REPORT TO THE

CHIEF JUDGE OF THE STATE OF NEW YORK

COMMISSION ON

PUBLIC ACCESS TO COURT RECORDS

FEBRUARY, 2004

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TABLE OF CONTENTS

Page

REPORT OF THE COMMISSION ON PUBLIC ACCESS TO COURT RECORDS

I. INTRODUCTION 2

II. RECOMMENDATIONS AND CONCLUSIONS 5

III. LEGAL AND FACTUAL BACKGROUND 17

1. The Presumption of Openness 17

2. Exceptions to the Presumption of Openness 19

IV. CURRENT COURT RECORDS ACCESS PRACTICES OF THE NEW YORK STATE UNIFIED COURT SYSTEM 27

1. Access to Paper Records at the Courthouse 27

2. Electronic Access 28

V. THE COMMISSION'S WORK 30

1. Preliminary Deliberations 30

2. Public Hearings 30

3. The Commission's Focus 32

CONCURRING AND MINORITY REPORT

Table of Exhibits

	Exhibit
Notice of Public Hearings	1
Federal Policy Regarding Internet Access to Court Records	2
Written Submissions to the Commission[1]	3

Doris Aiken — Remove Intoxicated Drivers

Michelle Rea — New York Press Association

Rex Smith — Times Union

Diane Kennedy — New York Newspaper Publishers Assoc.

Lisa Lewis — The Record

Association of the Bar of the City of New York

Kenneth Dreifach — NY Attorney General's Office, Internet Bureau

David Bralow — Newsday/Tribune

Charlotte Watson — NYS Office for the Prevention of Domestic Violence

Hillary Sunghee Seo — Sanctuary for Families

NYS Bar Association, Media Law Committee

David Tomlin — The Associated Press

George Freeman — New York Times

Robert Port — New York Daily News

Stephen Bell — The Buffalo News

William C. Altreuter, Esq.

Grant Hamilton — East Aurora Adviser

NYS Bar Association, Commercial & Federal Litigation Section

[1] Copies of the written submissions as well as the transcripts of each public hearing held by the Commission are available at the Commission's website: www.nycourts.gov/ip/publicaccess.

REPORT OF NEW YORK STATE COMMISSION ON PUBLIC ACCESS TO COURT RECORDS

This report is respectfully submitted to the Honorable Judith S. Kaye, Chief Judge of the State of New York, by the Commission on Public Access to Court Records. We do so to set forth our conclusions with respect to whether, in an Internet age, court case records that are already deemed public should be subject to any additional restrictions on public access before they are placed by the Unified Court System ("UCS") on the Internet.[2] Our basic conclusion is that they should not: the rules and conditions of public access to court case records should be the same whether those records are made available in paper form at the courthouse or electronically over the Internet. We do, however, suggest that, in light of the potential for harm to privacy interests and the personal security of individuals who are involved in judicial proceedings that may be occasioned by public disclosure of certain narrow categories of information, that information should not be referred to in court papers and therefore should not become public without

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[2] By "court case records" we refer to (a) documents, information or other things that are collected, received or maintained by a court, or by a county clerk on behalf of a court, in connection with a court case, including all exhibits and attachments to filed court papers; and (b) indexes, calendars, orders, judgments or other documents and any information in a case tracking system created by the court, other than for internal use only, that is related to a court case. Court records may be in paper, electronic, or other physical form. Court records do not include (a) records, such as public land and license records, that are maintained by a court or county clerk but are not connected with a court case; (b) notes, drafts and other work products prepared by a judge, or for a judge by court staff; (c) information gathered, maintained or stored by a governmental agency or other entity to which the court has access, but which does not become part of the court record as defined above.

leave of court. This policy should apply equally to court case records that are filed or maintained in paper or electronic form.

I. INTRODUCTION

With the advance of Internet technology, the introduction of electronic filings and the ability to convert paper documents into electronic form, the term "open courts" is taking on new and expanded meaning. New York state courts have already begun to make use of this technology. Today, attorneys, litigants and the press and public can examine many court calendars, decisions, and certain case information online. In the not distant future, more and more filings will be accomplished electronically, more and more case information will be available electronically and the public — as a direct and consequential result — is likely to be increasingly better informed about what occurs in its courts.

Chief Judge Kaye formed this Commission to respond to two related, but potentially competing, realities: that "the court system will begin to make case files available electronically within the next few years" and that even public "court records can contain sensitive information." UCS Press Release, April 24, 2002 (available on the Commission's Internet website: www.nycourts.gov/ip/publicaccess).

The prospect of Internet access to public court records routinely being provided is a positive and welcome development. It is certain to shed greater light on the functioning of the courts and thus to promote greater accountability of the judicial process. At the same time, the possibility of broad Internet access to court records, including

potentially sensitive information contained in those records, has, as Judge Kaye has indicated, led to the expression of serious concerns.

Court case records are, as a general proposition, public. As a general matter of state and federal law, they must be public. What Justice William O. Douglas said more than 50 years ago remains true today: "A trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 373 (1947). The same is true of most case records. There are, of course, exceptions: No one would seriously maintain that the identity of every undercover law enforcement officer must be revealed or that every (or any) trade secret referred to in a litigation must be done so publicly. But the rule, to which exceptions are narrow, remains just as Justice Douglas articulated it.

The question put by Chief Judge Kaye to the Commission is of a related but distinct nature. It is not what information should be made public in litigations and thus in court case records. It is whether information *already* deemed public that is in court files should be subjected to greater restrictions before being placed on the Internet by the UCS.

The question arises in a context that would have been unthinkable just a few years ago. New advances in technology such as the Internet now make it easier to disseminate public information than ever before. But the glories of the Internet — the ease of availability of information, the 24/7 availability of information, the unconstrained nature of who may receive the information — raise potential problems. Should the na-

ture of the Internet lead to rules limiting dissemination of information contained in public court files? Can there be too much availability of records that are already public but are, in a sense, practically obscure? Should Internet access lead us to take care about what finds its way into public court records in the first place?

Announcing the formation of this Commission, Judge Kaye put our task this way:

> In keeping with society's increasing reliance on technology, the court system will begin to make case files available electronically within the next few years. But while providing greater access to this information, we also must be diligent to protect a litigant's right to privacy. We recognize that court records can contain sensitive information, such as Social Security and home telephone numbers, tax returns, medical reports and even signatures. I have charged this commission with the hard task of examining any potential pitfalls, weighing the demands of both open access and individual confidentiality, and making recommendations as to the manner in which we should proceed.

Judge Kaye's formulation makes it plain that the important questions the Commission has been asked to consider are not easily answered. The Commission's own inquiries have confirmed the difficulties inherent in accurately predicting the impact of new technology, including technology that may not now exist. The Commission has sought to consider the questions from a broad range of perspectives and to focus on relevant legal, technological, and practical issues as well as the competing policy concerns surrounding electronic access to court records. Many issues were considered and then revisited as the Commission sought to fashion recommendations that would provide broad public access, while bearing in mind the need to take reasonable steps to safeguard individual privacy and security.

II. RECOMMENDATIONS AND CONCLUSIONS

The Commission offers the following recommendations and conclusions.

1. **Public court case records in electronic form should be made available to the public by the UCS remotely over the Internet. No additional limitations should be placed, on an across-the-board basis, on placing court case records on the Internet so long as those records are public in nature and conform to the requirements of the Commission's recommendations.**

The core premise of these recommendations is that court case records that are filed or maintained in electronic form should be made available to the public on the Internet to the same extent that paper records are available to the public at the courthouse. If a court case record is sealed or to any extent not deemed public — *i.e.,* a transcript of a Family Court proceeding — nothing in these recommendations would lead to it being made public and therefore available on the Internet. If a court case record, however, is public, and is therefore accessible to the public in paper form at the courthouse or County Clerk's office, the same record should, as a general matter, be publicly accessible on the Internet if it is filed in or converted to electronic form.

Our conclusion is rooted both in our understanding of New York jurisprudence and our pragmatic judgment as to how the law in this area should develop. As to the first, there is a strong presumption in New York that court case records are public, a presumption rooted in New York law and bolstered by constitutional principles. We are

thus reluctant to recommend denying broad access to such records in either paper or electronic form except in the narrow circumstances currently recognized under New York law. We are also chary about recommending any procedure that suggests that Internet access to court case records should result in *less* information being made available less speedily to the public. On a more pragmatic basis, we saw no need to propose a two-tiered definition of what is public and what is not. To treat differently, as a matter of course, paper and electronically maintained files, allowing greater public access to the first, seems to us to denigrate unjustifiably the value of the second while adding unnecessary complexity to this area of the law.

The Commission thus considered and rejected the proposition that electronic case records should be subjected to special limitations not applicable to paper records such as some sort of time gap after filing before those records are made public in the form they were filed. Such a proposal could, in the view of the Commission, foment significant additional litigation that should be avoided if it is at all possible to do so. The Commission is particularly reluctant to recommend such a procedure in light of the absence of any testimony before it suggesting a level of lawyer misconduct or malfeasance in placing inappropriate materials in court files that would justify such disparate treatment.

For the same reasons set forth above, the Commission recommends that public criminal case records should be made accessible to the same extent as civil case records. The Commission, in that regard, considered and rejected the suggestion that

criminal case records should not be made available on the Internet because they are subject to sealing in the event of an acquittal. Although the Commission understands that Internet access to such files creates the risk that they may be copied and then disseminated by third parties even after they are later sealed by the court, criminal case records are not presently protected against such a risk and the Commission believes that it is neither practical nor wise to seek to interpose additional limitations on public access.

The Commission similarly considered and rejected the notion that access to electronic case records should be made dependent upon the status of the individual or entity seeking access. While orders may be entered limiting the dissemination of certain information — *i.e.,* trade secrets — to counsel only, the Commission has concluded that once information is deemed public, there should be no different treatment of it as regards who may have access to it because it is in electronic as opposed to paper form.

Finally, while the Commission would prefer that records over the Internet be free of charge, if the UCS determines that a charge is advisable we recommend that the charge be nominal and that it in no event should exceed the actual cost to provide such records.

2. Without leave of court, no public court case records, whether in paper or electronic form, should include the following information in full: (1) Social Security numbers, (2) financial account numbers, (3) names of minor children, and (4) full birth dates of any individual. To the extent that these identifi-

ers are referenced in court filings, they should be shortened as follows: (1) Social Security numbers should be shortened to their last four digits, (2) financial account numbers should be shortened to their last four digits, (3) the names of minor children should be shortened to their initials and (4) birth dates should be shortened to include only the year of birth. The responsibility for ensuring compliance with these recommendations should lie with the filing attorneys or self-represented litigants. In addition, the UCS should determine how to protect at-risk individuals such as victims of domestic violence and stalking from being identified and located by use of their home and work phone numbers and addresses in public court records.

The Commission heard testimony from interested parties concerning the potential risk of harm to privacy and security associated with the publication of these types of personal identifiers and, in particular, the metastasizing phenomenon of identity theft.[3] Kenneth Dreifach, the Chief of the New York Attorney General's Internet Bureau, for example, testified that the incidence of identity theft is rising every year. Mr. Drei-

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3 The Commission also takes note of the Federal Trade Commission's Identity Theft Survey Report, published in 2003, which estimated that total losses to businesses from identity theft were $33 billion in the last year.

fach described Social Security numbers and financial account numbers as "high value" personal identifiers that can be combined with birth dates and other more accessible information by identity thieves. A bank account number, for example, is all that an identity thief needs to scan, forge and cash checks in another's name, or even to set up a bank account into which to deposit ill-gotten funds. Mr. Dreifach testified that an identity thief can use a Social Security number to obtain an individual's welfare or Social Security benefits, order new checks at a new address, obtain credit cards, or even obtain an individual's paycheck.

Testimony submitted by the New York Press Association, acknowledged a valid distinction between "non-public information that could be used to inflict harm (for example Social Security and credit card numbers, PIN numbers, or other information that could facilitate identity theft)" and other information "that would simply be embarrassing if disclosed." In this regard, the New York Press Association testified that "rarely, if ever, is there public interest in one's Social Security number."

The Commission accordingly finds that the four specific types of information identified above present a risk of potential harm to privacy and the personal security of individuals such that they should not be maintained in public court case records at all. In this regard, the Commission found of particular use the analysis in the Guidelines developed by the National Center for State Courts and the Justice Management Institute on behalf of the Conference of Chief Justices and the Conference of State Court Administrators (the "CCJ/COSCA Guidelines for Public Access to Court Records," October 18,

2002). The Commission took into account, as well, the recommendations of the Committee on Court Administration and Case Management of the Judicial Conference of the United States, pursuant to which these specific types of information are no longer to be included in filings in the federal courts. The Commission determined, in this respect, that a blanket policy of keeping all addresses and telephone numbers out of court records was both unnecessary and impractical. There are additional categories of information that are presently not permitted in case filings under New York law, as discussed more fully below. Nothing in these recommendations seeks any change with respect to these existing rules and laws.

The Commission heard testimony from several advocates for victims of domestic violence, stalking and other threats to personal safety. Charlotte Watson, Executive Director of the New York State Office for the Prevention of Domestic Violence, for example, described the difficulties faced by battered women in trying to hide their location from their abusers. Ms. Watson testified that such abusers may go to great lengths to track victims who attempt to escape and argued that the publication of personal information will increase the risk of harassment, stalking and violence toward such victims. Along similar lines, Hillary Sunghee Seo, of Sanctuary for Families, testified that batterers and stalkers generally will use any means available to track their victims. Ms. Seo described such abusers as often being technologically savvy and told the Commission that "the Internet is already a favored and extremely destructive weapon used by batterers and stalkers to terrorize and harm victims."

Because of the severity of the risk to these victims, we recommend that the UCS devote special attention to the protection of such individuals. In the meantime, courts should liberally grant requests by such individuals to protect their identity and location from public disclosure.

The Commission is aware that the types of information our recommendations seek to protect may already be available to some extent to the public over the Internet, and has seen examples of the ease with which such information can presently be obtained. The New York Attorney General's Office, for example, testified that Social Security numbers are presently available for purchase from some online vendors.[4] Robert Port, an investigative reporter for the Daily News testified that he teaches his journalism students how to "locate the birth date and home address of anyone in the United States in five minutes or less at a cost of about $5 per name." And the *New York Times Sunday Magazine* has reported that the types of information routinely collected about individuals, much of which can be easily purchased, also include:

- Your health history; your credit history; your marital history; your educational history; your employment history.
- The times and telephone numbers of every call you make and receive.

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4 Mr. Dreifach also testified to the "vigorous effort" currently being made by Congress to ban or severely impair such sales, citing the Social Security Number Misuse Prevention Act (S. 228, H.R. 637, sponsored by Sen. Feinstein and Rep. Sweeney).

- The magazines you subscribe to and the books you borrow from the library.
- Your travel history.
- The trail of your cash withdrawals.
- All your purchases by credit card or check.
- What you buy at the grocery store.
- Your electronic mail and your telephone messages.
- Where you go, what you see on the World Wide Web.

James Gleick, "Behind Closed Doors; Big Brother is Us," *The New York Times Magazine*, Sept. 29, 1996, at 130.

The Commission also heard testimony and reviewed reports indicating that a large volume of court record information is available currently on the Internet through commercial vendors who purchase the information in bulk form. Mr. Port testified that final judgments and civil docket information are available for a fee through commercial services such as Lexis-Nexis and CourtLink. The UCS currently sells extracted information from some of its courts, in bulk, to a variety of commercial entities. The information that is made available in this manner includes appearance records, judicial orders, final judgments, names of parties, motion details, conviction and sentence information.

The Commission recommends that the specific information set forth in these recommendations should nonetheless be excluded from public court filings because their public dissemination poses a particularly strong risk to personal privacy and security and because their protection would not significantly impair the public right of access to court case records.

The Commission believes that it is practical and appropriate to place the burden of implementing this recommendation on filing attorneys who are subject to court and ethical rules in New York, together with attorney education as discussed below. The UCS should consider whether additional rules should be adopted to assure compliance with these recommendations.

The UCS should also consider what steps may be necessary to assure compliance with these recommendations by self-represented litigants, and to provide them with the necessary information about electronic public access to case records and education about the importance of excluding or redacting the data items discussed above.

3. **In implementing Internet access to case records, priority should be given to assuring that court calendars, case indices, dockets and judicial opinions of all courts are available. With respect to other case records, such as pleadings and other papers filed by the parties, the UCS should begin making such records available remotely over the Internet, on a pilot basis, in those courts in the state that already permit electronic fil-**

ings, that themselves convert paper court records into electronic form, or that are otherwise deemed appropriate by the UCS.

The UCS currently makes court calendar and other basic case information for civil cases pending in all 62 Supreme Courts — as well as 21 criminal courts and two housing courts — available on the Internet through its "e-courts" program. It is recommended that, as a first priority, this program be expanded to include court orders and opinions in all cases.

It is further recommended that a pilot program be established to make available on the Internet other case records, such as pleadings, motion papers and transcripts of proceedings, in jurisdictions in which electronic filing is already permitted or are otherwise deemed appropriate by the UCS for a pilot program. The pilot is proposed to allow the UCS to develop mechanisms for notifying and educating judges, the bar, litigants, and the public about the policy, the prospects of Internet access to case records, and the need to exclude or redact certain data elements from filed documents. The pilot will also provide an opportunity to further test the policy in advance of providing wide scale Internet access.

4. **The principles set forth herein should be applied prospectively with regard to court case records that are filed or placed in electronic form after the adoption and implementation of these recommendations and conclusions.**

Court case records that already exist in paper or electronic form may contain the personal identifying information set forth in paragraph 2. Bearing that in mind, the UCS should adopt rules to take account of the substance of paragraph 2 with regard to earlier created court case records (other than judicial opinions) that may be placed on the Internet.

5. The UCS should provide education to practicing attorneys, litigants and judges concerning public access to court records over the Internet.

Because these recommendations place the primary responsibility for ensuring that filed materials do not include certain highly sensitive identifying information on filers, attorneys and self-represented litigants and those who assist them should be educated about their responsibility for protecting such information and about the realities of Internet access to court case records generally. Lawyers should be specifically instructed of their obligation to include in public court records only information that is reasonably germane to the issues in their case and of the availability of sanctions if they misuse the judicial system by publicizing information that has no genuine bearing on their case. Litigants and the public should be informed of the manner in which public court case records will be made available remotely over the Internet, both so that they can take full advantage of such public access and so that they may seek protection in individual cases consistent with existing rules and statutes governing the sealing of court case records, as appropriate. Judges should be advised that as they conduct trials or other pro-

ceedings, care should be taken to avoid public reference to personal identifying data referred to in paragraph 2. They should also be advised to assure that counsel abide by the legal and ethical rules that have been adopted to constrain the misuse of the legal system and that self-represented litigants comply with any rules applicable to them.

6. Nothing in these recommendations and conclusions should be understood to bar any motion currently permitted under law for protective relief.

While these recommendations and conclusions are offered for general guidance in the future, there may be specific cases in which special protection is appropriate before court case files are placed on the Internet. We leave to case-by-case adjudication the resolution of such applications, subject to our view that the basic principles set forth herein should be followed in the absence of a finding that good cause exists justifying that an exception be made.

III. LEGAL AND FACTUAL BACKGROUND

1. The Presumption of Openness

Both New York statutory and common law create a presumption that judicial proceedings and case records are to be open to the public.[5] Section 4 of the Judiciary Law requires that "[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same." Sections 255 and 255-b of the Judiciary Law (the judiciary's analogue to the New York State Freedom of Information Law) require that docket books and court records be public. Section 255 provides that:

> "A clerk of a court must, upon request, and upon payment of or offer to pay, the fees provided allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and documents in his office; and either make one or more transcripts or certificates of change therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper, of which the custody legally belongs to him, cannot be found."

Section 255-b requires that "[a] docket book, kept by a clerk of the court, must be kept open during the business hours fixed by law, for search and examination by any person."

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5 In light of the clarity with which New York state law presumes a right of access to court proceedings and files, it is unnecessary for us to pass upon the somewhat differing strains reflected in First Amendment law as determined by the United States Supreme Court through the years. *Compare Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) (concluding that there is a general common law but not constitutionally rooted right "to inspect and copy public records and documents") with *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984) (concluding that First Amendment-rooted presumption of openness of trials "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest").

Section 216.1 of the Uniform Rules for the Trial Courts, creates a presumption of public access to records filed with a court, and prohibits sealing except upon a written finding of good cause. 22 NYCRR § 216.1.

Numerous cases emphasize the value placed on open court proceedings and records. In *Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430 (1979), the Court of Appeals summarized the many salutary purposes that such openness offers in the context of a criminal case: *i.e.,* protecting the accused from "unjust prosecution by public officials," insuring justice for the accused and "instill[ing] a sense of public trust in our judicial process." 48 N.Y.2d at 437.

More recently, this view was echoed by the First Department in a civil case, *Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1 (1st Dep't 2000), where the *Washington Post* successfully sought to obtain access to previously sealed court records in a commercial dispute involving the manufacturer of an abortifacient drug, RU-486, regarding its possible distribution and sale in the United States. The court, relying on federal constitutional principles set forth in prior case law, noted that the public's interest in access to court proceedings and records often is as strong, or even stronger, in civil cases as it is in criminal cases. 274 A.D.2d at 6. Quoting from the Third Circuit's opinion in *Republic of the Philippines v. Westinghouse Electronic Corp.*, 949 F.2d 653 (3d Cir. 1991), the court stated: "the bright light cast upon the judicial process by public observation diminishes the possibility for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide

the public with a more complete understanding of the judicial system and a better perception of fairness." 274 A.D.2d at 7.

2. Exceptions to the Presumption of Openness

While the norm in New York is that court proceedings and records attendant to them must be open, there are exceptions. Section 4 of the Judiciary Law grants the court discretion to exclude the public in certain classes of cases: "in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court."

The court's discretion to exclude proceedings from public view is not limited to those delineated in Section 4 of the Judiciary Law. Rather, "[t]he inherent power of courts to control the records of their own proceedings has long been recognized in New York .... [T]his power does not depend on statutory grant but exists independently and 'inheres in the very constitution of the court' ...." *In Re Dorothy D*, 49 N.Y.2d 212 (1980) (citations omitted). Courts may, in individual cases, decide to seal all or part of a record, upon their own initiative or upon an application by a party. The extent of a court's discretion under Section 4 of the Judiciary Law is, of course, subject to limitation to be consistent with constitutional norms. *See*, *e.g., Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984).

The right to inspect and copy court records has also been limited by numerous statutes. Although it is beyond the scope of this report to include an exhaustive survey of existing exceptions to the presumption of openness referred to above, since case records that are not available to the public because they are sealed or otherwise deemed confidential will, perforce, not be available to the public on the Internet, the Commission believes it will be helpful to identify some of the more obvious examples of such case records.[6]

(a) Family Court Proceeding

Because Section 166 of the Family Court Act provides that the "records of any proceeding in the family court shall not be open to indiscriminate public inspection," Family Court case records generally are not available at the courthouse and would not be available on the Internet. Section 166 permits an exception insofar as the court has discretion to permit inspection of papers or records in a particular case upon an application, but this procedure would not result in the record being available to the public at the courthouse. This statutory framework, therefore, appears to preclude Internet access to Family Court records.

We note the Family Court Act also contains provisions regarding the confidentiality or sealing of particular case files and documents — for example, a case

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6 It is also beyond the scope of this document to outline the provisions of these statutes and rules regarding the circumstances under which access may be obtained to case files that are sealed or deemed confidential by law.

where a delinquency proceeding terminates in favor of the respondent (§ 375.1); order of adoption (§ 114); or court documents consisting of "reports prepared by the probation service or a duly authorized association, agency, society or institution for use by the court" (§ 1047).

(b) Matrimonial Actions

The Domestic Relations Law also includes provisions protecting certain cases between spouses from indiscriminate public inspection. It deems confidential certain files and records in matrimonial actions,[7] as well as in actions or proceedings for custody, visitation or child support.[8] Except by order of the court, "pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony," may not be copied or examined by any person other than a party, or the attorney or counsel of a party. *See* DRL § 235. These items will, therefore, be unavailable on the Internet.

Although trials or proceedings in a matrimonial action are public, the court or referee may determine that the public interest requires that the examination of the witnesses should not be public, and exclude all persons except the parties to the action

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7 A matrimonial action is defined as including actions for separation, annulment, dissolution, divorce, declaration of nullity of void marriage, declaration of nullity or validity of foreign judgment of divorce, and declaration of nullity or validity of marriage (CPLR § 105(p)).

8 Other types of proceedings between spouses or former spouses may take place that are not encompassed by this statute.

and their counsel. In such matters, the court may order the evidence to be filed with the clerk of the court under seal, to be viewed only by the parties to the action or proceeding or someone interested, on order of the court.

(c) Sealed and Confidential Records

Sealed records may be not be viewed by the public. There are several types of situations in which records are sealed by virtue of existing statutes or rules. Some examples follow:

- *Criminal Cases:* Several New York statutes require the sealing of the record of a criminal case. Section 160.50 of the Criminal Procedure Law mandates that a record be sealed when the criminal case is terminated favorably to the accused, such as when the defendant is acquitted of all charges or the case is dismissed. CPL § 160.50. (Exceptions are covered by CPL § 160.50(1)(d).) CPL § 720.35(2) requires the sealing of a court record in a criminal case in which the defendant is adjudicated a youthful offender. If a criminal matter against a juvenile offender is removed to the Family Court pursuant to CPL Article 725, the record must be sealed. CPL § 725.15.

- *Records Contained in a Court File:* Other records that are not available to the public at the courthouse include:

  - records in a sex offense case that might identify the victim (Civil

Rights Law § 50-b);

- grand jury minutes (CPL § 190.25(4), Penal Law § 215.70);
- probation reports and pre-sentence memoranda (CPL § 390.50);
- records that identify jurors (Judiciary Law § 509(a); Rules of the Chief Administrator of the Courts § 128.14);
- mental health records, including records of commitment, retention and discharge proceedings of the mentally ill and mentally retarded (Articles 9 and 15 of the Mental Hygiene Law) and clinical records submitted in connection with the proceedings (Mental Hygiene Law § 33.13(c));
- orders of commitment of mentally ill inmates (Correction Law § 402);
- records of adoption proceedings (Domestic Relations Law § 114);
- proceedings concerning applications for court approval of marriage licenses for individuals under the age of sixteen (Domestic Relations Law § 15);
- habeas corpus proceedings for a child detained by a parent (Domestic Relations Law § 70);

- special proceedings or habeas corpus to obtain visitation rights in respect of certain infant grandchildren (Domestic Relations Law § 72);

- certain proceedings under the Public Health Law (§ 2301 concerning venereal disease, and § 2785 concerning HIV-related information);

- allowing confidentiality of address or other identifying information in matters in which the court finds that disclosure of such information would pose an unreasonable risk to the health or safety of a party or the child (Family Court Act § 154-b(2));

- instruments filed with the County Clerk regarding guardianship or custody of children in foster care (Social Service Law § 383-c) and not in foster care (Social Service Law § 384).

- *Sealed by Court Order:* In addition, a case record may be sealed by order of the court, pursuant to the provisions of 216.1 of the Uniform Rules for the New York State Trial Courts, which provides that, where a case file is not otherwise sealed by statute or rule, the court "shall not" enter an order sealing the court records in whole or in part except on "a written finding of good cause, which shall specify the grounds therefor." In deciding whether good cause exists to seal records, the court must consider the interests of the

public as well as the parties. *See* George F. Carpinello, *Public Access to Court Records in New York: The Experience under Uniform Rule 216.1 and the Rule's Future in a World of Electronic Filing*, 66 Albany L. Rev. 1089 (2003).

- *Confidential or Sealed by Court Rule:* Court rules also address confidentiality and sealing of particular types of information:
  - juror questionnaires and other juror records (Rules of the Chief Administrator of the Courts § 128.14(a));
  - proceedings under the fee dispute resolution program, including any arbitration case file (Rules of the Chief Administrator of the Courts § 137.10).
- *Confidential by Federal Law:* In addition, federal law contains confidentiality protections for certain types of records, including:
  - Alcohol or drug treatment records (42 U.S.C. § 290dd-2; 42 CFR Part 2.31, et seq.);
  - certain criminal history information (28 C.F.R. § 20);
  - Social Security numbers (42 U.S.C. § 405(c)(2)(C)(viii)(I));
  - educational information (20 U.S.C. 1232g);

- research involving human subjects (28 C.F.R. Part 46).

IV. CURRENT COURT RECORDS ACCESS PRACTICES OF THE NEW YORK STATE UNIFIED COURT SYSTEM

1. Access to Paper Records at the Courthouse

The New York State Unified Court System currently provides public access to court records not restricted by statute or court rule at the courthouse or County Clerk's office pursuant to the Judiciary Law and other applicable law. The County Clerk is the custodian of court records for Supreme and County Courts.[9] Generally, a person seeking access to case records comes to the courthouse or the County Clerk's office and requests the record by filling out a form that indicates the docket number and the documents being sought. In some instances in which the docket number is not known, the person making the inquiry may ask the clerk for assistance in locating the docket number using a party or attorney name or the requestor may be provided access to a computer terminal that permits her to search for the case using the name of one or more litigants or attorneys or by reviewing a judge's calendar. Once the request is made, the clerk locates the file and provides it to the requestor for inspection or copying. The court may charge for copying the file, and this is usually done utilizing copy machines that require a per-page charge. The file is then returned to the clerk.

In many instances, those seeking regular access to case records hire professional services to review daily court calendars and retrieve all of the case records

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[9] We note that in all jurisdictions around the state, other than New York City, the County Clerk is an elected official, not under the direct supervision of the UCS.

filed in connection with cases of interest. In some instances, these professional services have been known to scan case records and make them available electronically to paying clients.

2. Electronic Access

Eager to provide easy and open access to court information of interest to the public, the UCS, through its "E-Courts" initiative, currently makes certain trial court index information (*i.e.,* lists of case name, party and attorney names, index number, judge, and description of significant case activity and dates) available electronically via the Internet free of charge. Judges' calendars, information about future court appearances, and selected decisions are also currently available online via the Internet.

E-Courts currently provides Supreme Court civil decisions from 28 counties and Supreme Court criminal and other criminal court decisions from 13 counties. In addition it provides access via links to decisions posted on the following court Web sites: Court of Appeals, Appellate Division (all departments) and Court of Claims. It also provides a link to the Law Reporting Bureau Web site, which posts all decisions of the Court of Appeals, Appellate Division (all departments), and Appellate Term; as well as all trial court decisions selected for publication in the Miscellaneous Reports (including those selected only for on-line publication).

The Law Reporting Bureau screens all decisions posted to its Web site for compliance with statutes requiring anonymity for persons named in text. Where a decision violates the anonymity rule, the Law Reporting Bureau consults with the authoring

judge on making a correction, posts the corrected decision to its Web site, and notifies commercial information services that a corrected decision has been issued.

In addition, the UCS is engaged in an electronic filing pilot in selected jurisdictions around the state. The electronic filing pilot permits the electronic filing of cases in certain Commercial Division, Court of Claims, and tax certiorari cases only if all of the parties agree voluntarily to participate. The pilot has been particularly successful in the context of tax certiorari cases (over 6,000 filings in 2003) but has had limited success in the Commercial Division, Court of Claims and other case types. One reason for limited participation appears to be the requirement that all parties are required to consent to participate in the pilot and that participation is usually initiated by one of the parties to the litigation (and then rejected by others). Another may stem from uncertainty about the treatment of private or sensitive information and concern that electronically filed documents will be made available over the Internet. As stated above, the Commission's view is that courts should treat private or confidential material in electronic form in the same manner it treats such material in paper form. In that respect, the Commission has proposed that certain personal indentifying data should not be made public in court records, whether maintained in paper or electronic form. As for more generalized concerns about disclosure of public case records on the Internet, the Commission has determined that across-the-board distinctions in the treatment of public case files should not be made based upon whether information is maintained in electronic or paper form.

V. THE COMMISSION'S WORK

The Commission went about the task of gathering relevant information, identifying pertinent issues, obtaining broad-based input, and crafting recommendations in essentially three stages.

1. Preliminary Deliberations

The Commission's preliminary deliberations took place over the course of several regular meetings during which Commission members were introduced to current UCS paper and electronic records rules and practices and to the range of concerns and points of view that had been raised in developing electronic access policies that balanced the interest in broad public access with concerns about privacy, security, fair trial rights, and effective administration. The Commission established subcommittees to review relevant law, technology issues, existing policy development, and practices in other states and on the Federal level. The Commission established a Web site, www.nycourts.gov/publicaccess, to serve as a resource for the public and to permit easy access to information sharing.

2. Public Hearings

To provide an opportunity for broad input on the questions of public access, privacy, security, due process, and other concerns related to electronic access to court records, the Commission conducted three public hearings about New York State: in Albany on May 16, 2003; in New York City on May 30, 2003; and in Buffalo on June 12, 2003. (A copy of the public hearing notice is attached as Exhibit A.) From the first tes-

timony in Albany of the founder of RID, a group dedicated to removing intoxicated drivers from the road, to the last in Buffalo of the publisher of four community newspapers in western New York, the Commission heard a wide range of views from members of the public, members of the bar, representatives of the media, bar associations, the New York State Attorney General's office, the Association of Chief Clerks of Surrogate's Courts, advocates for victims of domestic violence and from a County Clerk.

Through these public hearings, the Commission gained the benefit of a broad range of views, some of which are summarized below. Transcripts of the entire public hearings and written statements submitted to the Commission are posted on the Web site.

- The Commission heard testimony from a variety of viewpoints as to the benefit of providing Internet access to court case records. County clerks testified that Internet access would enable them to better serve the public and would free resources but offered warnings about the personal nature of some information already deemed public. Media entities testified that Internet access improves both the quality of journalism and the ability of the public to test the accuracy and fairness of journalism. Attorneys testified that Internet access would help them more efficiently serve their clients. A broad range of witnesses testified that Internet access will improve public understanding of the judicial system and processes.

- While the Commission heard testimony from a broad range of media entities,

ranging from small regional newspapers to *The New York Times*, in support of broad public Internet access to court records, virtually all of these entities acknowledged that some limitations on specific private information may be warranted and that, although they require certain individual identifiers, information such as Social Security numbers does not significantly improve their ability to report the news.

- The Commission also heard testimony from an array of witnesses, including advocates for victims of domestic abuse, stalking victims, and others, who asserted that personal identifying information in court case records may pose a risk to the security of individuals when made available remotely over the Internet.

- A number of witnesses, including the Reporters Committee for Freedom of the Press and the New York State Bar Association Federal and Commercial Litigation Section specifically supported, in part or in whole, the approach taken in the new federal rules regarding Internet access to court records.

3. The Commission's Focus

Following the public hearings, the Commission focused its inquiry on the arguments and approaches that appeared most appropriately to balance the interest in open access against the various competing concerns articulated. The recommendations set forth above are the result of this process and represent an approach that includes many elements contained in the Federal courts' policy regarding public access to court records,

with some departures designed to take into account specific circumstances, practices, or goals of the New York State UCS.

CONCURRING AND MINORITY REPORT
COMMISSION ON PUBLIC ACCESS TO COURT RECORDS

The Minority supports the Report of the Commission and its conclusions, except with respect to the following reservations applicable to part II, section 1 of the Commission's report. With respect to that portion, the Minority agrees with the basic conclusion of the Report that court records are generally public; that they should be widely available, and accessible on the Internet. However, the Minority does not agree that the rules for public access for paper and Internet records must in all respects be the same.

Although court records generally have been considered public, this does not answer the question of whether the court records should be published on the Internet immediately upon filing. To be sure, the historically public nature of court records is an important point, but concerns over privacy and the inadvertent or improvident disclosures of non-public information are important as well. A limited time period during which adverse parties may object to inclusion of information in an Internet publication is appropriate, and consistent with the public interest.

The Minority proposes a provision such as the following suggested new paragraph (9) to subdivision (e) of section 202.5-a of the Uniform Rules:

> **(9) Papers not yet under direct judicial consideration shall be available to nonparties on the IAS website __ days following filing, provided that such papers shall upon filing be made available at the court clerk's office upon request of any person, and further provided that the court may sua sponte or on application of any person suspend the application of this rule and direct that papers in an action be available to nonparties upon filing on the IAS website.**

The period of time to be inserted in the above rule was left open for purposes of debating the general proposition, but as the general proposition of a delay was rejected by the Majority,

the actual time period has not been settled for a recommendation. Such a time period should provide a reasonable opportunity for parties in a case to object to a filing, prior to it becoming available on the Internet. It is the view of the Minority that this period could be generally fixed, but subject to reduction on a case to case basis depending on the nature of the litigation.

The lag procedure is simple, generally automatic, and in the vast number of cases where no unusual public interest is evident, it would work without court involvement. Motion practice and sealing orders could ultimately be reduced in number by such a procedure. Redaction or withdrawal of sensitive information upon request of adversary counsel would be possible. Any party truly interested enough to determine what a particular filing contains, could await the expiration of the lag or immediately obtain access to the papers at the county clerk's office. In cases of public interest, the lag rule could be suspended by the parties or the court on the motion of any person.

On the other hand, the accommodation of privacy concerns could be seriously hampered in the event that electronically filed court papers are immediately available on the Internet. Once made public on the Internet, the subsequent sealing or protective order may be ineffectual, due to technologies that can copy and make available for reproduction anything once made public on the court system's WebPages.

The treatment of electronic papers differently from other court papers is not revolutionary. In the development of the model policy on public access to court records prepared on behalf of the Conference of Chief Justices and the Conference of State Court Administrators by the National Center for State Courts and the Justice Management Institute, it was proposed that a category of court records be identified for presumptive electronic availability to the public. These

did not include all filings, but generally included litigant/party indices; lists of new case filings; registries of actions showing documents that have been filed; calendars of court proceedings, final judgments, orders and similar dispositive matters (see Model Policy on Public Access §4.70 Court Records In Electronic Form Presumptively Subject To Remote Access By The Public).

With respect to requests to exclude public access to court records, the Model Policy suggests a balancing of the risk of harm to the individual, against the public interest in access to court records (see Model Policy §4.60). The delicacy of such a determination argues strongly in favor of a procedure that allows sufficient time for it to be effectively made.

For over a decade New York has had a rule relating to the sealing of court records (see 22 NYCRR §216.1). Recently, in a thoughtful article in the Albany Law Review, George F. Carpinello, Esq. noted that the New York rule on sealing of court records has generally worked well, but that electronic filing and availability of documents over the Internet raises special problems, and dramatically increases the risk of misuse (see 66 Albany Law Review, pp. 1089-1023, at 1022). While the proponents of the Minority Report do not advocate change in the standards with respect to sealing of court records or protective orders, they do propose the lag for purposes of allowing time for an effective motion to be made.

It is submitted that immediate availability of electronically filed court records is not required as a matter of constitutional law. As noted by the United States Court of Appeals for the Second Circuit in United States v. Amodeo, 44 F. 3d 141 (2nd Cir. 1995); 71 F. 3d 1044 (2nd Cir. 1995), the filing of a document with the court does not in and of itself create the presumption of access. Rather, the Amodeo Court recognized that granting public access to court records serves the purpose of assuring accuracy and fairness of judicial proceedings through public oversight.

The Court noted that disclosure documents, or other papers that are not directly involved in the Court's decision, would not if published advance the fundamental purpose of open court access. It follows that there are many things that may be disclosed during the discovery phase of a case that may not be presumptively public.

When such documents are filed, the act of filing may precede the nexus with the court's adjudicative functioning, and that nexus is the point on which the constitutional right of access depends (see Amodeo, *supra*). While there are strong arguments in favor of a general rule allowing for the maximum amount of public access to filed court records, it does not follow that immediate Internet access is required by the cases presently decided, nor necessarily as a matter of constitutional law.

Litigation in New York State Courts is far wider in topical scope than the type of litigation conducted in federal courts, and often would involve sensitive personal information such as medical or personnel records, financial information, trade secrets, etc. Often such information would not be covered under the description of sensitive information in the Majority Report. New York civil practice discovery rules are extremely broad, and invite inquiry into any matter that may conceivably lead to evidence. While counsel frequently enter into stipulations of confidentiality regarding discovery matters, it is difficult to predict in advance the information that might, if publicized, provide scant advancement to the litigation but at the same time cause significant discomfort or damage. At other junctures of the case, as for example during *voir dire* questioning, the scope of inquiry may involve persons who are not even parties to the litigation, but whose answers to counsel's inquires may involve court submissions and significant privacy issues. While such matters might ultimately be appropriately public, and even presumptively so,

immediate Internet access would render the determination of the private nature of information moot.

For the past several years, New York State has conducted an experiment on electronic filing of court papers through the Filing By Electronic Means (FBEM) system (see 22 NYCRR 202.5-a). The availability of such electronically filed court records promises great public benefit, through better access to court records, convenience of the parties and improved review of the actions of the judicial branch of government. However, the prospect of Internet availability of court papers has raised significant privacy concerns. These concerns repeatedly have been expressed by legislative representatives in the legislative authorization process, and by the attorneys who have participated in the pilot program.

The predominant limit on the use of the FBEM system has been the concern over the availability of court papers on the Internet. Even in cases involving purely commercial matters, and matters which typically would raise little or no public interest, attorneys nonetheless express reluctance[10] to subject court papers to technologies that allow Internet publication. Such publication, of course, may in many cases be a good thing, notwithstanding the reluctance of the parties or their counsel. However, Internet filings, in actual practice, are recognized as being different from filings at the court house. This recognition supports the advisability of a tempered approach, and a lag is a less aggressive measure than automatic Internet publication.

The Minority also is of the view that increasing the Bar's acceptance of electronically

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10 When provided with the opportunity to file papers in a secure form without making them publicly available on the Internet, virtually all of the subsequent filings have been made on a confidential basis.

filed court papers is in the public interest. If such papers are promptly made available on the Internet after reasonable opportunity for inquiry, with a procedure that allows for suspension of the delay in cases of public interest, the concerns of the public and litigants in privacy matters, and the interest of the public in the right to know what is proceeding in the judicial branch of government, will both be advanced.

The general, immediate and probably irrevocable public availability of court papers on the Internet strikes the members of the Minority as being neither necessary, nor at this juncture, wise. Such a rule would likely inhibit the proliferation of the electronic filing of documents, and ultimately, the availability of court papers in electronic form to the public in general.

Respectfully submitted,

Thomas F. Gleason
Member of the Commission

EXHIBIT 1

NOTICE OF PUBLIC HEARINGS

Commission on Public Access to Court Records

***The Commission on Public Access to Court Records** will be conducting three public hearings this Spring. The Commission was appointed by Chief Judge Judith S. Kaye to examine the future availability of court case records on the Internet. It will focus on the competing interests of privacy and the public interest in access to information in court case files. The work of the Commission relates to state court case records filed in or converted to electronic form in courts throughout New York State.*

THE PURPOSE OF THE PUBLIC HEARINGS is to receive the views of interested individuals and organizations with regard to the issues surrounding the future availability of court case records on the Internet. The Commission seeks comment on the following issues:

1. In light of the recognized public interest that is served by having court case records available for public inspection, are there any privacy concerns that should limit public access to those records on the Internet?
2. Should any information that is currently deemed public be subject to greater restrictions if made available for public access on the Internet by the Unified Court System? For example, when public court records contain an individual's Social Security identification number, credit card numbers, bank or investment account numbers or other personal identifying information, should privacy concerns limit their disclosure on the Internet?
3. If such personal identifying information should not be made available on the Internet, how should that information be eliminated from electronic/Internet availability?
4. If there are any limitations or restrictions to be placed on the dissemination of court records on the Internet, what role should be played by the courts, by attorneys or by others?
5. Should the public be charged a fee to access court case records on the Internet?
6. What information should a member of the public need in order to search case records on the Internet? Should a search require the name of a litigant or index number, or some other limited method, or should full text searches be available?

The hearings will take place from 1:00 P.M. to 5:00 P.M. at the following dates and locations:

ALBANY . . . . .MAY 16, 2003
Legislative Office Building
Hearing Room C., Empire State Plaza

NEW YORK CITY . . . . . .MAY 30, 2003
Association of the Bar of the City of New York
42 West 44th Street (Bet. 5th & 6th), N.Y., N.Y.

BUFFALO . . . . .JUNE 12, 2003
Supreme Court, Part 6
92 Franklin Street, Buffalo, N.Y.

ALL THOSE INTERESTED IN TESTIFYING should register at least 10 days before the hearing date by E-mail at publicaccess@courts.state.ny.us or by contacting **MELANIE SUE AT 212-428-2100**. Prior to the hearing, you will receive a time frame for your testimony. Comments should be limited to 10 minutes, but the Commission welcomes written submissions. If you are unable to attend the hearing but are interested in providing your views you may do so by E-mail or by mailing your written comments to the address below.

THE COMMISSION WILL NOT ADDRESS court records that are already unavailable to the public in the absence of a court order because they are protected by law, including, but not limited to:

- Documents filed in matrimonial actions, including child custody, visitation and support proceedings;
- Documents filed in family court proceedings, including abuse, neglect, support, custody and paternity proceedings;
- Documents containing the identity of victims of sexual offenses;
- Documents containing confidential HIV-related information;
- Pre-sentence reports and memoranda in criminal proceedings;
- Documents sealed pursuant to a lawful court order

COMMISSION ON PUBLIC ACCESS TO COURT RECORDS
C/O NEW YORK STATE UNIFIED COURT SYSTEM
25 BEAVER STREET
NEW YORK, NEW YORK 10004
Attn: Melanie Sue

E-mail: publicaccess@courts.state.ny.us

For further information about the Commission and the hearings, please visit the Commission's website:

www.nycourts.gov/publicaccess

EXHIBIT 2

REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES

Judicial Conference Committee on
Court Administration and Case Management

Reviewed by the Committees on Court Administration
and Case Management, Criminal Law,
Automation and Technology, Rules of Practice
and Procedure and the Administration of the
Bankruptcy System and submitted to
the Judicial Conference for approval

June 26, 2001

Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files

The Judicial Conference of the United States requested that its Committee on Court Administration and Case Management examine issues related to privacy and public access to electronic case files. The Committee on Court Administration and Case Management formed a special subcommittee for this purpose. This subcommittee, known as the Subcommittee on Privacy and Public Access to Electronic Case Files, consisted of four members of the Committee on Court Administration and Case Management: Judge John W. Lungstrum, District of Kansas, Chair; Judge Samuel Grayson Wilson, Western District of Virginia; Judge Jerry A. Davis, Magistrate Judge, Northern District of Mississippi; and Judge J. Rich Leonard, Bankruptcy Judge, Eastern District of North Carolina, and one member from each of four other Judicial Conference Committees (liaison Committees): Judge Emmet Sullivan, District of Columbia, liaison from the Committee on Criminal Law; Judge James Robertson, District of Columbia, liaison from the Committee on Automation and Technology; Judge Sarah S. Vance, Eastern District of Louisiana, liaison from the Committee on the Administration of the Bankruptcy System; and Gene W. Lafitte, Esq., Liskow and Lewis, New Orleans, Louisiana, liaison from the Committee on the Rules of Practice and Procedure. After a lengthy process described below, the Subcommittee on Privacy and Public Access to Electronic Case Files, drafted a report containing recommendations for a judiciary-wide privacy and access policy.

The four liaison Committees reviewed the report and provided comments on it to the full Committee on Court Administration and Case Management. After carefully considering these comments, as well as comments of its own members, the Committee on Court Administration and Case Management made several changes to the subcommittee report, and adopted the amended report as its own.

Brief History of the Committee's Study of Privacy Issues

The Committee on Court Administration and Case Management, through its Subcommittee on Privacy and Public Access to Electronic Case Files (the Subcommittee) began its study of privacy and security concerns regarding public electronic access to case file information in June 1999. It has held numerous meetings and conference calls and received information from experts and academics in the privacy arena, as well as from court users, including judges, court clerks, and government agencies. As a result, in May 2000, the Subcommittee developed several policy options and alternatives for the creation of a judiciary-wide electronic access privacy policy which were presented to the full Committee on Court Administration and Case Management and the liaison committees at their Summer 2000 meetings. The Subcommittee used the opinions and feedback from these committees to further refine the policy options.

In November 2000, the Subcommittee produced a document entitled "Request for Comment on Privacy and Public Access to Electronic Case Files," a copy of which is attached. This document contains the alternatives the Subcommittee perceived as viable following the committees' feedback. The Subcommittee published this document for public comment from November 13, 2000 through January 26, 2001. A website at www.privacy.uscourts.gov was established to publicize the comment document and to collect the comments. Two hundred forty-two comments were received from a very wide range of interested persons including private citizens, privacy rights groups, journalists, private investigators, attorneys, data re-sellers and representatives of the financial services industry. Those comments, in summary and full text format, are available at that website.

On March 16, 2001, the Subcommittee held a public hearing to gain further insight into the issues surrounding privacy and access. Fifteen individuals who had submitted written comments made oral presentations to and answered the questions of Subcommittee members. Following the hearing, the Subcommittee met, considered the comments received, and reached agreement on the policy recommendations contained in this document.

Background

Federal court case files, unless sealed or otherwise subject to restricted access by statute, federal rule, or Judicial Conference policy, are presumed to be available for public inspection and copying. *See Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978) (holding that there is a common law right "to inspect and copy public records and documents, including judicial records and documents"). The tradition of public access to federal court case files is also rooted in constitutional principles. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 575-78 (1980). However, public access rights are not absolute, and courts balance access and privacy interests in making decisions about the public disclosure and dissemination of case files. The authority to protect personal privacy and other legitimate interests in nondisclosure is based, like public access rights, in common law and constitutional principles. *See Nixon*, 435 U.S. at 596 ("[E]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes").

The term "case file" (whether electronic or paper) means the collection of documents officially filed by the litigants or the court in the context of litigation, the docket entries that catalog such filings, and transcripts of judicial proceedings. The case file generally does not include several other types of information, including non-filed discovery material, trial exhibits that have not been admitted into evidence, drafts or notes by judges or court staff, and various documents that are sometimes known as "left-side" file material. Sealed material, although part of the case file, is accessible only by court order.

Certain types of cases, categories of information, and specific documents may require special protection from unlimited public access, as further specified in the sections on civil, criminal, bankruptcy and appellate case files below. *See United States Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989) (noting that technology may affect the balance between access rights and privacy and security interests). To a great extent, these recommendations

rely upon counsel and litigants to act to protect the interests of their clients and themselves. This may necessitate an effort by the courts to educate the bar and the public about the fact that documents filed in federal court cases may be available on the Internet.

It is also important to note that the federal courts are not required to provide electronic access to case files (assuming that a paper file is maintained), and these recommendations do not create any entitlement to such access. As a practical matter, during this time of transition when courts are implementing new practices, there may be disparity in access among courts because of varying technology. Nonetheless, the federal courts recognize that the public should share in the benefits of information technology, including more efficient access to court case files.

These recommendations propose privacy policy options which the Committee on Court Administration and Case Management (the Committee) believes can provide solutions to issues of privacy and access as those issues are now presented. To the extent that courts are currently experimenting with procedures which differ from those articulated in this document, those courts should reexamine those procedures in light of the policies outlined herein. The Committee recognizes that technology is ever changing and these recommendations may require frequent re-examination and revision.

Recommendations

The policy recommended for adoption by the Judicial Conference is as follows:

General Principles

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.

2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.

3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

4. Except where otherwise noted, the policies apply to both paper and electronic files.

5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.

6. The availability of case files at the courthouse will not be affected or limited by these policies.

7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Case Types

Civil Case Files

Recommendation: That documents in civil case files should be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain "personal data identifiers" be modified or partially redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children.

The recommendation provides for liberal remote electronic access to civil case files while also adopting some means to protect individual privacy. Remote electronic access will be available only through the PACERNet system which requires registration with the PACER service center and the use of a log in and password. This creates an electronic trail which can be retraced in order to determine who accessed certain information if a problem arises. Further, this recommendation contemplates that certain personal, identifying information will not be included in its full and complete form in case documents, whether electronic or hard copy. For example, if the Social Security number of an individual must be included in a document, only the last four digits of that number will be used whether that document is to be filed electronically or at the courthouse. If the involvement of a minor child must be mentioned, only that child's initials should be used; if an individual's date of birth is necessary, only the year should be used; and, if financial account numbers are relevant, only the last four digits should be recited in the document. It is anticipated that as courts develop local rules and instructions for the use and implementation of Electronic Case Filing (ECF), such rules and instructions will include direction on the truncation by the litigants of personal identifying information. Similar rule changes would apply to courts which are imaging documents.

Providing remote electronic access equal to courthouse access will require counsel and pro se litigants to protect their interests through a careful review of whether it is essential to their case to file certain documents containing private sensitive information or by the use of motions to seal and for protective orders. It will also depend upon the discretion of judges to protect privacy and security interests as they arise in individual cases. However, it is the experience of the ECF prototype courts and courts which have been imaging documents and making them electronically available that reliance on judicial discretion has not been problematic and has not dramatically increased or altered the amount and nature of motions to seal. It is also the experience of those courts that have been making

their case file information available through PACERNet that there have been virtually no reported privacy problems as a result.

This recommended "public is public" policy is simple and can be easily and consistently applied nationwide. The recommended policy will "level the geographic playing field" in civil cases in federal court by allowing attorneys not located in geographic proximity to the courthouse easy access. Having both remote electronic access and courthouse access to the same information will also utilize more fully the technology available to the courts and will allow clerks' offices to better and more easily serve the needs of the bar and the public. In addition, it might also discourage the possible development of a "cottage industry" headed by data re-sellers who, if remote electronic access were restricted, could go to the courthouse, copy the files, download the information to a private website, and charge for access to that website, thus profiting from the sale of public information and undermining restrictions intended to protect privacy.

Each of the other policy options articulated in the document for comment presented its own problems. The idea of defining what documents should be included in the public file was rejected because it would require the courts to restrict access at the courthouse to information that has traditionally been available from courthouse files. This would have the net effect of allowing less overall access in a technological age where greater access is easy to achieve. It would also require making the very difficult determination of what information should be included in the public file.

The Committee seriously considered and debated at length the idea of creating levels of access to electronic documents (i.e., access to certain documents for specific users would be based upon the user's status in the case). The Committee ultimately decided that levels of access restrictions were too complicated in relation to the privacy benefits which could be derived therefrom. It would be difficult, for example, to prohibit a user with full access to all case information, such as a party to the case, from downloading and disseminating the restricted information. Also, the levels of access would only exist in relation to the remote electronic file and not in relation to the courthouse file. This would result in unequal remote and physical access to the same information and could foster a cottage industry of courthouse data collection as described above.

Seeking an amendment to the Federal Rules of Civil Procedure was not recommended for several reasons. First, any such rules amendment would take several years to effectuate, and the Committee concluded that privacy issues need immediate attention. There was some discussion about the need for a provision in Fed. R. Civ. P. 11 providing for sanctions against counsel or litigants who, as a litigation tactic, intentionally include scurrilous or embarrassing, irrelevant information in a document so that this information will be available on the Internet. The Committee ultimately determined that, at least for now, the current language of Fed. R. Civ. P. 11 and the inherent power of the court are sufficient to deter such actions and to enforce any privacy policy.

As noted above, this recommendation treats Social Security cases differently from other civil case files. It would limit remote electronic access. It does contemplate, however, the existence of a skeletal electronic file in Social Security cases which would contain documents such as the complaint,

answer and dispositive cross motions or petitions for review as applicable but **not** the administrative record and would be available to the court for statistical and case management purposes. This recommendation would also allow litigants to electronically file documents, except for the administrative record, in Social Security cases and would permit electronic access to these documents by litigants only.

After much debate, the consensus of the Committee was that Social Security cases warrant such treatment because they are of an inherently different nature from other civil cases. They are the continuation of an administrative proceeding, the files of which are confidential until the jurisdiction of the district court is invoked, by an individual to enforce his or her rights under a government program. Further, all Social Security disability claims, which are the majority of Social Security cases filed in district court, contain extremely detailed medical records and other personal information which an applicant must submit in an effort to establish disability. Such medical and personal information is critical to the court and is of little or no legitimate use to anyone not a party to the case. Thus, making such information available on the Internet would be of little public benefit and would present a substantial intrusion into the privacy of the claimant. Social Security files would still be available in their entirety at the courthouse.

Criminal Case Files

Recommendation: That public remote electronic access to documents in criminal cases should not be available at this time, with the understanding that the policy will be reexamined within two years of adoption by the Judicial Conference.

The Committee determined that any benefits of public remote electronic access to criminal files were outweighed by the safety and law enforcement risks such access would create. Routine public remote electronic access to documents in criminal case files would allow defendants and others easy access to information regarding the cooperation and other activities of defendants. Specifically, an individual could access documents filed in conjunction with a motion by the government for downward departure for substantial assistance and learn details of a defendant's involvement in the government's case. Such information could then be very easily used to intimidate, harass and possibly harm victims, defendants and their families.

Likewise, routine public remote electronic access to criminal files may inadvertently increase the risk of unauthorized public access to preindictment information, such as unexecuted arrest and search warrants. The public availability of this information could severely hamper and compromise investigative and law enforcement efforts and pose a significant safety risk to law enforcement officials engaged in their official duties. Sealing documents containing this and other types of sensitive information in criminal cases will not adequately address the problem, since the mere fact that a document is sealed signals probable defendant cooperation and covert law enforcement initiatives.

The benefit to the public of easier access to criminal case file information was not discounted by the Committee and, it should be noted that, opinions and orders, as determined by the court, and

criminal docket sheets will still be available through court websites and PACER and PACERNet. However, in view of the concerns described above, the Committee concluded that individual safety and the risk to law enforcement personnel significantly outweigh the need for unfettered public remote access to the content of criminal case files. This recommendation should be reconsidered if it becomes evident that the benefits of public remote electronic access significantly outweigh the dangers to victims, defendants and their families, and law enforcement personnel.

Bankruptcy Case Files

Recommendation: That documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits.

The Committee recognized the unique nature of bankruptcy case files and the particularly sensitive nature of the information, largely financial, which is contained in these files; while this recommendation does provide open remote electronic access to this information, it also accommodates the privacy concerns of individuals. This recommendation contemplates that a debtor's personal, identifying information and financial account numbers will not be included in their complete forms on any document, whether electronic or hard copy (i.e., only the last four digits of Social Security and financial account numbers will be used). As the recommendation recognizes, there may be a need to amend the Bankruptcy Code to allow only the last four digits of an individual debtor's Social Security number to be used. The bankruptcy court will collect the full Social Security number of debtors for internal use, as this number appears to provide the best way to identify multiple bankruptcy filings. The recommendation proposes a minor amendment to § 107(a) to allow the court to collect the full number, but only display the last four digits. The names of minor children will not be included in electronic or hard copies of documents.

As with civil cases, the effectiveness of this recommendation relies upon motions to seal filed by litigants and other parties in interest. To accomplish this result, an amendment of 11 U.S.C. § 107(b), which now narrowly circumscribes the ability of the bankruptcy courts to seal documents, will be needed to establish privacy and security concerns as a basis for sealing a document. Once again, the experiences of the ECF prototype and imaging courts do not indicate that this reliance will cause a large influx of motions to seal. In addition, as with all remote electronic access, the information can only be reached through the log-in and password- controlled PACERNet system.

The Committee rejected the other alternatives suggested in the comment document for various reasons. Any attempt to create levels of access in bankruptcy cases would meet with the same problems discussed with respect to the use of levels of access for civil cases. Bankruptcy cases

present even more issues with respect to levels of access because there are numerous interests which would have a legitimate need to access file information and specific access levels would need to be established for them. Further, many entities could qualify as a "party in interest" in a bankruptcy filing and would need access to case file information to determine if they in fact have an interest. It would be difficult to create an electronic access system which would allow sufficient access for that determination to be made without giving full access to that entity.

The idea of collecting less information or segregating certain information and restricting access to it was rejected because the Committee determined that there is a need for and a value in allowing the public access to this information. Further, creating two separate files, one totally open to the public and one with restricted access, would place a burden on clerks' offices by requiring the management of two sets of files in each case.

Appellate Case Files

Recommendation: That appellate case files be treated at the appellate level the same way in which they are treated at the lower level.

This recommendation acknowledges the varying treatment of the different case types at the lower level and carries that treatment through to the appellate level. For cases appealed to the district court or the court of appeals from administrative agencies, the documents in the appeal will be treated, for the purposes of remote electronic access, in the same manner in which they were treated by the agency. For cases appealed from the district court, the case file will be treated in the manner in which it was treated by the district court with respect to remote electronic access.

Attachment

Request for Comment on Privacy and Public Access to Electronic Case Files

The federal judiciary is seeking comment on the privacy and security implications of providing electronic public access to court case files. The Judicial Conference of the United States is studying these issues in order to provide policy guidance to the federal courts. This request for public comment addresses several related issues:

the judiciary's plans to provide electronic access to case files through the Internet;
the privacy and security implications of public access to electronic case files;
potential policy alternatives and the appropriate scope of judicial branch action in this area.

The judiciary is interested in comments that address any of the issues raised in this document, including whether it is appropriate for the judiciary to establish policy in this area. All comments should be received by 5:00 p.m. January 26, 2001 and must include the name, mailing address and phone number of the commentator.

All comments should also include an e-mail address and a fax number, where available, as well as an indication of whether the commentator is interested in participating in a public hearing, if one is held. The public should be advised that it may not be possible to honor all requests to speak at any such hearing.

The electronic submission of comments is highly encouraged. Electronic comments may be submitted at www.privacy.uscourts.gov or via e-mail to Privacy_Policy_Comments@ao.uscourts.gov . Comments may be submitted by regular mail to The Administrative Office of the United States Courts, Court Administration Policy Staff, Attn: Privacy Comments, Suite 4-560, One Columbus Circle, N.E. Washington, DC 20544.

Electronic Public Access to Federal Court Case Files

The federal courts are moving swiftly to create electronic case files and to provide public access to those files through the Internet. This transition from paper files to electronic files is quickly transforming the way case file documents may be used by attorneys, litigants, courts, and the public. The creation of electronic case files means that the ability to obtain documents from a court case file will no longer

depend on physical presence in the courthouse where a file is maintained. Increasingly, case files may be viewed, printed, or downloaded by anyone, at any time, through the Internet.

Electronic files are being created in two ways. Many courts are creating electronic images of all paper documents that are filed, in effect converting paper files to electronic files. Other courts are receiving court filings over the Internet directly from attorneys, so that the "original" file is no longer a paper file but rather a collection of the electronic documents filed by the attorneys and the court. Over the next few years electronic filing, as opposed to making images of paper documents, will become more common as most federal courts begin to implement a new case management system, called Case Management/Electronic Case Files (or "CM/ECF"). That system gives each court the option to create electronic case files by allowing lawyers and parties to file their documents over the Internet.

The courts plan to provide public access to electronic files, both at the courthouse and beyond the courthouse, through the Internet. The primary method to obtain access will be through Public Access to Court Electronic Records (or "PACER"), which is a web-based system that will contain both the dockets (a list of the documents filed in the case) and the actual case file documents. Individuals who seek a particular document or case file will need to open a PACER account and obtain a login and password. After obtaining these, an individual may access case files – whether those files were created by imaging paper files or through CM/ECF – over the Internet. Public access through PACER will involve a fee of $.07 per page of a case file document or docket viewed, downloaded or printed. This compares favorably to the current $.50 per page photocopy charge. Electronic case files also will be available at public computer terminals at courthouses free of charge.

Potential Privacy and Security Implications of Electronic Case Files

Electronic case files promise significant benefits for the courts, litigants, attorneys, and the public. There is increasing awareness, however, of the personal privacy implications of unlimited Internet access to court case files. In the court community, some have begun to suggest that case files – long presumed to be open for public inspection and copying unless sealed by court order – contain private or sensitive information that should be protected from unlimited public disclosure and dissemination in the new electronic environment. Others maintain that electronic case files should be treated the same as paper files in terms of public access and that existing court practices are adequate to protect privacy interests.

Federal court case files contain personal and sensitive information that litigants and third parties often are compelled by law to disclose for adjudicatory purposes. Bankruptcy debtors, for example, must divulge intimate details of their financial affairs for review by the case trustee, creditors, and the judge. Civil case files may contain medical records, personnel files, proprietary information, tax returns, and other sensitive information. Criminal files may contain arrest warrants, plea agreements, and other information that raise law enforcement and security concerns.

Recognizing the need to review judiciary public access policies in the context of new technology, the Judicial Conference is considering privacy and access issues in order to provide guidance to the courts.

The Judicial Conference has not reached any conclusions on these issues, and this request for public comment is intended as part of the Conference's ongoing study.

The judiciary has a long tradition – rooted in both constitutional and common law principles – of open access to public court records. Accordingly, all case file documents, unless sealed or otherwise subject to restricted access by statute or federal rule, have traditionally been available for public inspection and copying. The Supreme Court has recognized, however, that access rights are not absolute, and that technology may affect the balance between access rights and privacy and security interests. *See Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978), and *United States Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989). These issues are discussed in more detail in an Administrative Office staff paper, "Privacy and Access to Electronic Case Files in the Federal Courts," available on the Internet at www.uscourts.gov/privacyn.pdf .

The Role of the Federal Judiciary

The judiciary recognizes that concern about privacy and access to public records is not limited to the judicial branch. There is a broader public debate about the privacy and security implications of information technology. Congress has already responded to some of these concerns by passing laws that are designed to shield sensitive personal information from unwarranted disclosure. These laws, and numerous pending legislative proposals, address information such as banking records and other personal financial information, medical records, tax returns, and Social Security numbers. The executive branch is also concerned about implications of electronic public access to private information. Most recently, the President directed the Office of Management and Budget, the Department of Justice, and the Department of Treasury to conduct a study on privacy and security issues associated with consumer bankruptcy filings.

Accordingly, the judiciary is interested in receiving comment on the appropriate scope of judicial branch action, if any, on the broad issue of access to public court records, and the corresponding need to balance access issues against competing concerns such as personal privacy and security.

Policy Alternatives on Electronic Public Access to Federal Court Case Files

Regardless of what entity addresses the issues of privacy and electronic access to case files, the effort must be made to balance access and privacy interests in making decisions about the public disclosure and dissemination of case files. The policy options outlined below are intended to promote consistent policies and practices in the federal courts and to ensure that similar protections and electronic access presumptions apply, regardless of which federal court is the custodian of a particular case file. One or more of the policy options for each type of case file may be recommended to the Judicial Conference for its consideration. Some, but not all of the options are mutually exclusive.

Civil Case Files

1. Maintain the presumption that all filed documents that are not sealed are available both at the courthouse and electronically.

This approach would rely upon counsel and pro se litigants to protect their interests on a case-by-case basis through motions to seal specific documents or motions to exclude specific documents from electronic availability. It would also rely on judges' discretion to protect privacy and security interests on a case-by-case basis through orders to seal or to exclude certain information from remote electronic public access.

2. Define what documents should be included in the "public file" and, thereby, available to the public either at the courthouse or electronically.

This option would treat paper and electronic access equally and assumes that specific sensitive information would be excluded from public review or presumptively sealed. It assumes that the entire public file would be available electronically without restriction and would promote uniformity among district courts as to case file content. The challenge of this alternative is to define what information should be included in the public file and what information does not need to be in the file because it is not necessary to an understanding of the determination of the case or because it implicates privacy and security interests.

3. Establish "levels of access" to certain electronic case file information.

This contemplates use of software with features to restrict electronic access to certain documents either by the identity of the individual seeking access or the nature of the document to which access is sought, or both. Judges, court staff, parties and counsel would have unlimited remote access to all electronic case files.

This approach assumes that the complete electronic case file would be available for public review at the courthouse, just as the entire paper file is available for inspection in person. It is important to recognize that this approach would not limit how case files may be copied or disseminated once obtained at the courthouse.

4. Seek an amendment to one or more of the Federal Rules of Civil Procedure to account for privacy and security interests.

Criminal Case Files

1. Do not provide electronic public access to criminal case files.

This approach advocates the position that the ECF component of the new CM/ECF system should not be expanded to include criminal case files. Due to the very different nature of criminal case files, there may be much less of a legitimate need to provide electronic access to these files. The files are usually not that extensive and do not present the type of storage problems presented by civil files. Prosecution and defense attorneys are usually located near the courthouse. Those with a true need for the information can still access it at the courthouse. Further, any legitimate need for electronic access to criminal case information is outweighed by safety and security concerns. The electronic availability of criminal information would allow co-defendants to have easy access to information regarding cooperation and other activities of defendants. This information could then be used to intimidate and harass the defendant and the defendant's family. Additionally, the availability of certain preliminary criminal information, such as warrants and indictments, could severely hamper law enforcement and prosecution efforts.

2. Provide limited electronic public access to criminal case files.

This alternative would allow the general public access to some, but not all, documents routinely contained in criminal files. Access to documents such as plea agreements, unexecuted warrants, certain pre-indictment information and presentence reports would be restricted to parties, counsel, essential court employees, and the judge.

Bankruptcy Case Files

1. Seek an amendment to section 107 of the Bankruptcy Code.

Section 107 currently requires public access to all material filed with bankruptcy courts and gives judges limited sealing authority. Recognized issues in this area would be addressed by amending this provision as follows: 1) specifying that only "parties in interest" may obtain access to certain types of information; and (2) enhancing the 107(b) sealing provisions to clarify that judges may provide protection from disclosures based upon privacy and security concerns.

2. Require less information on petitions or schedules and statements filed in bankruptcy cases.

3. Restrict use of Social Security, credit card, and other account numbers to only the last four digits to protect privacy and security interests.

4. Segregate certain sensitive information from the public file by collecting it on separate forms that will be protected from unlimited public access and made available only to the courts, the U.S. Trustee, and to parties in interest.

Appellate Cases

1. Apply the same access rules to appellate courts that apply at the trial court level.

2. Treat any document that is sealed or subject to public access restrictions at the trial court level with the same protections at the appellate level unless and until a party challenges the restriction in the appellate court.

NEWS RELEASE

Administrative Office of the U.S. Courts

September 23, 2003

Contact: David Sellers

Judicial Conference Seeks Restoration of Judges' Sentencing Authority

The federal courts' policy-making body voted today to support repeal of a new law that severely limits the ability of trial judges to depart from Sentencing Guidelines and requires reports to Congress on any federal judge who does so.

The Judicial Conference of the United States also agreed to expand remote public access to electronic court documents by allowing access to criminal case files. The new policy will be implemented as soon as operational guidance to all federal courts can be developed and approved.

Sentencing

Because the Judiciary and the U.S. Sentencing Commission were not consulted prior to enactment, the Conference voted to support repeal of the following provisions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, known as the PROTECT Act:

- The requirement that directs the Sentencing Commission to make available to the House and Senate Judiciary Committees all underlying documents and records it receives from the courts without established standards on how these sensitive and confidential documents will be handled and protected from inappropriate disclosure;
- The requirement that the Sentencing Commission release data files containing judge-specific information to the Attorney General;
- The requirement that the Department of Justice submit judge-specific sentencing guideline departure information to the House and Senate Judiciary Committees;
- The requirement that the Sentencing Commission promulgate guidelines and policy statements to limit departures;
- The requirement that the Sentencing Commission promulgate a policy statement limiting the authority of the courts and U.S. Attorneys' Offices to develop and implement early disposition programs; and
- The amendment of 28 U.S.C. §991(a) to limit the number of judges who may be members of the Sentencing Commission.

The PROTECT Act, fast-moving legislation that passed both houses of Congress and was signed by the President in just over 30 days, provides protection for children by expanding to national coverage a rapid-response system to help find kidnaped children. When the legislation was considered on the House floor, an amendment was added to limit judges' sentencing flexibility. The Judiciary was not asked for its views on this amendment, nor was it advised of its consideration. After the PROTECT Act passed the House and the sentencing provisions came to the attention of the Judiciary, the Judicial Conference, the

(MORE)

Chief Justice, and the Sentencing Commission expressed serious concerns. The bill was signed into law on April 30, 2003. The Judicial Use of Discretion to Guarantee Equity in Sentencing Act of 2003, known as the JUDGES Act, is pending in the Senate as S.1086 and in the House as H.R. 2213. These companion bills would repeal many of the sentencing provisions in the PROTECT Act.

Case Files

In September 2001, the Conference adopted a policy for remote public electronic access to civil, bankruptcy, and appellate case files. But at that time it decided not to allow for similar access to criminal case files. In March 2002, the Conference established a pilot program for 10 district courts and one appellate court to allow Internet access to criminal case files.

The Federal Judicial Center has studied the experience of the pilot courts and found no evidence of harm to any individual and also found that a majority of those interviewed in the pilot courts —judges, court staff, and counsel — extolled the advantages of electronic access. The Conference Committees on Court Administration and Case Management, Criminal Law, and Defender Services will work together in drafting appropriate implementation guidance for the courts. The pilot program will continue access during the implementation period.

Once implemented, the policy requires that certain personal identifier information should be partially redacted by the filer of the document, whether it is filed electronically or in paper form. For example, Social Security and financial account numbers should be reported as the last four digits only and the names of minor children should be listed only by their initials. This is the policy currently in effect for civil cases.

Remote access to federal court files has been made possible by the Case Management/Electronic Case Files (CM/ECF) system, which is in the process of being implemented throughout the federal courts. As of September 1, 2003, 25 district courts and 60 bankruptcy courts are using the system. More than 10 million cases are on the CM/ECF system and more than 40,000 attorneys and others have filed documents over the Internet. Electronic access to these documents is available through the Public Access to Court Electronics Records (PACER) program.

In other action, the Conference

- Agreed to seek legislation to permit emergency special court sessions outside the district or circuit in which a court is located. The need for this legislation became apparent following the events of September 11, 2001, when court operations, particularly in New York City, were impacted.

- Declared courthouse space emergencies in Los Angeles, California; El Paso, Texas; San Diego, California; and Las Cruces, New Mexico. The Conference's Security and Facilities Committee said that intolerable security and operational problems exist in the three courts along the southwest border and in Los Angeles, which justifies the Judicial Conference designation of these locations as a space emergency.

The Judicial Conference of the United States is the principal policy-making body for the federal court system. The Chief Justice serves as the presiding officer of the Conference, which is composed of the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year to consider administrative and policy issues affecting the court system and to make recommendations to Congress concerning legislation involving the Judicial Branch. A list of Conference members is attached.

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JUDICIAL CONFERENCE OF THE UNITED STATES

September 2003

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Judge D. Brock Hornby	District of Maine
Chief Judge John M. Walker, Jr.	Second Circuit
Chief Judge Frederick J. Scullin, Jr.	Northern District of New York
Chief Judge Anthony J. Scirica	Third Circuit
Chief Judge Sue L. Robinson	District of Delaware
Chief Judge William W. Wilkins	Fourth Circuit
Judge David C. Norton	District of South Carolina
Chief Judge Carolyn Dineen King	Fifth Circuit
Judge Martin L.C. Feldman	Eastern District of Louisiana
Chief Judge Boyce F. Martin, Jr.	Sixth Circuit
Chief Judge Lawrence P. Zatkoff	Eastern District of Michigan
Chief Judge Joel M. Flaum	Seventh Circuit
Judge Marvin E. Aspen	Northern District of Illinois
Chief Judge James B. Loken	Eighth Circuit
Chief Judge James M. Rosenbaum	District of Minnesota
Chief Judge Mary M. Schroeder	Ninth Circuit
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Chief Judge Deanell R. Tacha	Tenth Circuit
Judge Frank Howell Seay	Eastern District of Oklahoma
Chief Judge J. L. Edmondson	Eleventh Circuit
Judge J. Owen Forrester	Northern District of Georgia
Chief Judge Douglas H. Ginsburg	District of Columbia Circuit
Chief Judge Thomas F. Hogan	District of Columbia
Chief Judge Haldane Robert Mayer	Federal Circuit
Chief Judge Gregory W. Carman	Court of International Trade

Conference Secretary:

Leonidas Ralph Mecham, Director
Administrative Office of the U.S. Courts