is right, it is the wave of the future, and it means identity thieves will pick the low hanging fruit of other victims that are not you and yours.