05-BK-013

Comments of The Reporters Committee for Freedom of the Press

05-CV-032

February 15, 2006

To: The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
www.uscourts.gove/rules

05-CR-019

Re: Judicial Conference Advisory Committees on the Bankruptcy, Civil, and Criminal Rules request for comments on proposed amendments to the federal rules and forms

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The Reporters Committee for Freedom of the Press submits these comments in response to the Request for Comments on proposed amendments to the federal rules and forms regarding proposed policies concerning privacy protection in court filings, issued by the Judicial Conference Advisory Committees on the Bankruptcy, Civil, and Criminal Rules ("the Committees").

We appreciate the opportunity to be heard on this important issue.

General Interest of Signatory

The Reporters Committee is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee also has published a series of special reports on court secrecy, including Anonymous Juries in 2000, Gag Orders in 2001, Access to Terrorism Proceedings in 2002, Secret Dockets in 2003, and Grand Juries in 2004, and a series of reports on electronic access to court records, including Access to Electronic Records in 2003 and Electronic Access to Court Records: Ensuring Access in the Public Interest in 2002.

The Reporters Committee assists journalists by providing free legal information via a hotline and by filing *amicus curiae* briefs in cases involving the interests of the news media. It also produces several publications to inform journalists and lawyers about media law issues, including a quarterly magazine, *The News Media and the Law*, and a biweekly newsletter, *News Media Update*.

As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing filings made in the federal courts.

Introduction

The Reporters Committee has a strong interest in the accessibility of *all types of information* currently available through public court records in civil, criminal, and bankruptcy cases. Remote access enables the news media to discover and report important stories. Electronic court records, in particular, are of tremendous value to reporters because they can be mass-analyzed to detect systemic trends. Journalists in the emerging field of computer-assisted reporting frequently use computerized court records to break stories of major public importance. To cite a few examples:

- In January 2004, *The Miami Herald* published a four-part series exposing problems in the Florida criminal justice system, including severe racial disparities and overuse of "adjudication withheld" determinations that erase convictions from people's records. The *Herald*'s reporting was based on a computer analysis of electronic court records in more than 800,000 cases. (*See* Manny Garcia & Jason Grotto, *Justice Withheld*, MIAMI HERALD, Jan. 25-28, 2004.)

- Also in January 2004, *The Denver Post* reported that, in 41 percent of Colorado's child abuse and neglect cases, including some resulting in deaths, social service agencies had missed warnings of problems. The story was based on a computer-assisted analysis of thousands of state records, including court documents. (*See* David Olinger, *The Loss of Innocents*, DENVER POST, Jan. 18, 2004.)

- In October 2003, *The (Louisville) Courier-Journal* used computer analysis of court records to report that more than 2,000 indictments in Kentucky had been pending for more than three years, and that hundreds of cases had been dismissed for lack of prosecution. (*See* R.G. Dunlop, et al., *Justice Delayed: Justice Denied*, LOUISVILLE COURIER-JOURNAL, Oct. 12-19, 2004 (four-part series).)

- In September 2000, *The Chicago Tribune* analyzed 3 million state and federal computer records, including court records, to determine that more than 1,700 people had been killed accidentally due to mistakes by nurses across the country. The paper traced the errors largely to cost-cutting measures that overburdened nurses in their daily routines. (*See* Michael J. Berens, *Dangerous Care: Nurses' Hidden Role in Medical Error*, CHICAGO TRIB., Sept. 10-12, 2000 (three-part series).)

All of these stories would have been far more difficult (if not impossible) to report in the absence of electronic access to various types of information in civil, criminal, and bankruptcy court records. There is factual information of interest and value to the public in all areas.

In addition, remote access improves the news media's coverage of individual cases. The depth and quality of news stories are enhanced when reporters can obtain court filings by remote access at all times, rather than just during weekday business hours. Journalists have also told us that remote access to judicial records helps them to be more accurate. These advances ultimately help make the judicial system more accountable to the public.

Because the Reporters Committee itself does not routinely gather or disseminate information from court records, we will devote the remainder of this comment to addressing the Committees' questions more pertinent to our role as a free press advocate, i.e., those that pertain to exemption or restriction of categories of information.

Comments re: Proposed Rules

Our response to several subdivisions of the proposed Civil, Criminal, and Bankruptcy rules concerning privacy protection for filings are the same. To avoid repetition, we group our responses to these provisions together.

I. Years of Birth and Minors' Names Should Remain Public; Redacted Information Should be Unsealed when there is Great Public Interest.

Proposed Fed. R. Civ. P. 5.2(a); Fed. R. Crim. P. 49.1(a); Fed. R. Bankr. P. 9037(a): Redacted Filings

We propose that years of birth and minors' names not be exempt from the right of access. Journalists use these personal identifiers to correctly identify the subjects of their stories. The full name of a minor child, for instance, is of legitimate interest to a journalist who is covering a case of alleged abuse or neglect and seeks to confirm that she has correctly identified the victim. Likewise, an investigative reporter may need the date of birth of a criminal defendant in the course of investigating the allegations against him.

We also suggest that the Committees consider adding a provision that acknowledges that members of the public may, under this policy, ask the judge to unseal the unredacted version of a pleading containing a redacted personal identifier (or require the litigant to disclose the information, if an unredacted version is not on file with the court).

We believe the provision also should specify the *standard* governing such a request – for example, by requiring release of the information if the public's interest in it outweighs the asserted interest in privacy.

This revision would not create a new right, because members of the public already may file a motion to intervene in a judicial proceeding for purposes of unsealing a court record. Rather, it would clarify that there may be circumstances in which the redacted information is of legitimate public interest, and should be released.

II. Remote Access Should Be Equivalent to Access at the Courthouse.

Proposed Fed. R. Civ. P. 5.2(c): Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases

We begin by setting out what we consider the correct presumption for any policy on remote access to court records: namely, that *remote electronic access to case files should be just as extensive as that available at the courthouse*. That approach is true to both the legal principles and the policy considerations underlying the public's right of access to the judicial system.

As a legal matter, providing co-extensive remote and paper access is the most faithful means of accommodating the public's established First Amendment and common-law rights. Indeed, courts across the country have repeatedly held that the public has a qualified right of access to judicial proceedings and records.[1] The purpose for which access is sought does not matter. In adult criminal and civil cases alike, a record filed with a court is presumed to be public unless the judge has sealed it on the basis of case-specific findings that explain why the presumption of access has been overcome.

Public policy considerations also justify remote access to court records. As the U.S. Court of Appeals for the Second Circuit has said, "Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring . . . the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial

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[1] *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (recognizing common-law right of access to judicial records); *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015, 1027-31 (11th Cir. 2005) (right of access to court dockets); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991) (right of access to trial records); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (right of access to documents filed with a summary judgment motion); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) (long-standing presumptive public access to judicial records); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (presumptive public access to judicial proceedings); *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983) (First Amendment right of access to court records); *Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (First Amendment and common law rights of access); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (presumptive right of access to court records); *In re Nat'l Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980) (strong presumption of right of access).

proceedings." *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). The public's capacity to monitor the justice system is greatly enhanced when records are available online.

By limiting remote access to social security appeals and immigration cases only to parties and their attorneys, the Committee indicates that certain data currently available to the public will not be accessible online. Such a policy would inflict a grave public disservice. Information found in documents filed in all court cases should be made available to the public electronically to the same extent they are available at the courthouse in paper form.

Presumably the Committee makes this distinction based on the notion that some information is of legitimate interest to the public, but too "sensitive" to be readily available.[2] Such a proposal promotes the theory of "practical obscurity" – a doctrine articulated in a case with which we are quite familiar, *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) – yes, these documents are public, but by forcing someone to travel to a courthouse and look up a file, they are, for all practical purposes, "obscure," if not exactly secret.

The phrase "practical obscurity" was coined by the government and used by the U.S. Supreme Court as part of its reasoning in the *Reporters Committee* decision. The case had nothing to do with the public's right of access to court records, but rather concerned FBI compilations of such records and the interpretation of the Freedom of Information Act. The *Reporters Committee* case is not germane to formulating a policy of electronic access to court records.

More importantly, institutionalizing "practical obscurity" does not truly serve the purpose of protecting privacy interests. The "obscure" information will still be compiled by private companies, used by businesses, and even compiled in commercial electronic databases. In addition, truly sensitive information that serves no public purpose and would cause harm if released can be sealed from public view – both online and at the courthouse – through a protective order.

Often information that is personal and of no public value in one context, can be critical to public understanding of the judicial process in another context. An immigration decision, for instance, may seem like a purely private matter, but investigating how factors like race, country of origin, or evidence of persecution affect immigration determinations, requires a close look at all the records in searchable, sortable form. The ability to investigate and monitor immigration

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[2]The "volume of filings" does not seem to justify lesser electronic access to these cases since many types of criminal and civil cases, such as class action or RICO litigations, involve a high volume of filings but the Committees have not chosen to exclude them from electronic access.

decisions is particularly important considering that immigration courts only rarely issue published opinions explaining the justifications for their decisions. Social security appeals provide another example. While there is private material in a social security appeal, the parties are only before the court because they seek official state action to establish their rights, and the public has a great interest in understanding what arguments parties made, and what evidence courts found persuasive. There is always a public interest in knowing how courts decide these issues, what they consider, and what they don't.

Recently, reporters at *The Miami Herald* discovered from an analysis of hundreds of thousands of computerized case records that white criminal offenders are almost 50 percent more likely than blacks to receive a plea agreement that erases felony convictions from their records, even if they plead guilty. (*See* Manny Garcia & Jason Grotto, *Odds Favor Whites for Plea Deals*, MIAMI HERALD, Jan. 26, 2004.) That is precisely the kind of reporting on racial disparities needed to draw public attention to the issue. Restricting online access to the data will make it far more difficult, if not impossible, for reporters to expose such problems.

Serving the public interest in knowing how the courts operate means that the records must be presumptively open, allowing problems to be addressed on a case-by-case basis, not by cutting off meaningful access to a broad swath of important information. Restrictions on access based on the nature of a case would be a gross disservice to the public interest.

Opponents of online access to court records typically protest that it threatens the privacy interests of litigants. Even assuming that such interests are legitimate,[3] experience in other jurisdictions has shown that this concern is overstated. States such as New York and Maryland, which have enacted liberal electronic access policies, have not suffered any adverse results. Nor have the federal courts. We urge the Committee not to strike entire categories of information from online availability until at least awaiting the results of actual practice, not unsupported fears.

As the Committee is aware, our legal system generally addresses the misuse of information through after-the-fact remedies, not through prior restraints on the information's availability. Under federal law, for example, identity theft is a felony with the potential for serious jail time. *See* 18 U.S.C. § 1028(a)(7) (identity theft is punishable by up to 15 years in prison, and more if used to facilitate terrorism). The threat of severe criminal penalties, combined with aggressive law enforcement, is the best means of discouraging identity theft.

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[3]The scope of litigants' "privacy" rights in documents that they file with a court is debatable, to say the least. The courts are a publicly financed institution, and litigants in civil disputes have availed themselves of the judicial process voluntarily.

Similarly, any concerns about the potential harms of non-meritorious allegations (for example) are best addressed through after-the-fact remedies, not prior restraints. Depending on the circumstances, abuse of such information might give rise to a claim for libel or defamation. Judges also have other remedies, such as entering sealing orders for particularly sensitive cases, at their disposal.

In short, existing law already provides remedies for the rare instances of abuse that might result, in isolated cases, from the widespread availability of court records over the Internet. We therefore encourage the Committee to give existing law an opportunity to address any problems that might arise, rather than rush to cut off electronic access to public information in advance.

We strongly urge the Committee to reject any attempts to make electronically accessible court records less available than those accessible at the courthouse.

III. The Standards for Sealing Filings and Entering Protective Orders Should be Explained.

Proposed Fed. R. Civ. P. 5.2(d); Fed. R. Crim. P. 49.1(c); Fed. R. Bankr. P. 9037(c): Filings Made Under Seal

Proposed Fed. R. Civ. P. 5.2(e); Fed. R. Crim. P. 49.1(d); Fed. R. Bankr. P. 9037(d): Protective Orders

For clarity, we suggest that the provisions for filings made under seal and protective orders specify the *standards* governing such requests – for example, by requiring specific findings on the record and giving the public an opportunity to be heard on the issue and by requiring a show of good cause that the party would otherwise suffer an undue burden. *See Press-Enterprise Co. v. Superior Ct. of Calif.*, 464 U.S. 501, 510 (1984) (a party may only overcome the public's first amendment right of openness if it shows "that closure is essential to preserve higher values and is narrowly tailored to serve that interest."); Fed. R. Civ. P. 26(c) (on good faith and for good cause shown, a court may enter a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."). As we mentioned on page 4 regarding redactions, we also recommend adding a provision that acknowledges that members of the public may, under these policies, ask the judge to unseal sealed filings and remove protective orders when the public's interest in the information outweighs the asserted interest in privacy. Again, these revisions would not create new rights, but would clarify the circumstances under which information may be sealed or protected and when it should be released.

Conclusion

We appreciate the chance to weigh in on the proposed amendments to the federal rules issued by the Judicial Conference Advisory Committees on the Bankruptcy, Civil, and Criminal Rules as the Committees reevaluate their policies concerning access to court records. Because a policy of broad remote access to court documents improves the quality of news coverage and enhances the public's capacity to monitor the judicial system, we ask the Committees to create a remote access system that is as extensive as paper access at the courthouse.

Respectfully submitted,

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