

1 Federal Rules of Civil Procedure, Rules and Commentary Rule 5.2

Federal Rules of Civil Procedure, Rules and Commentary | February 2017 Update
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II. Commencement of Action; Service of Process, Pleadings, Motions, and Orders

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Rule 5.2(c) or (d); and
- (6) a pro se filing in an action brought under [28 U.S.C. §§ 2241, 2254, or 2255](#).

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

- (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;
- (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
 - (A) the docket maintained by the court; and
 - (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

- (1) require redaction of additional information; or
- (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

CREDIT(S)

(Adopted April 30, 2007, eff. December 1, 2007.)

PRACTICE COMMENTARY

Overview

Rule 5.2 was added in 2007. It addresses the growing risk that persons might abuse the public's right to view the contents of court files. While that risk is not new, it is heightened by the fact that court files are now kept electronically and made available over the internet. To address the risk of abuse, Rule 5.2 generally requires lawyers to redact certain categories of sensitive information from their court filings. It applies to both paper and electronic filings, since paper filings are likely to be scanned by court personnel and thereby made available electronically to the public. Pursuant to Judicial Conference policy, the redaction provisions now also apply to transcripts of court proceedings when they are filed with the court and made remotely available to the public. Lawyers should check their Local Rules to see what specific responsibilities they have for ensuring the redaction of filed transcripts.

Background

E-Government Act of 2002—Generally. In the E-Government Act of 2002, Congress ordered the federal courts to develop and maintain websites.¹ In addition to general information about the court and local rules, the statute requires that courts provide online access to docket information and to publicly available documents (i.e., non-sealed) that are either filed with the court electronically or scanned into the court's electronic docket.²

E-Government Act of 2002—Privacy rules mandate. Congress recognized that remote access to electronic court files presents substantial privacy and security issues, but (with a few exceptions discussed below) chose not to legislate specific standards for addressing those issues. Rather, Congress ordered the Supreme Court to prescribe rules—through the Rules Enabling Act process—to address those issues.³

Judicial Conference policy. In 1997, the Judicial Conference began studying the issue of privacy and public access to electronic case files. The Judicial Conference adopted a policy in September 2001.⁴ With respect to civil case files, the principal provisions of the policy were: (1) that remote access should be the same as access at the courthouse; but that (2) the litigants should modify or remove/redact certain personal identifiers from their filings; and (3) Social Security cases should not be accessible online. The last recommendation was withdrawn in December 2006. In March 2008, in light of Rule 5.2, the Judicial Conference generally declared its privacy policy “no longer operative”; as discussed below, however, the policy continues in effect insofar as it requires redaction of electronic transcripts of court proceedings.⁵

Mechanics of Rule 5.2

General redaction requirement—Paper and electronic filings. Rule 5.2(a) creates a general redaction requirement that applies to *all filings*, whether electronic or paper.⁶ Unless the court orders otherwise,⁷ the following items of information must be limited as follows:

- (1) *social-security and taxpayer-identification numbers*: last four digits only;
- (2) *birth date*: year of birth only;
- (3) *name of an individual known to be a minor*: minor's initials only; and

(4) *financial-account numbers*: last four digits only.

These redaction requirements apply to any person making court filings, whether a party or a nonparty.⁸ Trial exhibits come under the rule when they are filed with the court.⁹

Names of parents. Many courts also permit parents proceeding on behalf of minors to litigate using their initials instead of their full names on the grounds that the privacy protection afforded to the minor under [Rule 5.2\(a\)](#) would be lost if the full names of the parents are used.¹⁰ In doing so, however, the courts appear to be applying the general test for permitting pseudonymous litigation under Rule 10(a), rather than recognizing a blanket extension of [Rule 5.2\(a\)](#) to the names of parents. Thus, the courts are looking on a case-by-case basis at the privacy interests underlying the litigation in order to determine whether the need to prevent a de facto disclosure of the minor's identity justifies a departure from the strong presumption of open judicial proceedings.

Exemptions. [Rule 5.2\(b\)](#) exempts six categories of items from the general redaction requirement:

- (1) financial-account numbers that identify property subject to forfeiture in forfeiture proceedings;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal that was not subject to the redaction requirement when originally filed;
- (5) filings covered by [Rule 5.2\(c\)](#) [limited remote access] or (d) [sealed]; and
- (6) pro se habeas filings under [28 U.S.C.A. §§ 2241, 2254, or 2255](#).

Special remote access rules for Social Security Appeals and Immigration Cases. [Rule 5.2\(c\)](#) presumptively limits nonparty remote access to the electronic file in social security appeals and immigration cases. Party access is not limited.¹¹ Nonparty access is not limited *at the courthouse*.¹² However, nonparty remote electronic access is limited to the docket and the court's orders, opinions, and judgment.¹³ In other words, while non-parties will have access only to the items listed above if they seek to view the case file remotely, they will have full access to all public (i.e., non-sealed) materials if they seek to view the case file at the courthouse.¹⁴ These cases were given special treatment because of their volume and the fact that they are very likely to contain sensitive information.¹⁵ While full access remains available at the courthouse, it is only full access to the public file; courts may seal particular items in these cases under the general standards for sealing court records.¹⁶

Rule 5.2 does not address whether items may be redacted in discovery. [Rule 5.2](#) has a narrow and specific role. It imposes requirements for redacting specified categories of private information from materials before they are filed with the court. [Rule 5.2](#) has nothing to do with the discovery of those materials or whether a producing party may be permitted to redact information before producing documents in discovery.¹⁷ Redaction in the discovery context is governed by Rule 26, which might permit redaction of information prior to production on the basis that the information is not relevant or pursuant to a protective order upon a showing of good cause.

Relationship between redaction requirement and filing materials under seal. Nothing in [Rule 5.2](#) disturbs the court's power to accept filings under seal or the standards the courts have developed for determining when filing under seal is appropriate.¹⁸ However, the court's power to accept sealed filings does intersect with the redaction requirement. As [Rule 5.2\(d\)](#) explicitly notes, if the court is going to accept a filing under seal, then it may order that the filing be made

without redaction.¹⁹ Conversely, the operation of the redaction requirements—or further redactions as ordered by the court—may provide an alternative to sealing.²⁰ Finally, in a case exempt from the sealing requirement, the presence of unredacted personal information may support a sealing order.²¹

Seeking additional protection. Parties or filers who believe that additional protection is appropriate may seek a protective order under [Rule 5.2\(e\)](#). For good cause, the court may order additional redactions²² or may limit or prohibit remote electronic access.²³ The Advisory Committee Notes make clear that the listing of specified protections in [Rule 5.2](#) was not intended to signify that further protections are unwarranted.²⁴ Rather, courts should consider on a case-by-case basis whether further redactions or remote access limits are needed. [Rule 5.2\(e\)](#) specifies that these additional protections be set forth in an “order in the case,” signaling that courts and judges should not establish expanded redaction requirements or limit remote access by local rule or via standing orders. The Advisory Committee Notes are careful to state that [Rule 5.2](#) does not disturb any protections that courts might give under separate authority, mentioning [Rule 16](#) and [Rule 26\(c\)](#) as examples.

Filing options. A person who makes a redacted filing also has the right to file an unredacted version under seal.²⁵ A person who makes a redacted filing also may file a reference list under seal and then use the specific identifiers in further filings or proceedings in the case.²⁶

Electronic transcripts of court proceedings. [Rule 5.2](#) does not directly cover electronic transcripts of court proceedings that the court may make remotely available to the public. Such transcripts, however, may contain the type of sensitive information subject to redaction under [Rule 5.2](#). In order to provide a parallel protection, the Judicial Conference has adopted a policy that requires such transcripts to conform to [Rule 5.2\(a\)](#).²⁷ The Policy places responsibility on the attorneys for reviewing transcripts and providing court reporters with statements of the redactions to be made. Many district courts are now formulating Local Rules to further clarify and define this obligation. Lawyers should check their Local Rules for further details.

Filers' Obligations and Waiver

Waiver of protection for person's own information. A person may include his own information in unsealed and unredacted filings. Doing so, however, waives the protections provided by [Rule 5.2\(a\)](#).²⁸ In other words, [Rule 5.2](#) allows a person to avoid any expense or hassle caused by redacting one's own personal information, but with the knowledge that as a result the information will be available on the internet.²⁹ It must be emphasized that a person may waive the protection only for the person's own information.

Seeking relief after mistakenly including protected information. If a person makes a filing that, by mistake, includes unredacted information, that person may seek relief from the court.³⁰ One remedy, for example, would be for the court to seal the initial filing, order the return or sequestration of any copies distributed to the parties, and accept a redacted filing in its place. Neither the Rule nor the Advisory Committee Notes directly address whether courts should provide relief to a party who intentionally waives the protection but later has a change of heart.

Remedies for violations of [Rule 5.2](#) involving other person's protected information. [Rule 5.2](#) does not specify what courts may or should do in the event that a party makes a filing that, without authorization, includes another person's information protected by [Rule 5.2\(a\)](#). It undoubtedly lies within the court's power to take corrective action, which might include ordering the party to correct the error,³¹ having the clerk make the needed redactions,³² sealing the offending

filing,³³ or some combination thereof.³⁴ Presumably, courts also have inherent authority to impose appropriate sanctions where warranted.³⁵ However, violations of Rule 5.2 do not give rise to a private cause of action.³⁶

Responsibility lies with the filer, not the clerk. The Advisory Committee Notes speak clearly on this point: “The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or the non-party making the filing.”³⁷

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Footnotes

- 1 [Public Law 107-347, 116 Stat. 2913](#). *See also* [44 U.S.C.A. § 3501](#) note (text appears in the legislative note material).
- 2 [Public Law 107-347, § 205\(b\), \(c\)\(1\)](#).
- 3 [Public Law 107-347, § 205\(c\)\(3\)](#). *See also* [Crossman v. Astrue, 714 F. Supp. 2d 284, 289-290 \(D. Conn. 2009\)](#) (describing requirements of the Act and the history leading to the development of Rule 5.2).
- 4 *See* Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files (as amended December 2006), available at <http://www.privacy.uscourts.gov/Policy.htm>.
- 5 *See* Judicial Conference Policy on Privacy and Public Access to Electronic Case Files (March 2008), available at http://www.privacy.uscourts.gov/privacypolicy_Mar2008Revised.htm.
- 6 The privacy concerns at issue derive from the fact that court files can be accessed remotely via the internet. Since most paper filing will be scanned into the electronic file by the clerk's office, a paper filing raises the same privacy and security concerns as an electronic filing. *See* [Fed. R. Civ. P. 5.2](#) advisory committee's note (2007).
- 7 *See, e.g.,* [Dawn L. v. Greater Johnstown School Dist., 586 F. Supp. 2d 332, 339 n.3, 239 Ed. Law Rep. 1015 \(W.D. Pa. 2008\)](#) (exempting month and day of birth year where those items were “necessary pieces of evidence”).
- 8 [Fed. R. Civ. P. 5.2\(a\)](#).
- 9 [Fed. R. Civ. P. 5.2](#) advisory committee's note (2007).
- 10 *See* [S.F. v. Archer Daniels Midland Co., 594 Fed. Appx. 11, 11 n.1 \(2d Cir. 2014\)](#); [J.W. v. District of Columbia, 2016 WL 4543993, *3 \(D.D.C. 2016\)](#); [P.M. v. Evans-Brant Central School Dist., 2008 WL 4379490, *3 \(W.D. N.Y. 2008\)](#) (“Since a parent must proceed on behalf of a minor child, the protection afforded to the minor would be eviscerated unless the parent was also permitted to proceed using initials.”).
- 11 [Fed. R. Civ. P. 5.2\(c\)\(1\)](#).
- 12 [Fed. R. Civ. P. 5.2\(c\)\(2\)](#).
- 13 [Fed. R. Civ. P. 5.2\(c\)\(2\)](#).
- 14 *See* [Crossman v. Astrue, 714 F. Supp. 2d 284, 289-290 \(D. Conn. 2009\)](#).
- 15 *See* [Fed. R. Civ. P. 5.2](#) advisory committee's note (2007).
- 16 *See* [Crossman v. Astrue, 714 F. Supp. 2d 284, 288-291 \(D. Conn. 2009\)](#) (rejecting request for blanket order placing all social security materials under seal but pointing out that item-specific motions would be proper).
- 17 *See* [Castellani v. City of Atlantic City, 102 F. Supp. 3d 657, 662 n.1 \(D.N.J. 2015\)](#) (Rule 5.2 irrelevant to whether party can redact individual names from materials produced in discovery).
- 18 [Fed. R. Civ. P. 5.2](#) advisory committee's note (2007) (stating that the rule “does not limit or expand the judicially developed rules that govern sealing”). *See* [Rega v. Wetzel, 2015 WL 540051, *2 \(W.D. Pa. 2015\)](#) (Rule 5.2 does not govern request to file under seal).

- 19 Fed. R. Civ. P. 5.2(d). This provision works in conjunction with the court's power under Rule 5.2(a) to "order otherwise" to override the redaction requirement, Fed. R. Civ. P. 5.2(a), and the exemption of sealed filings from the redaction requirement. Fed. R. Civ. P. 5.2(b)(5).
- 20 See Fed. R. Civ. P. 5.2 advisory committee's note (2007). See, e.g., *Winkler v. Grant*, 370 Fed. Appx. 145, 147 (2d Cir. 2010), cert. denied, 131 S. Ct. 823, 178 L. Ed. 2d 576 (2010) (vacating district court's denial of motion to seal record that contained unredacted children's names and remanding for trial court to determine what steps to take to protect the identities of the children).
- 21 See *Caldwell v. Bartow*, 2015 WL 3669981, *1 (E.D. Wis. 2015) (finding good cause to seal materials in pro se habeas action due to unredacted personal information).
- 22 Fed. R. Civ. P. 5.2(e)(1). See *Krumtum v. Crawford*, 2016 WL 2894929, *2 (W.D. Va. 2016) (state-court records exempt from redaction requirement but ordering redaction and sealing in judge's discretion).
- 23 Fed. R. Civ. P. 5.2(e)(2). See *Coleman v. Zaccari*, 2011 WL 2607941, *1 (D.N.H. 2011) (prohibiting remote access of document with minor's birthdate).
- 24 Fed. R. Civ. P. 5.2 advisory committee's note (2007).
- 25 Fed. R. Civ. P. 5.2(f).
- 26 Fed. R. Civ. P. 5.2(g).
- 27 See Judicial Conference Policy on Privacy and Public Access to Electronic Case Files (March 2008), available at http://www.privacy.uscourts.gov/privacypolicy_Mar2008Revised.htm.
- 28 Fed. R. Civ. P. 5.2(h). See *Gibson v. American Cyanamid Co.*, 760 F.3d 600, 604 n.1 (7th Cir. 2014), cert. denied, 135 S. Ct. 2311, 191 L. Ed. 2d 1000 (2015); *Liberty Life Ins. Co. v. Myers*, 2013 WL 593870, *1 (D. Ariz. 2013) (party that included own information could not complain that other party failed to redact that same information); *Evans v. Larchmont Baptist Church Infant Care Center, Inc.*, 956 F. Supp. 2d 695, 706 n.6 (E.D. Va. 2013); *Musick v. Dorel Juvenile Group, Inc.*, 818 F. Supp. 2d 960, 961 n.1 (W.D. Va. 2011) (court uses minor plaintiff's full name where already used in the plaintiff's complaint and other filings); *Wells v. EMF Corp.*, 757 F. Supp. 2d 791, 798 (N.D. Ind. 2010) (plaintiffs waived protection by including their social security numbers in their own filings). *But see* *Vieira v. Honeoye Cent. School Dist.*, 756 F. Supp. 2d 302, 302 n.1 (W.D. N.Y. 2010), on reconsideration, 2013 WL 1915770 (W.D. N.Y. 2013) (sua sponte redacting minor's full name to list only initials and ordering that noncomplying papers be re-filed).
- 29 See Fed. R. Civ. P. 5.2 advisory committee's note (2007).
- 30 Fed. R. Civ. P. 5.2 advisory committee's note (2007).
- 31 See *Minette v. Minette*, 162 F. Supp. 3d 643, 654 (S.D. Ohio 2016) (striking paper and ordering party to file a corrected version); *In re Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2 (D.D.C. 2013).
- 32 See *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 942 (7th Cir. 2012) (affirming on the merits but remanding for district court to strike the names of minors from a memorandum filed in support of summary judgment); *Payne v. Missoula*, 2010 WL 3081270, *1 (D. Mont. 2010) (ordering clerk to make redactions in lieu of granting motion to seal).
- 33 See *Jacobson v. American Honda Motor Co., Inc.*, 2010 WL 3075339, *2 (D. Or. 2010) (ordering affidavit that contained personal information sealed).
- 34 See *Offor v. Mercy Medical Center*, 167 F. Supp. 3d 414, 447, 94 Fed. R. Serv. 3d 303 (E.D. N.Y. 2016) (ordering redacted filings and sealing the original filings); *Hale v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 6673550, *2 (S.D. Ind. 2014) (ordering corrected filing and sealing the original filings); *Preuss v. Kolmar Laboratories, Inc.*, 970 F. Supp. 2d 171, 179 n.11 (S.D. N.Y. 2013) (ordering corrected filings and ordering the clerk to withdraw the unredacted documents); *Kinard v. Kinard*, 821 F. Supp. 2d 1228, 1229 n.1 (D. Colo. 2011) (ordering corrected filings and sealing the original filings); *Poparic v. European Music and Video Store*, 2009 WL 6318212, *6 n.3 (E.D. N.Y. 2009), supplemented, 2009 WL 6316252 (E.D. N.Y. 2009), report and recommendation adopted, 2010 WL 1260598 (E.D. N.Y. 2010) (sealing the unredacted filing and ordering the party to file a properly redacted version for the public docket).
- 35 See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27, 19 Fed. R. Serv. 3d 817 (1991) (discussing inherent powers of the courts). See, e.g., *Reed v. AMCO Ins. Co.*, 2012 WL 1964094, *1 (D. Nev. 2012) (awarding \$4,500 in attorney's fees incurred to file motions to remedy

repeated Rule 5.2 violations); *Weakley v. Redline Recovery Services, LLC*, 2011 WL 1522413, *1-2 (S.D. Cal. 2011) (invoking inherent authority and ordering defendant who disclosed plaintiff's social security number to pay plaintiff \$900 to cover the cost of credit monitoring for five years); *Engeseth v. County of Isanti, Minn.*, 665 F. Supp. 2d 1047, 1048-49 (D. Minn. 2009) (ordering plaintiff's counsel who made filing containing full names, social security numbers, and birthdates for 179 plaintiffs to notify them of the disclosure, provide each one with credit reports and credit monitoring, and pay \$5,000 to a food bank).

36 *See Good v. Khosrowshahi*, 296 Fed. Appx. 676, 680 (10th Cir. 2008) (stating that "rules governing procedures in federal courts do not give rise to private causes of action").

37 Fed. R. Civ. P. 5.2 advisory committee's note (2007). *See also Carpenters' Dist. Council of Greater St. Louis and Vicinity v. Neier Services Co., Inc.*, 2015 L.R.R.M. (BNA) 185563, 2015 WL 3971070, *2 (E.D. Mo. 2015) (emphasizing that duty rests with the parties not the clerk); *Evans v. Larchmont Baptist Church Infant Care Center, Inc.*, 956 F. Supp. 2d 695, 706 n.6 (E.D. Va. 2013) ("Simply put, it is the parties' obligation, not the Court's, to ensure that filings comply with these Rules.").

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