COMMENTS ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES TO THE JUDICIAL CONFERENCE OF THE UNITED STATES

These comments were originally submitted to the Committee on Administration and Case Management a year ago in my capacity as a subcommittee chair of the D.C. Bar Technology Task Force and as Freedom of Information chair of the Society of Professional Journalists, D.C. Professional Chapter.[1] They addressed issues raised in *Privacy and Access to Electronic Case Files: Legal Issues, Judiciary Policy and Practice, and Policy Alternatives* (referred to below as *Privacy and Access*), a report prepared by the staff in the Administrative Office of U.S. Courts, Office of Judges Programs. That document was the basis for discussions that resulted in November 2000 in issuance of the request for public comment on public access to electronic case files. Although the RFC recasts the issues raised in *Privacy and Access*, I am resubmitting these comments so they will reach the broader audience joining the debate over public access to case files online. The D.C. Chapter of SPJ has joined its parent, the Society of Professional Journalists, the Reporters Committee for Freedom of the Press, and the Radio-Television News Directors' Association in comments specifically addressing issues raised in the RFC. If the Judicial Conference holds a public hearing on this issue, which I believe it should, I request the opportunity to testify.

Privacy and Access discussed several concerns about online access which appear to come from within the judiciary, the Administrative Office, and interest groups. It discussed the origins of and limitations on the public right of access to case files and proposed alternatives for addressing the concerns. Although the report tended to minimize the legal foundation on which the public's presumptive right of access to case files rests and the importance of it, it did not promote any specific changes in law, rules or policy to restrict access.

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

It should be noted at the outset that in *Privacy and Access* the Administrative Office staff separated users of case information into three groups: judges and court personnel, parties to the case and their lawyers, and the general public. In discussing an alternative access model it mentioned a fourth category including U.S. attorneys, bankruptcy trustees and U.S. trustees. Lawyers who are not parties would be categorized as members of the general public.

Lawyers often become involved in litigation that is not unique. A case may present an issue that is also being litigated thousands of miles away in another federal courthouse, and that distant case may be further down the pipeline. Pleadings and discovery documents in that case probably would be very useful, and having them readily available might save the client considerable expense.[2] Recognizing this, defendants in many toxic tort and products liability cases and the tobacco companies in the early suits brought by individual litigants fought long and hard to

[1] I prepared these comments in response to a request from Andrew Marks, former president of the D.C. Bar, who was to meet January 25, 2000 with a subcommittee of the Committee on Administration and Case Management.

[2] Law and accounting firms that practice in the U.S. Tax Court regularly comb dockets for new case filings, a process that would be greatly facilitated if they had online access.

prevent public access to case documents and the sharing of discovery.[3] When Congress in 1978 refused to eliminate the filing requirement from Fed. R. Civ. P. 5(d), it expressed the belief that the public should have ready access to such information.

But many federal district courts have adopted local rules discouraging the filing of discovery because clerks lacked the space to store the large volume of material generated in civil litigation. Through the use of electronic filing and retrieval technology this concern will become almost negligible and the district courts should be able to implement both the letter and spirit of Rule 5(d), which were intended, at least in part, to benefit the general public, litigants similarly situated and their lawyers. Thus, public access to judicial records should increase as electronic filing systems are implemented.[4]

Online access to case information will facilitate the study of legal issues by academics and law students who do not have the resources to go from courthouse to courthouse to review case files. It will benefit the legal profession generally in that researchers will be able to analyze whether, in dealing with particular procedural or substantive issues, federal courts around the country are providing uniform justice. The 1988 *Washington Post* series cited above at footnote 3 demonstrates the value of such research aimed at informing the general public, as well as the legal community.

Denying the public equal access to electronic case files will work to the benefit of major corporations, government entities and other financially-sound organizations and to the detriment of litigants and potential litigants against them. This is so because the defendants have the resources to send lawyers and investigators to districts where similar litigation is pending to comb the files for useful information, but plaintiffs lack the ability to do the same.

But the USAO staff enumerates several factors "that may justify some electronic access restrictions." It notes that "[b]alancing access and privacy interests in public information would be consistent with recent actions by the executive branch." *Privacy and Access* at 30. This attempt to analogize access to court records, at least remote access to them, to principles developed in implementing access to executive agency records pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a causes serious problems. Agency claims that records may be withheld from disclosure under FOI Act Exemption 6, the privacy exemption, or Exemption 7, the law enforcement exemption, which includes a separate privacy provision, have prompted considerable litigation. These cases have developed precedent permitting agencies to withhold information that clearly would not be considered private under common law or state invasion of privacy statutes.[5] One of the most notable, *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), stated that the FBI could withhold criminal history information in its National Criminal Information Center (NCIC) database, even though the information is public in the jurisdiction that submitted the data.

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[3] The *Washington Post* documented the serious problems caused by court secrecy in such cases in a four-part series "Public Courts, Private Justice" published Oct. 23-26, 1988. I can provide copies of the articles.

[4] Once again the Judicial Conference has proposed changes in Rule 5(d) to limit filing of discovery documents.

[5] Although it focuses on case law developing a right of privacy under federal open records law, it totally ignores recent amendments to the federal FOI Act requiring agencies to increase dissemination of information on the internet and to provide requested data in electronic format if requested, so-called E-FOIA provisions.

In *Reporters Committee* the Court created a legal fiction which the authors of *Privacy and Access* refer to as "practical obscurity." It is the notion that although a document remains public in government files, it is private because the chance that it will be found and disseminated is remote. The USAO report candidly states that "there is no 'expectation of privacy' in case file information," but posits that "there is certainly an 'expectation of practical obscurity' that will be eroded through the development of electronic case files." *Privacy and Access* at 32.

Federal open records laws were adopted to create a right of access to government information where none previously existed. They provide limited access to executive agency records but not to congressional records. In *Reporters Committee*, the Court stated that the primary purpose of the FOI Act is to permit the public to oversee the operations of government, and that access to criminal rap sheets stored by NCIC did not accomplish that purpose. Similarly, as the Supreme Court recognized recently in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 120 S. Ct. 483, 145 L. Ed.2^{d} 451 (1999), because the public's right of access to arrestee and victim addresses was guaranteed only by statute, the legislature could amend the statute to impose restrictions on that access.

In the wake of the Supreme Court decision in *Reno v. Condon*, 528 U.S. 141, 120 S. Ct. 665, 145 L. Ed.2^{d} 587 (2000), the argument will likely be raised that limiting public access to court records is necessary to protect the personal safety of litigants and others. In *Condon* the Court upheld the constitutionality of the Driver's Privacy Protection Act, 18 U.S.C. § 2721 *et. seq.*, against a claim that Congress interfered with state decision making concerning dissemination of information from driver's license and motor vehicle registration records. The statute orders states to limit dissemination of such information and to give individuals the ability to bar dissemination of information they provided the state motor vehicle department.[6] The Court actually did not determine whether license and registration information is private, but merely that because the information is in interstate commerce Congress has authority to regulate its dissemination. Once again, the only basis on which the public has a right to obtain such information from state motor vehicle agencies is statutory.

Relying on decisions defining access under open records laws the staff came to a conclusion which clearly is not supported by court access decisions that

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

Id. at 32.

There is a strong presumption under the First Amendment and common law that the public has a right of access to court proceedings and case files. Furthermore, public access to them serves a much broader purpose. *See below at 6.*Although the Supreme Court has ruled that protecting individual privacy might justify court secrecy, it has never upheld a closure on those grounds,

[6] The legislation was proposed by Sen. Barbara Boxer in the wake of the murder of actress Rebecca Schaefer by a man who obtained her address through a private detective who traced it using a license plate number.

and has stated that judges considering privacy claims must balance the interests of the public against those of the movant on a case-by-case basis. Therefore, one should not analogize to decisions and policies interpreting the open records laws.

According to *Privacy and Access* "[n]ew forms of access may unduly raise the privacy 'price' that litigants must pay for using the courts." *Id.* at 32. In the face of repeated rulings by the Supreme Court that public access to court proceedings fosters public confidence in and willingness to employ the judicial system to resolve disputes, it is striking that the USAO staff argued that "the prospect of unlimited disclosure of personal information in case files may undermine public confidence in the litigation process, in general, and the federal courts in particular."

If a case file is public at the courthouse, a reasonably cautious litigant must operate under the assumption that someone will find it and might use information it contains. If that file contains personal information or sensitive business information counsel has a duty to protect the client's interests by seeking a protective order pursuant to procedural rules appropriate to the type of proceeding involved. The situation is no different if the right of access is expanded to electronic case files available on the internet. Thus, the "privacy 'price' " remains the same because a reasonably cautious litigant cannot rely on "practical obscurity" to protect its interests.

For a decade or more litigants, particularly corporate litigants, have expressed concern about the degree of public access to case documents guaranteed by the First Amendment and common law. One solution to this problem they have employed with increasing regularity is alternative dispute resolution to arrive at settlements while avoiding public disclosure. Federal and state judicial entities have encouraged use of ADR, and a joint project of the National Conference of Commissioners on Uniform State Laws and the ABA Section of Dispute Resolution is currently drafting a Uniform Mediation Act. Media organizations including the Society of Professional Journalists have been meeting with the drafting committee in an effort to delineate what information related to mediation should be public, particularly when one of the parties is a government entity. Considering that litigants now elect to use alternative means of resolving issues that might be presented to a court, it is disingenuous to maintain that the advent of online access will cause a significant new problem.

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

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

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

to support the closure, according to the opinion. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980).

Two years later, the Court said that, although states had a significant interest in protecting minor victims of sexual assaults from the trauma of testifying in open court, trial judges must determine on a case-by-case basis whether this interest outweighs the presumption of openness. *Globe Newspapers v. Superior Court*, 457 U.S. 596 (1982). The majority concluded as well that any closure order must be "narrowly tailored to protect that interest" without unduly infringing on First Amendment rights.[7]

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

The three-part test for closure that emerges from these cases[8] requires a judge to find that a compelling governmental interest exists which outweighs the public's interest in access, that no alternative to closure will protect that interest, and that the closure is no broader than necessary to protect the interest and, in fact, will protect it. Assuming there is a compelling interest, a reasonable alternative to closing a hearing might be to require counsel to refer to a particularly sensitive document by an innocuous name or exhibit number, rather than to discuss its content in open court. If no alternative will protect the governmental interest, it is not permissible to close an entire hearing merely to prevent disclosure of a discrete piece of information among many aired at the hearing.[9] Furthermore, if that information is already public and closure will not protect it, i.e. the existence of a confession, then closure is not permitted because it would not serve the intended purpose.

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

> There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them. Indeed, the two principal justifications for the First Amendment right of access to criminal proceedings apply, in general, to pretrial documents …. There can be little dispute that the press and public have historically had a common law right of access to most pretrial documents (citations omitted) … [and they] are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning.

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

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

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

Id. at 1145.

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

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

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

The Supreme Court has never addressed the question of whether there is a First Amendment right of access to civil trial and pretrial proceedings. However, several federal appeals courts, employing the reasoning of the high court's four criminal trial access decisions, have ruled that both are presumptively open to the public.[10]

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

Public access was not at issue in *Seattle Times*. The question, as framed in the opinion, was: "whether a *litigant's* freedom comprehends the right to *disseminate information* that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used." 467 U.S. at 32 (emphasis added). *See, also, Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2^{d} 157, 162 (3^{d} Cir. 1993). Stated another way, the Supreme Court had to decide whether the mere fact that the media libel defendants were principally engaged in First Amendment protected activity prevented a trial judge from prohibiting the newspapers from using discovered information as the basis for extrajudicial statements.[11] To answer this question "it is necessary to consider whether the

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

[11] The Court addressed this issue mainly to set the discovery process apart from other situations in which it had ruled that media organizations could not be penalized or censored for publishing information they legally obtained,

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'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression.' "[12] *Id.* (citations omitted)

The Supreme Court and other courts have long held that restrictions on such statements by parties and their lawyers do not violate the First Amendment if they are narrowly tailored to assure the fair administration of justice.[13] The Court concluded in *Seattle Times* that a protective order issued under the state equivalent of federal Rule 26(c), for "good cause" and "limited to the context of pretrial civil discovery, … does not offend the First Amendment. *Id.* 467 U.S. at 37.

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

In *Nixon*, news organizations sought access to White House tapes played as evidence during the trial of Nixon administration officials on charges arising from the Watergate scandal. In it the Court recognized that there is a common law right of access to exhibits used at trial but did not define the limits of that right beyond stating that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* 435 U.S. at 599.

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

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even if the party who disclosed the information was under an obligation to keep it secret. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail*, 443 U.S. 97 (1979); *Landmark Communications v. Virginia*, 435 U.S. 829 (1978); *Nebraska Press Ass'n, supra*; *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975).

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

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

Id. at 609.

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

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

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

Drawing on the Supreme Court's decisions, federal appellate courts have found a public right of access under the First Amendment, common law, statutes and court rules to documents introduced into evidence in civil pretrial proceedings and to documents not introduced but submitted to the court in support of various kinds of motions.[14]

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

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

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

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

The presumption of access encompasses any documents "the judge *should* have considered or relied upon." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 42 (C.D. Cal. 1984), *reh'r'g denied*, 10 Med. L. Rep. 2430 (9th Cir. 1984)(cited below as *Petroleum Products*). The First Circuit adopted the *Petroleum Products* view that the right of access includes those records that a court relies on in determining the litigants' substantive rights. *Federal Trade Commission v. Standard Financial Management Corp.*. No. 87-1340, 14 Med. L. Rep. 1750 (1st Cir. Oct. 6, 1987).

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

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

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

In *In re San Juan Star*, 662 F.2d 108 (1st Cir. 1981), the Court ruled that "significant but limited First Amendment concerns are implicated by [] protective orders" issued pursuant to Rule 26(c). *Id.* at 114. In determining whether the public should be granted access to discovery documents, the court must examine the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing

so, and the narrowness of the order if it is deemed necessary. *Id.* at 116. Before it affirmed the trial judge's decision to deny access, the First Circuit concluded that disclosure would create a reasonable likelihood of material harm to the defendant's right to a fair trial. The panel also determined that the order was narrowly drawn and likely to be effective in protecting the defendant's rights, and that alternatives to the protective order would be ineffective. *Id.* at 117.

The First Circuit reconsidered the issue of public access to discovery in *Anderson v. Cryovac Inc.*, 805 F.2d 1 (1st Cir. 1987). In that case the Court applied the "*Richmond Newspapers* analysis" because it found that First Amendment interests were implicated by protective orders issued in civil cases. It reaffirmed its earlier conclusion in *San Juan Star, supra*, stating that:

> Although the 'strict and heightened' scrutiny tests no longer apply, the first amendment is still a presence in the review process. Protective discovery orders are subject to first amendment scrutiny, but that scrutiny must be made within the framework of Rule 26(c)'s requirement of good cause.

Cryovac, 805 F.2d at 7.[15]

Taking a more conservative approach, the Second Circuit ruled in *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), that it did not need to decide whether the First Amendment guaranteed the public access to discovery documents because Fed. R. Civ. P. 26(c) and Fed. R. Civ. P. 5(d) required public access. *See below at 17.* The Second Circuit ruled that if good cause is not shown, discovery materials should not receive judicial protection and should be open to the public for inspection. *Id.* at 145. It held that the rule requiring discovery materials to be filed embodies a concern that the general public be afforded access to them, and that access is particularly appropriate where the subject matter of the litigation is of special public interest. *In re "Agent Orange," supra*, at 146.

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

PUBLIC ACCESS TO DISCOVERY DOCUMENTS IS FIRMLY GROUNDED IN HISTORY AND FURTHERS INTERESTS THE FIRST AMENDMENT WAS INTENDED TO PROTECT

Because much of the information that is perceived to be sensitive or "private" likely is contained in discovery material, not court pleadings which are unquestionably public records, it is necessary to discuss the public's right of access to discovery in some detail.

[15] The First Circuit decided that there is no First Amendment right of access only when the documents sought are relevant solely to a dispute over the discovery process itself. It ruled that *The Boston Globe* could not have access to a document shown to the trial judge during a hearing that was open to the public on whether the plaintiffs could depose the chief executive officer of one of the defendants. *Cryovac*, 805 F.2d at 12.

Public access to depositions, interrogatories and document discovery developed differently in the common law and equity courts of England and the United States.

Depositions

The deposition was introduced into British and American chancery courts in the 18th century as a device for perpetuating testimony. J. STORY, STORY'S COMMENTARIES ON EQUITY, 719-723 (1893). It was adapted to use in pretrial discovery by the late 19th century. RAGLAND, DISCOVERY BEFORE TRIAL,18 (1932). In England, equity required that depositions be filed with the court but kept secret until the witness testified. Then they were "published." C.C. Langdell, *Discovery Under The Judicature Acts, 1873, 1875, Part I*, 11 Harv. L. Rev. 137, 144 (1897).

In this country, however, Equity Rule 69, promulgated in 1842, gave federal judges the power to order "publication" of depositions upon filing under certain circumstances. J. HOPKINS, THE NEW FEDERAL EQUITY RULES, 122 (1933). In 1912, Rule 69 was renumbered Rule 55, and the provision requiring a judge to order publication was abolished. Thereafter, depositions were deemed public when filed. *Id*. at 264.

The circuit courts long ago acknowledged that the public has a right of access to depositions. In 1838, the Southern District of New York adopted Rules 113 and 114 which required all depositions to be filed with the court. *See Louis Werner Stave Co. v. Marden, Orth & Hastings Co.*, 280 F. 601, 606 & n. 3 (2d Cir. 1922). In that case, the court stated that because the parties knew the contents of depositions, "there was not the slightest reason why the deposition should not be placed upon the files of the court and become accessible to the litigants, and for that matter to the public." *Id*. at 604.

More than a hundred years ago, the District Court in Manhattan ruled that the dangers of restricting public access far outweighed any risks from a right of public access:

> While it is possible that in some cases the power to take testimony may be abused for the purpose of publishing scandalous and irrelevant matter, yet on the other hand the power of either party to forbid the opening of depositions until the trial may lead to abuses much worse, and to surprise and failure of justice at trial.

U.S. v. Tilden, 28 Cas. 169, 171 (S.D.N.Y. 1878).

That courts in other parts of the country agreed depositions were public court documents is evident in proceedings of the drafting committee that formulated the Federal Rules of Civil Procedure adopted in 1938. Some members of the committee stated that the public had the right to attend the taking of depositions.[16] Significantly, this discussion arose during consideration of

[16] The following colloquy occurred:

Mr. Pepper: Mr. Chairman, I am not worried about the fishing expedition aspect of this thing, but, in the part of the country I come from, I know perfectly well that this sort of power [to depose witnesses on a broad range of issues] given to a plaintiff is simply going to be used as a means of ruining the reputation of responsible people. You bring a suit against a man, without any ground whatever — the president of some important company. . . . You take his deposition, have the reporters present, and grill him in the most unfair way, intimating that he is a

Continued on next page …

Draft Rule 33(c), which would have permitted a deponent to request appointment of a master to preside over depositions to prevent abuse of this discovery tool. The idea of sealing depositions was not mentioned as a solution.

The preliminary draft of the rules published in May 1936 provides further evidence that the drafters presumed that depositions would be public. Draft Rule 32(b), *Depositions Before a Master*, stated: "… the court in which the action is pending may, on motion promptly made by such party and on good cause shown, make an order directing that such deposition shall be taken before a standing master of the court or a special master appointed for the purpose, …"[17] Committee member Edson R. Sunderland annotated his copy of this preliminary draft. Following the passage above, he wrote: "… and, in proper cases, that the examination shall be held behind closed doors with no one present except counsel and parties to the record and that after being sealed the deposition shall be opened only by order of the court." Sunderland's Preliminary Draft (annotated), May 1936.

Handwritten annotations in committee member Edmund M. Morgan's printed copy state: "at any rate ct. should have power to order dep. to be taken privately and to be sealed to avoid dep. for publicity only." Morgan's Preliminary Draft (annotated), May 1936.

As adopted, Rule 30(b), *Orders for Protection of Parties and Deponents*, stated:

> … upon motion seasonably made … and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, … or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed… .

Rules of Civil Procedure for the District Courts of the United States, 76th Cong., 1st Sess. (1938)

… Continued from previous page.

burglar or murderer, or this, that and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.

…

Mr. Sunderland: The particular difficulty you suggest, Senator [Pepper], by way of publicity as a result of the discovery examination, is one that does not actually occur very often, but I think it should be provided against by a rule that upon the request of either party the officer taking the deposition should exclude from the room where the deposition is being taken all persons not immediately concerned with the taking of it.

…

Mr. Dodge: I am not accustomed to having depositions taken in public.

Mr. Pepper: They always are with us.

The Chairman: Is not that a Constitutional requirement?

Transcript of Advisory Committee on Rules for Civil Procedure. Proceedings of Meetings (Feb. 20-22 1936, at 736, 754, 755.

[17] Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, May 1936 at 60.

at 39.

In 1970, as part of a general reorganization of the discovery rules, this provision was relocated to Rule 26(c).

Rule 30(f) required that depositions be "promptly" filed with the court clerk, and therefore they are public.

Interrogatories

At about the time depositions came into use in England and the United States, interrogatories were introduced in English chancery as devices for supplementing pleadings. Ragland, *supra*, at 11. Like depositions, interrogatories were intended to aid litigants in discovering the testimony of adverse witnesses. Accordingly, they were filed with the court, but kept secret until the witness had been cross-examined at trial. They were then made public. Langdell, *supra*, 11 Harv. L. Rev. at 144.

Federal Equity Rule 58 governing the taking and use of interrogatories followed the British practice. J. Hopkins, *supra*, at 269. The substance of Rule 58 was restated in Rule 33 of the Federal Rules of Civil Procedure. H.R. Doc. 588, 76th Cong., 1st Sess. at 31 (1938). Rule 33 allowed parties to serve written interrogatories and required the service of answers upon the submitter. It lacked an explicit filing requirement, but because answers had to be served, filing was required under Rule 5(d).

Document Discovery

Document discovery was also developed in Britain at chancery as a supplement to the pleadings. Ragland, *supra*, at 11. A litigant seeking documents through discovery had to file a bill for discovery in the Chancery Court. *Id*. at 12. Discovery at law and in equity were combined and reformed with the passage of the British Judicature Acts in 1873, which provided for interrogatories, depositions and document discovery. *Id.* at 18.

Although court procedure in England and in many of the United States permitted document discovery early in the 20th century, there was no similar procedure in federal courts prior to adoption of the Federal Rules of Civil Procedure. Pike and Willis, *The New Federal Deposition-Discovery Procedure: II*, 38 Colum. L. Rev. 1436, 1456 (1938). Lacking experience with document discovery, the Federal Rules drafters examined English and state procedure for guidance in formulating a new document discovery rule.[18] In England and many states, document discovery could be had only by order of the court, Ragland, *supra*, at 286-290 (1932); 3 SEARL, A TREATISE ON PLEADING AND PRACTICE AT LAW AND IN EQUITY IN THE STATE OF MICHIGAN § 1337 at 337 (1934). In the new Federal Rules of Civil Procedure, Rule 34 stated: "… the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party …" Like the rule

[18] Preliminary Draft of Rules Transcript of Advisory Committee on Rules for Civil Procedure, Proceedings of Meetings (Feb. 20-22, 1936), at 736, 754, 755.

governing interrogatories, Rule 34 lacked a filing requirement, although any papers which had to be served on parties also had to be filed under Rule 5(d).

Amendments made in 1946 brought document discovery under Rule 30(b) providing for protective orders. See Notes of Advisory Committee On Rules (1946). Under Rule 30(b), a party seeking to seal a document had to demonstrate "good cause." Thus, discovered documents, like depositions, were public unless sealed by a judge.

The Filing Requirement

The Advisory Committee on Rules for Civil Procedure wrestled with the issue of public access at some length before agreeing on the wording of Fed. R. Civ. P. 5(d), the general filing requirement which applied to interrogatories and document discovery, as well as pleadings. It considered three proposals — one designed to keep litigation private and two that permitted public access to discovery materials.[19]

The first version would have required filing only if an adverse party moved for filing or when the case went to trial. It applied to the "summons and each pleading … [and] all papers used or read on either side in connection with the application for an order or a hearing thereon…." The penalty for failing to comply was dismissal or default judgment.[20]

The second version stated, the complaint shall be filed with the court before the summons is issued. All other pleadings and all motions provided for in Rule 16 (governing pretrial procedure) shall be filed with the court within the time provided in these rules for serving and filing such pleadings and motions. All other papers in the action shall be filed with the court immediately after service thereof.[21] Filing pursuant to this proposal made papers public at once "for the purposes of directing speedy trial or exercising other control over the controversy, and *as notice to all persons*."[22]

The third version was very much like the second, but permitted the judge to impose sanctions for failure to comply with the filing requirement.

The Advisory Committee recommended that filing be required, following the precedent set by the Federal Rules of Equity, Report of the Advisory Committee on Rules for Civil Procedure, 16 (1937). The rule approved by Congress stated: "(d) FILING. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter." Fed. R. Civ. P. 5(d)(1938). Because documents were deemed published when filed, depositions and interrogatories were available to the public under the 1938 rules. Document discovery was impliedly opened to the public as a result of the 1946 amendments.

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[19] Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, Draft III (1936).

[20] Id. at 13-14.

[21] Id. at 14.

[22] 1d. at 15.

"[T]he first comprehensive review of the discovery rules undertaken since 1938" took place in 1970. H.R. Doc. 291, 91st Cong., 2d Sess., 17 (1970). In addition to amending the discovery rules, Rule 5 was amended in an effort to streamline civil discovery. *Id.* at 20. Amended Rule 5(a) made it clear that the filing requirement applied to those papers responsive to a document request. It read: "(a) Service; When Required. Except as otherwise provided in these rules … every paper relating to discovery required to be served upon a party unless the court otherwise orders, … shall be served upon each of the parties." Recognizing that answers might be voluminous or the number of parties great, the Advisory Committee stated that "the court is empowered to vary the requirement if in a given case it proves needlessly onerous." *Id.* at 21.

The discovery rules were rearranged to consolidate general provisions. Those dealing with protective orders were moved to Rule 26 and became applicable to all available discovery devices. *Id.* at 20. The requirement that a party seeking documents support the request with a showing of good cause was dropped from Rule 34. This change encouraged "extrajudicial discovery with a minimum of court intervention." *Id.* at 18.

These changes streamlined discovery by reducing the need for judicial participation and, for the first time, clearly brought document discovery under the general filing provisions, thereby making it public.

The Advisory Committee reconsidered Rule 5(d) in 1978 and proposed the following amendment: "[U]nless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examinations and interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in the proceedings." Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 622 (1978). According to the note accompanying the proposal, the change was needed because of "the cost of providing additional copies of such materials for the purpose of filing … and the … serious problems of storage in the clerk's office in some districts," *Id.*

Reaction to the proposed amendment was wide-ranging and critical, reflecting concern that the amendment would cut off public access to discovery materials as provided under Rule 5(a) and 5(d). Judge Walter R. Mansfield, chairman of the Advisory Committee, wrote of the reaction:

> It was pointed out that unless the products of discovery were filed in multi-party litigation, those parties who did not attend a deposition would often have difficulty gaining access to a copy. Representatives of the press complained about the 'unconscionable burden' of obliging them to secure a court order for access. Various organizations complained about the limitation on public access. Public interest lawyers argued that the lack of a file copy would increase their expense. It was objected that discovery materials form a part of the official record and should be on file with the court.

H.R. Doc. No. 306, 96th Cong., 2d. Sess., 15 (1980).

The Advisory Committee withdrew the proposal in 1979. *Id.* However, 18 chief District Court judges sought reconsideration of the proposal because of the cost and inconvenience of filing and because "some districts had already adopted local rules dispensing with the requirement that discovery materials be filed." *Id.* The Advisory Committee settled on a version of Rule 5(d) which required prompt filing unless dispensed with by the court on a case-by-case basis:

> (d) Filing — All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

H.R. Doc. 306, 96th Cong, 2d Sess., 3 (1980). The Advisory Committee note accompanying the proposal stated that the revised rule required the prompt filing of discovery materials because they "are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class. litigants similarly situated. or the public generally." *Id.* at 20.

Concern arose in Congress that the amended rule, approved by the Supreme Court, would prompt local rules waiving the filing requirement. Rep. Robert F. Drinan, chairman of the House Subcommittee on Criminal Justice, and Sen. Edward M. Kennedy, chairman of the Senate Committee on the Judiciary, sought assurance that this would not happen. In response, the Director of the Administrative Office of the U.S. Courts, William Foley, wrote that the amendment would not have the effect of allowing courts to routinely grant exceptions to filing. In a letter to Sen. Kennedy dated Aug. 26, 1980, Foley stated:

> The rule does contemplate that relief from the requirement of filing unnecessary discovery materials *will be authorized on a case-by-case basis and then only when the court has determined that it is unlikely that the proceedings will be of interest to the general public, members of a class. or litigants similarly situated.*

(emphasis added). With these assurances, Congress approved the amendment.

Local rules of many federal District Courts, including the D.C. District Court, however, adopt the position taken in the 1978 draft of Fed. R. Civ. P. 5(d) that filing is required only when ordered by the judge.[23] The comment accompanying the D.C. rule states:

> Due to the considerable costs to the parties of furnishing discovery material and the serious problems encountered with storage, this court is amending Local Rule 107(a). The amendment does not change the current practice or procedure of the court. The present rule requires that unless the judge assigned to the case enters a nonfiling of discovery order, discovery material is filed with the court. Since a majority of judges on the court presently enter orders for the nonfiling of discovery, the new rule would require the filing of discovery material only if an order is entered by the judge assigned to the case directing the filing of discovery material. Nothing in this rule precludes a party or

[23] Rule 107. Filing of Discovery Requests and Responses

Nonfiling of Discovery Materials.

Except as otherwise provided by this rule, interrogatories, depositions, requests for documents, requests for admissions, and answers and responses thereto, shall be served upon other counsel and parties but shall not be filed with the Clerk except upon order of the Court as require below…. The Court may in its discretion order that all or any portion of discovery materials in a particular case be filed with the Clerk.

other interested person from requesting of the judge assigned, that discovery materials be filed with the Clerk of Court in a particular case.

In opposing disclosure of discovery material, litigants often cite local rules permitting nonfiling and criticize Rule 5(d). But, as the Second Circuit noted in *In re "Agent Orange"*:

> Appellants disparage Rule 5(d) as merely a housekeeping rule, but an examination of the notes accompanying Rule 5(d) reveals substantive policy considerations underlying the Rule…. The Advisory Committee notes make clear that Rule 5(d), … embodies the Committee's concern that class action litigants and the general public are afforded access to discovery materials whenever possible. Moreover, we note that access is particularly appropriate when the subject matter of the litigation is of especial public interest… .

supra, 821 F.2d at 146.

In sum, discovery has long been open to the public under the Federal Rules of Equity and the Federal Rules of Civil Procedure. Various provisions in the rules and transcripts of Advisory Committee meetings since 1936 show that the drafters of the modern rules took public access into account in fashioning the discovery and filing rules.

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

In contrast to the public right of access to trials, which Chief Justice Burger traced back to early British common law, the concept of a right of privacy in the United States traces its origin to an article written by Louis D. Brandeis and Samuel D. Warren, 4 Harv. L. Rev. 193 (1890). They described it as the "right to be left alone." Dean Prosser elaborated on their work cataloguing four distinct torts encompassed by the right of privacy: intrusion, publication of private or embarrassing facts, statements that place a person in a false light, and misappropriation. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 804-14 (4th Ed. 1971). For our purposes only publication of private facts is relevant.[24]

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

RESTATEMENT (SECOND) OF TORTS, § 652D. Furthermore, if information, even intimate information, is already in the public domain, a new disclosure of that information would not be actionable. There are a few decisions in which state courts, notably in California, have found that publication of information about long-past crimes may give rise to private facts claims. *See, e.g., Briscoe v. Reader's Digest*, 483 P.2d 34 (Cal. 1971); *Melvin v. Reid*, 112 Cal. App. 285 (1931). But other states have concluded that when information is of public record it cannot be the basis

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

for such a claim, even after many years in obscurity. *See, e.g. Jenkins v. Bolla*, 600 A.2d 1293 (Pa. 1992); *Roshto v. Hebert*, 439 So.2d 428 (La. 1983); *Montesano v. Las Vegas Review*, 668 P.2 1081 (Nev. 1983); *Westphal v. Lakeland Register*, 2 Med.L.Rptr. 2262 (Fla. Dist. Ct. 10th Cir. 1977); *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (2d Cir. 1940).

Not all states have recognized either common law or statutory protection against publication of private facts. The New York Court of Appeals has ruled numerous times that the only form of invasion of privacy recognized in state law is misappropriation, codified in CIV. RIGHTS §§ 50 & 51. *See, e.g., Arrington v. New York Times*, 56 N.Y.2d 284, 434 N.E.2d 131 (N.Y. 1982), *cert. denied*, 103 S. Ct. 787 (1983). It does not recognize private facts claims, even under common law.

Because the common law right of privacy is inherently a matter of state law and the 50 states have taken significantly different positions on whether and to what extent they protect that interest; and because court records are deemed to be public and disclosure of such documents generally cannot be an invasion of privacy, even in states that recognize private facts claims, the federal judiciary should exercise extreme care in fashioning rules governing electronic access to case files, if it adopts rules at all.

CONCLUSION

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

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

Creating differing levels of access depending on the status of the person seeking it and/or the means used to obtain case information will work a significant hardship on members of the bar, the public, and the news media. In the absence of any hard evidence that granting access will cause harm that cannot be prevented by means less restrictive of First Amendment and common law interests, the Judicial Conference should not adopt restrictions on internet access to case

files. Rather it should rely on mechanisms already in place by which litigants can seek protective orders to ensure that sensitive information does not become public.

In sum, if the Judicial Conference adopts a uniform national policy it should be that all documents in case files that are open to the public at the courthouse should be available to the public online as well. To the extent that litigants believe that specific information in case files should be kept secret to protect personal privacy or sensitive proprietary information, it is their duty to demonstrate by the appropriate standard that the trial judge should issue protective orders. Trial judges, in turn, should be directed that they are to take the benefits of public access into consideration in ruling on such motions and that the public and news media have standing to oppose requests for protective orders. All of this is consistent with rulings of the Supreme Court and lower federal appellate courts.

Respectfully Submitted

ROBERT S. BECKER, ESQ.
3315 MORRISON STREET, N.W.
WASHINGTON, D.C. 20015
PHONE & FAX: (202) 364-8013
medialawyer@mindspring.com