Rules

From: Bryan Carey <bcarey@connmaciel.com>
Sent: Thursday, March 18, 2021 6:47 PM
To: Rules
Subject: Re: No. M-274-21 - Comments regarding availability of court filings by electronic means

Follow Up Flag: Follow up
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I am a lawyer licensed to practice law in the District of Columbia since 2002. I clerked for Judge John Terry at the Court for the 2002 term and have practiced in private firms in the District of Columbia for nearly twenty years.

As a practitioner in the District of Columbia courts, I frequently am interested in looking at both the opinions of the Court and the papers filed by litigants. Compared to many other state and federal courts that make appellate filings available, the Court's files are opaque, with electronic retrieval capabilities only for cases in which a lawyer is involved as counsel. This is frustrating to practitioners trying to follow the developments in other cases. And now that the COVID pandemic has many practitioners working from home offices and the courthouse is not open to the general public, electronic retrieval of court records is a necessity.

Access to the arguments presented to the Court from briefs in other pending cases would be a valuable research tool for both litigants and the public and would allow practitioners to more easily identify cases with similar issues pending before the Court. The legacy, commercial legal databases provide scant availability of documents filed with the Court for prohibitively high prices. In order to assemble cases on a particular topic pending before the Court, I typically piece together my own index of cases published in the Daily Washington Law Reporter and other law journals, citations found in those cases, and references from legal blogs published by other local lawyers and local media reports. My approach would be both simplified and more thorough with the availability of a single database in which to search.

Access to party briefs and the record on appeal should include not only links to images of documents on a particular docket as in the Superior Court's docket search system, but also should come with a full-text search and retrieval functionality that would allow a user to retrieve documents across the Court's docket on related topics. Full-text search capability is commonplace in many public databases allowing for powerful and open sharing of publicly available information. For example, the Securities and Exchange Commission's EDGAR database is a treasure trove of free contract language for practitioners as well as a valuable source of company financial information for investors, enabling lawyers drafting contracts to deliver services at a lower cost to their clients by piggybacking on the efforts of law firms serving public companies. As a lawyer who has moved through his career from serving large financial institutions to a practice focused more on small organizations and individuals, the availability of quality information sources for low cost is particularly important to be able to deliver competent legal services at prices clients can afford.

Finally, there exist open-source applications available to create a database without the use of proprietary, commercial software, which may be a cost-saving solution for the Court's limited, public budget. Such applications also provide more modern features and simplified interfaces than legacy commercial providers. The example of previous efforts to compile and publicize federal court documents undertaken by small groups

of skilled hackers show that making court documents accessible does not have to be a multimillion dollar IT project.

I look forward to seeing appellate filings being made more accessible to the public, to parties, and to the bar in our nation's capital so that the development of District law is enhanced by the free flow of ideas and legal work. Thank you for the opportunity to provide comments on this important project.

Sincerely yours,
Bryan Carey
Bar No. 478098

Conn Maciel Carey LLP
Attorneys at Law

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Council for Court Excellence
Improving Justice for the Community

COMMENTS BY THE COUNCIL FOR COURT EXCELLENCE IN RESPONSE TO DISTRICT OF COLUMBIA COURT OF APPEALS, NOTICE NO. 274-21, FILED FEBRUARY 12, 2021, RELATING TO PUBLIC ACCESS TO COURT ELECTRONIC RECORDS

Almost four years ago, the Council for Court Excellence (CCE) prepared and submitted a report to the District of Columbia Court of Appeals (DCCA), that examined how both state and federal courts had addressed the best means of providing public access to court records which were then, and are now, steadily being converted to electronic form. Our report, *Remote Public Access to Public Records: A Cross-Jurisdictional Review for the D. C. Courts*, found that "the results of the mid-2016 Council for Court Excellence/ National Center for State Courts survey of states show a broad movement towards online access to court records."[1] These comments are drawn from our report but have been adapted and supplemented as necessitated by the rapid developments in this field.

In the comments that follow, we make several major points:

- Online access is a 21st century essential that has been widely adopted and is expected by a wide range of court users.
- Issues of privacy are important but have workable solutions.
- Access should not be limited by the type of user or the user's ability to pay.
- Bulk use should be allowed.
- Consultation with users is a best practice in the governance of public access systems.

1. CCE supports development of online access to DCCA records as an essential part of access to the courts.

CCE's 2016 national survey found that, even at that time over four years ago, many states had developed systems of providing public access to court records (with 16 out of 19 state respondents allowing access to party filings and more to dockets). In requiring electronic filing and allowing electronic access to filed documents, this court will follow well-established practices. Many states and the D.C. Superior Court have moved in this direction, with the federal Public Access to Court Electronic Records (PACER) system leading the way for over two decades. PACER has shown the feasibility of allowing public access to all non-confidential e-filed materials in federal trial and appellate courts, and it has been commented that such a system has multiple benefits (beyond uses by attorneys), including: (1) helping to ensure judicial proceedings are perceived as fair; (2) providing the public with appropriate and, in some cases, constitutionally

[1] Available at: http://www.courtexcellence.org/uploads/publications/RACER_final_report.pdf.

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protected discussion and criticism of government; (3) fostering public education regarding the legal system; and (4) allowing for public oversight and monitoring of the legal system.[2]

2. **Privacy concerns are real, but have workable solutions.**

Ending the "practical obscurity" of court records (a term referring to inaccessible files as the *de facto* method of protecting privacy) requires courts to confront privacy issues previously downplayed.[3] We do not recommend that DCCA institute a paywall to resolve privacy issues. Instead, we recommend alternative methods of data protection be used, such as: closing cases of certain kinds, ordering the sealing of unique records, requiring attorney filers to remove certain data elements or submit them in a separate record that can be sealed, and using software to remove protected data elements. It is important to note that automated redaction has advanced greatly throughout the years and multiple vendors now offer redaction services reliably.[4] Privacy concerns can be dealt with thoughtfully, and should not, in our view, defeat electronic access.

3. **Access should not be limited by registration, fees or types of users.**

The most important attribute of both the federal PACER public access system and the access systems in many state court systems is universal remote public access. Most states (and D.C. courts at both levels) allow users without prior registration to access case dockets. We found in 2016 that a few states restricted access to case documents such as pleadings and motion papers to attorneys in general, or even to attorneys of record in a case. Such limits do not apply to public requests for record access at the courthouse and we see no reason to create such limits in the online system. Online access should be provided to individuals regardless of prior registration or whether or not they are a party to the case.

Fees have been an unstated way of limiting access, but may be essential in another sense. Some states told CCE in 2016 that they could not afford modern court record management technology without adding special fees. We recommend not charging a fee if possible. It is the most widely criticized element of the existing PACER system and will hopefully be changed.[5]

4. **Bulk users should not be categorically excluded**

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[2] *See* Peter W. Martin, *Online Access to Court Records – From Documents to Data, Particulars and Patterns*, 53 VILLANOVA L. REV., Issue 5 (2008), at 857.

[3] The term has been widely used as we do in this text but has no normative weight as a legal rule. It was first used in a case concerning access to federal executive branch records under the Freedom of Information Act. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 498 U.S. 749, 770 (1989) (denying access to FBI rap sheets assembled from various court and law enforcement sources).

[4] Thomas M. Clarke, *et al*., *Automated Redaction Proof of Concept Report* (National Center for State Courts, 2018). Available at: https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/804/rec/1.

[5] Excessive PACER fees are the subject of a class action in the U.S. District Court here, No. 2016-cv-745 (ESH). The court ruled for the claimants on government liability for some charges beyond statutory limits, Nat'l Veterans Legal Servs. Program v. United States, 291 F. Supp. 3d 123 (D.D.C. 2018); aff'd, 968 F.3d 1340 (Fed. Cir. 2020). The case is stayed for mediation on the scope of the remedy. Also, the House in December 2020 passed the Open Courts Act, H.R. 8235, that would order modernization of PACER in many ways and revision of the fee structure.

One type of user has caused wide discussion—commercial firms that "scrape" or download many records for resale, for example, all cases of a certain party, judge, or case type. This is a much more significant problem in trial courts, where a huge fraction of the civil docket is debt collection and eviction cases of interest to those assessing business risk.[6] Only one state at the time of our survey allowed bulk downloads without restriction; several others simply did not allow it at all; and the rest set limits such as only certain data elements, non-commercial users only, or only under contract with a vendor or the court directly.

Safeguards could include requiring a contract so each bulk user may be identified and accountable to specific terms. Some states exclude resellers altogether by a rule prohibiting release of all records for any "commercial purpose." But in general, the value of access to cases in bulk is exponentially greater now with the rapid growth of quantitative analysis tools including machine learning and artificial intelligence. Bulk access should be allowed and managed carefully.

5. **Online access is a tool for a wide range of users and they should be involved in developing this system.**

Should this Court decide to move forward with providing online records access, we recommend that the Court involve a wide range of representation in the system's design and implementation. CCE's survey found that most court systems setting policy on public access to electronic case records have created standing committees that worked over long periods on difficult questions of access, system design, and implementation. Court officials told us they were quite pleased with such committees that included representatives of major users such as judges and court staff, prosecution and defense attorneys, the bar generally, legal services organizations, the media, specialized researchers such as in nonprofits and universities, and the public. Such broad-based groups offer a better opportunity to consider all aspects of the public access issues and assure accessibility and user-centered design that in turn assures public support.

Conclusion

The Council for Court Excellence enthusiastically supports the concept of remote online access to pleadings and opinions in the D.C. Court of Appeals. Our research at the court's request in 2016 led us to report that it was a best practice in the states answering our survey. The explosive growth since then of technical tools for making sense of legal information adds to the reasons we

[6] Hesitation about bulk access stems from evidence of misuse of records, gathered *en masse* from the courts by data-mining companies and resold on the Internet. To avoid a risky hire or lease, employers or landlords seeking background information on applicants are ready to draw questionable conclusions from an "arrest record" or "suit for eviction" – regardless of the result of either proceeding. Such "facts" gain spurious gravitas when packaged as "court records" though many criminal charges go nowhere, and many housing court cases are settled without adjudication. Advocates emphasizing the harsh collateral consequences of criminal charges or eviction have successfully demanded limits to bulk access systems through litigation and legislative action. Legislation to seal some criminal and some eviction case records is pending in the D.C. Council. To help guard against endless recycling of old and fragmentary case histories, some states require any bulk user to replace stale data on a regular schedule and open their records for audit to assure the replacement rule is followed. All such rules are much less salient at the appellate level at issue here.

saw then. Technology advances have brought new solutions for handling tasks associated with access, such as redaction.

We would be pleased to assist the Court in further development of the ideas, including bringing together a stakeholder committee of users and experts in law and technology that could advise the court going forward.

Respectfully submitted,

Elizabeth Scully

James Hulme

As Co-Chairs of CCE's Civil Justice Committee on behalf of the Council for Court Excellence.

*

CCE is a nonpartisan, nonprofit organization with the mission to enhance justice in the District of Columbia. For nearly 40 years, CCE has worked to improve the administration of justice in the courts and related agencies in D.C. through research and policy analysis, facilitating collaboration and convening diverse stakeholders, and creating educational resources for the public. No judicial member of CCE participated in the formulation or approval of these comments. These comments do not reflect the specific views of or endorsement by any judicial member of CCE.

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April 12, 2021

Clerk of the District of Columbia Court of Appeals
Historic Courthouse
430 E Street, N.W.
Washington, D.C. 20001

Via electronic mail: rules@dcappeals.gov

Re: Comments on the D.C. Court of Appeals February 12 and March 9, 2021 Notices (Notice No. 274-21 and No. M-274-21) regarding Public Access to Electronic Records

The D.C. Access to Justice Commission[i] submits the following in response to D.C. Court of Appeals notices regarding public access to electronic records. As you know, the Commission's mission is to address the scarcity of civil legal services for low- and moderate-income District residents and to reduce the barriers these litigants face in navigating the civil justice system.

We understand that the Council for Court Excellence (CCE) will be submitting comments to the Court in response to these notices, building on its previously published cross-jurisdictional review on public access to electronic records, and the Court will also have the benefit of comments from at least one legal services provider with appellate expertise.

With the knowledge that the Court will have the benefit of this detailed analysis, the Commission submits the following brief comments emphasizing a few of the points raised therein to reflect its access to justice perspective.

First, we applaud the Court for exploring how best to make court documents electronically available to the general public. In our view, greater public access to court materials increases access to justice, particularly for the many unrepresented parties who appear before the D.C. Court of Appeals.[ii] In order to further the benefit to this population, we would underscore the importance of not charging fees for electronic access, not limiting access to attorneys only, and not creating other barriers that would disproportionately impact unrepresented litigants.

Additionally, public access to electronic court records benefits not just individual parties but is also an essential access to justice tool generally. Legal services organizations utilize this information to identify individual cases and conduct outreach to potential clients who would benefit from representation. Access to case information also allows organizations to identify larger access to justice issues and trends that would benefit from more thorough legal

involvement and analysis. The opportunity to conduct this type of assessment is critical to advancing access to justice more broadly and assisting the Court in ensuring a thorough examination of important legal issues.

We agree with the Court that ensuring appropriate redaction procedures to protect private or sensitive information will be important. Developing clear and transparent privacy procedures advances public trust in the court system and promotes continued engagement with litigants. We suggest that in developing these policies and procedures, the Court solicit external feedback to identify the types of pleadings or other document that should be flagged for heightened privacy protections or not made publicly available. For example, confidential or sensitive personal information is frequently transmitted to the Court by D.C. Government agencies as part of petitions for review of agency actions, and likely warrants special consideration. Similarly, there may be other documents such as Applications to Proceed Without Prepayment of Costs, Fees, or Security, that contain such sensitive personal and financial information that they should not be made publicly available due to the risk of misuse of this information. There may be other protections for certain categories of cases or litigants (i.e., cases involving domestic violence) that should be considered and incorporated into court policies and procedures.

We appreciate the opportunity to provide comments regarding public access to electronic records of the D.C. Court of Appeals. Should the Court decide to move forward with providing public online records access, we recommend that the Court involve a wider range of stakeholders in advising the Court on the system's design and implementation. We offer the Commission's help in facilitating that process if that would be useful to the Court.

Respectfully submitted,

Prof. Peter B. Edelman, Chair

James J. Sandman, Vice Chair

cc: Nancy E. Drane, Executive Director

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[i] The following court leadership and judicial officers who sit on the D.C. Access to Justice Commission have recused themselves from the consideration of this submission: Dr. Cheryl Bailey; Hon. Anthony Epstein; Hon. Sharon Goodie; Hon. Maribeth Raffinan; Hon. Vanessa Ruiz; and Hon. Phyllis Thompson.

[ii] In the Commission's *Delivering Justice* report, we highlighted court data that between 50-90% of litigants in the D.C. Court of Appeals lack legal representation. D.C. Access to Justice Commission, *Delivering Justice: Addressing Civil Legal Needs in the District of Columbia* (December 2019), at p. 203 (Appendix I).

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D.C. Open Government Coalition

3901 Argyle Ter., N.W.
Washington, D.C. 20011
www.dcogc.org -- 202-780-6020

Comment of the
D.C. Open Government Coalition

by

Fritz Mulhauser
Co-Chair, Coalition Legal Committee

Submitted to the
D.C. Court of Appeals
In Response to Notice No. M-274-21

April 12, 2021

Thank you for the opportunity to provide the views of the D.C. Open Government Coalition as the Court considers how best to make documents filed in the court electronically available to the general public.

Assuming this means expanding remote online access, such as in Superior Court, we enthusiastically endorse this important step. Electronic filing of course creates a digital version of the file in every case. This creates the potential to put court records within the reach of not only those regularly in the courthouse such as bench, bar, staff and litigants, but the public via Internet connection.

More than any other development in recent years, this expanded access can help bring about the benefits this Court noted years ago: "public scrutiny can serve to inform the public about the true nature of judicial proceedings, and public knowledge of the courts is essential to democratic government because it is essential to rational criticism and reform of the justice system."[1]

We address two aspects of the work ahead: the creative solutions needed to protect privacy as access broadens, and the importance of engaging users in designing the access scheme.

Public access is compatible with careful treatment of sensitive information

Access to proceedings and records of the courts is here to stay, whether protected by reasoning from the First Amendment or the common law. What will be challenging is to avoid just imposing new rules to take the place of longstanding access limits inherent in the chore of trekking to the courthouse

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[1] *Mokhiber v. Davis*, 537 A.2d 1100, 1110 (D.C. 1988).

and reading the files. Thus we oppose limits on who may access electronic records, whether by ability to pay or purpose of the use.

- The paywall shielding the federal PACER system is one of its most unfortunate features and will be changing as court and legislative challenges move forward. Our Coalition would be pleased to join the D.C. Courts in advocacy for the public resources needed to develop public access, rather than finance it through user fees.[2]
- Prohibiting commercial use is in some states' rules, but few, and we do not recommend such a limit. There are interesting cases questioning the state's ability to treat data-broker users' access differently. Limits on "commercial" use will be increasingly untenable as "legal tech" capabilities advance and offer amazing reasons for the legal sector to end chronic under-investment in technology. The promise is astonishing of new analytic tools for making sense of the enormous quantities of legal information now available.

Restrictions on access to certain kinds of cases are common; protecting privacy of minors was an acknowledged compelling interest even in the landmark *Globe Newspaper Co.* case about trial access. At issue is how to protect that interest, and mandatory rules have drawn close review.

If what's in the court file is available to anyone willing to read it at the clerk's office, it's hard to argue the same person shouldn't be able to read the same file online from home. Though some states do have such two-file double standards (a complete file available in the courthouse, an edited one online), and they are probably lawful so long as the public does have access to the full file somewhere.[3]

Certain data elements are of common concern; Federal and D.C. rules already direct that they be omitted from filings.[4] Experience (and empirical study of volumes of records) show, however, that sensitive material enters the records anyway, often not even needed for adjudication.[5] These obviously raise privacy concerns. The court can take an aggressive role to reverse this pattern by clear rules, ubiquitous warnings, and discipline where needed. We recommend the court review the experience of Florida state courts where a Commission on Privacy & Court Records worked for some years to analyze

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[2] Extra costs to the court for high volume commercial users' access could justify a fee structure, as has been suggested in the FOIA context. Laurence Tai, "Fast Fixes for FOIA," 52 *Harvard J. on Legisl.* 455 (2015).

[3] Provocative discussion of different access rules for different information flows is in Amanda Conley et al., "Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry," 71 *Maryland Law Review* 772, 839-845 (2012) (noting that even the convention of indexing records by party name is not universal, in fact "many European countries … maintain[] strict anonymity for the parties in court cases"). Available at SSRN: https://ssrn.com/abstract=2112573.

[4] Fed. R. Civ. P. 5.2, also D.C. Sup. Ct. R.5.2

[5] David S. Ardia and Anne Klinefelter, "Privacy and Court Records: An Empirical Study," 30 *Berkeley Tech. Law J.* 1807 (2015) (reporting on a review of sensitive information in a sample of 500 filings in North Carolina Supreme Court over the years 1984-2000). Available at: https://ssrn.com/abstract=2666752. Criminal cases had the most sensitive information, which is good news in the sense that both parties typically have attorneys. Courts can readily educate them about improved privacy practices.

information actually contained in court records and its necessity, develop new policies to reduce the amount collected, and comprehensively educate attorneys and the public on the new approach.[6]

Finally, we note that technology now allows scanning records and reliably locating unnecessary items, freeing staff to educate filers to edit their submissions to follow the court's guidance.[7]

Governance deserves careful attention in designing the next generation of court access

System design always benefits from close consultation with the users, and especially so in this area where public expectations and court concerns intersect around new technology.[8] The court should work closely with the bar and a wide variety of other public users to share and work through the important dilemmas of privacy and access. The District is fortunate to have a strong technology community that can also be enlisted in the effort. And not just at the beginning; initial plans can be evaluated and user data analyzed (including study of trends in sensitive information in submitted materials as the minimization campaign goes forward). Then plans can be revised in repeated cycles as the court and advisory group build a knowledge base together.

Conclusion

We commend the court for taking on the challenge of remote access to the court record. It is becoming a best practice in state courts nationwide, just as technology has helped other parts of government do work more efficiently and also engage the public better.

As our comments suggest, we believe the court can manage the privacy issues by reducing what is submitted and can keep faith with the public access principle through good design of the new access scheme, developing it through a broad advisory structure to address the issues and offer solutions that command public confidence.

The D.C. Open Government Coalition is a citizens' group established in 2009 to enhance public access to government information and ensure the transparency of government operations of the District of Columbia. Transparency promotes civic engagement and is critical to responsive and accountable government. We strive to improve the processes by which the public gain access to government records (including data) and proceedings, and to educate the public and government officials about the principles and benefits of open government in a democratic society.

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[6] Results of the courts' years of work on access issues are on the Florida Supreme Court website at https://www.floridasupremecourt.org/News-Media/Reports-on-Privacy-Access-Court-Records.

[7] National Center for State Courts several years ago demonstrated the technologies and tested their reliability on various challenging kinds of documents. They are doubtless even better now. Thomas M. Clarke et al., *Automated Redaction Proof of Concept Report* (National Center for State Courts, 2018). Available at: https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/804/rec/1.

[8] The General Services Administration that oversees federal technology development describes its version of user centered design and its benefits here: https://www.usability.gov/what-and-why/user-centered-design.html. The GSA is completing a study of the federal courts' electronic records system including public access. Its staff may be useful advisors.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

Office of the Solicitor General

March 12, 2021

Julio A. Castillo, Clerk of Court
District of Columbia Court of Appeals
430 E Street, NW
Washington, D.C. 20001

Re: No. M-274-21, Electronic Access to Case Filings

Dear Mr. Castillo:

The Court has requested comments regarding "how best to make documents filed in the [C]ourt—briefs, appendices, transcripts, and record materials from trial-court and agency proceedings—electronically available to the general public to the extent feasible." 2/12/21 Notice. Based on our experience litigating in this Court, the U.S. Supreme Court, and federal courts of appeal around the country, the Office of the Solicitor General submits the following suggestions for the Court's consideration.

First, we would recommend making documents filed in this Court broadly available to the public, without cost or the need for a login or registration. Public access is a priority of the District in general, *see, e.g.*, D.C. Code §§ 2-531 to -539 (District of Columbia Freedom of Information Act), and access to Courts is an important right of its own accord, *see, e.g.*, *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596 (1982). The U.S. Supreme Court has recently made its docket open to the public and provides an excellent model. It is easily searchable by case name or docket number. This Court already has a similar system that makes its docket easily searchable. However, unlike the Supreme Court's system, the filings are not currently hyperlinked and available for download. If there is a way to update the current system to include links to the relevant documents, that would be ideal—that way, the Court could maintain a single system for viewing and filing documents. Otherwise, the Court could use a system like the Supreme Court's, where submitting filings and viewing dockets are done separately.

There must, of course, be some exceptions to the general rule of public accessibility. Sealed cases, for example, should not be viewable by the public. Nor should sealed documents. The Court's current system requires a login to view sealed cases—for example, those with sensitive information regarding juveniles—and we suggest that practice should be maintained. Litigants should be responsible for redacting sensitive information in cases that are not sealed.

Second, we take no position regarding the accessibility of transcripts. However, we would note that court reporters make a living by charging a set fee per page for all transcripts, whether litigants are requesting a first copy or a duplicate. If the transcripts were accessible for free, reporters may be deprived of important income. Moreover, if transcripts are made available, it is unclear whose responsibility it would be to redact sensitive information. Logistically and as a matter of fairness to court reporters, it may not be feasible to make transcripts broadly available online.

Third, as to record materials, we do not believe that those should be made available on the Court's website. For Superior Court cases, record materials are already available on that court's website and on CourtView. Regarding agency cases, many of those—including, for example, workers' compensation cases—include extensive sensitive and personal identifiable information. Agencies like the Office of Administrative Hearings and the Department of Employment Services deal with such a large volume of records that it is simply not feasible for them to redact all sensitive information before sending a record to the Court. As a result, we recommend maintaining the current system for records: records should be obtainable by the litigants through the Court's file room, but not generally available to the public online.

We are, as always, happy to discuss with the clerk's office or the Court the best method for ensuring accessibility while protecting the privacy of District residents. We commend the Court for its continued commitment to public access and its efforts to make the e-filing process streamlined and effective.

Sincerely,

Loren L. AliKhan
Solicitor General

Caroline S. Van Zile
Principal Deputy Solicitor General
Office of the Attorney General for the District of Columbia

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Rules

From: Evan B <bolicked@gmail.com>
Sent: Wednesday, March 17, 2021 11:21 AM
To: Rules
Subject: Comment on Rules proposal No. M-274-21

Follow Up Flag: Follow up
Flag Status: Flagged

Hi,

I am writing to comment in favor of your proposal to make court records open to the public. This is an important step to increase public confidence and help practitioners and pro se clients who can't afford legal search databases like Lexis and Westlaw.

I practiced for 9 years in the State of Arizona, which makes all minute entries, orders and dockets available online. You can search for these documents on the superior court website by case number or by party. I think that is a good basis for building a similar system in Washington, DC. I'd also urge that, to the extent possible, the documents be uploaded in a searchable format so that readers can quickly search for specific words.

Thanks for your consideration.

--
Evan D. Bolick

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Rules

From: John Ronan <johnronanesquire@gmail.com>
Sent: Wednesday, March 3, 2021 8:11 PM
To: Rules
Subject: M-274-21. Public Access to Documents

Follow Up Flag: Follow up
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Allowing public access to the documents which the D.C. Court of Appeals reviews prior to rendering a decision will tend to demystify the appellate process for the public and engender respect for law since the public can see that decisions result from a reasoned consideration of the papers submitted by appellee and appellant and not from bias.

There is also a secondary benefit. Many lawyers will read the briefs that are submitted and see the level of good legal writing on display. It is my hope that such writing will be inspirational and result in an increased level of good persuasive writing among all lawyers.

Respectfully Submitted,

John Ronan, Esq.
(Admitted DC and Ga. Bars Only)
johnronanesquire@gmail.com
1-917-763-6693

Sent from my iPad

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April 12, 2021

Via electronic mail: rules@dcappeals.gov

The Honorable Chief Judge Blackburne-Rigsby; Associate Judges Glickman, Thompson, Beckwith, Easterly, McLeese, and Deahl
District of Columbia Court of Appeals
430 E Street, N.W.
Washington, D.C. 20001

Re: Public Comments on Potential Rules and Procedures Concerning Public Access to Documents Filed in the Court

Dear Honorable Judges of the Court:

The Legal Aid Society of the District of Columbia (Legal Aid) commends the Court on its efforts to expand public access to Court documents. We respectfully submit the following comments for the Court's consideration when drafting rules and procedures regarding public accessibility to court records that may include confidential or sensitive personal information.

I. Making Litigation Documents Publicly Accessible Expands Access to Justice.

Rules and procedures regarding public accessibility of Court documents would further access to justice in at least three ways.

First, allowing the public to access documents filed with this Court would make it easier for unrepresented individuals to fully litigate their cases. For many unrepresented litigants, the most significant barrier to successful appellate self-advocacy is the need to draft a brief without formal training with respect to either its form or its substance. Access to this Court's opinions is helpful, but the most direct and impactful way to assist an unrepresented party is to provide access to briefs that are as close as possible – both factually and legally – to that party's situation. Making all briefs accessible to everyone would allow unrepresented parties to find good examples to follow. Moreover, access to a complete electronic docket would allow unrepresented litigants to better understanding the chronology and timeline of cases. This would also assist the Court, as it would result in better, more timely, and more specific briefing, even in cases without legal representation.

Second, expanding public access would directly assist Legal Aid, and other legal service providers, in our client outreach initiatives. Legal Aid's Barbara McDowell Appellate Advocacy

Project, founded in 2004, has represented parties or *amici* in more than 100 cases before this Court. One way in which Legal Aid works to achieve its goal of offering representation to those in need of assistance is by reviewing this Court's online docket, finding potentially important cases, and requesting further information about those cases from this Court's file room. While the file room clerks have gone above and beyond to make documents promptly available to Legal Aid, having such documents readily available on the e-access website would expedite our organization's review process and make it easier for us to prioritize cases. Such access would also facilitate Legal Aid's consideration of requests from the Court to participate in particular matters.

Third, expanding public access to documents would promote transparency. Transparency is especially important to Legal Aid and its client population, which has historically been discriminated against and underrepresented in the legal system. Many applicants and clients express frustration with the opaqueness of the legal system and are often concerned that they will lose their cases simply because they are unable to navigate the litigation process on their own. Posting litigation materials, as well as other documents filed with this Court, would help to alleviate those concerns and increase knowledge of and trust in the legal system. It would also allow Legal Aid, as an institution, to understand better how the Court operates by easily obtaining detailed information that is not always included in the Court's opinions and by comparing how issues were briefed to how the Court addressed them.

II. As a General Rule, All Litigation Documents – Including Orders or Notices from This Court – Should Be Made Accessible to the Public.

With regard to the type of documentation that will potentially be made publicly accessible, the Court's Notice Requesting Comments specifically refers to, "briefs, appendices, transcripts, and record materials from trial-court and agency proceedings." Legal Aid agrees that as a general rule, these documents should be made readily accessible for the reasons mentioned in Section I of this comment.

In addition to these documents, Legal Aid strongly recommends that this Court provide public access to orders and notices issued by this Court. Court orders and notices are an integral part of the litigation stage, as they contain valuable instructions regarding the sufficiency of filings and provide litigants – especially unrepresented litigants – with greater insight regarding the Court's expectations and what it will or will not accept in terms of party submissions and behavior.

III. Public Accessibility Must Not Result in Public Disclosure of Confidential or Sensitive Personal Information.

The Court's Notice Requesting Comments states that "[t]he court intends to require that [documents made electronically availably] be subject to appropriate redactions and other procedures to protect confidential and other sensitive information and to comply with any laws limiting or prohibiting the dissemination of such information." Legal Aid agrees with the Court that redaction is necessary to ensure privacy and prevent inappropriate data mining, and we urge the Court to ensure that adequate redaction safeguards are fully implemented *before* documents are made available online (or otherwise).

The problem of Court records containing confidential or sensitive personal information is particularly acute in petitions for review of agency action. Many agencies have no redaction rules and transmit to this Court administrative records including confidential and sensitive personal information. In contrast, the D.C. Superior Court has redaction rules in place that should largely prevent such information from being included in the judicial record. Legal Aid has, during the course of client representation and other review of agency records, encountered records transmitted from D.C. Government Agencies to this Court that did not (or did not fully) omit or redact sensitive private information. For example, in a recent unemployment insurance decision of the Office of Administrative Hearings reviewed by this Court, the records transmitted to this Court (which Legal Aid typically obtains from the File Room) included sensitive information such as unredacted copies of the petitioner's social security card (displaying the full social security number), driver's license (displaying the full license number) and Permanent Resident Card (commonly known as a "Green Card" and providing residence status and other sensitive information).

Given the sensitivity of such information (as well as the risk of malevolent misuse of this information by a bad actor or data mining bot), this Court should structure the rules regarding public access in such a way that affirmatively requires District agencies and/or Court personnel to ensure that records are appropriately redacted. The preferable approach is for redactions to take place *before* records are sent to this Court so that no unnecessary sensitive information is in this Court's records, to be found by electronic or more traditional means of access.

Although the risk of disclosure of confidential or sensitive information in documents submitted by the parties to the Court may be lower, similar redaction requirements should apply to such documents before they become public. And, for consistency, a similar limitation on the revelation of such information should apply to oral argument as well.

As an additional measure to prevent data mining, Legal Aid also recommends that similar to the D.C. Superior Court's electronic docket, all documents made available on D.C. Court of Appeal's electronic docket be placed behind a CAPTCHA barrier (i.e., some sort of challenge-response test that ensures that the entity seeking information is human). These types of challenge-response tests would not prevent the most sophisticated commercial data miners. However, they would, at a minimum, establish a barrier between a litigant's private financial information and a bad actor.

IV. Certain Documents Should Be Categorically Excluded from Public Access Or, in the Alternative, Subject to More Stringent Accessibility Thresholds.

Legal Aid believes that as a general rule, documents submitted before the Court should be made publicly available. However, certain documents, such as Applications to Proceed Without Prepayment of Costs, Fees, or Security should not be made available to the public. These types of applications, by necessity, include sensitive personal and financial information about monthly income, dependents, assets, and expenses. Providing public and electronic access to this information, increases the risk that a litigant will be exposed to hacking, identity theft, fraud schemes, harassment, or other malevolent actions.

If the Court does choose to make fee waiver motions accessible to anyone other than the applicant, persons authorized by the applicant, and Court personnel, the Court should additionally

establish a rule that requires individuals attempting to access these documents to submit a motion to the Court for good cause. Further, to ensure that these documents are used for the proper purposes, this Court should establish a rule that forbids further dissemination of these documents.

****

Legal Aid appreciates the Court's consideration of these comments and recommendations. We invite further discussion of and collaboration with the Court on its efforts to make its records more accessible to the public while implementing appropriate safeguards.

Respectfully Submitted,

/*s*/ Jonathan H. Levy
Jonathan H. Levy, Director
Mariah Hines, Appellate Advocacy Fellow
Barbara B. McDowell Appellate Advocacy Project
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005

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Rules

From: Linda Sun <lcsun8@yahoo.com>
Sent: Friday, February 19, 2021 1:42 PM
To: Rules
Cc: judgehigashichambers@dcsc.gov; Barfield Sheila (OEA); Brown Lasheka OEA; Comentale Andrea OAG; Martini Ryan (OAG)
Subject: No. M-274-21 Notice Regarding How Best to Make Pleadings Electronically Available to the Public

Follow Up Flag: Follow up
Flag Status: Flagged

This email responds to the Court's Notice for the public's comments and suggestions on how best to make pleadings electronically available.

I believe the primary concern of the public is whatever appears on the courts' website must be accurate. It is a matter of trust. The public must be able to trust what it sees displayed on the website.

When I filed a petition for agency review in 2017 the record from the agency was transmitted to the Superior Court. I received a copy of the record from the agency also. In reviewing both sets of record I discovered substantial portions of the record were missing from the court's record when compared with the record I received. Those missing parts concerned material facts that affected my case. The case number is 2017 CA 007451 P (MPA)

The Clerk's Office informed me that the record was posted as it was received. Whoever tampered with the record did it knowingly and fraudulently.

There must be a mechanism whereby the court gives notice that if the record were found to be inaccurate it would be declined or returned to the filer.

Secondly, there is a problem with Superior Court Agency Review Rule 1 and the Case File Xpress system. Usually, if a petitioner wishes to challenge a decision from the agency, it needs to file a petition for review. I filed a petition for review for which the court remanded part of the case to the agency.

The agency issued an initial decision on remand. It contained errors in law and in fact. I tried to file a petition for review as Rule 1 dictates but Case File Xpress did not have a drop-down entry for a petition for review for the same case (on remand). The only comparable filing was a motion for judicial review----or else I would have to file another petition for review.

That would involve another submission of the record, a record which would only duplicate what was already on file. Given the fact that the record on file had been tampered with, I did not want to file a new petition for review and risk tampering again, and instead filed a motion for judicial review. I hope the Courts' rules committee will think of something on how one can file a petition for review on remand for the same case on Case File Xpress and not risk having the motion and one's due process rights be denied, because as it is, the Case File Xpress system is unconstitutional. .

Thank you.

Best regards,
Linda Sun

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Rules

From: Martin Zhou <mdz27@cornell.edu>
Sent: Thursday, March 11, 2021 1:58 PM
To: Rules
Subject: M-274-21 comment for electronically delivering documents to the public

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Honorable Clerk of the Court of Appeals:

I am a practicing attorney admitted in the District of Columbia and Maryland. Although I am employed by a law firm, I am submitting my comment solely in my personal capacity and not as a member of a firm. I posit that adopting the Superior Court's online imaging system (allowing filings to be imaged through the case search online portal) is a generally solid system and could be readily adopted for the Court of Appeals as well.

For certain types of cases where documents may be accessed by the public but additional screening is required, chiefly family or criminal matters, I note that the Government of the District of Columbia has successfully implemented an online portal for FOIA requests (example link here: https://foia-dc.gov/App/Index.aspx). This FOIA portal is relatively easy to use and works quite well. The Court of Appeals could adopt a similar portal for requesting electronic delivery of records that can be publicly accessed but require additional screening.

Thank you for your consideration.

Sincerely,

Martin D. Zhou, DC Bar 1034109

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nvrdc
Network for Victim Recovery of DC

Clerk, DC Court of Appeals
430 E St NW
Washington, DC 20001

April 12, 2021

Re: Notice M274-21 Regarding How to Best Make Documents Filed in Court Electronically Available to the Public

Network for Victim Recovery of DC ("NVRDC") submits this comment in response to the February 12, 2021 District of Columbia Court of Appeals ("Court of Appeals") Notice regarding making documents filed with the Court publicly available electronically.

I. Introduction

NVRDC is a non-profit organization in the District of Columbia that provides free legal, advocacy, case management, and therapeutic services to crime victims in the District. NVRDC attorneys represent hundreds of crime victims in DC Superior Court (hereinafter "Superior Court") annually through Civil Protection Order proceedings and in the assertion of their rights as crime victims in criminal prosecutions.

On February 12, 2021 the Court of Appeals issued a Notice (hereinafter "Notice") stating:

> [t]his court is exploring how best to make documents filed in the court — briefs, appendices, transcripts, and record materials from trial-court and agency proceedings — electronically available to the general public to the extent feasible. The court intends to require that such materials be subject to appropriate redactions and other procedures to protect confidential and other sensitive information and to comply with any laws limiting or prohibiting the dissemination of such information.

The Notice further asked for comments and suggestions from the public and interested parties. Given our work representing and advocating for the rights of crime victims, NVRDC wishes to highlight several legal protections for victims under federal and local law that would be implicated by making filed documents publicly accessible.

While NVRDC generally supports the Court of Appeals' interest in furthering access to justice by making court documents accessible, either online or through other means, all possible efforts ***must*** be made to protect the safety and privacy of crime victims, whose personal and confidential information is often contained in such documents. Increased access to information by the general public must not come at the expense of the privacy rights of crime victims in the District. While NVRDC strongly believes court records containing crime victims' personal or confidential information should not be available to the general public in any format, we will focus our comment on the idea of making electronically filed court documents available online; however, we would

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make these same arguments regarding access to such documents if a member of the general public were to physically go to the DC Court of Appeals and request access to such documents via a computer terminal or on paper. If the Court of Appeals makes electronically filed documents accessible to the general public, especially if that access is through the convenience of the internet, all private, confidential, and personal-identifying information (PII) of crime victims ***must*** be redacted pursuant to statutory rights of crime victims. Additionally, where the law is silent, NVRDC implores the Court to default to protecting such information of crime victims.

II. Crime Victims Are Guaranteed Privacy Rights Under the DC Code and Federal Law.

Both DC and federal law create privacy protections specifically for crime victims. DC's Crime Victims' Bill of Rights provides that victims have the right to be treated with fairness and with respect for privacy.[1] The federal Crime Victims' Rights Act ("CVRA") also provides that a crime victim has "[t]he right to be treated with fairness and with respect for the victim's dignity and privacy."[2] Courts have found that a victim's interest in their privacy means private information about a victim may be withheld from a public docket or other publicly accessible documents.[3] Many courts have understood the right to privacy granted by the CVRA to require the redaction of victims' names from court records and public documents.[4] Publicly sharing private information about a victim of crime, such as their name, contact information, or even their status as a crime victim would be a violation of a victims' right to privacy.

In NVRDC's crime victims' rights practice, we often see victim information in court records. For example, Stay-Away Orders are frequently issued in criminal cases that order defendants to stay away from a victim or their home or business as a condition of pretrial release or sentencing. Often, victims' full names or their initials are used in these orders.[5] Having a victim's full name on a criminal case Stay-Away Order that is

[1] D.C. Code §21-1901(b)(1).
[2] 18 U.S.C. § 3771(a)(8).
[3] *See Banks v. D.O.J.*, 757 F. Supp. 2d 13, 18-19 (D.C. Cir. 2010) (finding it was proper to redact victims' identifying information from criminal records sought in a Freedom of Information Act ("FOIA") request, noting that the victim's privacy interest was not outweighed by the public's interest in disclosure); *Kuffel v. U.S. Bureau of Prisons*, 882 F. Supp. 1116, 1123 (D.D.C. 1995) (finding that names and addresses of victims were exempt from disclosure in a FOIA request); *U.S. v. Madoff*, 626 F. Supp. 2d 420, 426 (S.D.N.Y. 2009) (stating that "presumption of access must be balanced against the victims' privacy rights" as expressed in CVRA); and *United States v. Patkar*, 2008 WL 233062 (D. Haw. Jan. 28, 2008) (holding that it was appropriate for the trial court to limit disclosure of materials that would cause damage to victim's reputation pursuant to victim's right to privacy under CVRA).
[4] See, e.g., *United States v. Clark*, 335 Fed. Appx. 181, 184 (3d Cir. July 7, 2009) (finding that redaction of names of victims and their family members from victim impact statements was consistent with provision of the CVRA guaranteeing victim's right to be treated with respect for dignity and privacy, and that there is no requirement a victim's identity be revealed when giving a victim impact statement). See also *United States v. Robinson*, 2009 WL 137319, (D. Mass. Jan. 20, 2009) (stating that, despite a general public right of access, a victim of crime has significant privacy interests in non-disclosure of identity to the public and such interests were statutorily protected by CVRA's privacy provision, and can outweigh public right of access).
[5] NVRDC has advocated with the Superior Court to ensure that such orders are not accessible through the Superior Court's online docket and that crime victims' names are not viewable in any online docket

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available in an online, publicly accessible docket would violate victims' right to privacy. Even including a victim's initials could reveal a victim's identity, particularly in cases where a defendant and victim are related, since the docket would also contain the name of the defendant. Even if victims' did not have an explicit statutory privacy right, the protection of victims' privacy in court cases is a public interest issue that should be taken seriously.

Additionally, in many of the criminal cases in which NVRDC represents victims, we see subpoenas sought and granted pursuant to Rule 17(c)(3) of the Superior Court Rules of Criminal Procedure, which allows for subpoenas of victims' personal and confidential information when notice is provided to the victim and the victim is given an opportunity to respond to the subpoena, unless there are exceptional circumstances. Often these subpoenas are for mental health, medical, or education records of victims, as well as records of medical forensic exams of sexual assault and intimate partner violence victims. The litigation surrounding these records, as well as the records themselves, frequently contain privileged, confidential, and extremely private information about victims, including names of medical and mental health providers, victims' educational histories, their medical and mental health diagnoses, medical histories, detailed notes from therapy sessions, as well as private identifying information like a victim's name, patient or student identification numbers, phone numbers, or other contact information. All of this information must be carefully redacted in order to protect a victim's right to respect for their dignity and privacy. Failing to redact all of this information would violate that right and unnecessarily expose victims' private information to the public.

In addition to these specific documents, there are numerous other documents in criminal cases in which a victims' name or initials may appear, from charging documents to sentencing memoranda to transcripts of testimony. Transcripts of testimony would include a victim stating their name and often their address. Their home address could also be revealed in others' testimony if the crime occurred at the home of the victim. Every docket entry in a criminal case must be diligently reviewed to ensure that victims' federal and local rights to privacy are protected.

III. The Violence Against Women Act Emphasizes the Importance of Victim Privacy and Imposes Obligations on Courts to Ensure that Personal Identifying Information of Victims is Not Published Online.

The Violence Against Women Act (VAWA) has placed specific limits on what information a court can put in an online public docket about victims of intimate partner violence, sexual assault, and stalking who seek protection orders, restraining orders, or injunctions. In the context of DC, this would apply to civil protection order, anti-stalking order,[6] and extreme risk protection order matters, as well as possibly in certain

entries. We have seen much progress on this issue since we began advocating for victims' privacy in 2012.

[6] The Intrafamily Offenses and Anti-Stalking Order Amendment Act of 2020 created a new process for victims of stalking to request protection from the Superior Court. That Act is protected to become effective in late April 2021. D.C. Act 23-571.

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other civil injunctions and restraining orders where the protected party is a victim of intimate partner violence, sexual assault, or stalking. VAWA states the following:

> A State, Indian tribe, or territory shall not make available publicly on the Internet any information regarding the registration or filing of a protection order, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order. A State, Indian tribe, or territory may share court-generated and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes.[7]

VAWA prohibits the disclosure of the names of a petitioner, respondent, locations of where the parties live and where the incidents in the petition occurred, and even details of the incidents, when those details could identify a petitioner.[8] Dockets in civil protection order cases in particular must be carefully reviewed and heavily redacted to ensure that any information that could reveal the name or location of an intimate partner, sexual assault/abuse, or stalking survivor is not available on an online docket.

IV. Even in Cases Other Than Criminal, Civil Protection Order, Anti-stalking Order, or Relevant Civil Cases Covered By VAWA, Victims' Personal Identifying Information Must Be Redacted in Order to Protect Victims' Privacy and Safety.

In addition to private information in criminal case and protection order cases, private, identifying information of victims may be in many other places in court dockets. For example, dockets in other cases often note related matters, such as in a domestic relations matter where the plaintiff and defendant are also parties to a civil protection order case, or in a criminal case where the victim and defendant are parties to a civil protection order case. These types of notations must additionally be redacted to prevent the disclosure of information about a protected party.

Even where no such notation exists, the private information of a victim on any public docket must be carefully reviewed and redacted to ensure that victim's privacy is not invaded and that they are safe. Under the DC Crime Victims' Bill of Rights and the CVRA, victims have a right to reasonable protection from the person who harmed them.[9] A victim may be a party to an unrelated case in which their address is on the public docket. Failing to redact this information could violate a victims' right to privacy or their right to reasonable protection, as information in unrelated cases could reveal

[7] 18 U.S.C. §2265(d)

[8] In 2007 a group of organizations, attorneys, and law school faculty wrote a letter to the Superior Court in response to requests for comments regarding the issue of domestic violence cases being accessible on the Superior Court's online docketing system. That letter can be viewed online at https://epic.org/privacy/dv/DC_Court_records.pdf. As of the date of this letter, Civil Protection Order cases and some felony domestic violence cases are **not** accessible on the Superior Court's online docket. NVRDC encourages the Court of Appeals to consider the recommendations made in that letter, especially the recommendations on page 13 regarding Fair Information Practices.

[9] DC Code §23-1901(b)(2); 18 U.S.C. § 3771(a)(1).

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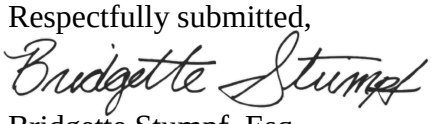
significant information about a victim. For example, where a victim of a crime or a civil protection order petitioner is also party to a landlord-tenant matter, their address could be revealed. On any number of dockets, a victim's home or work address may be listed for service purposes. All of this information must be redacted to ensure that victims are safe and their privacy is not invaded.

V. Conclusion

The Court of Appeals has an affirmative obligation to ensure victims' are afforded their right to privacy.[10] Therefore, any sharing of filed documents (electronically filed or otherwise) that contain victim's information must be carefully reviewed and redacted in order for the Court to comply with its legal obligations to crime victims. If the Court of Appeals creates a publicly accessible platform with information from Superior Court cases, all case records, including pleadings, docket entries, and victim records, must be prudently reviewed and carefully redacted to fully protect the privacy and safety of crime victims. NVRDC thanks the Court of Appeals for its advocacy for access to justice and its diligent efforts to ensure the protection of crime victims privacy in the District.

Respectfully submitted,



Bridgette Stumpf, Esq.
Executive Director
Network for Victim Recovery of DC (NVRDC)
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[10] "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a)." 18 USC § 3771(b)(1). "(a) Officers or employees of the District of Columbia engaged in… the judicial process shall make their best efforts to see that victims of crime are accorded the rights described in subsection (b) of this section." DC Code § 23-1901(a).

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April 12, 2021

BY E-MAIL (rules@dcappeals.gov)
Mr. Julio Castillo
Clerk, D.C. Court of Appeals
430 E Street, NW
Washington, DC 20001

RE: Comments of the Public Defender Service on Notice No. M-274-21, Regarding Electronic Access To Publicly Filed Documents

Dear Mr. Castillo:

The Public Defender Service submits these comments on the Court's proposal in Notice No. M-274-21 to make documents filed in the Court electronically available to the general public. We appreciate the opportunity to provide feedback, and urge the Court to adopt the federal courts' approach and make applicable on appeal the privacy and redaction procedures that already apply in D.C. Superior Court. A uniform system of privacy protections throughout the District's court system would provide consistency, predictability, and ease of administration, and benefit litigants and the public alike.

The D.C. Superior Court Rules of Civil and Criminal Procedure already require litigants to redact specific information in electronic and paper filings "[u]nless the court orders otherwise." Super. Ct. Crim. R. 49.1(a); Super. Ct. Civ. R. 5.2(a). This information includes individuals' social-security numbers, taxpayer identification numbers, and driver's license and identification card numbers; the names of minor children; birth dates; debit card, credit card, and financial account numbers; and—under the criminal rule—individuals' home addresses. *Id*.[1]

[1] Criminal Rule 49.1(b) identifies some types of filings or proceeding records that are exempt from the redaction requirements.

Both Criminal Rule 49.1 and Civil Rule 5.2 leave open the possibility of greater privacy protections when warranted in a given case. Both rules permit the court to order a filing to be made "under seal without redaction," *see* Super. Ct. Crim. R. 49.1(c); Super. Ct. Civ. R. 5.2(d), and both allow the court, "[f]or good cause" in a given case, to order additional redactions or "limit or prohibit a nonparty's remote electronic access to a document filed with the court." Super. Ct. Crim. R. 49.1(d); Super. Ct. Civ. R. 5.2(e).

Both the civil and criminal privacy rules are modeled on and substantially similar to their federal counterparts, Rule 49.1 of the Federal Rules of Criminal Procedure and Rule 5.2 of the Federal Rules of Civil Procedure. D.C. Criminal Rule 49.1 is "identical" to the federal rule, with minor exceptions. *See* Super. Ct. Crim. R. 49.1, Comment to the 2009 Amendment.

In the federal courts, the same privacy protections that govern filings in District Court generally apply on appeal, pursuant to Rule 25(a)(5) of the Federal Rules of Appellate Procedure, which provides as follows:

> (5) *Privacy Protection*. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

Thus, in the federal system, counsel are required to redact enumerated identifying information in their appellate pleadings – consistent with their obligations in the trial court. In this Court, Appellate Rule 12 provides that if a record has been sealed in Superior Court it shall be sealed on appeal as well, D.C. App. R. 12(c), but this Court has not updated its rules to impose redaction requirements at the appellate level equivalent to those that exist in the trial court.

The consistency in federal court privacy protections at the trial and appellate level implements a congressional directive expressed in the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899 (2002) (codified at 44 U.S.C. 3501 note). The E-Government Act mandates that federal courts provide electronic access to publicly filed documents, and requires the Supreme Court to make rules to address privacy and security concerns. *See* § 205(c)(3). It specifies that "[s]uch rules shall provide to the extent practicable *for uniform treatment of privacy and*

security issues throughout the Federal courts." § 205(c)(3)(A)(ii) (emphasis added).

A uniform scheme of privacy protections for all publicly filed documents would be equally valuable in the District of Columbia court system. Its consistency and predictability would make it easier for litigants to comply with redaction requirements and would set clear expectations regarding the type of information that will be protected. These benefits would be even greater given the general consistency between the Superior Court's privacy rules and their federal counterparts.

In contrast, adoption of an additional layer of privacy protections that kick in only at the appellate level (such as those contained in the Court's Order No. M20-271, *Pilot Project: Posting Briefs on the District of Columbia Court of Appeals Website* (Nov. 2, 2020) ("Pilot Project Order")) would create confusion and inconsistency and result in an unnecessarily complex and inefficient system that is difficult for litigants to follow. More fundamentally, redaction requirements beyond those that already exist in Superior Court would also fail to serve privacy interests, as information not subject to redaction from Superior Court pleadings is already in the public record.[2]

We are particularly concerned that the categories of information the Court identified as subject to redaction in the Pilot Project Order are far too broad and vague, and would impose undue burdens on appellate litigants. These categories include: (1) names of witnesses, (2) "any information revealing the identity of an individual receiving mental health services," and (3) "any information revealing . . . the identity, diagnosis, prognosis, or treatment of an individual receiving or under evaluation for substance use disorder services."

Redacting the names of all witnesses would require extensive redaction of appellate briefs, without furthering any valid privacy interest. Numerous adult witnesses are named and discussed throughout every criminal appellate brief. Requiring counsel to redact every use of every witness's name would be time

[2] The Pilot Project requirements created the additional anomaly that briefs posted on the Court's website had redaction requirements different than and additional to requirements for the same briefs filed in the public docket. In the federal scheme, redaction requirements apply to all briefs filed in the public docket, and those same briefs are then made available electronically to the public.

consuming and is not necessary to protect adult witnesses, who testify in open court and generally have no right to hide their name from the public sphere. Such a requirement would also impede the goals of public access to appellate briefs and transparency in the justice system. Many briefs would become confusing or incomprehensible were every witness name obscured. And because criminal appellate briefs frequently contain discussion of police witnesses, a broad requirement to redact all witness names would prevent the public, as well as criminal defendants, from learning about the conduct and statements of government officials.

Similarly, redacting "any information" or "anything" that would reveal the identity of a person who is receiving "mental health services" or "substance use disorder services" would require a vast amount of redaction. Witnesses in criminal trials are frequently questioned about substance use and mental health in order to probe issues of bias, perception, and credibility, and the topics of substance use and mental health are often intertwined with legal issues argued on appeal. Combing through every brief to pinpoint "any" information that could reveal the identity of someone receiving "mental health services" or "substance use disorder services" would be time consuming, and redaction of all such information would make the legal issues in some briefs very difficult to understand. And again, it would serve no true privacy purpose, as these witnesses testified, and the identified information was elicited, in open court at the trial level.

In addition to their outsized reach, the additional categories of information listed in the Pilot Project Order are too vague to be workable. Descriptors such as "any information," "anything," and mental health or substance use disorder "services" are imprecise and subject to varying interpretations, making them extremely difficult to apply consistently. Further, the inclusion of catchall language requiring redaction of "personally identifiable information including but not limited to" the specific categories listed in the Pilot Project Order exacerbates this problem. Such language provides no guidance to attorneys and others tasked with determining which information must be redacted and would also be detrimental to public access.

All of these problems could be avoided by simple adoption of the standard set forth in Federal Rule of Appellate Procedure 25(a)(5). For all of these reasons, the Public Defender Service requests that the Court create a uniform scheme of privacy protections for publicly filed documents in the D.C. Courts by adopting an

appellate rule that maintains the same privacy protections that already exist in Superior Court, in accordance with the uniform federal scheme.

Sincerely,

/s/

Samia Fam
Chief, Appellate Division

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REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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Submitted via email

April 12, 2021

Clerk of the Court
D.C. Court of Appeals
430 E Street, N.W.
Washington, D.C. 20001

Re: Notice No. M-274-21 (Feb. 12, 2021), Request for Comments on Public Access to Court Records

Dear Clerk of the Court,

The Reporters Committee for Freedom of the Press ("RCFP" or the "Reporters Committee") submits these comments in response to the Court's request for comments on making electronic court records accessible to the public. Notice No. M-274-21 (Feb. 12, 2021).

The Reporters Committee is an unincorporated nonprofit association whose attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.[1] It has long championed the public's constitutional and common law rights of access to judicial records and appreciates the opportunity to comment on this important issue.

The First Amendment and common law guarantee the public a presumptive right to inspect judicial records in civil and criminal matters. *See, e.g.*, *Nixon v. Warner Communications Inc*., 435 U.S. 589 (1978) (recognizing common law right of access to judicial records); *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661 (D.C. Cir. 2017) (collecting cases addressing the common law right to judicial records); *Washington Post v. Robinson*, 935 F.2d 282, 292 (D.C. Cir. 1991) (noting that the First Amendment "guarantees the press and the public a general right of access to court proceedings and court documents unless there are compelling reasons" to the contrary); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (recognizing, based on an "unbroken, uncontradicted history, supported by reasons as valid today as in centuries past," that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."). Thus, consideration of any judicial policy or procedure affecting the public's right of access to judicial records should begin with that presumption, which is "integral to our system of government." *United States v. Erie Cty.*, 763 F.3d 235, 238–39 (2d Cir. 2014).

The Reporters Committee welcomes the Notice's statement that the Court is, consistent with the public's common law and First Amendment rights of access, exploring how to best make "briefs, appendices, transcripts,

[1] More information about RCFP and its work is available at www.rcfp.org

and record materials from trial-court and agency proceedings" available electronically. Electronic access to court records is particularly important for reporters and news media organizations who "function[] as surrogates for the public" by reporting on judicial matters to the public at large. *Richmond Newspapers, Inc.*, 448 U.S. at 573. Electronic access allows reporters to efficiently check for new case filings, gather information about existing cases, and review filings and updated case information even when they are unable to physically visit the courthouse. Access to federal judicial records via PACER, as well as similar electronic access to judicial records in other jurisdictions around the country during the ongoing COVID-19 pandemic has underscored how vitally important electronic access can be. Electronic access to judicial records has enabled members of the news media to continue to report on matters of public concern pending in courts, including matters directly connected to the pandemic, even when physical access to courthouses has been restricted for health and safety reasons. *See, e.g.*, Hannah Schuster, *Federal Judge Rules D.C. Jail Must Do More to Protect Inmates from the Coronavirus*, WAMU (Jun. 18, 2020), https://perma.cc/5C4Y-A7NJ.

Even in non-emergency situations, however, in an age when news is reported online nearly as quickly as it occurs, journalists rely on the availability of online information to break and verify stories of major importance to the public. Electronic access to judicial records, including documents filed by the parties and court orders, improves the depth, quality, and accuracy of news media's coverage of judicial developments. Indeed, the public often expects a link or copy of the court record when reading a story about its significance.

The Court's February 12, 2021 Notice states that it intends to require electronically available records to be "subject to appropriate redactions and other procedures to protect confidential and other sensitive information and to comply with any laws limiting or prohibiting the dissemination of such information." Such limitations must be narrowly tailored and consistent with the First Amendment and common law presumptions of public access to judicial records, which generally require, *inter alia*, a case-by-case judicial assessment of whether (and to what extent) the public's right of access is overcome as to specific judicial records—a determination that is made after notice and an opportunity for members of the public to object to sealing. The rules of some jurisdictions clearly set forth specific procedures for moving to seal (and moving to unseal) judicial records. *See, e.g.*, Cal. R. of Court 2.551; *see also* D.C. Super. Ct. R. Civ. P. 5-III (requiring written court order to seal cases and documents). Court rules mandate redaction only of very narrow, specific categories of information. *See, e.g.*, Fed. R. Civ. P. 5.2 (requiring filings to, in most instances, redact specific portions of social security and taxpayer identification numbers, birth dates, minor's names, and financial account numbers); Fed. R. Crim. P. 49.1 (additional required redactions to portions of individual's home address); D.C. Super. Ct. R. Civ. P. 5.2 (required redactions for D.C. Superior Court civil filings). Potential embarrassment, injury to reputation, or other general "privacy" concerns are insufficient to overcome the presumption of access. *See, e.g., F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 411–12 (1st Cir. 1987) (granting public access to judicial records over claim of privacy intrusion); *Under Seal v. Under Seal*, 27 F.3d 564 (4th Cir. 1994) (potential harm to reputation is insufficient to overcome

presumption of access to court records); *Littlejohn v. Bic Corp.*, *851 F.2d 673* (3d Cir. 1988) (party's desire for privacy was insufficient to overcome presumption of access); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982) (conclusory assertion that access will cause "harm" is insufficient to deny access to a court record).

The Reporters Committee urges the Court to continue to engage members of the press and public as it develops specific rules and procedures concerning electronic access to judicial records, and to follow a user-centered design philosophy in developing its electronic access platform. *See, e.g.*, *User-Centered Design Basics*, usability.gov, *archived at* https://perma.cc/ZCQ7-R6UN. Designing such rules and systems with public input from the outset will ensure that they facilitate and encourage the public's exercise of the right of access to judicial records.

We would be pleased to provide any additional information to the Court upon request. Please do not hesitate to contact Reporters Committee Legal Director Katie Townsend (ktownsend@rcfp.org) with any questions.

Sincerely,
Reporters Committee for Freedom of the Press

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Rules

From: Richard Seligman <raseligman@gmail.com>
Sent: Thursday, March 4, 2021 11:44 AM
To: Rules
Subject: Comment on Public Access to Court Filings

Follow Up Flag: Follow up
Flag Status: Flagged

Clerk
D.C. Court of Appeals

Re: Comment on Public Access to Court Filings

The current system restricts access to attorneys and the public who may seek access to pending or closed cases raising similar issues. The system should contain published as well as unpublished opinions. The website should be searchable by name of the parties and subject if feasible. The access should be free to all that use it with reasonable restrictions to protect confidential or sensitive information.

Respectfully,

Richard Seligman

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ROBERT S. BECKER, ESQ.

COMMENTS TO THE DISTRICT OF COLUMBIA COURT OF APPEALS ON REMOTE PUBLIC ACCESS TO ITS CASE FILES

I am writing in response to the call for input regarding public access to documents filed electronically in cases before the D.C. Court of Appeals. For nearly three decades, I have represented indigent criminal defendants and others before this Court, the Superior Court of the District of Columbia, the U.S. Court of Appeals for the District of Columbia Circuit, and the U.S. District Court for the District of Columbia. For nine years before that, as a staff attorney for the Reporters Committee for Freedom of the Press, I litigated public access to court proceedings and records in the U.S. Supreme Court and several federal circuits.

When the Judicial Conference of the United States addressed public access through PACER to all federal trial and appellate courts in 2000 – 2002, it engaged in a very similar inquiry in response to *Privacy and Access to Electronic Case Files: Legal Issues, Judiciary Policy and Practice, and Policy Alternatives* (referred to below as *Privacy and Access*), a report prepared by its Office of Judges Programs in the Administrative Office of U.S. Courts. The report discussed several concerns voiced by judges, Administrative Office staff, and interest groups.

CASE FILES SHOULD BE AVAILABLE TO THE PUBLIC ONLINE TO THE SAME DEGREE THEY ARE AVAILABLE AT THE COURTHOUSE

There is a tendency to think of "the public" as a random universe of individuals interested in particular cases or types of case, including litigants' acquaintances, business associates and competitors, political opponents, and neighbors; civic organizations and community activists; and journalists. This is particularly true of those who advocate limiting or denying electronic public access, who characterize members of the public seeking access at best as voyeurs, and at worst as having bad motives for doing so.

But "the public" is a much broader universe, and its largest component by far includes individual and businesses who have very legitimate reasons to access court documents.[1] For example, lawyers often become involved in litigation that is not unique. A case may present an issue that is

[1] "Besides court staff, users include members of the bar; city, state, and federal employees; and the general public. Nine of the ten biggest users are major commercial enterprises or financial institutions, with the Department of Justice being the only non-commercial user in the top ten." APPENDIX 2 — ELECTRONIC PUBLIC ACCESS PROGRAM, 1. https://www.uscourts.gov/file/29684/download.

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also being litigated thousands of miles away in another federal, state or municipal courthouse, and that distant case may be further down the pipeline. Documents in that case could be very useful, and having them readily available might save the client considerable expense. Recognizing this, defendants in many toxic tort and products liability cases and the tobacco companies in the early suits brought by individual litigants fought long and hard to prevent public access to case documents and the sharing of discovery.[2]

Online access to case information will facilitate the study of legal issues by academics and law students who do not have the resources to go from courthouse to courthouse to review case files. It will benefit the legal profession generally in that researchers will be able to analyze whether, in dealing with particular procedural or substantive issues, courts around the country are providing uniform justice. The 1988 *Washington Post* series demonstrates the value of such research aimed at informing the general public, as well as the legal community.

In an article published on the 25th anniversary of PACER, Dennis Rose, a Cleveland litigator, said,

> the online systems were "a boon to practitioners. We didn't have to keep paper files at our desk. We didn't have to send runners to the clerk's office to retrieve copies of filings. We didn't have to pay a copy charge. PACER is cheaper than old-fashioned paper files."
>
> Best of all was the expanded transparency on court affairs…. While the vast majority of court records always have been public, they were available only at a federal courthouse, and hard for many to access. "Online access makes the public record truly public, which I think is of great value."

25 YEARS LATER, PACER, ELECTRONIC FILING CONTINUE TO CHANGE COURTS, https://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts.

As the Court of Appeals is doing now, Administrative Office staff enumerated several factors 20 years ago "that may justify some electronic access restrictions." It posited that "[b]alancing access and privacy interests in public information would be consistent with recent actions by the executive branch." *Privacy and Access* at 30. The Administrative Office staff relied on decisions defining access to agency records under open records laws.

> The primary purpose of access to case files as articulated in case law — promoting effective public monitoring of the courts — may be accomplished without unlimited disclosure of all documents in case files. This consideration is especially relevant to documents in the file that are only marginally related to the adjudication process.

Id. at 32.

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[2] The *Washington Post* documented the serious problems caused by court secrecy in such cases in a four-part series "Public Courts, Private Justice" published Oct. 23 – 26, 1988.

After receiving comments from more than 300 individuals and organizations, the Judicial Conference ordered that PACER should maximize public availability of most civil and criminal case documents filed in federal trial and appellate courts. In 2007, it made transcripts of proceedings in district and bankruptcy courts available through PACER as well.[3]

The Judicial Conference defined categories of information and documents that should be kept confidential,[4] and placed the burden on litigants to sanitize documents to prevent disclosure of personal information.[5] For example, the D.C. Circuit's HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES, II(C)(5), 11 – 12 (2021), states,

> Litigants must be aware of the federal rules and take all necessary precautions to protect the privacy of parties, witnesses, and others whose personal information appears in court filings. Sensitive personal data must be removed from documents filed with the Court and made available to the public — whether the document is filed electronically or in paper form. All filers must comply with Federal Rule of Appellate Procedure 25(a)(5) and Circuit Rule 25(e) and must follow the guidance on redacting personal data identifiers that is posted on the Court's web site.

D.C. Cir. Rule 25 states,

> **(e) Privacy Protection.** Unless the court orders otherwise, parties must refrain from including or must redact the following personal data identifiers from documents filed with the court to the extent required by FRAP 25(a)(5):
>
> - Social Security numbers. If an individual's Social Security number must be included, use the last four digits only.
>
> - Financial account numbers. If financial account numbers are relevant, use the last four digits only.
>
> - Names of minors. If the involvement of an individual known to be a minor must be mentioned, use the minor's initials only.
>
> - Dates of birth. If an individual's date of birth must be included, use the year only.
>
> - Home addresses. In criminal cases, if a home address must be included, use the city and state only.

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[3] https://www.uscourts.gov/news/2007/09/18/transcripts-federal-court-proceedings-nationwide-be-available-online.

[4] For example, Presentence Investigation Reports (PSR) and Statements of Reasons judges file to explain their sentencing decisions in criminal cases are filed under seal.

[5] Privacy Policy for Electronic Case Files, https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files.

> The filer bears sole responsibility for ensuring a document complies with these requirements.

The U.S. District Court provides detailed instructions on its website regarding privacy protection in criminal cases,[6] and civil cases.[7] It, too, makes clear that "[t]he responsibility for redacting personal identifiers rests solely with counsel and the parties. The Clerk will not review each pleading for compliance with this rule."

The D.C. District Court began electronic filing in civil cases in about 2002, and in criminal cases in early 2003; and the D.C. Circuit began accepting electronic filings in District Court appeals in 2009. Since then, neither court has reported difficulty protecting privacy or confidentiality. Nationwide, the federal courts' Case Management/Electronic Case Files (CM/ECF) systems in all districts and appellate circuits receive millions of electronic filings annually, and the U.S. Supreme Court receives electronic filings through a separate system. The Administrative Office reported that PACER processed 523 million requests for documents in fiscal year 2020 from 3.4 million users.[8] No significant breaches of privacy or confidentiality have been reported.

Although this Court requested comments regarding remote public access to documents filed in appeals, my comments apply equally to cases in the Superior Court. That said, there should be far less concern that documents filed in appeals might reveal private or confidential information because this Court's main focus is on the case record and briefs. It almost never receives pleadings including information that has not been vetted first by the Superior Court or an agency, and rarely receives briefs that would need to be redacted or filed under seal. In short, there is extremely little risk to personal privacy or confidentiality from remote public access to appellate documents.

THE PUBLIC AND NEWS MEDIA HAVE A PRESUMPTIVE RIGHT TO EXAMINE CASE FILES IN CIVIL AND CRIMINAL JUDICIAL PROCEEDINGS

The public and the news media have a First Amendment right to attend judicial proceedings. The right of access to case files is rooted in the First Amendment, common law or both, perhaps depending on whether the case is criminal or civil, but in either case, there is a strong presumption in its favor. This is so because access to such proceedings and to the case files that underlie them is essential if the public is to fulfill its duty to oversee the operations of the government and to ensure continued public confidence in the judicial system.

An analysis of the public's right of access to case files must begin with an examination of the U.S. Supreme Court's decisions holding that the public and media have a First Amendment right to attend criminal trials. In 1980, the Court ruled that under the First Amendment, criminal trials are presumptively open to the public and media, and may be closed only to protect some interest

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[6] https://www.dcd.uscourts.gov/criminal-privacy-notice.
[7] https://www.dcd.uscourts.gov/civil-privacy-notice.
[8] https://www.uscourts.gov/file/29684/download.

that outweighs the public's interest in access. A trial judge must articulate findings, on the record, to support the closure, according to the opinion. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980).

Two years later, the Court said that, although states had a significant interest in protecting minor victims of sexual assaults from the trauma of testifying in open court, trial judges must determine on a case-by-case basis whether this interest outweighs the presumption of openness. *Globe Newspapers v. Superior Court*, 457 U.S. 596 (1982). The majority concluded as well that any closure order must be "narrowly tailored to protect that interest" without unduly infringing on First Amendment rights.[9]

The First Amendment right of access extends to *voir dire* proceedings in criminal cases. *Press Enterprise v. Superior Court* (*Press Enterprise I*), 464 U.S. 501 (1984). It applies to preliminary hearings in criminal cases as well. *Press-Enterprise v. Superior Court* (*Press Enterprise II*), 106 S. Ct. 2735 (1986).

The three-part test for closure that emerges from these cases[10] requires a judge to find that a compelling governmental interest exists which outweighs the public's interest in access, that no alternative to closure will protect that interest, and that the closure is no broader than necessary to protect the interest and, in fact, will protect it. Assuming there is a compelling interest, a reasonable alternative to closing a hearing might be to require counsel to refer to a particularly sensitive document by an innocuous name or exhibit number, rather than to discuss its content in open court. If no alternative will protect the governmental interest, it is not permissible to close an entire hearing merely to prevent disclosure of a discrete piece of information among many aired at the hearing.[11] Furthermore, if that information is already public and closure will not protect it, i.e. the existence of a confession, then closure is not permitted because it would not serve the intended purpose.

In *Associated Press v. U.S.* (*DeLorean*), 705 F.2^{d} 1143 (9th Cir. 1983), the Ninth Circuit ruled that the public's and media's First Amendment right to attend pretrial criminal proceedings extends to documents in a criminal case file, even if the documents have not been introduced into evidence.

> There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them. Indeed, the two principal justifications for the First Amendment right of access to criminal proceedings apply, in general, to pretrial documents …. There can be

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[9] The Court ruled unconstitutional a Massachusetts statute mandating closure of criminal trials during which minor victims would testify because, by definition, it was not "narrowly tailored" to protect the state's interest. *Id.* at 609.

[10] The test is an adaptation of the Court's test for imposition of a prior restraint on publication enunciated in *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539 (1976).

[11] In *Globe, supra*, the state statute required closure of the trial when a minor sexual assault victim was involved in the case. The Trial Court attempted to comply with both the law and the First Amendment's "narrowly tailored" requirement by interpreting the statute as requiring closure only during the minor's testimony.

> little dispute that the press and public have historically had a common law right of access to most pretrial documents … [and they] are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning.

Id. at 1145 (citations omitted).

In analyzing the public's right of access and extending it to different types of proceedings, first trials and then pretrial proceedings, the Supreme Court followed two paths. It examined whether the type of proceeding at issue had been open to the public historically and whether public access provided structural benefit — whether it furthered the interests of justice. The plurality opinion in *Richmond Newspapers* stressed the historical analysis. However, Justices Brennan and Marshall concurred in a separate opinion focusing instead on the structural importance of access. According to Justice Brennan, openness of judicial proceedings assures:

> fair and accurate adjudication, … that procedural rights are respected, … [demonstrates] the fairness of the law to citizens, … [acts as] 'an effective restraint on possible abuse of judicial power' (citing *In re Oliver*, 333 U.S. 257 at 270 (1948)), … [and] aids accurate factfinding.

Richmond Newspapers, supra, 448 U.S. at 584 – 598. All of these are essential to self government, he explained. The *Globe* decision, written by Justice Brennan and joined by Justices White, Marshall, Blackmun and Powell, states that "Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of the Amendment was to protect the free discussion of governmental affairs." 457 U.S. at 604 (citations omitted).

The Supreme Court has never addressed the question of whether there is a First Amendment right of access to civil trial and pretrial proceedings. However, several federal appeals courts, employing the reasoning of the high court's four criminal trial access decisions, have ruled that both are presumptively open to the public.[12]

Similarly, the Court has never ruled on public access to case files, although opponents of public access to them frequently cite two decision, *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), and *Nixon v. Warner Communications*, 435 U.S. 589 (1978). Neither case put before the Court the question of whether the public had a right of access to case files.

Public access was not at issue in *Seattle Times*. The question, as framed in the opinion, was: "whether a *litigant's* freedom comprehends the right to *disseminate information* that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used." 467 U.S. at 32 (emphasis added).

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[12] *Publicker Industries v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (preliminary injunction hearing and hearing transcript); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (hearing on motion to dismiss and evidence introduced); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984) (contempt hearing); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (depositions, conferences and pre- and post-trial hearings in class action suit concerning jail overcrowding).

See, also, Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 162 (3d Cir. 1993). Stated another way, the Supreme Court had to decide whether the mere fact that the media libel defendants were principally engaged in First Amendment protected activity prevented a trial judge from prohibiting the newspapers from using discovered information as the basis for extrajudicial statements.[13] To answer this question "it is necessary to consider whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression.' "[14] *Seattle Times, supra.* (citations omitted)

The Supreme Court and other courts have long held that restrictions on such statements by parties and their lawyers do not violate the First Amendment if they are narrowly tailored to assure the fair administration of justice.[15] The Court concluded in *Seattle Times* that a protective order issued under the state equivalent of federal Rule 26(c), for "good cause" and "limited to the context of pretrial civil discovery, … does not offend the First Amendment. *Id.* at 37.

Because it was concerned only with the *litigants'* right to disseminate information, the high court never examined the historical and structural foundations for the *public's* claim of a First Amendment right of access to discovery documents.

In *Nixon*, news organizations sought access to White House tapes played as evidence during the trial of Nixon administration officials on charges arising from the Watergate scandal. In it the Court recognized that there is a common law right of access to exhibits used at trial but did not define the limits of that right beyond stating that "the decision as to access is one best left to the

---

[13] The Court addressed this issue mainly to set the discovery process apart from other situations in which it had ruled that media organizations could not be penalized or censored for publishing information they legally obtained, even if the party who disclosed the information was under an obligation to keep it secret. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail*, 443 U.S. 97 (1979); *Landmark Communications v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n, supra*; *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975).

[14] It should be noted that in the discussion of whether public access to case files should be limited the justification given is to protect individual privacy, a common law interest. In *Seattle Times* the libel plaintiffs, a religious group and its leader, asserted that disclosure of member and donor lists would jeopardize listed individuals' First Amendment right to religious association. Thus, in balancing competing interests each side claimed that its constitutional right trumped that of its opponent. *See, also, In re The Courier-Journal & Louisville Times Co.*, 828 F.2d 361 (6th Cir. 1987)(trial judge issued protective order in civil litigation arising from arson of black couple's home, possibly by Ku Klux Klan; disclosure denied because order issued to protect Klan members' constitutional right of freedom of association).

[15] "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court, staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is … highly censurable and worthy of disciplinary measures." *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). *See Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (1975).

sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* 435 U.S. at 599.

> In the instant case … there is no claim that the press was precluded from publishing or utilizing as it saw fit the testimony and exhibits filed in evidence. There simply were no restrictions put upon press access to, or publication of, any information in the public domain. Indeed, the press — including reporters of the electronic media — was permitted to listen to the tapes and report on what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish…. Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes — to which the public has never had *physical* access — must be made available for copying.

Id. at 609.

Rather, the Court ruled, the media would be barred from copying the tapes because Congress had established a scheme in the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107, for reviewing and disseminating the Nixon tapes. Therefore, "[b]ecause of this congressionally prescribed avenue of public access we need not weigh the parties' competing arguments as though the District Court were the only potential source of information regarding these historical materials. The presence of an alternative means of public access tips the scales in favor of denying release." *Id.* at 606. It went on to say that "court release of copies of materials subject to the Act might frustrate the achievement of the legislative goals of orderly processing and protection of the rights of all affected persons." *Id.*

> *Nixon* did not hold that there was no First Amendment right to access court documents. Rather, the Court there merely held that, in a situation where there "was no question of a truncated flow of information to the public," there was no right to physically access and copy the Watergate tapes that had already been played in open court where transcripts of the tapes were available to the media and the public generally.

United States v. McVeigh, 119 F.3d 806, 812 (10th Cir. 1997).

Drawing on the Supreme Court's decisions, federal appellate courts have found a public right of access under the First Amendment, common law, statutes and court rules to documents introduced into evidence in civil pretrial proceedings and to documents not introduced but submitted to the court in support of various kinds of motions.[16]

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[16] *Krause v. Rhoads*, 671 F.2d 212 (6th Cir. 1982), *cert. denied sub nom. Attorney General of Ohio v. Krause*, 459 U.S. 823 (1982); *In re Continental Illinois Securities* and *Newman v. Graddick* (see note 12, *supra*); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation (Petroleum Products*), 101 F.R.D. 34 (C.D. Cal. 1984), *reh'r'g denied* 10 Med. L. Rep. 2430 (9th Cir. 1984)(trial court cited reasoning of *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100

Continued on next page …

In *Brown & Williamson Tobacco Co. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984), the Court lifted a trial judge's order sealing FTC administrative transcripts and all documents submitted by the agency during pretrial proceedings. The panel held that principles that apply when ruling on public access to judicial proceedings apply in determining whether to permit access to court documents because "court records often provide important, sometimes the only, bases or explanations for a court's decision." *Id.* at 1177. Both the First Amendment and the common law limit judicial discretion to seal court documents, and a judge considering imposing restrictions must determine that they would "serve an important governmental interest; that this interest [is] unrelated to the content of the information to be disclosed in the proceeding; and that there [is] no less restrictive way to meet that goal." *Id.* at 1179. The panel went on to say, "Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." *Id.*

In *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984), the Court adopted the reasoning of *Brown & Williamson*, *supra*, that the policy reasons for granting public access to criminal proceedings apply to civil cases as well. *Id.* at 1308. It went on to hold that the public had a First Amendment right to examine a special litigation committee report recommending that Continental I1linois terminate derivative actions against outside directors of the company. The report was submitted to the trial court in support of a motion to terminate the derivative actions. The Seventh Circuit rejected a claim that a blanket protective order and the discovery order requiring disclosure of the report to plaintiffs negated the presumptive public right of access. It concluded that neither of the orders, nor the "good cause" standard of Fed. R. Civ. P. 26(c), "purports to control disclosure of material introduced as evidence in support of a motion." *Id.* at 1310.

In *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied* 460 U.S. 101 (1983), the Second Circuit recognized that "documents used by parties moving for, or opposing summary judgment should not remain under seal absent the most compelling reasons," *Id.* at 893. This case, too, involved access to a special litigation committee report used in a stockholder derivative action.

The presumption of access encompasses any documents "the judge *should* have considered or relied upon." *Petroleum Products, supra*, at 42. The First Circuit adopted the *Petroleum Products* view that the right of access includes those records that a court relies on in determining the litigants' substantive rights. *Federal Trade Commission v. Standard Financial Management Corp.*, No. 87-1340, 14 Med. L. Rep. 1750 (1st Cir. Oct. 6, 1987).

> Once those submissions come to the attention of the district judge, they can fairly be assumed to play a role in the court's deliberations. To hold otherwise would place us in a position of attempting to divine and dissect the exact thought processes of judges …. [W]e rule that relevant documents which are submitted to, and accepted by, a court of

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(1984), with approval, but adopted common law right of access; Court of Appeals said right of access grounded in common law and First Amendment. (citing *Associated Press, supra*).

> competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies.

Id. 14 Med. L. Rep. at 1754 (footnote omitted).

In *Krause v. Rhoads, supra*, the Sixth Circuit affirmed a trial judge's decision to unseal discovery documents in the cases resulting from the shooting deaths of four individuals at Kent State University in 1970. The judge had unsealed all documents that did not reveal law enforcement investigative techniques, matters coming before a grand jury and the identities of witnesses, "because of First Amendment interests and the historic nature of the events portrayed in the materials concerned." *Id.* 671 F.2d at 217. The court stated, "We recognize that we deal here with substantial issues involving emanations from the First Amendment such as the public's right to know…" *Id.*

As noted above at 5, where the public's right of access is rooted in the First Amendment, closure will be permitted only to protect a compelling governmental interest. Courts that have found only a common law right of access to case files and other court documents have applied essentially the same three-part test, substituting in the first part a requirement that the moving party demonstrate a substantial governmental interest.

THE RIGHT OF PRIVACY IS FOUND IN COMMON LAW OF RECENT ORIGIN

In contrast to the public right of access to trials, which Chief Justice Burger traced back to early British common law, the concept of a right of privacy in the United States traces its origin to an article written by Louis D. Brandeis and Samuel D. Warren, 4 Harv. L. Rev. 193 (1890). They described it as the "right to be left alone." Dean Prosser elaborated on their work cataloguing four distinct torts encompassed by the right of privacy: intrusion, publication of private or embarrassing facts, statements that place a person in a false light, and misappropriation. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 804 – 14 (4th Ed. 1971). For our purposes, only publication of private facts is relevant.[17]

> A private facts or "intimacy" claim arises when:
>
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that:
>
> (a) would be highly offensive to a reasonable person and
>
> (b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS, § 652D. Furthermore, if information, even intimate information, is already in the public domain, a new disclosure of that information would not be

[17] Although it is conceivable that a litigant might claim that publication of information about a court proceeding placed him in a false light, such a claim would be unlikely to survive because fair and accurate accounts of judicial proceedings and court records are privileged under the laws of most, if not all, states.

actionable. There are a few decisions in which state courts, notably in California, have found that publication of information about long-past crimes may give rise to private facts claims. *See, e.g., Briscoe v. Reader's Digest*, 483 P.2d 34 (Cal. 1971); *Melvin v. Reid*, 112 Cal. App. 285 (1931). But other states have concluded that when information is of public record it cannot be the basis for such a claim, even after many years in obscurity. *See, e.g. Jenkins v. Bolla*, 600 A.2d 1293 (Pa. 1992); *Roshto v. Hebert*, 439 So.2d 428 (La. 1983); *Montesano v. Las Vegas Review*, 668 P.2d 1081 (Nev. 1983); *Westphal v. Lakeland Register*, 2 Med.L.Rptr. 2262 (Fla. Dist. Ct. 10th Cir. 1977); *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir. 1940).

"PRACTICAL OBSCURITY," A PUBLIC RECORDS LAW CONCEPT, IS INAPPLICABLE TO COURT RECORDS

"Practical obscurity," the theory on which opponents of online, remote access to court records rely, is a legal fiction originated in caselaw interpreting access to executive agency records pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a.[18] It is the notion that although a document remains public in government files, it is private because the chance that it will be found and disseminated is remote.

The D.C. FOI Act, like its federal counterpart, was adopted to create a right of access to government information where none previously existed. It provides limited access to executive agency and D.C. Council records. In *Reporters Committee*, the Court stated that the primary purpose of the FOI Act is to permit the public to oversee the operations of government, and that access to criminal rap sheets stored by NCIC did not accomplish that purpose. Similarly, as the Supreme Court later recognized in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 120 S. Ct. 483 (1999), because the public's right of access to arrestee and victim addresses was guaranteed only by statute, the legislature could amend the statute to impose restrictions on that access.

These cases have developed precedent permitting agencies to withhold information that clearly would not be considered private under common law or invasion of privacy statutes.[19] In fact, the Administrative Office report candidly stated that "there is no 'expectation of privacy' in case file information." *Privacy and Access, supra*, at 32.

In the face of repeated rulings by the Supreme Court that public access to court proceedings fosters public confidence in and willingness to employ the judicial system to resolve disputes, it

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[18] The most notable, *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), stated that the FBI could withhold criminal history information in its National Criminal Information Center (NCIC) database, even though the information is public in the jurisdiction that submitted the data.

[19] Although it focuses on case law developing a right of privacy under federal open records law, it totally ignores recent amendments to the federal FOI Act requiring agencies to increase dissemination of information on the internet and to provide requested data in electronic format if requested, so-called E-FOIA provisions. The D.C. Freedom of Information Act, D.C. Code § 2-531, *et seq.*, include similar affirmative disclosure and E-FOIA requirements.

is striking that the Administrative Office staff argued that "the prospect of unlimited disclosure of personal information in case files may undermine public confidence in the litigation process, in general, and the federal courts in particular."

Opponents of online, remote access argue that "practical obscurity" is necessary to protect privacy and confidentiality of unwary litigants, particularly individuals who file *pro se.* That argument fails because, if a case file is public at the courthouse, a reasonably cautious litigant must operate under the assumption that someone will find it and might use information it contains. If that file contains personal information or sensitive business information, counsel has a duty to protect the client's interests by seeking a protective order pursuant to procedural rules appropriate to the type of proceeding involved.

CONCLUSION

There is a strong presumption that court records are public and any claim that they should be withheld must be assessed on a case-by-case basis by the judge presiding over the matter. If documents are public at the courthouse, the concept of "practical obscurity" will never justify denial of online access under the Supreme Court's three-part test for closure. Even if the movant could demonstrate a compelling or substantial interest that outweighs the public's interest in access, s/he would never be able to demonstrate that denial of online access will prevent the perceived harm.

In proposing that some restrictions on access might be necessary, *Privacy and Access* posits that there are dangers to permitting the general public to obtain access to case files over the internet, but does not offer even anecdotal evidence to support these contentions. It always is easier to keep information secret in the name of preventing harm than it is to punish those who use legally-obtained information to harass or injure. But, although government agencies often resort to such tactics in the open records context, the Supreme Court and lower federal appellate courts have never found that speculation as to dangers that might arise from court openness were sufficient to justify secrecy. *See, e.g., New York Times v. United States*, 403 U.S. 713, 725 – 6 (1971)(Brennan, J. concurring)("The entire thrust of the Government's claim … has been that publication of the material … 'could,' or 'might,' or 'may' prejudice the national interest …. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.")

Creating differing levels of access depending on the status of the person seeking it and/or the means used to obtain case information will work a significant hardship on members of the bar, the public, and the news media. In the absence of any hard evidence that granting access will cause harm that cannot be prevented by means less restrictive of First Amendment and common law interests, the Court of Appeals should not adopt restrictions on internet access to case files. Rather it should rely on mechanisms by which litigants can sanatize pleadings or seek protective orders to ensure that sensitive information does not become public.

In sum, the Court of Appeals should adopt a policy that all documents in case files that are open to the public at the courthouse should be available to the public online as well. It should adopt a procedure similar to one the federal courts employ to protect sensitive information, such as Social Security Numbers, taxpayer IDs, bank account numbers and telephone numbers, that

requires litigants to file documents containing such information under seal, and sanitized versions of those documents on the public docket. To the extent that litigants believe that procedure would not adequately protect personal privacy or sensitive proprietary information, it is their duty to demonstrate by the appropriate standard that the trial judge should seal specific documents or issue appropriate protective orders. Trial judges, in turn, should be directed that they are to take the benefits of public access into consideration in ruling on motions to seal or for protective orders, and that the public and news media have standing to oppose such requests. All of this is consistent with rulings of the Supreme Court and lower appellate courts.

Respectfully Submitted

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