COMMENTS TO PROPOSED TRIAL COURT RULE XIV UNIFORM RULES ON ACCESS TO COURT RECORDS

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Comment on Trial Court Rule XIV

From : Benforado,Adam <afb35@drexel.edu> Fri, Jan 29, 2016 12:32 PM

Subject : Comment on Trial Court Rule XIV

To : rules comments <rules.comments@jud.state.ma.us>

Dear Judge Lauriat,

I am a law professor at Drexel University's Kline School of Law in Philadelphia. A journalist who read my recent book, Unfair: The New Science of Criminal Injustice, contacted me this week about the proposed Trial Court Rule XIV because he believed that proposed Rule 4 stood as a threat to one of my reform proposals: encouraging the collection and analysis of data on judicial behavior and outcomes. Having now read the rule, I share his concerns.

To ensure equal justice and accountability, bulk data needs to be made available for analysis. Much of the unfairness in our system continues to occur simply because no one is aware it is going on. Compiled data is helpful in gaining insight into unappreciated problems, but it is bulk data that provides the best chance for journalists and academics to identify damaging patterns.

The notes to Rule 4, articulating the motivation for the rule, are unconvincing. It is not clear to me that providing access to bulk data would actually entail a significant burden for court personnel and, if it did, I think providing access for a fee to cover additional costs would be much better than denying access to the public altogether. In addition, I'm dubious that providing bulk data would cause unwarranted harm to litigants, victims, witnesses, and jurors. And it seems that any harm (e.g., employing the bulk data for commercial purposes) could easily be remedied with a restriction on the use of the data. Most importantly, I think Rule 4 ignores the ongoing harm to court participants that comes from unacknowledged disparities within the system. The only way to address hidden biases is to expose them.

I hope that you will consider a revision.

Best regards,

Adam

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*** UNFAIR: The New Science of Criminal Injustice ***

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May 4, 2015

BY EMAIL (rules.comments@jud.state.ma.us) AND BY HAND

Hon. Peter M. Lauriat, Chair
Public Access to Court Records Committee
Superior Court Administrative Office, 13th Floor
Three Pemberton Square
Boston, MA 02108

Re: Press Access To Docket Information on www.masscourts.org

Dear Justice Lauriat:

I write on behalf of Bloomberg BNA ("BNA"), a leading provider of legal, tax, regulatory and business information for professionals, in response to the request for comments on the Proposed Uniform Rules on Public Access to Court Records (the "Proposed Rules"). BNA has seen the comments submitted by Courthouse News Service, the New England Newspaper and Press Association, and the New England First Amendment Coalition ("the Press Coalition"), and wishes to join in those comments, with which it agrees.[1] BNA writes separately to make several additional suggestions for the Public Access to Court Records Committee's consideration.

1. Final Court Decisions in All Cases Should be Remotely Accessible.

Proposed Rules 5(b) and 5(d) provide that electronic full text court documents will only be available on the "Attorney Portal," unless the Chief Justice of the Trial Court determines that "additional electronic court records or information may be made remotely accessible to the public." Because of the paramount importance of final judicial decisions in our ability to report on matters of great public interest, we suggest that Rule 5(b) be modified to provide that Superior Court judicial opinions, judgments, and final memoranda of law presumptively be made available, remotely as well as at courthouse kiosks on a statewide basis, to lawyers and non-lawyers alike.

2. Civil Case Searches by Date Range Should Be Permitted.

Proposed Rule 5(a)(1)(ii) provides, "Civil cases may be searched by party name or case number." BNA urges that remote access to electronic court records also enable date-range searches, so that journalists are able efficiently to discover new case filings and

[1] The Press Coalition argues, and BNA agrees, that Superior Court records should be publicly accessible to lawyers and non-lawyers alike; that kiosk access should be statewide in scope; that any "time, place, and manner" restrictions on access in a courthouse must protect the timeliness of access; and that handheld devices should be permitted.

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developments. Such a capability is integral to the news media's ability to report on new case filings and keep their readers as informed as possible on matters of public interest.

3. Rule 3's Presumption Against Commercial Use Should Not Extend to Legal Information Providers.

Proposed Rule 3 ("Requests for Compiled Data") allows requests for compiled data solely for "scholarly, educational, journalistic, or governmental purposes," and permits approval of a request to be conditioned on the requester's agreement not to use the material "for a commercial purpose." It is not entirely clear where the Trial Court would draw the line between "educational" or "journalistic" use, on the one hand, and "commercial" use, on the other. We request that Rule 3 be modified to clarify that requests for compiled data by legal information providers would be among the purposes for which a request for compiled data could presumptively be permitted.

4. The Committee Should Leave the Door Open to Adopting Rules in the Future That Would Allow Limited Bulk Access.

Finally, we note that Proposed Rule 4 ("Requests for Bulk Data") indicates that requests for bulk data will be denied except where "explicitly required by law, court rule, or court order." Bulk access, if properly regulated, can in fact cause less burden on court personnel and less of a strain on court resources than manually configured searches for specific subsets of compiled data. It can also lead to more accurate, comprehensive, and efficient transmission of information. We understand that the Committee is not prepared to summarily allow bulk access at this time. As the Trial Court's experience with these new rules proceeds, however, we urge the Committee to leave the door open to developing, in the future, rules permitting bulk access to civil, non-housing docket information. Access of that nature is routinely allowed in numerous other jurisdictions and is yet another important tool to keep the public informed. To that end, we suggest that the proposed rule be revised as follows: "Requests for bulk distribution of court record information shall not be granted **at this time**, except where explicitly required by law, court rule, or court order, **or except as may in the future be authorized by the Trial Court subject to delineated restrictions."** BNA would be pleased to work with the Committee as it explores this issue further.

Thank you for your consideration of BNA's comments on the Proposed Rules.

Sincerely,

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April 20, 2016

Hon. Peter M. Lauriat
Chair, Public Access to Court Records Committee
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Boston, MA 02108

Re: Comments on Proposed Trial Court Rule XIV Uniform Rules on Access to Court Records

Dear Judge Lauriat,

On behalf of the Boston Bar Association (BBA), I thank you for the opportunity to comment on the proposed Trial Court Rule XIV, Uniform Rules on Public Access to Court Records. The BBA appreciates and recognizes the efforts put forth by the Public Access to Court Records Committee (Committee).

The proposed Uniform Rules were reviewed by a Working Group of BBA members from diverse fields including criminal law, employment law, health law, legal services, media and First Amendment law, probate and family law, and real estate and landlord/tenant law. The Working Group wrote draft comments that were then reviewed by all of the BBA's practice-area Sections. The Criminal Law, Delivery of Legal Services, Immigration, and Family Law Sections all added further comments that are included in the attached document. We hope that they may be useful to the Committee as it considers the proposed initiatives.

Thank you for providing members of the bar with an opportunity to weigh in on this important issue, and please feel free to contact me should you have any questions or concerns.

Very truly yours,

Lisa G. Arrowood

Lisa Arrowood
President

Comments of the Boston Bar Association on the Proposed Uniform Rules on Public Access to Court Records
(4/20/2016)

The Boston Bar Association (BBA) applauds the work of the Public Access to Court Records Committee (Committee) in crafting the Proposed Uniform Rules on Public Access to Court Records ("Proposed Rules") and thank them for inviting public comment and holding an open hearing on June 15, 2015.The BBA appreciated the opportunity to submit a letter noting the importance of broad online access to court records.

The BBA convened a Working Group which included lawyers who practice in diverse fields including criminal law, employment law, health law, legal services, media and First Amendment law, probate and family law, and real estate and landlord/tenant law. As such, the comments below will often reflect divergent viewpoints, but the BBA believes the Committee will benefit from the full range of perspectives the BBA membership has to offer.

Executive Summary

The Working Group found common ground on the following recommendations:

1. Pro se litigants should have the same remote access as their opposing counsel.

2. In light of the important public policy interests at stake and the self-accelerating pace of technological developments, the Rules should require a periodic review of the public and the bar's experience with remote access to permit consideration of recommended revisions.

3. Remote access to Superior Court orders and decisions in civil cases should be made available on the public online docket system to the extent the records are not impounded, confidential, or subject to any of the limitations otherwise laid out in the Proposed Rules.

4. Attorneys participating in pro bono programs that permit limited assistance without filing an appearance in the case (e.g., Lawyer for Day in the Housing Court and Probate and Family Court) should have remote access to the cases of the clients they serve.

5. Cellular phone cameras or scanning programs that require the use of a relatively small flash should be permitted to photograph or copy records in clerks' offices and courts where cell phones are permitted.

6. Requests for "compiled data" under Proposed Rule 3 should not require a description of the purpose of the request other than a certification that the data is sought for scholarly, educational, journalistic or governmental purposes. The discretion of the Court Administrator to deny such requests should be limited to requests that would unduly tax the resources of the Court.

7. The home addresses of pro se litigants should not be available online to ensure equal treatment with litigants represented by counsel.

8. The procedures for requesting the correction of errors in court records should be streamlined to provide a more efficient remedy for aggrieved parties.

The Working Group did not reach consensus on other aspects of the Proposed Rules. We summarize the differing views below so that the Committee has the benefit of those differing perspectives. As a general matter, the Working Group divided between those who are concerned about the effect public remote access to all criminal and civil dockets would have on vulnerable constituencies and those who support a greater measure of online access than is permitted under the Proposed Rules for lawyers, the media and scholars who certify the purpose for which expanded access is sought.

The Working Group's comments were also reviewed by all BBA Sections and comments from the Criminal Law, Delivery of Legal Services, Immigration, and Family Law Sections are also included here. They shared many of the thoughts and concerns of the Working Group, but had specific views based on their practice areas of expertise.

BBA Working Group Comments

1. Consensus Comments

While the BBA's Working Group labored to find consensus, given its diverse composition, there are a few points where all members agreed.

1. *Pro se* litigants should have the same online access to court records concerning their own cases as they would have if they were members of the bar. The members of the Working Group understand that this may require the creation of a special login and password regime for *pro se* litigants, but believe that fairness and "access to justice" demand that parties litigating a case do so on as equal a playing field as possible. In addition, such access may alleviate some of the burden on clerks' offices from having to answer routine questions of *pro se* parties.
2. Given the constant development of technology and the importance of protecting the delicate balance between convenience, access rights, and privacy, the Committee should add a provision requiring the review and update of these rules at a regular set interval of a period of years. The Committee should determine the best time frame for this review interval.
3. The rules should provide that images of civil Superior Court orders and decisions shall be made available on the *public* online docket system to the extent they are not impounded, confidential, or subject to any of the limitations otherwise laid out in the Proposed Rules. The Proposed Rules currently provide only that civil dockets will be made public, that pdfs of decisions may be made available on the Attorney Portal, and that the Chief Justice of the Trial Court may make additional documents public in her discretion. (Proposed Rule 5(b)-(d)). The Working Group believes that broad online access to Superior Court civil decisions would serve as a valuable resource for lawyers, *pro se* litigants, and the public at large, and carries little risk of prejudice to any party.
4. The Proposed Rules provide that civil dockets shall be generally available online, subject to the right of each department of the trial court to request that certain case types be exempted from such access. Proposed Rule 5(a). The Notes to the Proposed Rules further state that "attorneys shall have no greater access to court records than the general public except for those cases in which they have entered an appearance." Notes to Proposed Rule 5(b). However, some pro bono programs permit attorneys to provide limited advice and representation without entering an appearance in a case. To the extent civil cases are exempted from public online access and from online access by attorneys without an appearance in the matter, the Proposed Rules should still provide online access to all court dockets related to attorneys participating in a pro bono program that permits limited assistance without an appearance in the case, such as Lawyer for Day in the Housing Court or Probate and Family Court. Online docket access in these limited circumstances would help lawyers better advise and serve the many individuals seeking assistance through these programs.
5. Other consensus points more clearly tracked specific Proposed Rules. They are:
    a. Proposed Rule 2 - The language in Proposed Rule 2(j)(1) and its accompanying Note appear to prohibit the use of handheld devices to scan court records if they use a flash. The prohibition on the use of devices with flash capabilities in a clerk's office seems anachronistic given the widespread use of cellular phone cameras or scanning programs that require the use of a relatively small flash, but are otherwise innocuous. Because of

their prevalence and convenience, such devices should be allowed to be used to scan documents in clerks offices and courts where cell phones are permitted.

b. Proposed Rule 3 –This rule should be revised to provide more guidance to both requesters of "compiled data" and the Courts. Specifically, requesters of data should not have to "describe the purpose" for their requests as is required by Proposed Rule 3(a) but rather should require a requester only to certify that the purpose of the request is scholarly, educational, journalistic or governmental. Additionally, Proposed Rules 3(b) and (d) should limit the discretion of the Court Administrator to deny such requests to circumstances where the resources of the court would be unduly taxed.

c. Proposed Rule 5 – Proposed Rule 5(a)(1)(i)(B) should not require the addresses of self-represented litigants to be available online. Such requirement could amount to unequal treatment, since litigants represented by attorneys are not subject to having their personal address information online.

d. Proposed Rule 6 –Proposed Rule 6 should be edited to more clearly lay out standards both for requests to correct clerical errors and for the courts in reviewing and potentially fixing them. Members discussed frequent clerical errors on dockets, especially prevalent in certain courts, which errors could have life-changing implications for vulnerable individuals and recognized the important need for a fast and efficient way to correct such mistakes. The comments below contain some suggested language to accomplish this task.

2. Non-Consensus Comments

Members of the BBA Working Group did not reach consensus on the following points after lengthy discussions. These comments reflect the differing and, at times, divergent views.

a. Proposed Uniform Rules

Two major schools of thought emerged in lengthy discussions amongst Working Group members regarding online access to court records generally. These are: 1) everyone should have equal online access to their own or their client's court records and, 2) lawyers and other select groups (media, scholars) should have broader online access than the general public. In addition, members were divided on how to address application of the Proposed Rules in various courts, particularly those handling the highest volumes of sensitive information.

In addition, members also noted that it is unclear how the Proposed Rules will operate with regard to the current masscourts.org system. For example, the Proposed Rules repeatedly describe the attorney portal as providing the same access as the public online portal with the sole exception that it will provide attorneys with "remote access to all cases in which they have entered an appearance and a calendar of scheduled events in such cases." As stated in the notes to Rule 5(b), "attorneys shall have no greater access to court records than the general public except for those cases in which they have entered an appearance." Yet the attorney portal of the masscourts.org system presently provides more information to attorneys than is available to the general public, as it allows attorneys access to online information on cases where they have not entered an appearance.

b. Equal Online Access

Members expressed different views on the varying degrees of equal access. Some felt that a public portal and an attorney/open-case portal as generally contemplated in the Proposed Rule was the best resolution. Others felt that the public should have the same level of access as attorneys, and within this group, some then felt that such access should either be greater than or more limited than the bounds contemplated in the Proposed Rule.

c. Tiered Online Access

Some members expressed support for a tiered online access system whereby some defined group(s) could enjoy the same access as attorneys, while the general public would have lesser access than is currently contemplated to give further protections to certain case types. In discussions about the Proposed Rules as well as at the Committee's public hearing, some members expressed the following concerns that favored lesser access to online data to protect privacy, including:

- Case information could be obtained from the database (even if encryption software is used) and used either for improper purposes by third parties and/or posted publicly and potentially indefinitely on the internet.
- The internet opens a different dimension of communication that continues to evolve and has the capacity to repeatedly put people in harm's way (i.e. cyberstalking, malicious tweets) if personal information in court records is readily available remotely on the internet.
- There is no right to counsel to protect one's privacy rights, which mean the poor are the most adversely affected when information they do not want to be public is put online.
- Certain landlords blacklist any tenants whose names appears in certain types of cases or case captions, even if their name was on the case in error or the case was to enforce their rights, such as requiring a landlord to perform requisite repairs.
- Online dissemination of intensely personal information for those involved in family law cases, even if access is limited to docket information. Pleading titles in that court may contain descriptions that can reveal much of their substance. This could again lead to improper use of such information and expose the individuals involved as well as their relatives, especially their children, to ridicule, public shame, or other detriment if these records are readily available online.
- Online access to criminal court records could increase barriers to jobs, housing, and other opportunities (training, internships, or even accompanying one's child on school field trips) that result from having a past criminal case. Some members felt that limiting criminal case searches to docket number (or date) rather than a name was not sufficient protection from these risks because software could be developed to search all docket numbers.
- Online access to court records will lead to greater proliferation of criminal background checking companies which the National Consumer Law Center has stated are under-regulated and produce reports that are out of date, contain errors, and/or fail to comply with consumer laws.
- New software is expensive, quickly goes out of date, and is not enough to stop data "scraping."
- Online access to criminal records would undermine record sealing laws that intend that sealing be available after a five or ten year wait for convictions, and permit sealing of non-convictions without a waiting period. Sealing would become a useless remedy if data is too easily accessed, posted online, or misused for commercial or other purposes.
- Internet access to criminal records will deepen poverty in communities of color because of racial disparities in the criminal justice system. Piling on of further adverse consequences through

online access to court records would further erode confidence in our system of justice, especially in a post-Ferguson world.

- Putting court dockets online is a mistake because Masscourts records often have errors that may cause harm to litigants and former defendants.
- There is no constitutional right to online record access.

However, other members noted the benefits of online access to court records:

- "What transpires in the courtroom is public property." Craig v. Harney, 331 U.S. 367 (1947).
- There is no legally recognized privacy interest in public court records absent a valid statute, court rule or court order.
- Because the Proposed Rules do not permit access to any records that are impounded by statute, court rule or court order, the Proposed Rules are entirely consistent with existing privacy rights.
- Remote access to criminal dockets should be expanded to permit searches by calendar date. The predecessor electronic docket system permitted searches by calendar date. The notes to the Proposed Rules do not cite any data indicating that this longstanding practice caused any problems or infringed on any protected interest.
- Imposing additional restrictions on remote electronic access will not serve the intended purpose because (a) the information is public to all; and (b) employers, landlords and private citizens already may obtain access to the same information (and more detailed records) by using inexpensive commercial services. These companies will continue to flourish with or without public access to electronic court records. The primary effect of imposing restrictions on the public will be to make it more difficult for citizens who have a legitimate interest in the functioning of the courts to obtain public information about the judicial system.
- The combination of limiting searches to one court at a time and utilizing anti-scraping software provides substantial protection against private entities creating compilations of criminal record history of the type that arguably implicate privacy interests.
- As a matter of public policy, discrimination against tenants or individuals with criminal records should be addressed by legislation that outlaws such discrimination or addresses the root causes of those problems. Attempting to solve these problems by imposing confidentiality regimes fails to recognize the price paid by depriving the public of ready access to public information about the functioning of the criminal justice system.
- The competing interests identified by members of the Working Group might be balanced by establishing a system that allows more extensive remote access to authorized representatives of news organizations that (a) register with the Court; and (b) commit not to re-sell or use the information for any commercial purpose other than newsgathering and reporting.

Proposal 1: Online Criminal, Housing, and Probate and Family Court Case Access

The Proposed Rules already grant preferential access to certain categories of requesters in Proposed Rule 3 where members of the public can access "compiled data" for "scholarly, educational, journalistic, or governmental purposes." The Proposed Rules also allow the Court Administrator to condition approval of a request on the requestor agreeing in writing that the information will "not be used for a commercial purpose." Other court rules have similar restrictions on the purposes of information usage. See e.g., Supreme Judicial Court Rule 1:19: Electronic Access to the Courts (permitting "photographing or

electronic recording or transmitting of courtroom proceedings open to the public by the news media for news gathering purposes and dissemination of information to the public.").

Thus, some members recommended granting the following online access to court records to attorneys and a defined class of individuals:

- Superior Court cases (both civil and criminal): as defined in the Proposed Rules 5(a)(1)-(2)with the addition of PDFs of pleadings and orders; and
- District Court civil and criminal cases[1]: as defined in the Proposed Rules. 5(a)(1)-(2)._

The public online portal would have access to:

- Superior Court civil and criminal cases: as defined in the Proposed Rules 5(a)(1)-(2); and
- District Court civil cases: as defined in the Proposed Rules 5(a)(1)-(2), but excluding , all Housing Court cases, District Court landlord-tenant cases, and Probate and Family Court cases.

Under this approach, the general public would continue to have full in-person access rights and abilities, but would have more limited online access than is contemplated in the Proposed Rules. This would protect individuals with relatively minor criminal records, tenants from landlord abuse, and individuals with cases in Probate and Family Court who are at potentially greatest risk for having sensitive information revealed in filings and dockets.

Proposal 2: Online Criminal, Housing, and Probate and Family Court Case Access

Other attorneys agree there should be no online public access to Probate and Family Court cases or housing cases in Housing Court or the District Court, but would also exclude all criminal cases in all trial courts divisions from access online by the public and attorneys not involved in the cases. Proposed Rule 5(a)(2)(iii) would limit online access and provides that "criminal cases may be searched only by case number." The notes to Proposed Rule 5(a) (2) state that "as a matter of policy, the committee has determined criminal case searches will be limited to case number." "If the Trial Court were to provide the public with the ability to remotely search criminal cases by a defendant's last name, which could essentially reveal a defendant's entire criminal history, it could thwart the careful balance between access and privacy struck by the Legislature in enacting the CORI statute." The Notes also discuss the SJC's decision in *Commonwealth v. Pon*, 469 Mass. 296 (2014) and state "that access to criminal records

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[1] (2) Criminal cases.
(i) Generally. Except as exempted in Rule 5(a)(2)(iii), the following information shall be viewable remotely in criminal court records:
(A) The full name of each defendant and the related case or case number(s) by court department and division;
(B) The name and mailing address of each attorney who has entered an appearance and of each self-represented litigant;
(C) The docket of a specific case; and
(D) Calendar information.
(ii) Search. Criminal cases may be searched by case number.
(iii) Exemption of certain criminal case types. Each appropriate Department of the Trial Court may request permission from the Chief Justice of the Trial Court to exempt certain criminal case types or categories of information from remote access. A list of the approved exemptions shall be available on the Trial Court's website.

negatively affects a defendant's future employment prospects, which, in turn, makes rehabilitation more difficult." The notes indicate that the Proposed Rule reflects the committee's "concern that permitting a broad criminal record search through the Internet Portal would frustrate the privacy and rehabilitation concerns identified and protected by the Legislature and Supreme Judicial Court."

These Working Group members in favor of limiting online access to criminal records in Superior Court, District Court and the Boston Municipal Court praised the committee's recognition of the risks related to putting records online. They noted that former defendants with convictions or the most serious records are the very people who need the most help finding jobs. CORI reform intended to help people with records in all trial court divisions. They also noted that a job is a major factor in reducing recidivism and also can reduce reliance on public assistance.

d. Other Provisions

i. Proposed Rule 2 – Cell phone or camera flash

Some members felt that the language in the note to Proposed Rule 2(j)(1) Handheld Device was outdated given the widespread use of cellular phone cameras or scanning programs that require the use of a flash, but are otherwise unobtrusive. Because of the prevalence of these devices, their convenience, and relatively small flash as compared to external flash units for SLR-style cameras, members recommended that the note be amended from the following options:

- (1) Handheld Device. A member of the public may use a cellular telephone or other electronic imaging device to photograph or generate an image of a court record in a Clerk's office provided doing so does not unreasonably interfere with the operation of the Clerk's office~~, use a flash,~~ or make an audio or video recording.
- (1) Handheld Device. A member of the public may use a cellular telephone or other electronic imaging device to photograph or generate an image of a court record in a Clerk's office provided doing so does not unreasonably interfere with the operation of the Clerk's office, use an excessive flash, or make an audio or video recording.
- (1) Handheld Device. A member of the public may use a cellular telephone or other electronic imaging device to photograph or generate an image of a court record in a Clerk's office provided doing so does not unreasonably interfere with the operation of the Clerk's office, use an external flash, or make an audio or video recording.

Some members also hoped that the Proposed Rules would provide an exception in the same note for cellular phone usage, even at Court facilities that do not otherwise permit the public to bring cellular phones. The exception could be narrowly tailored to permit only phone usage for record gathering and could also be conditioned on the phone user's completion of paperwork to provide identification and a certification on their cellular phone usage. For example:

> The Trial Court has adopted a Policy on Possession and Use of Cameras and Personal Electronic Devices (effective August 14, 2015). Under the policy, some Trial Court facilities do not permit the public to bring cellular telephones and other personal electronic devices into a court facility. The Trial Court's policy and a list of the Trial Court facilities that have banned the public's use of cellular telephones and PEDs is available of the Trial Court's website. Proposed Rule 2(j) does

not supersede a particular courthouse's security regulations. However, courthouses should permit cellular phone usage for individuals taking pictures or scans of documents and may condition such usage on the completion of identifying paperwork and certification on cellular phone usage only for this limited purpose. ~~If the court facility does not permit cell phones within the building, the requester may obtain a copy through other means identified in this rule.~~

ii. Proposed Rule 2(g) Comment

Working Group members had concerns that the note on Proposed Rule 2(g), Impounded Records (p.13) was unclear and may contain a typographical error. They recommended the following change:

Rule 2(g) Impounded Records. Only parties to and attorneys of record with an active appearance in a restricted case shall be granted access to the impounded court records in that case, unless the records are ~~sealed~~ unsealed or access is ordered otherwise.

iii. Proposed Rule 3 Compiled Data

Some members had concerns about Proposed Rule 3, Requests for Compiled Data, specifically, that requesters of data should have to "describe the purpose" for their requests as is required by Proposed Rule 3(a) and felt that Proposed Rules 3(b) and (d) had overly broad language and the potential for abuse. Instead, they felt that requests for compiled data should be limited only by certification of purpose (scholarly, educational, journalistic or governmental) and the burden on court resources. The following proposed revisions would help to alleviate some of these concerns:

RULE 3. REQUESTS FOR COMPILED DATA

(a) Procedure for Making Requests. Requests for compiled data may be made by any member of the public for scholarly, educational, journalistic, or governmental purposes. Such requests shall be made to the Court Administrator in such form as the Court Administrator may prescribe. Each requester must (i) identify what compiled data is sought, and (ii) ~~describe the purpose for requesting the compiled data.~~ certify that the compiled data is being sought for scholarly, educational, journalistic or governmental purposes.

(b) Determination. The Court Administrator, in consultation with the Chief Justice of the Trial Court, shall have discretion to grant or deny any request or part thereof for compiled data if fulfillment of the request would unreasonably burden court resources. ~~The Court Administrator shall consider (i) whether the request is consistent with the purpose of these rules and (ii) whether the request may be compiled by the court without undue burden or expense.~~ The Court Administrator shall not grant a request for compiled data that is otherwise prohibited from public disclosure ~~or for data where the electronic record is not an accurate representation of the official court record.~~ The Court Administrator's decision shall be communicated to the requester with the reasons therefor.

(c) Fees. Upon allowance of a request, the Court Administrator may require the payment of a reasonable fee for staff time and resources to compile and provide the requested compiled data.

(d) Conditions. The Court Administrator may condition approval of a request for compiled data on the requester agreeing in writing not to use it for ~~to certain limitations on the use of the data, such for a as that it not be used for~~ a commercial purpose that is unrelated to a scholarly, educational, journalistic or governmental purpose.

iv. Proposed Rule 5 Motions to Limit Access and Address Provisions

1. Motions to Limit Access

Some members of the Working Group recommended providing a process in this Proposed Rule for individuals to file a motion that would limit online access to their court records. Sample language that could be included as Proposed new Rule 5(a)(1)(iv) is below, provided such a motion would clarify that judges have authority to grant such relief. Other members felt that this remedy was already available to litigants and that a specific rule would not only be duplicative, but could also burden the courts, should these motions begin to proliferate in practice.

Motion to Limit Remote Access. At any time during or after the pendency of a civil action, a litigant in a civil case may petition the Court to limit remote access to some or all of the docket information displayed under this rule. The Court shall grant such a motion upon a showing of good cause

2. Address Provisions

Some members of the Working Group had concerns about the address requirements of Rule 5. The note on Proposed Rule 5(a)(1)(i)(B) on addresses for self-represented litigants state such litigants can provide a "preferred" address "such as a United States post office box number, if they do not want their home address viewable on the Trial Court's Internet Portal." Members recognized the convenience of listing addresses of criminal parties for ease of contact for those involved in the case, general record keeping, and protection against confusion of individuals with common names. However, they had concerns that requiring addresses of pro se litigants was unequal treatment, as litigants represented by attorneys were not subject to having their personal address information online. Thus, Working Group members agreed that while attorneys address information should be available online, pro se litigants should not be subject to this requirement. Some members also had concerns about indigent pro se litigants who would be forced to provide their home address because they cannot afford a post office box or who may not be able to provide any address if they are homeless.

v. Proposed Rule 6 – Correcting errors

Members of the Working Group noted the importance of having an efficient process for correcting clerical errors, especially given many members' observations of frequent errors in dockets currently and the potentially major consequences noted above related to online access. Members supported revising Proposed Rule 6 to clarify the process for correcting errors.

Any party, nonparty, or their attorney may make a written request to correct a clerical error in an electronic docket. Such a request ~~must~~ may be made using a form that ~~can be found~~ shall be made available online at masscourts.org ~~or~~ and at ~~any~~ each Clerk's office. The completed form must be submitted to the Clerk's office where the court record in question is physically

located and to all parties. If the form, including any supporting materials filed therewith, indicates that the electronic docket entry contains a clerical error, and the court indicates the electronic docket entry contains a clerical error, opposing counsel shall have 14 days to file an objection. If no objection is filed, the clerk shall grant such request forthwith without hearing and without the necessity of appearance of any party or counsel.

Should the clerk deem a hearing to be necessary, or upon the filing of a response by any other party to the request for correction, a hearing shall be held promptly and no later than seventeen (17) days following the request for correction or three (3) days after the response thereto filed by any other party.

NOTE

This Rule is intended to allow parties and nonparties to alert the Clerk to a potential clerical mistake or error, but does not apply to the correction of errors of substance. The Rule recognizes that certain errors can cause prejudice to the parties and thus provides for prompt resolution of requests for correction. For further process see Mass. R. Civ. Pro. 60 and Mass. R. Crim. Pro. 42.

vi. Additional Protected Case Types

Members were concerned that the note on Proposed Rule 5(a)(1) on excluded records does not include all harassment and domestic abuse records that merit exemption from online access. They encourage the Committee to add Domestic Relations Protective Orders (DRPO's) issued pursuant to G.L. c. 208 §18; G.L. c. 209 §32; and G.L. c. 209C §15 to the Proposed Rules. The revised section would read as follows:

Rule 5

Harassment and Domestic Abuse Records. The Federal Violence Against Women Act (VAWA) prevents the courts from displaying harassment and domestic abuse case types on the Internet. See 18 U.S.C. § 2265(d)(3) ("A State . . . shall not make available publicly on the Internet any information regarding the registration, filing of a petition for, or issuance of a protection order, restraining order or injunction, restraining order, or injunction in either the issuing or enforcing State, tribal or territorial jurisdiction, if such publication would be likely to publicly reveal the identity or location of the party protected under such order."). Thus, cases and orders entered under G.L. c. 209A or G.L. c. 258E, G.L. c. 208 §18, G.L. c. 209 §32, and G.L. c. 209C,§15~~, as well as any similar order,~~ shall not be made available through remote access.

Members also noted that civil commitment records should be exempted from public access. See G.L. c. 123 §36A ("All reports of examinations made to a court pursuant to sections one to eighteen, inclusive, section forty-seven and forty-eight shall be private except in the discretion of the court. All petitions for commitment, notices, orders of commitment and other commitment papers used in proceedings under sections one to eighteen and section thirty-five shall be private except in the discretion of the court."). Thus recommend revising page 28 of the addendum, changing the header "Mental Health Reports" to "Civil Commitments and Mental Health Reports" and adding the additional civil commitment citations. Suggested language is below:

Civil Commitments and Mental Health Reports. Mental health examination and commitment records (G.L. c. 123, §§ 1-18, 35, 47, 48), other than ordinary entries on the criminal docket, except on a judge's order.

vii. Revisions and Uniformity

Some members were concerned that, although the Proposed Rules create a framework, they ultimately leave open to the Chief Justice of the Trial Court and each Trial Court Department the ability to make major changes. For example, in Proposed Rule 2, "the Chief Justice of each Trial Court Department may determine whether to require a written form for all requests" for court records and in Proposed Rule 5, "each Department of the Trial Court may request permission from the Chief Justice of the Trial Court to exempt certain additional civil [and criminal] case types or categories of information from remote access."

While the Proposed Rules begin at a uniform place ("to the extent any preexisting administrative order of the Trial Court or the Chief Justice of the Trial Court are inconsistent with these rules, the rules control and govern future procedures and access to court records"), the rules may end up with potentially major differences across court departments which can be confusing for the public and attorneys.

Members agreed that, given the constantly changing technological landscape, it was important for the Proposed Rules to have a degree of flexibility and a mechanism for revision. However, they felt that changes may best be implemented uniformly across the Trial Court and after review. As stated above, Working Group members recommend that the Committee include a time-specific review requirement provision in the Proposed Rules. Members also felt that where rule changes by the Chief Justice or Departments are contemplated, that the Proposed Rules should provide standards and considerations to help guide their process.

viii. Computer Kiosks

Some members expressed concerns about the lack of clarity on the Clerk's office computer kiosk. For example, the notes on Proposed Rule 1(d) state that "most courts" maintain a public computer kiosk "at which members of the public may search and access court information." However, Proposed Rule 2(f) states that "all publicly available electronic docket information shall be viewable at a computer kiosk or terminal located in the courthouse," and the note on Proposed Rule 2(a) states that "access to publicly available court records in a courthouse shall be provided in paper form and through a computer kiosk." This point is made again in the note on Proposed Rule 5(a)(2), which states that "each court should provide in the Clerk's office a kiosk for the public to use…" Based on the language in these sections, it appears that courts currently lacking a kiosk, will need to install one, though this is not explicitly stated in the Proposed Rules.

3. Additional comments

a. Data Scraping Protections

Some members were particularly concerned about the removal of information from the online database, its posting elsewhere, and use by third parties. Especially in criminal matters, they feared that information could be pulled and reformed to be searchable by name or other variable, removing the

Proposed Rule's protection of searches only by docket number. They also feared that any case information posted elsewhere on the internet would "take on a life of its own," where it could be more readily available if generally searchable online outside of the database, have a lasting negative impact on the individual, and for criminal case information, nullify CORI record sealing.

Members encourage the Committee to consider the protections which can be built into the online database. While they recognize that total protection is likely impossible, especially as technology continues to evolve, they note that many states have incorporated data scraping programs into their court records databases in an attempt to prevent third parties from removing information from the database. For example, Arizona, California, New Jersey, and Wisconsin all use CAPTCHA ("Completely Automated Public Turing test to tell Computers and Humans Apart") for their online access programs.

Other states place data scrubbing requirements on requestors of bulk data in order to protect personal information from disclosure. Another possible solution could be to require everyone accessing the online database to register and provide some identifying information which would then also be available through the database. Some members suggested requiring registrations could be used to give the Court and general public the ability to see database users, and potentially more detailed information about their searches. Some members, however, noted that registering names will not prevent or undo harm that occurs when data is misused. Tech savvy users also may be able to create multiple online identities.

Boston Bar Association Comments from the Criminal Law, Delivery of Legal Services, Family Law, and Immigration Law Sections

The Working Group comments were reviewed and discussed by all Boston Bar Association Section Steering Committees. The Sections agreed with many of the points made by the Working Group and voiced similar points of support of and concerns about the Proposed Rules.

Criminal Law Section

Members of the Criminal Law Section shared many of the concerns raised on pages 3 and 4 of the comments above. They discussed the dangers of increasing online access to court records and were especially troubled by the likelihood that criminal case information might be pulled from the database and posted elsewhere online. Members of the Section felt that this could result in major and long-lasting negative social consequences for individuals involved in criminal cases and even those with common names. Members urged the Committee to consider these consequences when reviewing the rules and the impacts increased online access to criminal court records can have.

Delivery of Legal Services Section

Members of the Delivery of Legal Services had significant concerns about providing online access to court records for certain cases, and recommended that criminal, landlord-tenant, and Probate and Family Court records and/or docket entries should not be made available online due to the serious consequences it could have for low-income individuals. Specifically, members raised the following points:

- Allowing access to sensitive information related to housing, criminal cases or family law cases online to the general public will be harmful because court records/docket sheets often have errors and members were concerned about whether the courts had adequate staff and resources to ensure that all of the records/docket sheets placed online are accurate. In the event that there is an inaccuracy brought to the court's attention, the process of rectifying the error does take some time. While the error is in the process of being rectified, there is a significant possibility of causing an irreparable harm to an individual.
- Internet release of criminal record information via docket sheets will make it harder for many unemployed people to get jobs, housing or access to other opportunities because once information is released online, it has a life of its own and will undermine our criminal record sealing laws.
- Housing Court docket sheets/records should not be available online because at present, it is not uncommon for landlords to check Masscourts and reject any tenant whose name is in the database.
- Putting Probate and Family Court records/docket sheets online could readily provide children access to their parents' divorces or their classmates' parents' cases. In docket sheets, the title of a motion often reveals much of its substance or a potentially sensitive issue at hand (I.e "Motion for a Mental Evaluation or Motion for Heroin Testing"). This could again lead to improper use of such information and also could expose the individuals involved as well as their relatives, especially their children, to ridicule, bullying, or public shame, or other detriment if these records/docket sheets are readily available online.
- There should be better defined limits on who gets compiled data to ensure the data is not misused.
- In Superior Court, Landlords file actions against tenants pursuant to M.G.L. c.139 Section 19. As such the same concern about the potential for harm applies with respect to housing court records/docket sheets.

Family Law Section

Some members of the Family Law Section were troubled by the potential for misuse of online access of court records, even if only docket information, because of the personal information often revealed by pleading and motion titles. They discussed potential limits on this information such as removing sensitive information from titles or replacing them with a number system to eliminate personal information from dockets, but members acknowledged that this would pose administrative challenges. Relatedly, members noted the importance of correcting clerical errors in a timely fashion. However, members of the Section also agreed with "consensus point 1" (p.1), that pro se litigants at least merited the same access as attorneys to records in their own cases. Some members thought that the public should also have the same amount of access, but many members felt that would lead to increased misuse of information.

Some members of the Family Law Section also supported "consensus point 5(c)" (p.2), that the Proposed Rules should remove the requirement of addresses for pro se litigants. They added that in addition to the potential for unfairness, the inclusion of addresses could increase the potential for misuse of information, particularly if parties have unusual names.

Immigration Law Section

Members of the Immigration Law Section noted that in addition to the concerns raised about increased online access to court records on pages 3-4 above, immigrants may have additional concerns. For example, members discussed that online access to court records may chill immigrants' access to the courts, especially for asylum-seekers whose identities and whereabouts, and those of vulnerable family members, could become easily known to their prosecutors, as well as for undocumented people who may become subject to exploitation. For this reason, members of the Section recommend limiting online access to case information only to the litigants and their lawyers.

Members also raised concerns about identity confusion as immigrants often have common names shared by others, which could expand the potential negative consequences of online records access.

Comments of Boston Globe Media Partners, LLC to the Proposed Uniform Rules on Public Access to Court Records

Boston Globe Media Partners, LLC, publisher of the Boston Globe newspaper (the "Globe"), respectfully submits these comments to the Proposed Uniform Rules on Public Access to Court Records (the "Proposed Rules"). The Globe is grateful for the work done by the Committee and appreciates the opportunity to submit these comments. It requests that the Committee consider the following amendments to the Proposed Rules:

A. Grant expanded remote access to electronic court records in ways which safeguard the interests underlying the limitations imposed by the Proposed Rules, such as by allowing lawyers, journalists and scholars remote access subject restrictions on creating commercial databases of court records that could be made available to employers or landlords.

B. Allow remote searches of dockets of criminal cases to be conducted both by docket number and by calendar date (Proposed Rule 5 (a)(2)(iii));

C. Recognize the public's constitutional right of access to court records located in a courthouse (Note, Proposed Rule 1(c), Note, Propose Rule 5(e));

D. Eliminate the suggestion that written requests for court records located in a courthouse should be considered a "best practice" (Note, Proposed Rule 2(b));

D. Clarify that the Criminal Offender Record Information Act, G.L. c. 6, § 167, *et seq.* ("CORI"), does not restrict the public's right of access to court records in paper or electronic form (Note, Proposed Rule 5(a)(2)) or, alternatively, defer any court-endorsed pronouncement on this complex issue in the absence of an actual controversy adjudicated by a court with the benefit of a complete record and full briefing; and

F. Amend or eliminate Addendum A to the Proposed Rules ("Records Excluded From Public Access").

A. Expanding remote access to electronic court records while safeguarding the interests underlying the restrictions imposed by the Proposed Rules.

1. Remote Electronic Access under the Proposed Rules

Rule 5 of the Proposed Rules allows the public limited remote access to electronic docket information for civil and criminal cases. Under the Proposed Rules, the public (including the press) will be able to search civil cases by name or by docket number.[1] Criminal dockets will be searchable only by case number.[2] The Proposed Rules do not permit remote public access to

[1] Remote access to docket information will not include abuse prevention and harassment orders and proceedings or sexually dangerous person proceedings. Proposed Rule 5 (a)(1)(iii).

[2] The predecessor system allowed attorneys to remotely search dockets of criminal cases in the Superior Court by calendar date as well as by docket number. Under that system, for example, a lawyer whose client was subpoenaed in a criminal case, or who wished to file a motion on behalf of a non-party for access to a court record or proceeding, could search a Superior Court docket for a day in which a hearing

pleadings or court orders, documents that the federal courts now make available on PACER. Proposed Rule 5.

In addition to limiting remote public access to dockets, the Proposed Rules permit attorneys to view 12 different categories of court orders online, but only in cases in which they have filed an appearance.[3] As the system currently operates, attorneys now have remote access to the following courts regardless of whether they have filed an appearance in the case: (a) criminal cases in Suffolk Superior Court; and (b) civil Superior Court, Probate and Family Court, Housing Court, and Land Court (remote access to District Court and Juvenile Court dockets are not now available through the attorney portal).

2. Opposition to Remote Access to Electronic Court Records

Opponents to remote access to electronic court records do not object to the longstanding right of the public and press to inspect judicial records. Nor do they dispute that commercial companies (including various online services) compile public criminal records for the purpose of selling compilations to landlords, employers and other persons or entities, regardless of whether the end users are prohibited from obtaining the same criminal records from the Department of Criminal Justice Information Services ("DCJIS"). These opponents remain concerned, however, that remote access to electronic court records will have unintended negative consequences.

For example, some have expressed concern that remote access to criminal records might be used to create private databases of criminal records. The concern is that these databases might be used by employers and landlords to access an individual's criminal records after the time period has expired in which CORI permits DCJIS to grant access to that person's criminal records. Others have expressed concerns that remote access to housing court cases might permit landlords to screen for tenants who have been involved in eviction or other landlord-tenant disputes. Although these concerns animate the limitations contained in the Proposed Rules, there are alternative means to address them while still permitting expanded remote access to civil and criminal records.

3. Expanded Access for Lawyers and Registered Journalists and Scholars

To the extent anti-scraping technologies do not fully address the concerns about remote access permitting the creation of private databases of criminal records (or other potential misuses of court records), granting remote access to lawyers and registered journalists and scholars -- subject to restrictions on their use of the electronic data -- would address many of the concerns underlying the Proposed Rules' limitations on remote access to criminal records.

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was scheduled, retrieve the docket number for a case on that day's calendar, and click through to obtain the docket of the case.

[3] The Trial Court's website lists those orders as: (1) Endorsement on Dispositive Motion; (2) Endorsement on Equity; (3) Finding and Order on Equity; (4) Findings of Fact and Rulings of Law; (5) Declaratory Judgment G.L. c. 231A; (6) Judgment and Order; (7) Memorandum of Lis Pendens Issued; (8) Memorandum and Order; (9) Writ of Attachment Issued; (10) Order; (11) Preliminary Injunction Issued; and (12) Temporary Restraining Order Issued.

a. Expanded Remote Access for Lawyers

The Court has ample authority to grant members of the Massachusetts bar expanded remote access to electronic records of civil and criminal proceedings without the risk of creating the types of private databases or other abuses feared by privacy advocates. A court rule that forbids lawyers from using remote access to create private or commercial databases of court records (or other perceived abuses of remote access) would address this concern while, at the same time, allowing lawyers to use remote access to search court records for their own legitimate purposes and for those of their clients. The Court's authority to regulate and discipline members of the bar provides more than adequate protections against the potential for abuses cited by privacy advocates.

b. Expanded Remote access for journalists and scholars

The concern expressed by opponents to remote access has *not* been about the press being granted remote access for the purpose of reporting on the judicial system. Instead, the primary concern is the risk of abusive behavior by landlords, employers, neighbors, and commercial background check companies. For this reason, the Globe suggests that the Proposed Rules incorporate a pilot project that allows the press expanded remote access to electronic court records.

The Globe recognizes that "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[4] For example, the constitutional and common law right of access to judicial proceedings and records is a right of the public *and* the press.

There are examples, however, of the press permissibly obtaining certain types of preferential access because of its role as a representative of the public. For example, "[w]hile media representatives enjoy the same right of access [to criminal trials] as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

Moreover, cases recognizing the "equal access" principle either involved records to which the public had a common law or constitutional right of access,[5] or classifications drawn between similarly situated persons or entities.[6] The Proposed Rules recognize, however, that "there is no constitutional or common law right to remote access" to court records that also are available in a courthouse. *See* Notes to Rule 5(e). In similar situations where the public has no constitutional, common law, or statutory right of access to particular information, courts have upheld granting access to the press beyond that granted to the public, provided that the distinction furthers an important government interest and is not based on viewpoint discrimination.

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[4] *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

[5] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) ("media representatives enjoy the same right of access as the public").

[6] *See Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986) ("There may be a rare situation in which continued application of a protective order could be justified after one media entity but not another was granted access. We cannot, however, think of one."). *See also McCoy v. Providence Journal Co.*, 190 F.2d 760, 765-66 (1st Cir.), *cert. denied*, 342 U.S. 894 (1951) (allowing *Pawtucket Times* access to city records while denying access to *Providence Journal* constituted a denial of equal protection).

For example, Supreme Judicial Court Rule 1:19: Electronic Access to the Courts grants the news media a type of preferential access not granted to the general public. Rule 1:19 permits "photographing or electronic recording or transmitting of courtroom proceedings open to the public *by the news media for news gathering purposes and dissemination of information to the public*." (Emphasis added.) The "news media" is defined as "any authorized representative of a news organization that has registered with the Public Information Officer of the Supreme Judicial Court or any individual who is so registered." The effect of the Rule is that only members of the news media who register with the court (and not members of the general public) may record courtroom proceedings that are open to the public.[7]

The Proposed Rules also recognize this principle by granting preferential access to certain requesters, including journalists, seeking "Compiled Data." *See* Proposed Rule 3. "Compiled Data" is defined by Rule 3 as "electronic records that have been generated by computerized searches of Trial Court case management database(s) resulting in the compilation of specific data elements." The Rule allows requests for Compiled Data if used for "scholarly, educational, journalistic, or governmental purposes." Proposed Rule 3. The Court Administrator has discretion to grant or deny any such request and to condition approval on the requestor agreeing to limitations on the use of the data, such as that the data "not be used for a commercial purpose." Proposed Rule 3(d). *See also Commonwealth v. Barnes*, 461 Mass. 644 (2012) (addressing pilot project permitting WBUR-FM to live stream over the Internet video and audio recordings of certain proceedings in Quincy District Court).

Part of the justification for the distinctions drawn by rules such as SJC Rule 1:19 and Proposed Rule 3 is that there is no recognized constitutional right of access to televise or record court proceedings or to obtain compiled data of court records. Both rules put the court in the business of granting the press some level of preferential access to court information in order to serve a compelling interest without engaging in content-based discrimination. Allowing the public greater remote access to electronic records would have the same effect and is supported by case law. As summarized below, case law supports this approach in cases where (a) there is no independent constitutional right of access to the information at issue; (b) granting access serves a compelling interest; and (c) the classifications are not based on viewpoint discrimination.

For example, in *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999), the Supreme Court rejected a constitutional challenge to a California statute that granted journalists and scholars preferential access to arrestee address records. The plaintiff in *United Reporting* was a private company that provided arrest news to its customers. The company brought suit challenging a California statute limiting access to arrestee addresses to licensed private investigators and to requesters who swore under the penalty of perjury that the information was sought for a "scholarly, journalistic, political, or governmental purpose." *Id.* at 35. The district court and circuit court of appeals struck down the statute on its face, ruling that the numerous exceptions for journalistic, scholarly, political, governmental, and investigative

[7] Registration is limited to "organizations that regularly gather, prepare, photograph, record, write, edit, report or publish news or information about matters of public interest for dissemination to the public in any medium, whether print or electronic, and to individuals who regularly perform a similar function." Registrants are required to certify that they perform such roles and to familiarize themselves with the provisions of the rule and comply with them. SJC Rule 1:19.

purposes undercut the statutory purpose of protecting the privacy of arrestees and rendered the statute unconstitutional under the First Amendment. *Id.* at 37.

The Supreme Court reversed, ruling that the facial challenge to the statute failed because the government only was limiting access to information that it was not required to release in the first place:

> This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. . . . . For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. **California could decide not to give out arrestee information at all without violating the First Amendment**.

Id. at 39 (emphasis added).

The individual members of the Court disagreed about whether the same result would occur if a plaintiff claimed that its own rights were violated by the statute (*i.e.*, an "as applied" rather than a facial challenge). Justice Ginsburg, with whom Justice O'Connor, Justice Souter, and Justice Breyer joined, stated in a concurrence that California could, as the majority noted, "constitutionally decide not to give out arrestee address information at all." *Id.* at 43. Under those circumstances, she concluded, the selective disclosure of address information was permissible because the distinctions drawn by the statute were not based on any "illegitimate criterion" (such as the political viewpoint of the requester). *Id.*

Justice Scalia (joined by Justice Thomas) wrote separately to state that the Court's decision did not, in his view, address the merits of an "as applied challenge" to a statute that allowed access to the press while denying access to other persons who wished to use the same information for certain speech purposes. *Id.* at 42 (Scalia, J., concurring). Justice Stevens (joined by Justice Kennedy) also wrote separately, stating that the interest in protecting arrestee privacy would justify a total or near-total ban on access, but would not justify a law that permitted the information to be accessed by private investigators and published by the media, while restricting access to others who also could make lawful use of the information. *Id.* at 46 (Stevens, J. concurring).

Four years after *United Reporting*, the Sixth Circuit rejected an "as applied" challenge to a statute that granted access to motor vehicle accident reports to journalists and to those with a personal interest in the accident. *Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003). The case concerned a Kentucky statute that broadly limited public access to accident reports to persons involved in an accident or their attorneys and insurers, subject to the following exception for the press:

> The [accident] report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news. The news-gathering organization shall not use or distribute the report, or knowingly allow its use or distribution, for a commercial purpose other than the news-gathering

> organization's publication or broadcasting of the information in the report. A newspaper, periodical, or radio or television station shall not be held to have used or knowingly allowed the use of the report for a commercial purpose merely because of its publication or broadcast.

Id. at 824. A group of attorneys and chiropractors claimed that the statute violated their First Amendment rights. The court held that because the statute did not restrict the plaintiffs' *use* of any information but, rather, simply restricted their *access* to governmental records, the law did not violate commercial speech principles. *Id.* at 826-27.

The court also rejected the claim that the law violated the First Amendment by treating certain potential speakers more favorably than others. The court cited *United Reporting* for the proposition that the state could have decided not give out any accident reports without violating the First Amendment. *Id.* at 827. Because the statute did not grant or deny access based on the content of any group's speech or their political viewpoints, the court concluded that the law "does not specifically disfavor discrete groups on content-related grounds" and therefore did not violate the First Amendment. *Id.* at 828 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.")). Finally, the court rejected the plaintiffs' equal protection claim for the following reasons:

> Protecting the privacy of accident victims is a legitimate state interest. By limiting public disclosure of accident reports, § 189.635 rationally furthers that interest. Permitting news-gathering organizations to access the reports does not completely negate this legitimate interest. Kentucky's legislature might well have concluded that the occasional publication of information contained in an accident report because of its newsworthy nature is less invasive to the overall class of accident victims than the myriad other uses to which such reports could be put. The legislature could have easily assumed that the number of accident reports of interest to news-gathering organizations would be infinitesimal as compared to the overall number of accident reports on file. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955) (holding that, absent invidious discrimination, government may further its legitimate interests incrementally).

Id. at 829.

More recently, in *McBurney v. Young*, 133 S. Ct. 1709 (2013), the Supreme Court upheld a state's right to make public records available to its own citizens but not to citizens of other states. *McBurney* involved a challenge to Virginia's Freedom of Information Act, which grants citizens of Virginia (but not citizens of any other state) the right to obtain public records. Noting that it "has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws," the Supreme Court rejected the arguments that denying non-Virginians the right to access public information on equal terms with Virginians violated the Privileges and Immunities Clause or the dormant Commerce Clause. *See generally FEC v. Legi-Tech*, 967 F.Supp. 523 (D. D.C. 1997) (upholding statute granting public access to political contribution information subject to prohibition on information being sold or used for any commercial purposes or to solicit contributions); *FEC v. International Funding Institute, Inc.*, 969 F.2d 1110 (D.C. Cir.) (en banc), *cert. denied*, 506 U.S. 1001 (1992) (statute granting public access to

political contribution information subject to restriction on information being sold or used for any commercial purposes or to solicit contributions was not subject to strict scrutiny and was upheld under both intermediate and rational basis scrutiny); *Capitol Resources Corp. v. Department of State Police*, 2007 WL 2332716 (KY App. 2007) (finding "no constitutional implications" in a statute that prohibited access to accident reports by entities involved in non-journalistic commercial enterprises where the law did not permit access decisions to be based on a judgment of the newsworthiness of any particular accident report).

The foregoing case law provides support for a rule which would grant the press the right to obtain more expansive remote access to electronic court records, subject to a commitment (or possibly a contractual obligation) not to re-sell the information or use it for any commercial purpose other than news reporting. Such a rule would address concerns of opponents about abusive behavior by landlords, employers, or other commercial enterprises while, at the same time, serving the public interest by facilitating public supervision and understanding of the courts. A pilot project allowing press access subject to similar conditions would serve the public interest.

B. Allowing remote searches of dockets of criminal cases to be conducted both by docket number and by calendar date (Proposed Rule 5 (a)(2)(iii)).

The Proposed Rules provide that remote searches of dockets of criminal cases only may be performed if the user knows the docket number of the criminal case. The predecessor electronic docket search system for criminal cases in the Superior Court was not so limited. Under that system, a user could search by court calendar date and retrieve the docket number of all cases heard by the court on that particular date. Clicking through the docket number provided by the calendar retrieved the entire criminal docket.

Under the prior system, a user who knew the date on which a case had been before a particular court was allowed to retrieve the docket number and the entire docket of the case. Nothing in the Proposed Rules or the Notes identifies any problems that arose under the prior system. There does not appear to be good cause to impose a more restrictive system in the Superior Court, nor any reason not to permit district court dockets of criminal cases to be searched by calendar date.

C. The public has a constitutional right of access to court records located in a courthouse.

The Notes to the Proposed Rules acknowledge that the public has a common law right of access to judicial records but do not acknowledge that the First Amendment independently grants the public a right of access to judicial records. *See* Notes to Proposed Rules 1(c) and Rule 5(e). Because the Notes will be an authoritative source when disputes arise concerning the public's right of access to court records in particular cases, including in cases in which statutory restrictions on public access are at issue, adding a reference to the constitutional right of access is well-warranted. *See generally Republican Co. v. Appeals Court*, 442 Mass. 218, 223 (2004) ("In addition to the common-law right of access to judicial records, the public has a First Amendment right of access to court records such as the transcripts of judicial proceedings and the briefs and evidence submitted by the parties."); *Com. v. Winfield*, 464 Mass. 672, 675 (2013) ("The First Amendment right of access to court trials includes the right to purchase a transcript of the court proceeding that was open to the public."); *Globe Newspaper Co. v. Clerk of Suffolk Cty. Superior*

Court, No. 01-5588-F, 2002 WL 202464, at *3 (Mass. Super. Feb. 4, 2002) (Gants, J.) ("There is also a presumption of public access to court records in criminal cases under the First Amendment....").

D. CORI does not restrict the public's right of access to court records in paper or electronic form.

The Note to Proposed Rule 5(a)(2) states that expanded remote access to electronic court records of criminal cases would be inconsistent with CORI. The Globe respectfully submits that the issue of whether CORI's restrictions on access to criminal records apply to records in the custody of a court are too complex (and contested) to be adequately addressed in the Notes and, instead, should not be addressed until and unless a concrete case reaches the Court.

1. CORI does not apply to court records.

Although the CORI Act restricts access to certain criminal offender record information, its provisions do not apply to court records. As the *District Court Guide* states in a section entitled "The CORI Law Does Not Limit Access to Clerk's Records":

> The restrictions found in the Criminal Offender Record Information Act on disseminating criminal records **are inapplicable to records (case files, docket books, daily trial lists, and defendant indexes) maintained by a clerk-magistrate's office**. The CORI law does not prevent a court from releasing warrant information or specified summary information regarding a criminal sentence of incarceration or probation.

District Court Guide at 8 (emphasis added) (footnotes omitted). *See also id.* at 11 ("Dockets and contents of case files" are publicly available); *id.* n. 34 ("The CORI law is inapplicable to case files of the clerk-magistrate's office.").

This conclusion is dictated in part by the statutory language of G.L. c. 6, § 172(m)(2), which provides in relevant part: "Notwithstanding this section or chapter 66A, the following shall be public records: . . . chronologically maintained court records of public judicial proceedings." *Id.* Court dockets, case files, and calendars are maintained chronologically and therefore are public records under § 172(m).

In *Globe Newspaper Co. v. District Att'y for the Middle Dist.*, 439 Mass. 374, 382 (2003), for example, the Supreme Judicial Court ruled that "[d]ocket numbers are assigned chronologically and maintained by courts as part of their court records, criminal proceedings against adult defendants are public proceedings, and docket number information thus falls squarely within the second listed exception to the CORI statute." *Id. See also District Court Guide* at 8 n. 27 ("Case files, docket books, and daily trial lists are exempted from the CORI law because they are 'chronologically maintained records of public judicial proceedings....'" (quoting *Middle Dist.*, 439 Mass. 374).

At the time *Middle Dist.* was decided, the CORI Act contained a provision (since repealed) requiring that "no alphabetical or similar index of criminal defendants [be] available to the public, directly or indirectly." 439 Mass. at 382 n. 12. Because the issue on appeal was limited to requests for docket numbers of specified offenses (not named defendants), the *Middle Dist.*

Court was not required to address whether the CORI Act applied to requests for information about specifically-named defendants. 439 Mass. at 384 n. 16. The Supreme Judicial Court did rule, however, that "[t]here is no violation of the CORI statute when the search specifications consist of information that would also be revealed on the court's records accessible to the public." *Id.* at 385. Because searches of alphabetical indices and case files are "framed in terms of information that would presumably appear on the court's records," they do not violate the CORI Act. *Id.*

The *Middle Dist.* Court noted that a 1993 federal court decision struck down on First Amendment grounds the provision of the CORI Act prohibiting public access to the alphabetical indices of criminal case. 439 Mass. at 382 n. 12 (citing *Globe Newspaper Co. v. Fenton*, 819 F.Supp. 89, 100-101 (D. Mass. 1993). "As a result of that decision," the Court observed, "the public has access to court clerks' alphabetical indices of defendants' names and may thereby obtain access to court records concerning an individual defendant." *Middle Dist.*, 439 Mass. at 382 n. 12. *See also id.* at 379 n.8. The Commonwealth did not appeal the district court's judgment in *Fenton*.[8]

Commonwealth v. Pon, 469 Mass. 296 (2014), did not alter the foregoing analysis. *Pon* modified the standard governing the sealing of certain court records in certain cases, but did not address CORI's exceptions for court records -- paper or electronic.

2. Electronic court records are chronologically maintained records of public judicial proceedings exempt from CORI.

The same section of the CORI Act which provides that paper copies of court records "shall be public records" applies to electronic court records. *See* G.L. c. 6, § 172(m)(2). Whether maintained in paper or electronic form, court dockets and case files are "chronologically maintained court records of public judicial proceedings." *Id. See also Middle Dist.*, 439 Mass. at 382; *District Court Guide* at 8 n. 27. Because § 172(m)(2) draws no distinction between paper and electronic records, the provision applies in full force to electronic court records and requires that both "shall be public records."

3. CORI's Restrictions on Access Do Not Apply to Electronic Judicial Records.

Wholly apart from § 172(m)(2)'s public records provision, an examination of the CORI Act, and in particular the 2010 amendments, demonstrates that the restrictions on public access mandated by the CORI Act do not apply to electronic court records maintained by the judicial branch. The 2010 amendments (a) struck the provisions of the Act that broadly restricted the right to obtain criminal record information from any source; (b) eliminated the Act's restrictions on public access to alphabetical or similar indices; and (c) granted authorized persons and entities the right to obtain from the newly-created Department of Criminal Justice Information Services (the "Department") criminal offender record information maintained in the Department's database,

[8] To the extent any lingering doubt about the public's right of access to the alphabetical indices of criminal cases remained after *Fenton* and *Middle Dist.*, the issue was definitively resolved in 2010 when the legislative amendments to the CORI Act struck the prior version of § 172 that had prohibited public access to such records.

subject to limitations on the use of information so obtained. The current statutory language does not apply to court records.[9]

In sum, because CORI's application to court records and the legislative policies underlying the Act are subject to legitimate debate, prudence counsels in favor of avoiding judicial pronouncements on those issues in the absence of an actual controversy and the benefit of a complete record and briefing.

E. Written requests for court records located in a courthouse should not be considered a "best practice."

The Note to Proposed Rule 2(b) recommends as a "best practice" requiring written requests for paper records of court records located in a courthouse. While written requests might be helpful in situations where a clerk is looking for a specific name or docket number in the "stacks" of criminal records stored in a courthouse, the recommendation of requiring written requests for hard copies of court records as a best practice should be rejected. Citizens are entitled to inspect court records for any or no reason. They should not be required to leave behind a paper trail, nor should unnecessary conditions be imposed on the exercise of a constitutional right.

F. Addendum A to the Proposed Rules ("Records Excluded From Public Access") should be amended or deleted.

Addendum A to the Proposed Rules, entitled "Records Excluded from Public Access," provides a list of material that "a statute, court rule, or standing order designates as 'must be impounded....'" For example, Addendum A includes a reference to "Trade secrets and other matters in connection with discovery," citing Mass. R. Civ. P. 26(c). Rule 26(c) generally does not apply to records filed with the court, however, and requires the party seeking a protective order to carry the burden of demonstrating "good cause." *See generally George W. Prescott Pub. Co. v. Register of Prob. for Norfolk Cty.*, 395 Mass. 274, 280 & n.6 (1985) (vacating protective order with respect to filed and unfiled discovery materials).

Addendum A also cites Financial Statements filed in the Probate Court as subject to mandatory impoundment. *But see Prescott Pub.*, 395 Mass. at 280 ("We conclude, first of all, that rule 401 must be interpreted in this case so as to permit a challenge to the impoundment of the litigants' financial records."). References to medical records and presentence reports (also listed in Addendum A) are similarly subject to exceptions based on whether the records have been admitted in open court and their specific contents.

Because these and other materials listed in the Addendum are not always subject to mandatory impoundment, the Globe suggests that the Addendum be eliminated entirely or amended to clarify that the list contains materials that either must be or may be, depending upon the circumstances, impounded or withheld from public inspection.

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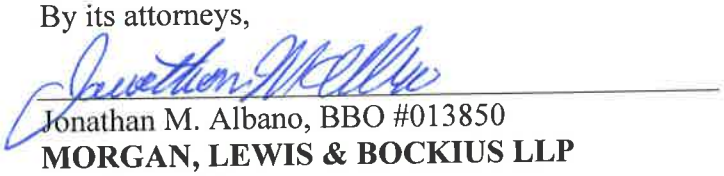
[9] The Globe's position on this issue was previously set forth in J. Albano, *Public Access to Electronic Judicial Records* volume no. 15 #4, Boston Bar J. (October 21, 2015) and therefore will not be repeated here.

Conclusion

Thank you for the opportunity to present these comments concerning the Proposed Rules, and for the extraordinary time and effort that the Committee devoted to this matter.

BOSTON GLOBE MEDIA PARTNERS, LLC,

By its attorneys,



Jonathan M. Albano, BBO #013850
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110-1726
617.951.8000

Zimbra **rules.comments@jud.state.ma.us**

Uniform Trial Court Rule XIV

From : Brian T Mulcahy <brian.mulcahy@jud.state.ma.us> Fri, Feb 12, 2016 03:08 PM

Subject : Uniform Trial Court Rule XIV

To : Rules Comments <rules.comments@jud.state.ma.us>

Rule 5(a)(1)(i)(B) - In cases where an employee of the Trial Court is proceeding pro se, providing remote access to his or her home address could be considered a violation of G.L. c. 66, § 10 (d), which prohibits the Commonwealth from disclosing the home address of judicial personnel. Violations of G.L. c. 66, § 10 are punishable by a fine up to $500.00 or by imprisonment up to one year or both. G.L. c. 66, § 15.

Brian Mulcahy
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Bristol County Bar Association

448 County Street
New Bedford, Massachusetts 02740
(508) 990-1303 or (800) 647-5151
Facsimile (508) 999-0477

May 3, 2016

Hon. Peter M. Lauriet
Chair Public Access to Court Records Committee
Superior Court Admin. Office, 13th Floor
Three Pemberton Square
Boston, MA 02108

RE: Comments on Proposed Trial Court Rule XIV

Dear Judge Lauriet,

This letter is being written on behalf of the Bristol County Bar Association. It is the position of the Bristol County Bar Association that criminal case data, domestic relations case information should not be accessible to the public via remote online access. It is further the position of the Bristol County Bar Association that the problems with errors in records and of landlords accessing the online Housing Court database to deny housing applications because of prior landlord-tenant cases need to be addressed before records are placed online for the access by the general public. Allowing the general public to access such information online serves to harm litigants by adversely impacting a litigant's right to due process as well as threatening the privacy of the indigent and further weakening confidence in the Commonwealth's justice system.

The nature of the internet is such that once information is released onto the online sphere, it cannot easily be retracted, if at all. Allowing the general public to access court records via remote online access presents a myriad of problems that are unique to remote access. Access to court records physically housed in the Commonwealth's courthouses or contained on secure electronic databases within the courthouses protect the public from widespread, instant and continuous dissemination of the sensitive information, including personal financial information, that is often contained in court records.

The instant availability and potential perpetuity of such information via remote online access can unfairly prejudice people and create impediments to employment and housing, cause humiliation as well as damage familial relations. In addition, the ease of accessibility 24-hours a day, 365 days a year opens such court records to a vast and potentially limitless audience. The ease of access and the ability to immediately disseminate court record information through remote online access can destroy reputations, weaken family bonds and place people at risk of harm. Furthermore, individuals' personal financial information may be available for public consumption thereby opening the door for increased opportunities for identity theft and fraud.

The Commonwealth's indigent litigants will be disparately affected by online access to criminal, domestic relations and housing court records. The indigent typically cannot afford to hire an attorney to protect their privacy rights. Allowing the public to remotely access online criminal, domestic relations and housing court records also serves to create a barrier to justice as potential litigants with meritorious claims may be deterred from bringing such claims out of fear that their personal information will be accessible by the public or that the litigation could be used against them in future employment and housing applications.

The impact of online access of domestic relations records on families also presents serious concerns. Children would be able to access embarrassing and emotionally devastating information about their parents.

The online availability of Criminal, Domestic Relations and Housing Court case information can be used by abusers to further abuse and harass victims with information contained online. There are also concerns that public online access to information relative to Ch. 209A Abuse Prevention Orders and Harassment Prevention Orders may violate federal law, including the Violence Against Women Act.

The widespread online accessibility of criminal case information can be particularly damaging to individuals and runs contrary to the laws requiring the sealing of criminal records, including the CORI Reform Law of 2010, which expanded opportunities for sealing records. Remote online access of criminal case information can inhibit a person's ability to find or maintain employment.

Like any record keeping system, errors often arise in our docketing systems and the frequency of such errors is such that docket entries should not be available to the public via online remote access. Some docketing errors can portray a completely different outcome of a case and an accurate read of a file can only be done by physically reviewing the file in the courthouse.

Impounded or sealed cases are sometimes accidentally made available and the possibility that information can be widely accessed and disseminated by the general public far outweighs any interest the public has in accessing court records through remote online access.

It is imperative that the Public Access to Court Records Committee closely examines the potentially catastrophic effect remote online access by the public to Criminal, Domestic Relations and Housing Court case information will have on the administration of justice and the risk of harm that such online access poses to individuals, children, families and victims of abuse. On behalf of the Bristol County Bar Association, it is respectfully requested that the Committee vote to oppose online remote access by the public to Criminal and Domestic Relations case information and that the Committee address the problems with errors in records, and of landlords accessing the online Housing Court database to deny housing applications because of prior landlord-tenant cases.

Sincerely,

BY: _____

Kimberly Moses Smith, President
Bristol County Bar Association

The Commonwealth of Massachusetts

Committee for Public Counsel Services
44 Bromfield Street, Boston, MA 02108-4909

TEL: (617) 482-6212
FAX: (617) 988-8495

ANTHONY J. BENEDETTI
CHIEF COUNSEL

May 4, 2016

Honorable Peter M. Lauriat, Chair
Public Access to Court Records Committee
Superior Court Administrative Office, 13th Floor
Three Pemberton Square
Boston, MA 02108

By Electronic Mail to: rules.comments@jud.state.ma.us

RE: Comments of the Committee for Public Counsel Services
Regarding Proposed Trial Court Rule XIV Uniform Rules on Access to Court Records

Dear Judge Lauriat:

The Committee for Public Counsel Services (CPCS) submits the following comments regarding the Proposed Trial Court Rule XIV Uniform Rules on Access to Court Records.

Proposed Rule 2(g) Impounded Records

Comment: We recommend that CPCS be authorized to review any court records for oversight purposes, even if the records in question are impounded.

If CPCS has provided an attorney for a party under Supreme Judicial Court Rule 3:10, after verification that the requester is an attorney employed and authorized by the Committee, the Clerk shall permit access to any impounded court record.

Proposed Rule 2(i)

Comment: Counsel appointed to represent indigent parties should not be charged a fee for copying. Indigent parties are entitled to the same access to the courts as other parties. Requiring counsel and the court to go through the process of processing motions for funds is inefficient for the court and the attorneys and may have the unintended consequence of interfering with the indigent party's access to justice. Such fees shall be waived if requested by counsel appointed to represent an indigent party. Such fess should also be waived for indigent parties representing themselves.

Proposed Rule 5. Remote Access to Electronic Court Records
(2) Criminal Cases
(ii) Search. Criminal cases may be searched by case number

Comment: We propose that all attorneys be permitted to search by defendant name for purposes directly related to their representation in a particular case. Attorneys need to be able to search by defendant name for docket information pertaining to the criminal history of witnesses and to check for potential conflicts of interest. It is inconvenient and time consuming and does not serve any of the purposes of the CORI laws to restrict attorneys to search by docket number only. Additionally, CPCS staff attorneys, serving in a supervisory or administrative capacity, need to be able to search the database by defendant name. Often when CPCS staff administrators and supervisors need to investigate client complaints or to supervise work of staff attorneys, it is inconvenient and time consuming and does not serve any of the purposes of the CORI law to restrict attorneys to search by docket number only.

(b) Remote Accessibility to Information in Electronic Form through the Attorney Portal.

Comment: See comment regarding (ii) Search above. This is unnecessarily restrictive, especially for attorneys conducting searches directly related to their specific case representation and for CPCS staff supervisors and administrators who must respond to client complaints and supervise the work of staff attorneys.

By limiting remote access to criminal case dockets solely to each attorney's own cases, this proposed rule would reduce the current ability of CPCS oversight staff to look at Superior Court dockets online to perform their statutory duty to investigate client complaints and oversee the performance of assigned counsel. Remote access to all criminal case court dockets and the ability to search for dockets by party name are necessary to the efficient accomplishment of oversight of assigned cases by CPCS staff and bar advocate program contractors to whom such duties have long been delegated in part. Therefore the restrictions set out in this rule should be waived for CPCS oversight attorneys, their administrative support staff, and Bar Advocate Program Administrators, all of whom could be granted access subject to a protective order limiting their use of the material to their statutory or contractual duties. This amendment will avoid the impairment of substantial increase in the cost of CPCS oversight which would otherwise result from the restrictions in the proposed rule. Moreover, remote access to district court electronic dockets should be granted to this same group subject to the same protective order.

(d) Availability of Additional Records

Comment: Remote access to an electronic image of an allowed motion for funds in the District and Superior Court dockets will assist assigned counsel in arranging compensation through CPCS of expert witnesses and thus would reduce the costs of assigned cases before the courts.

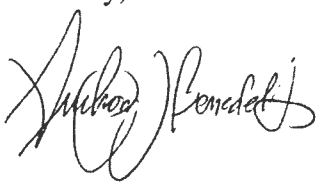
ADDENDUM: RECORDS EXCLUDED FROM PUBLIC ACCESS

Proposed Rule "Juvenile Trials"

Comment: The purpose of closing the courtroom in juvenile cases is to protect the confidentiality of the juvenile defendant. The rule should make clear that the juvenile has the right to permit any individuals s/he desires to be present in the court room for his/her proceedings.

If you have any questions regarding the comments we have submitted, please do not hesitate to contact me.

Sincerely,



Anthony J. Benedetti
Chief Counsel

COMMON CAUSE
Massachusetts

May 4, 2016

Hon. Peter M. Lauriat
Chair, Public Access to Court Records Committee
Superior Court Administrative Office, 13th floor
Three Pemberton Square
Boston, MA 02108

BY EMAIL to: rules.comments@jud.state.ma.us

Dear Judge Lauriat:

A core mission of Common Cause is to promote open and accountable government. Accordingly, we endorse the proposed rules to the extent that they provide greater and more unfettered access to judicial records by members of the public.

We share the concerns of the Massachusetts Newspaper Publishers Association, and join in its letter to you of even date. We underscore particular concern with proposed Rule 5(a)(2). While the public interest in permitting those convicted of crimes to re-join society as productive members is indeed compelling, so is the public interest in ensuring the fair administration of justice. We suggest that it is for the legislature, and not the court, to weigh the competing concerns and to determine which should yield and to what degree. In our view, it is not the proper function of a rules committee to effect the proper balance by shielding name indices and differentiating between in-court and remote access.

Proposed Rule 2(j) permits, but does not require, the clerk to allow the public to use handheld electronic imaging devices and scanners to make reproduction. While the notes seem to limit the clerk's discretion not to allow scanning and imaging, we recommend that the clerk be required to permit such use in the absence of specific reasons not to. Otherwise, clerks may categorically refuse to permit self-directed electronic reproduction in order to generate revenue from making copies. Therefore, the permissive "may" throughout that section should be replaced with "shall." Limitations should be expressed in the rule itself rather than in the notes.

We also suggest that the policy and security reasons not to permit cameras in the courtroom or in lock-up do not extend to the clerk's office, and that it should be possible to accommodate such use in a limited area. At a minimum, if the requester is authorized to possess a cell phone or other handheld device in the courthouse, e.g., attorneys, he or she should be able to use the phone or device in the clerk's office to make copies.

Thank you for the opportunity to weigh in on this important issue.

Very truly yours,

Jeanne M. Kempthorne

Jeanne M. Kempthorne
Vice-chair, Board
Common Cause Massachusetts

PRINCE LOBEL

May 4, 2016

VIA HAND DELIVERY

Hon. Peter M. Lauriat, Chair
Public Access to Court Records Committee
Superior Court Administrative Office, 13th Floor
Three Pemberton Square
Boston, MA 02108

Re: Comments of Courthouse News Service, the New England Newspaper and Press Association, and the New England First Amendment Coalition Regarding Proposed Trial Court Rule XIV

Dear Justice Lauriat:

On behalf of Courthouse News Service, the New England Newspaper and Press Association, and the New England First Amendment Coalition ("the Press Coalition"), we are pleased to submit the following comments on the Proposed Uniform Rules on Public Access to Court Records (the "Proposed Rules"). The Proposed Rules reflect significant work and time commitment by the Trial Court Public Access to Court Records Committee (the "Committee"), and we offer the following comments in the spirit of clarifying and improving that work.

1. Superior Court Records Should be Publicly Accessible to Lawyers and Non-Lawyers Alike.

Proposed Rules 5(b) and 5(d) provide that electronic full text court documents will only be available on the "Attorney Portal," unless the Chief Justice of the Trial Court determines that "additional electronic court records or information may be made remotely accessible to the public." Currently, the Attorney Portal gives any registered attorney access to .pdf images of certain types of Superior Court decisions, even if the attorney has not appeared in the matter. This practice would seem to conflict with the notes to Rule 5(b), which state that attorneys "shall have no greater access to court records than the general public except for those cases in which they have entered an appearance."

We respectfully submit that the approach taken in the notes to Proposed Rule 5(b) is correct: attorneys, as a group, should not have greater electronic access to court records or information than members of the public and the press. This equality-of-access principle has been part of our law since the adoption of the Body of Liberties in 1641, which provided that "*Every* inhabitant of the Country shall have free libertie to search and veewe any Rooles, Records, or Regesters of any Court or office except the Councell." More recently, it has been reflected in court policies such as the "Guide to Public Access, Sealing & Expungement of District Court Records" (rev.

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Sept. 2013), published by the Administrative Office of the District Court, which states that the "presumptive right of public access extends to all members of the public, and cannot be restricted only to certain groups such as attorneys...." *Id.* at 4 (emphasis added), citing Trial Court Administrative Directive No. 2-93 ("Access to public records shall not be restricted to any class or group of persons.").

In a memorandum dated March 30, 2016, the Committee explained that upon implementation of the new rules, "Current attorney portal access would be reduced to cases in which the attorney has entered an appearance." While that change would remedy the current state of preferred attorney access, it would regrettably do so by reducing, rather than expanding, the universe of persons who can access to electronic records. Instead, electronic Superior Court records should be made fully accessible to the public on the public access portal. Such an approach would be consistent with the public policies favoring access to court records. This is in turn reflected in the growing recognition of a constitutional right of access not only to criminal court proceedings, but also to court records, including in civil cases. As the Second Circuit has noted, "all the other circuits that have considered the issue" have concluded "that the First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and their related proceedings and records." Accord *Courthouse News Service v. Planet,* 750 F.3d 776, 786 (9th Cir. 2014) ("the federal courts of appeal have widely agreed that [the First Amendment right of access] extends to civil proceedings and associated records and documents.").

In addition, while the notes to Proposed Rule 5(b) are clear that attorneys "shall have no greater access to court records than the general public except for those cases in which they have entered an appearance," Proposed Rule 5(b) rule itself is less clear. We respectfully suggest this ambiguity be eliminated by amending the second sentence of the proposed rule as follows: "The portable document format (PDF) version of certain publicly available court records, if so maintained by the court, may be made available on the Attorney Portal***, so long as those records are also made available on the Public Portal at the same or earlier time."***

2. Kiosk Access Should Be Statewide.

The Press Coalition is pleased that Proposed Rule 2(f) requires all publicly available docket information to be "viewable at a computer kiosk or terminal located in the courthouse," as is currently the practice in most courthouses. However, the Proposed Rules should go a step further and explicitly provide that each courthouse kiosk shall permit statewide searching and accessing of publicly-available docket information (and, to the extent available, full-text documents), in all court locations. A person located in Williamstown, for example, should be able to go to the courthouse in nearby Pittsfield to search Barnstable County Superior Court records, rather than having to drive three and a half hours to West Barnstable. Providing statewide kiosk access in this manner would lessen the inconvenience caused by keeping certain dockets and information off the public access internet portal. There should be no significant technical barrier to accomplishing such statewide access—numerous

other states provide statewide access from each court kiosk for some or all of their courts, including Rhode Island, New Hampshire, North Dakota, New Mexico, South Dakota, Minnesota and Utah.

3. Any "Time Place and Manner" Restrictions on Access in a Courthouse Must Protect the Timeliness of Access.

Clerks' offices clearly have an obligation to protect the integrity of court records and the right to ensure that their working environments are not unduly disrupted by persons seeking access. However, the notes to Proposed Rule 2(c), which permits clerks to "set reasonable limits on the time, location, volume, and manner of access," should be amended to remind clerk's offices that any such "time place and manner" restrictions may not impinge on the public's *contemporaneous* right of access to adjudicative court documents, and point out that even short delays in such access have been deemed unconstitutional. *See, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay" in access to court records "burdens the First Amendment"); *Company Doe v. Public Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) ("we take this opportunity to ... emphasize that the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies"); *Lugosch v. Pyramid Co.*, 435 F.3d 110, 126 (2d. Cir. 2006) ("Our public access cases and those in other circuits emphasize the importance of immediate access where a right of access is found."); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("[i]n light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous"); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (48 hour delays in access to court records constituted "a total restraint on the public's first amendment right of access even though the restraint is limited in time, and are unconstitutional unless the strict test for denying access has been satisfied."); *Courthouse News Serv. v. Jackson*, 2009 WL 2163609, *11 (S.D. Tex. July 20, 2009) (rejecting argument that "'slight delay" in availability of new civil complaints was "a reasonable time, place or manner restriction").

4. Handheld Devices Should be Permitted.

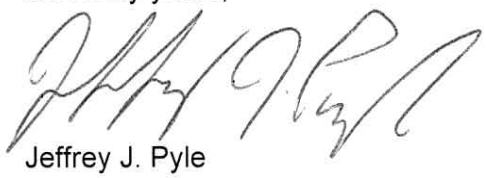
Proposed Rule 2(j) provides that clerks may, but need not, permit the use of handheld devices to image, photograph or scan court documents. The notes to Proposed Rule 2(j) further specify that, where permitted, such devices may not be used with a flash.

In this mobile, electronic age, handheld scanning devices should be permitted under all circumstances. This will have a number of salutary effects, including reducing the demand for photocopiers in clerks' offices, lessening the burden on court staff to make copies, and reducing the cost to the public of obtaining copies. Absent a security reason that would justify prohibiting smartphones from courthouses altogether, there would appear to be little reason for a clerk to prohibit the use of

such devices to scan or photograph court records. In addition, some scanning applications on smartphones, such as Evernote, may work better with a flash in low-light areas. With appropriate instructions to records requesters, the rules should generally allow the use of handheld devices, including those with flash capabilities.

Thank you for this opportunity to submit comments to the Proposed Rules. We would be happy to discuss these matters with members of the Committee at any time.

Sincerely yours,



Jeffrey J. Pyle

Direct: 617-456-8143
Email: jpyle@princelobel.com

JJP/kt

Zimbra **rules.comments@jud.state.ma.us**

copying fee - proposed trial court rule 14

From : dennis@dennisshedd.com Wed, Mar 09, 2016 09:04 PM

Subject : copying fee - proposed trial court rule 14

To : rules comments <rules.comments@jud.state.ma.us>

To The Honorable Peter M. Lauriat and Members of the Trial Court Committee on Public Access to Court Records:

Trial Court Rule 14 (2)(i) currently permits the clerk's offices to charge as much as $1/page for uncertified copies. This if far more than any copy shop would charge and I assume it is far more than is necessary to reimburse the clerk's office for time spent making copies. I support limiting the fee to no more than 10 cents/page.

Furthermore, most clerk's offices permit attorneys to scan pleadings. Some, however, including Suffolk, do not. I recommend that the clerks uniformly be required to permit attorneys to scan pleadings and exhibits. I regularly take appointments from CPCS. Suffolk, unlike many other offices, requires even appointed counsel to pay the copying fee. That means I have to pay $1/page for the copies, I scan the copies, dispose of them, and submit a bill to CPCS for reimbursement of the copying fee. If I could scan the documents in the clerk's office myself, I would not have to bill CPCS and another tree would be saved.

Thank you for your consideration.

Dennis Shedd

GREATER BOSTON
LEGAL SERVICES
...and justice for all

May 4, 2016

Honorable Peter M. Lauriat
Chair, Public Access to Court Records Committee
Superior Court Administrative Office, 13th Floor
Three Pemberton Square
Boston, MA 02108

Re: GBLS CORI & Re-entry Project and Family Law Unit Comments on Proposed Rule XIV

Dear Justice Lauriat and the Trial Court Public Access to Court Records Committee:

I am writing on behalf of the CORI and Re-entry Project and the Family Law Unit at Greater Boston Legal Services (GBLS) to provide comments on the proposed rule. The GBLS CORI & Re-entry Project helps individuals seal their criminal records and overcome CORI related barriers to jobs and other opportunities that trap them and their children in poverty. The Family Law Unit focuses primarily on representation of indigent victims of abuse in Probate and Family Court.

Executive Summary

Our major points and areas of concern are listed below.

- Copying of documents with cellphones should be permitted.
- Compiled data should not include names absent a compelling reason.
- The standard for release of compiled data needs to provide more guidance.
- A contract with conditions on usage should be required for receipt of compiled data.
- Software should be installed to prevent bulk downloads of court data.
- Home addresses of pro se litigants should not be listed online.
- Probate Court Domestic Relations Protective Orders need to be added to the remote access exclusion that applies to protective orders and is required by VAWA.
- Criminal cases should not be accessed online even by docket number because of the serious collateral consequences, dating mining issues, and potential misuse of the data.
- Domestic relations cases in Probate and Family Court should not be available online given the personal nature and volatility of these cases and the potential impact on children.
- Pro se parties should be able to access their own cases online.
- Chief Justices of trial departments wishing to expand remote access after the rules are adopted should provide the public with an opportunity for comment.
- Civil commitment records need to be added to the list of excluded cases online.

- The Supreme Judicial Court should be asked to provide further comments before finalizing the rules.
- Legal aid lawyers specializing in housing and criminal record sealing should be invited to be on the access to records committee if lawyers outside the court are invited in the future.

I. Handheld Devices: Rule 2(j)(1). (Page 10).

Rule 2(j) (1) on page 10 regarding handheld devices needs to be revised to say that clerks "shall allow" as opposed to "may allow" individuals to copy court documents with cell phones (or similar devices). Some clerk's offices (e.g. Suffolk Superior Court) routinely prohibit copying of any documents with a cell phone. The Notes in line 4 on page 14 also need to be revised to delete the phrase "use a flash" because the text indicates that only devices without a flash may be used. Most cell phones, including phones with apps for photocopying, such as TurboScan, produce a minor flash.

Low income clients cannot afford to pay a dollar per page for court document copies. It is burdensome for legal aid and pro bono attorneys to have clients execute affidavits of indigency for a fee waiver every time a need for a copy of a court document arises.

II. Requests for Compiled Data: Rule 3. (Page 15).

Procedure for Making Requests: Rule 3(a). If the requestor seeks data that may include names of parties or defendants or similar personal identifiers, the requestor should have to explain why inclusion of this identifying data is critical to the reason for request of the data. Proposed rule 3(a) also should specify that "compiled data" released to requestors for "scholarly, educational, journalistic or governmental purposes" shall not include names of parties or similar identifying data unless the requestor shows a critical need for inclusion of such information.[1]

The proposed rule does not specify what compiled data may contain. The rules should require and specify that safeguards will be set up to exclude social security numbers and similar identifiers from compiled data. Potential data subjects have no opportunity to protect this information because they do not receive notice of a request for compiled data under the proposed rule. Interim Guidelines for the Protection of Personal Identifying Data in Publicly Accessible Court Documents have been in effect since 2009, but non-compliance by pro se parties and lawyers is not unusual. Omission of names and personal identifiers

[1] Arkansas Administrative Order 19, § VI, for example, provides that when "the identification of specific individuals is not essential to the purpose of the inquiry . . . names, addresses (except zip code), month and day of birth shall be redacted from the information." This order is available online at: https://courts.arkansas.gov/rules-and-administrative-orders/administrative-orders

from compiled data might obviate harm or controversy related to the release of voluminous amounts of data that implicate large numbers of people.

Determinations about Release of Compiled Data: Rule 3(b). (Page 15).

Proposed rule 3(b) on page 15 provides that if the electronic record correctly reflects the official record, the criteria for determining whether to release "compiled data" is whether the request is "consistent" with the "purpose" of the rules and not unduly burdensome or expensive to compile. The "purpose" of the rules set forth in rule 1(a) is to "provide public access to court records and information while protecting the security and privacy of litigants and non-litigants." Some lawyers complain that the proposed standard is vague enough to provide unfettered discretion to deny requests, but the same might be said for allowance of requests for compiled data.

The Notes on page 15 come closer to explaining how determinations might be made, but fall short on details. The Notes state that the court seeks to provide access to compiled data for purposes of "transparency and accountability," but must consider "unwanted harm to litigants, victims, and jurors that can come from unfettered access." More nuanced factors with examples should be added to the notes to reflect the breadth of concerns as well as problems specific to Massachusetts. Letters to your committee from the bar and the public in 2015 voiced concerns that might be factors to be weighed.

We suggest that rule 3(b) should require consideration of the following factors:

(1) the nature of and the volume of information sought by the requestor;

(2) whether release of the data promotes transparency and accountability (e.g. data requested on what is perceived to be a statewide problem with bail amounts);

(3) significance of the topic and data to the practice of law, the legal profession, and the public;

(4) whether release of the data is important to the study and improvement of court practices and/or dispositions (i.e. measuring the effect of specialized courts or certain sentences on recidivism, recovery from addiction, and compliance with probation);

(5) whether release of the data is consistent with promoting access to justice and will increase or decrease reluctance to use the court to resolve disputes (e.g. tenants avoiding litigation in Housing Court to avoid being blacklisted by landlords, or victims not using the courts to avoid being tracked or abused by a stalker or violent former partner);

(6) whether data release will put any individual(s) at risk of harm (e.g. stigma from the data puts defendants at risk of loss of job and housing opportunities, or release of data may endanger the safety of victims, witnesses, family members, or others);

(7) whether protection of individual privacy rights and interests can be achieved (i.e. by redacting names or other identifying data);

(8) whether protection of proprietary business information can be achieved (i.e. trade secrets in need of protection);

(9) whether release of the data will promote fairer administration of justice and benefit the public (e.g. studies of represented versus pro se party case outcomes, urban court versus wealthier community court prosecution practices, sentencing patterns in DUI cases);

(10) whether providing compiled data will unduly burden ongoing the business of the court;

(11) other relevant considerations, including but not limited to whether sufficient safeguards are in place to protect individuals from use of inaccurate information contained in MassCourts or other court records.

A number of jurisdictions use similar factors in determining whether to provide compiled data.[2]

Conditions for Use of Compiled Data: Rule 3(d). (Page 16).

The language in rule 3 (d) on page 16 which states that the court administrator "may condition approval" on a requestor agreeing in writing to certain limitations should be changed to "shall condition approval." All requestors should be required to sign a contract certifying that the names of litigants and related information obtained from the compiled data will not be disseminated to others except for the approved specific purpose and that the data shall not be sold or used for commercial purposes.

The rule should require requestors to protect the confidentiality of the data. For example, Wyoming Rule 12 (online at http://www.courts.state.wy.us/WSC/CourtRule?RuleNumber=17) requires requestors of compiled information not only to explain the benefits to the public interest in releasing data, but to "explain provisions for the secure protection of any information requested." The requestor

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[2] For example, South Dakota releases compiled data if the data: "(1) Maximizes accessibility to court records, (2) Supports the role of the judiciary, (3) Promotes governmental accountability, (4) Contributes to public safety, (5) Minimizes risk of injury to individuals, (6) Protects individual privacy rights and interests, (7) Protects proprietary business information, (8) Minimizes reluctance to use the court to resolve disputes, (9) Makes most effective use of court and clerk of court staff, (10) Provides excellent customer service, and (11) Does not unduly burden the ongoing business of the judiciary." S.D. Codified Laws § 15-15A-12. Colorado and Idaho include the same factors although Colorado adds a 12th factor— whether the release "protects individuals from the use of outdated or inaccurate information" which has implications for defendant re-entry and credit reporting. The first 11 factors were suggested in an early report of the Council of Chief Justices and State Court Administrators. *See* Martha Wade Steketee & Alan Carlson, Developing CCJ COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts (2002). Arizona Rule 19 (b) includes whether a request is filed for the purpose of harassing or substantially interfering with routine court operations as a factor if that is of concern to this committee.

is "required to certify that the data will not be sold or otherwise distributed directly or indirectly to third parties, that the information will not be used directly or indirectly to sell a product or services to an individual or the general public, and that the information will not be copied or duplicated, except in the public interest." Idaho's Administrative Rule 32 (online at http://www.isc.idaho.gov/icar32) similarly requires that requestors of compiled data explain how the information will benefit the public interest and "explain provisions for the secure protection of the requested information." South Dakota requires that "[t]here will be no copying or duplication of information or data provided other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose." SD St. § 15-15A-12. It would be helpful if the proposed rule contained a similar type of restriction.

Bulk Data and Downloading: Rule 4. (Page 17).

Rule 4 prohibits allowance of requests for bulk data except as required by law or court order. Rule 4 should be revised to require court administrators to install software protections that detect and block "bulk" downloading of information. If the administrator determines that a person authorized to access online court records publishes the records in a searchable format that allows third parties to search the records (i.e. in a database), the administrator should be required to cut off future access.

Sanctions. The proposed rule on compiled data should also provide that the court may impose sanctions for unauthorized use of compiled data and/or failure to safeguard the confidentiality of the data in accordance with the agreement for release of the information.

III. Remote Access to Electronic Court Records: Rule 5. (Pages 18-22).

Home Addresses of Pro se Parties. Rule 5(a)(1)(i)(B) and rule 5(a)(2)(i)(B) pertaining respectively to civil and criminal cases on page 18 provide that the mailing addresses of pro se litigants will be viewable online.[3] This amounts to unequal treatment because the addresses of represented parties are not listed. Indigent clients can ill afford the costs of a post office box to protect their privacy in most instances, and disabled or homebound people may not have the help needed to easily obtain a post office box.

The addresses of pro parties should not be online. Having one's address online opens a gateway to unsolicited contact and has safety implications for victims, elders, and other vulnerable populations. Abuse victims sometimes quietly relocate without seeking a protective order, but an action as simple as filing for guardianship of a child or seeking other relief could put them in harm's way if their addresses are in an easily searchable database.

Many past and present litigants are or were pro se and cannot be expected to know that their case information might be available on the internet in the future in the absence of an allowed

[3] The right to counsel also does not extend to all types of criminal cases which means some defendants are pro se not by choice, but because they are indigent.

motion to impound records. Internet access under the proposed rule would widen the divide between the rich and poor related to access to justice. Court appointed counsel is not available to protect privacy rights. People with meritorious claims would have to choose between filing a court case and avoiding disclosure of their addresses and personal information on the internet.

Protective Orders and Exemption of Certain Civil Cases: Rule 5(a)(1)(iii). (Page 18).

Rule 5 (a)(1)(iii) on page 18 states that abuse prevention and harassment orders and records in these proceedings are not available by remote access. The Notes to proposed rule 5 (a)(1)(iii) on page 20, however, only include citations to Chapter 209A and 258E orders. The Notes should be amended to include abuse prevention orders entered pursuant to G.L. c. 208, § 18, G.L. c. 209, § 32, and G.L. c. 209C, § 15, commonly known as Domestic Relations Protective Orders (DRPO's). These orders fall under Federal Violence Against Women Act (VAWA) which prohibits courts from putting harassment and abuse prevention order information on the Internet. The Addendum of Excluded Records on page 25 should also be revised to add citations to G.L. c. 208, § 18, G.L. c. 209, § 32, and G.L. c. 209C, § 15 so as to include Domestic Relations Protective Orders under "Abuse Prevention Orders."

As a practical matter, it would be difficult and labor intensive for the Probate and Family Court to ascertain which divorce, Chapter 209C and separate support cases have DRPO's without reviewing countless files from the past few decades. Thus, excluding all divorce, Chapter 209C and separate support cases may be the only way to comply with VAWA if domestic relations cases become remotely accessible online in the future.

Remote Access to Criminal Cases: Rule 5(a)(2)(i)-(iii). (Pages 18-19).

The committee is to be applauded for its sensitivity to the devastating consequences of having a criminal record and its excellent articulation of the legislative scheme and case law related to CORI as reflected in the Notes on pages 21 to 22.

The committee obviously tried to strike a balance between competing interests, by limiting searches to docket numbers rather than names in rule 5(a)(2)(iii) on page 19. This approach will be helpful to many people, but unfortunately it will not solve problems related to data mining companies who "scrape" websites and often fail to comply with consumer protection laws. Once a former defendant is in their database, the stigma of one's criminal record may be permanent which undermines the benefits of our sealing laws. As cautioned by Persis Yu from the National Consumer Law Center in her recent letter to your committee, new software might be developed to gather all criminal docket numbers which can later be searched by name.[4]

[4] The internet has spawned scores of online background screening companies that troll the web and sell data they collect. In 2012, the National Consumer Law Center issued a report on this phenomena and said that the Fair Credit Reporting Act (FCRA) as currently interpreted and enforced fails to adequately protect people applying for jobs. Background checking agencies are required to update and ensure the accuracy of data they report, but sloppy

DCJIS implements graduated levels of access to CORI data based on the type of employer or entity requesting CORI and revamped its report format in 2012 to eliminate confusing acronyms. If criminal records are online, the same employer can pull up MassCourts which will contain the same acronyms and sometimes even worse, serious errors. It is not unusual in my experience to find errors in MassCourts related to criminal cases. The prevalence of errors, by itself, should be a reason to keep the data offline since the only way to trust its accuracy is to check the real file.

A better approach is to not provide remote access to criminal cases except to parties in the case and counsel of record. Massachusetts would not be an outlier in not granting remote access to criminal records, but instead has the opportunity to become a model for other state on access to court records. Just as not all states elect judges, not all states provide remote access to trial court criminal records or even civil trial cases. Vermont and Delaware courts specially exclude criminal trial court cases from remote access.[5] Other states such as Maine, Michigan, Mississippi, Montana, and Louisiana put no civil or criminal trial court records online. New Hampshire courts also put no trial court records online, except when they deem a case to be a special interest. As Attorney General Lynch said last week during National Re-entry Week, "Supporting successful reentry is an essential part of the Justice Department's mission to promote public safety — because by helping individuals return to productive, law-abiding lives, we can reduce crime across the country and make our neighborhoods better places to live." Because online access to criminal records will undermine the benefits of sealing records and successful re-entry, your committee is to be commended for trying to address the collateral consequences of internet access.

There is no constitutional right to remote access to court records, but a common problem is rule makers fail to appreciate that putting records online is very different from providing access to records at a courthouse, and thus, a different set of rules needs to apply to avoid putting people in harm's way. More restrictive rules need to apply because the internet opens a different dimension of communication with the ability to hurts unlimited numbers of people with no way to un-ring the bell or retrieve the data. Because court files are available at the courthouse, the real question is not transparency or access, but whether convenience for the media or researchers trumps the interests of many more people with past and present cases in the court system, often through no choice of their own. The fact that technology exists to put records online is not a reason to provide remote access when so many powerful public policy considerations militate against online access given that the vehicle for disclosure is as uncontrollable as the internet.

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data collection practices as well as errors, and stale information in their reports are very common. This has grave consequences for job seekers. The report (Broken Records—How Errors by Criminal Background Checking Companies Harm Workers and Businesess) is available on the National Consumer Law Center website at: http://www.nclc.org/issues/broken-records.html

[5] Vermont also excludes family law cases from remote access. New Jersey limits access to criminal cases to cases indicted in Superior Court. New York has a varied complicated scheme. Virginia varies by circuit as do some states.

The "purpose" of the proposed rules stated in rule 1(a) is to "provide public access to court records and information while protecting the security and privacy of litigants and non-litigants." (Emphasis added). As the Notes to rule 3(b) indicate "unwanted harm to litigants, victims, and jurors that can come from unfettered access" must be considered. Given that privacy and potential harm are considerations, the concerns voiced by the people who will suffer the consequences of online access must be listened to or the result will be that access always trumps privacy and risk of harm. Studies repeatedly show that most employers will not hire someone with a criminal record even when a case was dismissed. The fact that putting criminal records online will contribute to poverty and unemployment for former defendants and undermine the benefits of criminal record sealing provides ample grounds to keep the records offline.

Remote Access to Civil Cases: Rule 5(a)(1)(i) (Page 18).

Rule 5(a)(1) does not exclude domestic relations cases from online access. Online access would too easily subject litigants, including former spouses, victims of abuse, and others to vindictiveness and retaliation given the volatility and turmoil related to family law matters. Children and/or their classmates would be able to access embarrassing and devastating information related to their parents or their classmates' parents. The captions of motions (for substance abuse evaluation, etc.) alone can carry a heavy stigma. Online access would give domestic abusers the ability to send links to records to employers and others to further abuse victims who are often the subject of bogus child abuse claims filed by abusers to press the victim to return to the relationship.[6]

Pro Se Parties and Remote Accessibility Through Attorney Portal: Rule 5(b) (Page 19).

Rule 5(b) provides attorneys with remote access through an attorney portal for cases where they are counsel of record. Pro se litigants should have remote access to their own cases through a similar portal. Otherwise, it creates the appearance of unfairness. Pro se parties taking advantage of Limited Appearance Representation (LAR) also may want to view docket entries on a phone when seeking advice from attorneys who draft documents, but never appear in court.

Chief Justice Expansions and Exceptions: Rule 5(a)(1)(iii), Rule 5(a)(2)(iii), Rule 5(d). (Page 18-19).

Rule 5(a)(1)(iii), rule 5(a)(2)(iii), rule 5(d) permit Trial Court Department Chief Justices to exclude or add case types or categories available for remote access. Given the adverse consequences to individuals and families can result from remote access, the rules should suggest an opportunity for public comment when Chief Justices are considering expansion of remote access.

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[6] The comments submitted by Esme Caramello from Harvard Legal Aid and others on online access to Housing Court are illustrative of the harm that can flow from online access to MassCourts even in civil cases.

Civil Commitments: Addendum of Records Excluded from Public Access (Page 28).

The Addendum of Excluded Records on page 28 should be revised to change the header titled "Mental Health Reports" to "Civil Commitments and Mental Health Reports." A citation to G.L. c. 123, § 36A should also be added to the text below the header. Section 36A provides that "[a]ll petitions for commitment, notices, orders of commitment and other commitment papers used in proceedings under sections one to eighteen and section thirty-five shall be private except in the discretion of the court."

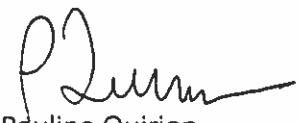
Additional Comments

We urge the committee to suggest to the Supreme Judicial Court that it solicit comments before finalizing and adopting the final proposed rule of your committee because of the gravity of the issues presented.

We also suggest that future standing committees on access to records that include attorneys from outside the trial court include several legal aid attorneys who specialize in housing and criminal record sealing because the vulnerable populations we serve are so adversely affected by release of records.

We thank you and the committee for your tremendous work on these important issues. Your time and effort are appreciated. I can be contacted at pquirion@gbls.org by email and my direct phone line is 617-603-1554.

Respectfully submitted,



Pauline Quirion
Director, CORI & Re-entry Project
Greater Boston Legal Services

May 3, 2016

Hon. Peter M. Lauriat
Chair, Public Access to Court Records Committee
Superior Court Administrative Office, 13th Floor
Three Pemberton Square
Boston, MA 02108

RE: Proposed Trial Court Rule XIV -
Internet Access to Criminal Case Docket Entries and Files

Dear Judge Lauriat:

I am the Legal Director at GLBTQ Legal Advocates & Defenders (GLAD), a legal rights organization, which is headquartered in Boston and serves the lesbian, gay, bisexual, transgender (LGBT) and HIV communities in the six New England states. Since our founding in 1978, our mission has been to end discrimination based on sexual orientation, HIV status and gender identity and expression.

We at GLAD understand that there are interests on both side of the question of public access to court records in criminal cases, but we believe that the interests and concerns in protecting these records from broad public access clearly outweigh any countervailing interest favoring disclosure. We recognize that the proposed rule limits criminal case searches to case numbers, and not defendant names; however, we are concerned that continually increasing sophistication in data mining will erode any protections that might be afforded by numbers-only searching.

Information released online surely gains a life of its own and tends to become accessible forever. Therefore, it is reasonable to believe that this will hurt people who need jobs the most. In the same vein, this availability seemingly still runs into conflict with our laws on the sealing of records whether immediately or within a period of years and with the spirit of our reformed CORI laws.

We are also aware of how the criminal justice system negatively and wrongly impacted gay men for many years. Now, and historically, the racial disparities in our criminal justice system raise serious concerns about harms to people in communities of color as a result of internet access to records.

Lastly, we are concerned about errors in court records and how those unintentional errors become effectively compounded by broad dissemination by individuals and the criminal background checking industry. And, of course, both with and without errors, there is the danger of criminal use of court records to harass, bully and otherwise harm individuals who have reason to believe that their privacy should be protected in such matters.

Thank you for your consideration of these comments.

Sincerely,

/s/ Gary Buseck
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GREATER BOSTON
LEGAL SERVICES
…and justice for all

May 4, 2016

The Honorable Peter M. Lauriat
Chair, Public Access to Court Records Committee
Superior Court Administrative Office, 13th Floor
Three Pemberton Square
Boston, MA 02108

Re: Proposed Trial Court Rule XIV (public access to court records)

Dear Judge Lauriat and Committee Members:

We write to comment on the addendum to proposed Rule 5 (a)(1), which is an overview of the material that a statute, court rule, or standing order designates must be withheld as "impounded," "withheld from public inspection," "not available for public inspection," "confidential," "segregated," or "sealed."

Greater Boston Legal Services (GBLS) is a non-profit corporation that provides civil legal services to eligible low income clients in 33 cities and towns in eastern Massachusetts. As part of its mission, GBLS, through its' Disability Benefits Project, and Children's Disability Project, represents individuals with disabilities of all who are seeking to receive or preserve benefits under Titles II or XVI of the Social Security Act. It also provides representation in state court pursuant to chapter 30A when an administrative agency, such as MassHealth, has denied or terminated health care benefits.

The Disability Law Center (DLC) is the Protection and Advocacy agency for Massachusetts. It is a private nonprofit entity that provides free legal assistance to individuals with disabilities throughout Massachusetts. A key mission of the DLC is to help ensure that people with disabilities are able to access the items and services they need to live and work in the community. Access to cash disability benefits and the associated medical coverage is crucial for many to achieve this goal - whether the benefits are needed for a year or longer term or episodically. Since 1983, the Disability Benefits Project (DBP) at the Disability Law Center has provided technical back up and support to legal services advocates and private attorneys who represent individuals before the Social Security Administration (SSA).

The Addendum to proposed Rule 5 (a)(1) lists many types of material that may be impounded or withheld. "Medical, Health, and Hospital Records. A party's release form or court order is needed to access records. G.L. c. 111, §§ 70, 70E(b). HIPAA health providers may release personal health information only if the release signed by a party complies with the provisions of the federal law." These are the types of records that are part of certain MassHealth appeals under c.30A, where an individual has been determined not be disabled, or has been denied certain

medical services. In those instances, the individual would have given permission for the health care provider to release the medical records to the agency. As noted in the addendum, this is required. In instances where the individual is seeking medical coverage, he or she is required to come forward with documentation supporting the claim. But just because permission has been given to have the administrative agency review these records, does not mean they should be available remotely on the internet once a case reaches the court, and the administrative record is filed. Such broad and unintended re-disclosure may have the effect of discouraging individuals from seeking beneficial services.

While the addendum heading states that the list is not exhaustive, civil commitment records should be added to this list at this time. *See* G.L. c. 123 §36A ("All reports of examinations made to a court pursuant to sections one to eighteen, inclusive, section forty-seven and forty-eight shall be private except in the discretion of the court. All petitions for commitment, notices, orders of commitment and other commitment papers used in proceedings under sections one to eighteen and section thirty-five shall be private except in the discretion of the court."). These sections above could be added to the current "Mental Health Reports" on page 28, and change the heading to "Civil Commitments and Mental Health Reports" and adding the additional civil commitment citations. We would recommend that the list be reviewed annually for any updates to be added.

Thank you for the opportunity to comment.

Sincerely,

/s/Sarah Anderson, esq.
Greater Boston Legal Services

/s/Linda Landry, esq.
Disability Law Center

Zimbra **rules.comments@jud.state.ma.us**

Proposed Rules on Public Access

From : Gregory Lee <gregleelaw@bostonfamilylegal.onmicrosoft.com> Tue, Jan 05, 2016 04:25 PM

Subject : Proposed Rules on Public Access

To : rules comments <rules.comments@jud.state.ma.us>

Dear Judge Lauriat:

I am writing to comment on the proposed rules for public access to documents. I have a particular concern about the language relating to the right of members of the public to use their own legal electronic devices to copy court records. The proposed rule states:

> (j) Requester's Self-Service Duplication of a Court Record. (1) Handheld device. The Clerk **may** allow a member of the public to use a personal handheld electronic imaging device (e.g., personal scanner, or, if permitted at the court location, a camera on a cell phone) to produce a copy of a court record. A fee shall not be charged for such reproduction. (2) Sheet-fed or flatbed scanner. The Clerk **may** allow a member of the public to use a sheet-fed or flatbed scanner or imaging device to produce a copy of a court record. A fee shall not be charged for such reproduction.
>
> Emphasis supplied.

My concern is that the language gives discretion to each individual clerk's office. Each clerk's office, in its discretion "may" allow such copying. Respectfully, I believe that no such discretion should be allowed, because the discretion "may" be abused in favor of "revenue enhancement.

I speak as an attorney who occasionally needs to copy large portions of files. In some cases, I enter a family law case already in progress. Copying pleadings in high-contest cases is essential. In others, I learn of related proceedings, such as criminal matters in another court, or landlord/tenant matters which may have a bearing. In the last ten years I have had three (3) portable scanners (one broke after being dropped, one became obsolete with Windows 8, and the third is in regular use), each of which has more than paid for themselves by my NOT having to pay upwards of fifty cents a page. They also amortize themselves when I can scan documents at the courthouse, immediately before or after a court appearance.

However, an assistant clerk magistrate of one District Court which I shall not name as

such (but which is quite local to me) has forbidden me on one occasion to use my hand scanner. It is apparently his opinion that I am not allowed to use such a device in the courthouse as it is at least akin to a forbidden cell phone camera – even though, as an attorney, I am permitted to carry my cell phone. Apart from the fact that this in essence forced me has forced me on a number of recent occasions to unnecessarily spend $1.00 dollar per page at my clients' expense, it is a clear over-reaching of the rules in place to protect witnesses from intimidation. A hand scanner cannot be used to photograph a live witness; the only way I could use it in intimidation would be as an expensive club.

Respectfully, giving clerks the discretion to charge a dollar a page is not to the benefit of the public in general or the practicing bar. It is nothing short of revenue enhancement. It has the additional effect of limiting access to justice for low-income litigants, represented or not. It creates inefficiency – I scan documents to make them more readily available to me and for preservation of my file.

I believe that the rule should be rewritten to **mandate** that the public be allowed to scan documents using handheld scanners. It may also be rewritten to suggest that the general public be allowed to use other devices **when they are allowed in the courthouse** (i.e., courthouses that ban cameras certainly have the discretion to not allow them in for the mere purpose of photographing documents).

Needless to say, documents scanned in this way are not certified or attested. They are not available for use as documentary evidence, and any party or attorney who obtains such scans without proper attestation does so at his or her own risk. However, I strenuously object to being subjected to the potential charge of thirty or forty dollars, or even ten dollars, to obtain a file relevant to one of my divorce clients' cases when my **informational** purposes can be achieved by merely zipping the pages through my already well-amortized third portable scanner.

Thank you for considering this comment.

Sincerely

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May 4, 2016

Hon. Peter M. Lauriat, Chair
Public Access to Court Records Committee
Superior Court Administrative Office, 13th Floor
Three Pemberton Square
Boston, MA 02108

Re: Comments on Proposed Trial Court Rule XIV as Applied to Landlord-Tenant Cases

Dear Judge Lauriat and Members of the Committee:

First and foremost, we wish to thank the Committee for the hard work it has done in crafting the proposed Uniform Rules on Public Access to Court Records. The technologies of the 21st century offer the public unparalleled access to our courts, allowing us more easily and fully to pursue justice in individual disputes and to observe the workings of the court system and learn from the stories that unfold there. The democratization of access to information and systems is one of the great movements of our time, and it is heartening to see the Trial Court and the Committee moving boldly to ensure that our court system is part of it.

As the Court wades into this exciting but unfamiliar territory, however, we ask that it pay particular attention to the real harm that broadcasting personal information, irreversibly, on the Internet can have on people who are already very vulnerable. For all of us, the publication of our court records online might be embarrassing. For some, especially people with low incomes, people of color, immigrants, people with disabilities, and others who already face significant barriers to securing housing, jobs, and other basic life necessities, having entries in masscourts.org ("MassCourts") remotely accessible for free, 24 hours a day, to anyone in the world with access to a computer or a phone, can have a dramatic impact on their lives and families. As we have recognized in other contexts, as with the Legislature's recent reform of the CORI system, the public interest is best served by systems that minimize these harms as much as possible consistent with the public policy in favor of broad and equal access to information.

As legal aid and private lawyers practicing landlord-tenant law in both the Housing and the District/Municipal Courts we observed a major change once the court made housing case records freely available online: our clients, who are already so poor that their housing choices are severely limited, are now being rejected more often for the few apartments they can afford when their names appear on MassCourts. Moreover, tenants are increasingly wary of exercising their legal rights because of the impact that having a court "record" will likely have on their future housing searches. We have heard similar stories from tenant advocates across the state and the

country. We therefore write to share what we have seen and to ask that the Committee consider changes to proposed Rule XIV to address the greatest problems. Specifically, with the support of legal aid programs across the state, we recommend that the final rule:

- Provide that in landlord-tenant cases, parties' names be displayed only as initials in the online version of the database;

- Set forth clear procedures and short timelines for the correction of errors in the masscourts.org database ("MassCourts"), allowing clerical errors to be corrected by clerks without judicial involvement; and

- Establish a procedure by which parties may, for good cause, request removal of their cases from the remotely accessible database.

While these changes will not eliminate the problems we identify, they will help to minimize them. *It is crucial that these efforts take place at the Trial Court level*, because housing cases are brought not only in the Housing Court, which does not extend statewide, but also in the District/Municipal Courts. Deferring these questions to the individual departments risks creating a patchwork of unequal rights and remedies for litigants across the state. Moreover, *it is important that protective steps be taken on the front end, before the Court broadcasts sensitive material*, given the practical and legal limitations on what the Court may do to limit the use or abuse of the material once the Court has published it online.

The Problem: Over-Screening, Blacklisting, and a Chilling Effect on the Exercise of Important Rights

When the Court first put landlord-tenant records online on MassCourts, the system was celebrated by landlords as "a powerful new and free tool for tenant screening," the result of "years of lobbying from real estate groups." *See* "Massachusetts Housing Court And Tenant Eviction History Now Online," April 24, 2013, http://massrealestatelawblog.com/2013/04/24/massachusetts-housing-court-and-tenant-eviction-history-now-online/. In principle, there is nothing wrong with a landlord's conducting a background check on a potential tenant. But screening based on overly broad or impermissible criteria – like having any sort of housing litigation history, or having children or a Section 8 voucher – or based on inaccurate information – as where the system displays a false negative outcome like a money judgment owed to a landlord – can unfairly and even unlawfully deprive people of access to important resources, including stable housing. Allowing remote access to landlord-tenant records on MassCourts makes this kind of blacklisting too easy to do and too hard to identify and prevent. Following are specific examples of problems that we have seen exacerbated by remote access to MassCourts:

1. **Tenants are blacklisted for accessing the court system for any reason and are thus deterred from exercising their legal rights.**

Tenants often appear in MassCourts for reasons other than a failure to pay rent or a violation of their leases. One of my current clients was just evicted from her home of 17 years because the landlord wants to sell the building in which she lives and use the proceeds to fund

his retirement. In another current case, my client's minor children have been improperly named as defendants by an overzealous landlord; they now have an eviction "record." Tenants in Worcester were (properly) named as defendants in the city's action against their delinquent landlord because the city wanted the court to order that their rent payments be paid into escrow rather than directly to the landlord. Tenants are sometimes forced to bring cases against their landlords directly when emergency repairs are not made, locks are changed, security deposits are stolen. All of these tenants appear in the MassCourts database, and when they go to look for apartments, they are red-flagged.

Certainly, not all landlords reject tenants merely because they appear in an online court database. But plenty do, in Massachusetts and elsewhere.[1] For example, a tenant in Central Massachusetts was recently rejected by a MassHousing-financed development based on a tenant screening report showing "any LL-T activity" in the previous 48 months. It took significant work by a legal aid lawyer to get the decision reversed, and virtually no tenants have access to such services. Tenants who successfully exercise their legal rights can, in fact, be at even greater risk than those who are quietly evicted for nonpayment of rent. As Massachusetts landlord Elmir Simov put it on his blog last summer:

> If I see that a prospective tenant has ever had a lawyer in any proceeding at http://www.masscourts.org as of this case forward I no longer take them as a tenant. This is a free country. They certainly have a right to hire a lawyer and I have a right to not take them as tenants because of that. http://massachusettslandlords.com/42f/ (June 12, 2015).

The legitimate fear of this kind of backlash deters tenants from going to court when they have every right to do so. Indeed, some landlords are using tenants' widespread fear of having a "record" to extort benefits from them in exchange for a mere promise not to file a case. As one landlord put it in a November 2015 letter to a tenant, in which the landlord sought to persuade the tenant to agree to be evicted, pay for maintenance that was the landlord's legal responsibility, and pay the landlord an hourly rate for any time he spent trying to evict her:

> If everything goes to plan, then it won't go to court. But once the summary process is served and filed, you will have a permanent record in housing court. Even if we reach an agreement without going before the judge or if we just ask for dismissal and never go to

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[1] The practice of refusing to rent to tenants based solely on court filings, rather than dispositions, has been documented and addressed in other states, as well. *See, e.g.,* Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L. Rev. 1344, 1347 (Apr. 2007) (quoting a tenant screening bureau as saying, "it is the policy of our [landlord] customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome it, because if their dispute has escalated to going to court, an owner will view them as a pain"); Eric Dunn and Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 Seattle J. Soc. Just. 319, 336 (2010-2011) (finding that in much of Washington, residential landlords commonly reject any applicant who has been involved in an eviction case regardless of the outcome); NY State Bar Association, LegalEase: The Use of Tenant Screening Reports and Tenant Blacklisting (2013), p. 9, http://old.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=153855 (noting that merely appearing on lists leads to blacklisting and advising tenants on how to invoke protections that do not exist in MA). *See also* Massachusetts Housing Court and Tenant Eviction History Now Online, *supra* (describing value of MassCourts not as giving access to specific information about a person's case but "whether [she] has been a party to a previous eviction, small claims or related housing case."

court. If you win sanctions against me and you can say you won in court. Do you think that will make any prospective landlords feel better about renting to you?

This pressure exists, of course, regardless of whether the landlord vocalizes it.

These are just a handful of examples of the many ways that the current system and proposed Uniform Rules, by making tenants' court records available online and searchable by name, facilitate abusive screening practices and deter tenants from accessing our justice system to vindicate important rights.

2. Tenants generally cannot prevent their records from appearing online, even for good cause.

When the tenants mentioned above were sued by their city – the city they had called for help when their landlord refused to make critical repairs to their home – in a declaratory judgment action despite the fact that everyone involved acknowledged that the tenants had done nothing wrong, the tenants were suddenly faced with reduced access to housing in the future. So they filed a motion to dismiss, which was granted, and a motion to remove their names from MassCourts' *online* database. The Housing Court judge was sympathetic and took the request seriously, continuing the case to the afternoon to give the matter some thought. In the end, however, the judge determined that it was not within the court's power to grant the relief the tenants requested. Needless to say, the tenants (and those to whom they tell their story) will be reluctant to call the government for help the next time around.

Because there is effectively no mechanism short of impoundment to protect tenants from online publication of their court records, some have tried that remedy. But impoundment is a square peg for a round hole. As retired Chief Justice of the Housing Court Steven Pierce observed more than once, "While the defendant may be correct in her perception that public record of these summary process actions is hampering her housing search, that alone does not establish good cause to impound [the] actions." *Peabody Properties v. Small*, 00-SP-00811 (September 8, 2008). Impoundment, with its First Amendment implications, may also be an over-inclusive remedy, if the relief sought is merely removal from the online version of the database.

3. The MassCourts database is rife with inaccuracies that harm tenants, and there is no clear, well-understood process for correcting them.

Compounding the problem of overzealous screening is the fact that a significant portion of the information published online is inaccurate in ways that harm tenants. And as court personnel have confirmed both informally and publicly, and as tenant advocates' experience shows, there is no clear procedure for correcting such errors. Following are a few examples:

- In 2014, a student of mine, Nora Mahlberg, conducted a study of 47 housing cases that our office had closed in calendar year 2013. For each, she looked at the case "disposition" on MassCourts and compared it against the actual outcome of the case according to our case file. In just that small sample from our office alone, Ms. Mahlberg found 4 cases – almost 10% -- in which MassCourts displayed a judgment of eviction against the tenant when in fact there was no such judgment.

- In early 2015, an experienced legal aid lawyer plugged just her own name into the system and drew 36 "Active" summary process cases that were not in fact active. All had in fact been resolved. Another tenant lawyer did the same and found that a number of his active cases were missing from his list, while his list included one case where he had no connection whatsoever to the tenant.

- As detailed in the written submission of Mac McCreight of Greater Boston Legal Services to the Committee prior to the release of the Proposed Rules, summary process plaintiffs sometimes, in a misguided attempt to cover their bases, name every adult in a household, and sometimes even minor children, even though the head of household is the only legally responsible tenant.[2] This is particularly inexcusable in subsidized tenancies, where with limited exceptions state and Federal law require the lease to identify explicitly all persons with contract obligations.

- A tenant in Western Massachusetts was unable to co-sign a car loan for her son because of an erroneous entry of a judgment for $3,300 that a clerk had made in her eviction case months earlier. In fact, the tenant had won the case, and the landlord had paid her attorneys' fees. Nonetheless, it took the tenant several years to clear her credit, and she was able to do so only after hiring a lawyer to help her.

- A Greater Boston Legal Services review of its cases in MassCourts revealed that cases were coded as "nonpayment" or "fault" cases when they were in fact filed as "no fault" evictions.

- In cases where the parties have settled, after negotiation, for an agreement that does *not* impose a judgment on either party are sometimes coded as "agreements for judgment," which appears to be a judgment against the tenant.

- The "Disposition" box at the bottom of the docket screen often reflects a judgment long after a judgment has been vacated and a dismissal has been entered, either by court order or by agreement. If the first disposition is a judgment, that disposition remains on display despite changes in the status of the case.

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[2] It has long been recognized that persons may be "holding under" the tenant or leaseholder, such as a spouse and children, or sublettors or others who do not stand in the relationship of tenancy with the owner. If the leaseholder or tenant is named, and the owner obtains a judgment of possession and execution in a summary process action against that person, the execution is good to displace such other persons without them being named. See Keith v. Perlig, 231 Mass. 409, 413 (1918); Fiske v. Chamberlin, 103 Mass. 495 (1870).

Such errors are not easy to correct. As court personnel have confirmed both informally and publicly, there is no clear and well-understood – much less published – mechanism for tenants to request correction of even obvious database errors. This leads to unequal treatment in different courts and on different days, to delays at times when tenants are trying to move and desperately need clean records, and at times to the failure to correct errors altogether.

Solutions from Other States

Some states grappling with the negative impacts of publishing case information online have developed solutions that seek to balance the public's interest in access to court information with the legitimate privacy interests of litigants. Following are a few approaches taken by other states in response to some of the problems noted above.

New York: The New York court system once distributed landlord-tenant case information electronically, on a daily basis, for a fee. In response to concerns about the "blacklisting" of tenants and the chilling effect it was having on the lawful exercise of their housing rights, **the court agreed, in 2012, to remove tenants' names from the electronic feed.** *See* Hon. Gerald Lebovits and Jennifer Addonizio, "The Use of Tenant Screening Reports and Tenant Blacklisting," New York State Bar Association (2013). Applauding this action "to protect both New York's tenants and the integrity of the court system," one legislator explained: "When the fear of being 'blacklisted' causes many tenants to avoid the court and relinquish their legal rights, access to justice is fundamentally undermined." Sen. Krueger Announces Courts to End Electronic Sale of Housing Court Data Used in "Tenant Blacklists" (2012 Press Release) (https://www.nysenate.gov/newsroom/press-releases/liz-krueger/victory-tenants-sen-krueger-announces-courts-end-electronic-sale).

California: Under California Code of Civil Procedure §1161.2, **landlord-tenant records are not made available to the general public for 60 days**, with early release by court order available upon a showing of good cause, including "gathering of newsworthy material". This period can be extended by the Court for good cause. Cases are not broadly disseminated if the tenant wins or the issues are favorably resolved before the "masking" period expires.

Minnesota: In 2015, Minnesota adopted Minn. Stat. § 484.014, under which **a tenant can obtain the expungement of an eviction record** upon a showing that the landlord's case is "sufficiently without basis in fact or law" and expungement is "clearly in the interests of justice," taking into account any potential public interest in the information. In certain post-foreclosure eviction cases, expungement is mandatory upon motion.

Washington: Earlier this year, Washington passed Senate Bill 6413 (2016), which created a **procedure for courts to flag an eviction file for "limited dissemination"** if the case was without basis or was dismissed on certain grounds, or for other good cause. The bill further created a more transparent and centralized tenant screening system that makes error correction easier and minimizes the credit damage that tenants suffer during a housing search, when multiple landlords pull their credit reports within a short period of time.

While none of these might be the perfect solution for Massachusetts, the fact that three of the four measures were adopted in just the last four years highlights the current existence of a significant problem and the need for creative solutions.

Recommended Revisions to Proposed Trial Court Rule XVI

To help address the problems identified above, we ask that the Court implement the following changes to the proposed Rule.

1. **In landlord-tenant matters, display names remotely using initials only, rather than full names.**

Revise Rule 5(a)(1)(i)(A) by adding the underlined portion below:

5(a)(1)(i) [Civil cases] Generally.... [T]he following information shall be viewable remotely in civil court records:

(A) The full name of each party and the related case or case number(s) by court department and division, except that in all cases docketed in the Housing Court or within the subject matter jurisdiction of the Housing Court, including without limitation residential summary process cases and actions under G.L. c. 111, § 127C et seq. to enforce the State Sanitary Code, but docketed in the District Court or the Boston Municipal Court, only the initials of the party shall be viewable remotely.

2. **Establish a procedure by which parties may, for good cause, request removal of their cases from the remotely accessible database.**

Add the following subsection to Rule 5: Remote Access to Electronic Court Records:

(a)(1)(iv) Motion to Limit Remote Access. At any time during or after the pendency of a civil action, a litigant in a civil case may petition the Court to limit remote access to some or all of the docket information displayed under this rule. The Court shall grant such a motion upon a showing of good cause. In cases involving the occupancy of residential premises, good cause shall include:

(A) That the party was improperly named in the action;
(B) That all claims brought against the party in the action were dismissed by agreement or Court action;
(C) That the party was the plaintiff in an action brought to enforce the party's legal rights, and remote access to the court record may have a prejudicial effect on the party; or
(D) That the benefit of remote access is outweighed by the prejudice to the requesting party of having the information displayed online.

The procedure provided for under this section shall apply to remote access only, and all records shall remain available and searchable at the courthouse, unless impounded or otherwise restricted by law or rule. Any motion filed under this section shall be served on all parties to the action and shall be heard within seven (7) days.

3. **Set forth clear procedures and short timelines for the correction of errors in the MassCourts database, allowing clerical errors to be corrected by clerks without judicial involvement.**

Delete the strikethrough text and add the underlined material to Rule 6: Correction of Clerical Error in Electronic Docket Entry:

Any party, non-party, or their attorney may make a written request to correct a clerical error in an electronic docket. Such a request may be made using a form that ~~can be found~~ shall be made available online at masscourts.org ~~or at any~~ and at each Clerk's office. The completed form must be submitted to the Clerk's office where the court record in question is physically located and to all parties. If the form, including any supporting materials filed therewith, appears regular and complete on its face and indicates that the electronic docket entry contains a clerical error, the Clerk shall grant such request forthwith without hearing and without the necessity of appearance of any party or counsel.

Should the Clerk deem a hearing to be necessary, or upon the filing of a response by any other party to the request for correction, a hearing shall be held promptly and no later than three (3) days following the request for correction or response thereto filed by any other party.

NOTE

This Rule is intended to allow parties and nonparties to alert the Clerk to a potential clerical mistake or error, but does not apply to the correction of errors of substance. The Rule recognizes that certain errors can cause prejudice to the parties and thus provides for prompt resolution of requests for correction. For further process see Mass. R. Civ. Pro. 60 and Mass. R. Crim. Pro. 42.

Comment on Other Issues in the Proposed Rule

We also endorse and encourage the Court to carefully consider the comments submitted by Pauline Quirion of GBLS regarding the display of criminal case records and guidelines for granting requests for compiled data. Furthermore, we echo the call for the Court to suggest to the Supreme Judicial Court that it solicit further comments before finalizing the rules, and that any future standing committees on access to court records include representatives from civil legal aid organizations specializing in housing matters and criminal records reform, given the dramatic impact the Court's decisions in this area have on our clients.

Thank you again for your time and attention to these important issues.

Very truly yours,

Esme Caramello
Faculty Director, Harvard Legal Aid Bureau
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along with

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Zimbra **rules.comments@jud.state.ma.us**

Proposed Trial Court Rule XIV

From : John Bowman [redacted] Tue, May 03, 2016 09:43 PM

Subject : Proposed Trial Court Rule XIV

To : rules comments <rules.comments@jud.state.ma.us>

Dear Judge Lauriat,

I write briefly to urge you and the members of your committee to curtail access by employers and property owners to criminal records on the court system's website.

- In its decision in the Peter Pon case the Supreme Judicial Court recognized the "negative impact of criminal records on the ability of former criminal defendants to reintegrate into society and obtain gainful employment" and that the earlier balance over access to court records had shifted "in an age of rapid informational access through the Internet." Thus, the SJC adjusted its own standard to support the "State's compelling interest in providing privacy protections for former criminal defendants to enable them to participate fully in society." (Commonwealth v. Pon, 469 Mass. 296, 297, 300 (2014))

- The Legislature recently underscored the need to restrict access to records of court convictions in Mass. St. 2016, c. 64, sec. 3 (3/30/16), where it instructed the Registry of Motor Vehicles to "shield from public view" records of drug convictions and drivers' license suspensions that had previously been available through the R.M.V. Thus, the Legislature closed what had become a "back door" around the restrictions imposed in the CORI (Criminal Offender Record Information) statute at the core of the Peter Pon litigation.

- The Council of State Governments is currently conducting a study of the Commonwealth's criminal justice system. The Governor, Lt. Governor, Senate President, House Speaker and the S.J.C. Chief Justice asked the study team to pay special attention to the re-entry of ex-offenders to their communities and to recidivism. The literature is clear that the ex-offender's ability to get a job and housing is critical to successful reintegration to society and to avoid re-offending.

- As the Trial Court implements electronic filing and online access to court documents it should take care that its efforts to modernize its systems do not inadvertetly create a new "back door" that results in the denial of job and housing opportunities to offenders who have served their sentences.

Thank you for your consideration.

--
John E. Bowman, Jr.
Access to Justice Fellow
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May 2, 2016

Trial Court Committee on Public Access to Court Records
c/o The Hon. Peter M. Lauriat, Chair
Superior Court Administrative Office, 13th Floor
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By electronic mail: *rules.comments@jud.state.ma.us*

Proposed Trial Court Rule XIV Uniform Rules on Access to Court Records

Dear Justice Lauriat and Members of the Committee:

I'm very pleased with the rules you've proposed, and the Committee has taken to heart the concerns raised at the public hearing. I know I feel as if you took all of my suggestions! However, I wanted to raise one major and several smaller items ("nits").

Self-service scanning, Rule 2(j)
You may recall my frustration at the inconsistency between different courts regarding the use of scanners. (As a journalist, my preference is to scan the case file for any significant case I cover, because that lets me write far more effectively and accurately about the details of the case. But I can't afford hundreds of dollars of fees to copy thousands of pages in a single case.)

The Committee addressed this concern in Rule 2(j), Requester's Self-Service Duplication of a Court Record: "*The Clerk may allow a member of the public to use [various scanners].*"

Unfortunately this rule is too weak ("may"). The problem was never that a Clerk felt he was not empowered to grant permission to use a scanner. The problem was a Clerk instituted a burdensome process:

1. Write a letter to the judge in the case.
2. Potentially serve the letter on all parties in the case purusant to Rule 9A and allow time for objections.
3. Wait an indeterminate amount of time for the judge to rule on it.
4. Hope the judge rules favorably (precedent on this is mixed).
5. And if it turns out a brief has unbreakable binding and can't be sheet-fed scanned, so is better photographed, repeat the whole process explicitly requesting permission to photograph if you didn't ask for that in the first letter.

That is not prohibited under this rule.

A more effective rule would be *"The Clerk shall allow."* Of course any such use would be

subject to reasonable restrictions to avoid interfering with Court operations, etc. Currently there is language to that effect in the Notes section of Rule 2(j), and it would be equally relevant with the stronger rule.

In the alternative, the rule could stay as-is and text in the Notes could indicate Clerks "should" allow this, absent compelling justification to the contary. That would be a lot less clear, but would be better than no change at all.

Bulk data versus compiled data? (not quite a nit)
Rule 1(e) defines, and Rules 3 and 4 expand on, "bulk data" and "compiled data." But the definitions are confusing and not commonplace. A person requesting, e.g., the captions of all civil litigation filed in Superior Court in calendar year 2015 might easily look to the Bulk Data rule and think that query was barred, even though it would really be allowed as Compiled Data.

Drafters of rules tend to see them as a coherent set, but in practice they are used and read surgically, such as through pin cites. People read the rule they think applies, and may not read all the related rules. So if a rule does not stand well on its own, it is confusing.

It is too easy to read Rule 4 as barring the distribution of large datasets that seem like "bulk," even though those might be available as "compiled data."

Rule 3(d) suggests compiled data might be released subject to a restriction preventing its use for commercial purposes, and Rule 3(a) allows inquiry into the purpose of the request. This is in tension with the longstanding precedent under the Massachusetts Public Records Law, that a custodian is barred from inquring as to the purpose of the request (with the exception of G.L. ch. 4 §7(26)(n), the safety and security exemption). And it is in tension with Rule 2(b).

It also does not define "commercial." It's important that mere involvement of a corporate entity not result in a determination of a commercial purpose—*The Boston Globe* is a corporation.

There are also commercial purposes that should be allowed. In a future world where written opinions are in an electronic database, if LEXIS and Westlaw wish to obtain "compiled data" of all opinions in a year and index them and sell them to their subscribers, this rule should not stop them.

Rule 3(a) has an extra period between its two sentences.

Nits
Rule 1(b)'s Notes advise the rules do not limit access to persons entitled by "state law," but that's not exactly correct, because, as the Notes to Rule 1(c) explain, there is a common-law right of access to court records. Strictly speaking, the rules do limit that common-law right.

Rule 1(e) defines "electronic court record" as something stored in an electronic database. This is confusing, as it appears to suggest that an electronic copy of an opinion may not be an "electronic court record," though it is "electronic" and a "court record." For instance,

when I hear an opinion comes down in a case I am covering, I may call the session clerk and ask her to email me a copy of the judge's opinion. If it is not stored in a database, it is therefore not an electronic court record, even though it was written electronically and transmitted electronically?

Rule 2(h)(3)'s Notes indicate no additional fee should be charged beyond a copy machine's fees, but the fees for Court-provided public copiers vary wildly, and have little relationship to the fees for public copiers in the outside world. It seems like in some cases, the fees on copy machines are set artificially high, perhaps as a result of the competitive bid process to select a vendor for maintaining those machines. In these cases, it feels like an additional fee is being charged—it's just hidden.

Rule 2(h)(4) discusses reproduction of court audio records, something that is currently a $50.50 fee per the Uniform Schedule of Fees. This highlights the lack of language about access to such records that do not involve reproduction. If I would like to listen to recorded audio from a hearing pursuant to Rule 2(b), am I required to pay $50.50 for the privilege? It would probably be easier on everyone if the Court furnished a copy of the CD for the cost of doing so (30¢ for a blank disc, plus labor?), but the current Uniform Schedule of Fees disincentivizes that.

Rule 2(h)(6) has an extra line break in the word "C-lerk."

Rule 5(a)(1)(ii) notes that civil cases "may be searched" by party name or case number. I hope this is not intended to be comprehensive, as the current system allows many other kinds of useful searches, such as all cases opened on a given day, or of a particular type. These are often useful when the names of parties are abbreviated or otherwise rendered in unpredictable ways making a party search challenging; or simply when searching for similar types of cases.

But see Rule 5(a)(2)(ii), criminal searches, which is clearly intended to be comprehensive, despite using the same language as 5(a)(1)(ii): "may be searched." Perhaps the word "only" could be added to the criminal section, or clarification to the civil section that its list is not comprehensive. At present the two sections use the same language to express different concepts.

Rule 5 lacks discussion about remote access to calendar information outside of dockets. The legacy `MA-TRIALCOURTS` system allowed viewing the daily calendar of any court, listing all cases. Our federal district court also posts such a listing on their website for the current and upcoming days[1]. That function is currently missing from `MassCourts`, and we feel its lack. It's very hard to determine whether a case of interest is in competiton with 5 other cases for a 2pm timeslot, or if it is the sole matter scheduled.

‽ Lastly, at the June 2015 hearing, advocates for housing equity expressed concern at the way `MassCourts` allowed unethical behavior on the part of landlords and lent itself for use as a tenant screening tool. Although this is not an issue I am familiar with and I have not

[1] `http://www.mad.uscourts.gov/Inet/today.pdf` and `http://www.mad.uscourts.gov/Inet/tomorrow.pdf`, respectively.

spoken to those advocates, I'm concerned that the proposed rules do not appear to touch on this issue. To the extent feasible, I think it would be helpful for the Committee to make a public statement explaining why it was impractical to address those issues in context of the proposed rule change.

Thank you very much for your hard work on this process, and for your willingness to engage the public, both in your rulemaking process and in the results of your rules themselves.

Very truly yours,

s/JOHN A. HAWKINSON/
John A. Hawkinson

Public Access ⇒ Data Standards + API

Given that the adoption of a common data standard for the Massachusetts legal community offers the promise of increased efficiency, lower information sharing costs, and improved access to courts, we propose that the Massachusetts Trial Courts adopt a set of data standards to facilitate sharing information between the Trial Courts and other stakeholders, and that all data deemed publicly available be made accessible in a machine readable format consistent with these standards via an application programming interface (API) overseen by the courts. This would supersede the need for the Courts to create idiosyncratic user portals for various stakeholders, as described in Rule 5. It would also simplify the procedures described in Rule 3 as the use cases envisioned could be conducted over the API.

Signatories (*Alphabetical by institution or last name. Institutional support in* ***bold.***)

- **Matthew R. Segal, Legal Director, ACLU Foundation of Massachusetts** (@ACLU_Mass)
- Heidi Alexander (@heidialexander), attorney and law practice advisor, BBO No. 677212
- Steven M. Ayr, BBO No. 673221
- Katrina Brundage (@KBrun13), Data Scientist & Legal Analytics Consultant.
- Pamela S. Chestek, BBO No. 647124
- David Colarusso (@colarusso), attorney and data scientist, BBO No. 683292
- **Daniel Saroff, Chief Information Officer, Committee for Public Counsel Services** (@CPCSnews). In addition to the reasons laid out in these supporting materials, we as an institution would be available to help with the implementation of the above, providing consultation on data standards and constructing open source tools to interact with a court API.
- Marc Dangeard, consultant working on bringing the world to agreement at CommonAccord
- Tom Druan (@druanip), intellectual property attorney, BBO No. 674178
- Brian Focht (@NCCyberAdvocate) attorney and technology consultant & blogger
- Kenneth A. Grady, lean law professor, author, speaker
- Sam Harden (@samuelharden), attorney and founder of MyCourtCase.org
- James Hazard - BBO No. 227347 (inactive)
- Matt Henry (@heymatthenry), public defender and former software developer
- Brandon Hudgeons (@bhudgeons), COO and VP Technology, Schoox, Inc.
- William Li, Fellow, Harvard Berkman Center for Internet and Society
- Joe Mornin, software engineer and attorney
- Tanina Rostain (@TaninaRostain), professor and founder Georgetown Iron Tech Lawyer program, Georgetown Law Center
- Eva Shang (@eva_shang), Harvard student, co-founder of Legalist
- **Suffolk University Law School** (@Suffolk_Law)
- Gabe Teninbaum, Professor of Legal Writing; Director, Institute on Law Practice Technology & Innovation; Director, Legal Technology & Innovation Concentration; Suffolk University Law School
- Gyi Tsakalakis (@gyitsakalakis), attorney and technology services provider
- Ryan Wold, Software Engineer, Service Designer, and former Public Servant
- Adam Ziegler - attorney (BBO #654244)

CPCS's Supporting Materials (also available at https://www.publiccounsel.net/?p=3334)

The following is an open reply to the Massachusetts Trial Court's call for comments regarding its Proposed Uniform Rules on Public Access to Court Records. It is the joint comment of multiple organizations and individuals. CPCS is a signatory, and this post is meant to provide some context explaining why. For a complete list of signatories, visit http://ma-court-comment.github.io/

> *Given that the adoption of a common data standard for the Massachusetts legal community offers the promise of increased efficiency, lower information sharing costs, and improved access to courts, we propose that the Massachusetts Trial Courts adopt a set of data standards to facilitate sharing information between the Trial Courts and other stakeholders, and that all data deemed publicly available be made accessible in a machine readable format consistent via an application programming interface (API) overseen by the courts. This would supersede the need for the Courts to create multiple, disparate portals for various stakeholders, as described in Rule 5. It would also simplify the procedures described in Rule 3 as the use cases envisioned could be conducted over the API.*

Context

The challenge: electronic access to Court data

External stakeholders, including the public, law enforcement, CPCS, and executive agencies (including the Department of Public Health and the Department of Mental Health) have unique data needs. Providing each of these stakeholders with their own information portal, its own secure electronic access, user interface, etc. is costly and time-consuming. Fortunately, the Courts need not bear this burden.

What it means to adopt data standards

Data standards allow parties to both read and write data in a way others can understand. Given a standard for court data, the Trial Court could implement a single access point for all parties seeking access to their data. This access point would operate as a place for computer programs to securely exchange standardized data, including everything from requests for court information to electronic filings. **As the administrator of this access point, the Trial Court would maintain complete control over access based on whatever permissions it deemed appropriate, and could supply different data to different parties depending on need and confidentiality requirements.**

This information exchange between computers does not require the development of a traditional user interface, which simplifies the sharing of data. The Trial Court would simply provide a platform upon which stakeholders could create their own tools to interact with Trial Court data. As a result, the development of a standard would make it easier for unique, custom portals to be developed, shared, and modified by different stakeholders meaning the Courts could be saved from this effort themselves.

Data standards provide interoperability; the ability of different systems to talk to each other. It is this rationale that drove the development of the National Information Exchange Model (NIEM), a data standard used to share information between federal and state agencies, including law enforcement agencies in MA.

Standards have been developed specifically with the legal community in mind, for example, Legal XML. Consequently, the adoption of MA specific standards need not start from scratch. Rather, MA stakeholders could learn from and build upon other's work.

Successful examples of data standards

MassDOT: Sharing real-time transit data. MassDOT recognized that riders would benefit from the installation of digital signs that could share transit alerts and bus/train arrival. However, installing the displays had long been delayed as they required major capital investments and take years to roll out. In 2009, MassDOT began publishing transit data in a standard format (GTFS), and it invited developers to build tools based on this data. The MassDOT Developer's Initiative, as it was called, led to the creation of dozens of transit apps and websites, products that were developed at no cost to MassDOT (aside from the cost of publishing their data). MassDOT was able to offload the cost of development, and improve service to its customers through this data sharing. This judicious use of resources was widely seen as an example of prudent resource allocation and best practice.

Open311: Open311 is an API standard used to help citizens report problems to local governments, and one can find implementations in Boston, San Francisco, the District of Columbia, Portland, and Los Angeles. By adopting the Open311 standard, cities make it possible for citizens to submit requests for services over apps the city did not have to fund. See Mayor Newsom Launches National Initiative to Open 311 Customer Service Centers to Developers.

The benefits of data standards

- Decentralized development of information portals – no need for the Trial Court to develop specific portals for different audiences.
- No change in security – continued ability to control and limit access to data.
- Decreased costs to the Trial Court and Commonwealth, because portals would be developed by interested outsiders, thus alleviating the need to hire contractors and/or devote existing human resources to develop tools other than the API.
- Increased cost savings through efficiencies gained from improved communication between the court and other parties.
- More rapid development of tools, since they would be developed by a large number of partners rather than straining the limited resources of the Trial Courts.

*With thanks to our data science maven, David Colarusso, for drafting the majority of this blog post.

Zimbra **rules.comments@jud.state.ma.us**

Comments on the Proposed Trial Court Rule XIV: Uniform Rules of Public Access to Court Records.

From : Diane D'Angelo <ddangelo@suffolk.edu> Tue, May 03, 2016 09:06 PM

Subject : Comments on the Proposed Trial Court Rule XIV: Uniform Rules of Public Access to Court Records.

To : rules comments <rules.comments@jud.state.ma.us>

Hon. Peter M. Lauriat, Chair Public Access to Court Records Committee
Superior Court Administrative Office
13th Floor
Three Pemberton Square
Boston MA 02108

Dear Judge Lauriat and Members of the Massachusetts Trial Court Public Access to Court Records Committee,

I am writing on behalf of the executive board and the members of the Law Librarians of New England to submit our comments on the Proposed Trial Court Rule XIV: Uniform Rules of Public Access to Court Records. We are a professional organization of law librarians from across the six New England states. Our members come from all segments of the legal community, including academic libraries, federal and state courts and agencies, county and public law libraries, corporate legal departments, publishers, vendors, bar associations and private law firms. We are also a regional chapter of the Association of American Law Libraries, a national organization committed to leadership and advocacy in the field of legal information and information policy.

First, we would like to thank the committee for their hard work and their commitment to soliciting the input of various stakeholders. Addressing both the public's right to information and the various privacy interests involved requires a delicate balance. We believe that these proposed rules mark a significant step towards finding a solution that will work for all.

We would like to register the following comments:

[Rule 5(a)(1)(ii) Remote Accessibility to Information in Electronic Form Through the Public Portal: Civil Cases: Search

and

Rule 5(a)(2)(ii): Remote Accessibility to Information in Electronic Form Through the Public Portal: Criminal Cases: Search

We would like to suggest that as you develop the portal and search options for civil and criminal cases that you consult with librarians and other public users in order to develop a user friendly search interface. With respect to criminal record searches, we understand the serious privacy and CORI concerns that have led to the Court's policy that restricts remote searches to docket number searches. However, as docket numbers are not always easily available to the public, we would also suggest adding an option to search by party name and specific date. We believe that this would allow smoother public access to the records of a particular case and would still avoid de facto criminal background checks.]

Rule 5(b): Access through the Attorney Portal

Many of our members are law firm librarians and are frequently called on to access court records on behalf of attorneys. Therefore we suggest that Rule 5(b) be clarified to explicitly state that librarians and other designated agents of an attorney be able to use the Attorney Portal to access the calendars, dockets and images of court documents in cases where a specific attorney has registered an appearance. Accordingly, we suggest that Rule 5(b) be amended to add the language in italics:

> Attorneys who are licensed to practice in Massachusetts and have registered with the Mass. Trial Court, and their designated agents (including librarians), shall have access

Rule 5(d): Availability of Additional Records

As the Committee has recognized, public access to court proceedings and records is a fundamental principle of our judicial system. Our organization believes that access to court records is necessary both for those involved in a specific case and for the general public. Furthermore, as more information is available online, the presumption of what it means for documents to be publicly available is shifting towards online access.

We urge the Trial Court to continue to expand remote access to full court documents, including page images, wherever not otherwise prohibited. We hold out hope that more court records will be electronically available, either under these Rules, or if these rules are intended to be transitional, under new Rules that allow greater access.

Again, we greatly appreciate the work of the Trial Court in their effort to clarify and expand access under the Rules on Public Access to Court Documents. We look forward to additional advances in public access.

Yours sincerely,

Diane D'Angelo
President

Law Librarians of New England

****

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Stay current with the Faculty Awareness Blog:
http://sufab.wordpress.com/

See my articles at:
http://ssrn.com/author=734898

Zimbra **rules.comments@jud.state.ma.us**

comment

From : Lisa Redmond <lredmond@lowellsun.com> Mon, Jan 04, 2016 11:21 AM

Subject : comment

To : rules comments <rules.comments@jud.state.ma.us>

To whom it may concern,
As a member of the press, I have two comments about access to the new Trial Court computer system. The first is that "remote access" shouldn't be defined as accessing court cases via a public computer kiosk in superior court. That is hardly "remote." Remote access should include media access from a remote location outside the courthouse using a special login given to authorized members of the media. This is NOT public access. We had remote access to the same information under the old system, it baffles me why we can't have remote access under this new and improved system.

Secondly, the biggest complaint I have heard from attorneys is that they do not have access to the general court calendar as they did under the old system. Yes, they have access to THEIR calendars, but most of them keep their own calendars anyway. What should be accessible via the new court system is the general calendar, especially for sole practitioners, who have to juggle cases with other attorneys. Again, this was available under the old system.

Those are my comments. Feel free to contact me.

Lisa Redmond
Court Reporter, Lowell Sun newspaper
lredmond@lowellsun.com/[redacted]

--
Sent from Gmail Mobile

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Executive Director

March 4, 2016

Hon. Peter M. Lauriat
Chair, Public Access to Court Records Committee
Superior Court Administrative Office
Three Pemberton Square, 13th Floor
Boston, AMA 02108

Re: Proposed Trial Court Rule XIV, Uniform Rules on Public Access to Court Records

Dear Justice Lauriat:

I write on behalf of the Massachusetts District Attorneys Association regarding Proposed Trial Court Rule XIV, Uniform Rules on Public Access to Court Records.

Rule 5(b), Remote Access to Electronic Court Records, which concerns remote access to electronic information through an attorney portal, limits case access to those attorneys who have entered an appearance in a case. The Note to Rule 5(b) provides: "The ability to conduct a general search for court records not connected to an attorney's cases will be available only on the Internet Portal, pursuant to Rule 5(a)." Rule 5(a) limits remote searching of criminal cases by a member of the public to a search by case number; a search by a defendant's name is not permitted. The Notes to Rule 5 indicate that the committee set up this limitation because a name search could reveal a defendant's criminal history and thereby undermine the Criminal Offender Record Information (CORI) statute. The Notes also indicate that a computer search by a defendant's name is permitted at the kiosk in the Clerk's office.

Assistant District Attorneys, who have access to CORI, require the ability to remotely search court records by a defendant's name in cases where they have not entered an appearance "for the actual performance of their criminal justice duties." G.L. c. 6, § 172(a)(1). Such access is needed, for example, for work on trial motions, direct appeals, and post-conviction motions, to find a defendant's prior cases/convictions, and for supervisors to track cases. Additionally, The District Attorney is the attorney of record on all criminal cases, and his/her Assistants, as his/her appointees acting in his/her stead, should each be accorded equal access to all cases regardless of whether they have filed an appearance. Where the District Attorney's office is not located in the

courthouse, going to the Clerk's office to perform a case-name search would be unduly time-consuming and burdensome.

For these reasons, the MDAA suggests amendment of Rule 5(b) to permit Assistant District Attorneys remote access to cases, even where they have not entered an appearance, and the ability to search those cases by case number or by defendant name.

Sincerely,

David F. Capeless
President, Massachusetts District Attorneys Association
Berkshire District Attorney

May 1, 2016

Hon. Peter M. Lauriat, Chair

Public Access to Court Records Committee

Superior Court Administrative Office, 13th Floor

Three Pemberton Square

Boston, MA 02108

Re: Internet Access to Court Records

Dear Justice Lauriat:

I am the President of the Advisory Board of MOAR (Massachusetts Organization for Addiction Recovery), a non-profit, voluntary organization dedicated to supporting and empowering persons in their recovery from addiction and their maintenance of a constructive life style. Although now retired, I spent 40 years working in the substance abuse field.

I am writing to you to request that your committee oppose online access to criminal records from the trial court by the general public. A person in recovery is much more likely to avoid criminal activity and lead a productive life. One of the greatest hurdles that a recovering person has for sustaining their recover is the stigma associated with addiction. Unfortunately, this stigma can be manifested by knowledge that a person once suffered from the disease. (One reason why anonymity is an important part of AA.) That stigma isolates a person, drives him or her to personal isolation and back into a life style associated with relapse and higher risk of criminal behavior. Therefore, I believe that online, public access to criminal records will work against public safety and individual rehabilitation.

One of the worst impacts of the old CORI process was access by potential employers. Without a job and salary, most of us are vulnerable to loss of hope leading to poor decisions.

Thank you for your consideration.

Thomas J. Delaney

Thomas J. Delaney, Jr.

[redacted]

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March 7, 2016

Hon. Peter M. Lauriat, Chair
Public Access to Court Records Committee
Superior Court Administrative Office
13th Floor
Three Pemberton Square
Boston, MA 02108

Re: Comments to Proposed Trial Court Rule XIV

Dear Chair Judge Lauriat and Members of the Trial Court Committee on Public Access to Court Records:

I am writing these comments to Trial Court Rule XIV because I believe in public access to documents at a reasonable price in a way that is respectful of the ability of the poor to obtain and keep jobs and housing, while protecting families and individuals from unnecessary intrusion into the most intimate and confidential information about their lives.

I have copied the pertinent parts of the proposed rules upon which I would like to comment in blue font color, which are followed by my comments in black font color. Quotes from Governor Charlie Baker's press release and corresponding Memorandum on public records fees and procedures established for the Executive Branch last summer are in gray.

1. The charge for the cost of copies should be no more than 10 cents per page. The current cost of $1 per page is excessive, has no basis in the actual cost, and is unjustified. There is no true access if the cost is not affordable and reflect the actual cost.

> Rule 2
> (i) Fee. The Clerk shall charge a fee for its duplication or provision of any court record as prescribed in the Trial Court's Uniform Schedule of Fees. No fee shall be charged to view a court record without reproduction.

I believe no more than 10 cents per page is a reasonable fee. The Rule needs to state this and the Trial Court's Uniform Schedule of Fees needs to be adjusted. There is no true access to justice unless the poor can afford to walk away with a copy or copies and the media be able to obtain the documents needed without exorbitant fees. Fairness and public access requires that the fees reflect the actual cost.

I reviewed the Trial Court's Uniform Schedule of Fees and I believe that at least one category is unreasonable. "For an unattested copy of court documents, records, or other papers in possession and under the control of the clerk, register, or recorder" the cost is $1.00 per page. This $1 fee is exorbitant and has no basis in actual cost, considering that copy centers charge 10-12 cents per page. For example, compare the cost at a clerk's office that 100 pages cost $100 and 200 pages cost $200, while at Staples the costs are $11.00 and $22.00 respectively. The cost of paper, ink, and the pay per hour of the clerk copying in a clerk's office do not justify this fee.

Outcry from the public, agencies, organizations, legislators, and others have called for greater transparency, greater public access, and more reasonable fees. In response, Governor Baker announced new procedures for public record requests for the Executive Branch on July 30, 2015. The price for copies is 10 cents. You can find the press release and the Memorandum he issued online at:

www.mass.gov/governor/press-office/press-releases/fy2016/new-procedures-for-public-records-requests-introduced.html

www.mass.gov/governor/docs/news/prr-reforms-memo-final.pdf

In his press release, Governor Baker notes:

> The procedures being implemented by the Baker-Polito Administration in accordance with best practices from around the nation, seek to comply with and exceed the requirements under the existing public records law to more diligently respond to the number of public records requests while reducing delays and costs to requesters and continuing to protect the personal information of taxpayers and service users.

The fees and procedures set forth in the Governor's Memorandum on Public Record Requests are reasonable. Suggested changes for adapting it for the Trial Court Rule are in brackets.

> 6. Charge Standardized Production Costs
> . . .
> • . . . No "duplication" costs may be charged for producing electronic documents. ~~An agency~~ [The Clerk] may be reimbursed for the cost of a disc, thumb-drive or other storage device needed to transmit the requested documents. ~~If the requester seeks~~ [For] hard copies of requested documents, ~~agencies~~ [the Clerk] ~~should charge~~ [must not charge more than] 10 cents per page, for both single- and double-sided copies. For copies in color, ~~agencies should charge~~ [the Clerk must not charge more than] 50 cents per page.
> • Requests for one - four precisely defined documents should be produced respectively at no cost . . .

I also suggest adding that vendor machine charges must not be more than 10 cents per page.

> Rule 3
> (c) Fees. Upon allowance of a request, the Court Administrator may require the payment of a reasonable fee for staff time and resources to compile and provide the requested compiled data.

Rather than leave it vague, the Rules Committee should consider having similar fees and procedures as set forth in the Governor's Memorandum. They would give guidance and more uniformity.

> 4. Waive Search and Retrieval Fees
> While permissible ~~under the public records law~~ to recover costs, ~~agencies~~ [a Clerk] should not charge for time spent to inspect, search for, retrieve or redact documents for straightforward requests. Charging for those activities is reasonable if requests are broad in scope or likely to require an extensive collection or redaction effort or produce a large number of documents/pages. In that case, the first four hours of ~~agency~~ work should be performed at no cost; after that, the ~~agency~~ [Clerk] may charge up to $25 per hour, but not in excess of actual costs, for any work performed by the employee(s) best suited to respond to the request. This ~~should~~ [must] be explained to the requester in advance . . .

2. The public should not have access to online case information, especially the actual court documents.

I share many of my colleagues' concerns about online access to dockets. It affects parties' ability to get jobs, maintain them, and obtain housing. All online information is subject to being misused and abused. It goes against all that was accomplished by the new CORI laws. Once on the web, information takes on a life of its own and, even if a record is sealed in a clerk's office, it can never be sealed on the internet; the damage has been permanently done.

One of my greatest concerns is actual court pleadings being available to the public online; they should not be. As to attorneys, it would be extremely helpful, and it would lighten the burden of clerks. As to the public, online access would result in emotional damage, abuse, and discrimination, among other problems. Court pleadings contain details which online dockets do not. Just as we expect privacy of our homes and have laws and the Constitution to protect against invasion of our homes, we should not be able to read the most intimate details of others' lives by going online. It would be like opening drawers in others' homes containing their most confidential information and then disseminating it with no limit. Requiring someone to go to the courthouse to request and view documents in public narrows down the viewing to those most likely to have a pertinent reason to view them. Also, online pleadings open the door to identity theft more readily as I have seen social security numbers and dates of birth in court documents. A balance must be carefully struck. My comments are not in reference to the media. I defer to others regarding the media.

3. Rule 1(e) defines who are members of the public. There are four groups that are not. The Rule or the Rule Notes should specify that notwithstanding that these four groups are not members of the public, they still have the same rights.

> Rule 1
> (e) Definitions
> "Public" or "member of the public" means any person and any business or nonprofit entity, association, or government entity, or organization, including the media, who seeks access to a court record. The term "public" does not include (1) Judicial Branch staff, acting in their official capacities; (2) authorized persons or entities, private or governmental, who assist the court in providing court services; (3) public agencies or law enforcement departments whose access to court records is defined by statute, court rule, standing order, case law, or court order; and (4) the parties to a case, their lawyers, victims as authorized by G.L. c. 258B, § 3, or their authorized representatives requiring access to the court record in a specific case.

The language I question is that attorneys are excluded as members of the public. Attorneys have been restricted at times from viewing and copying documents to which the attorney has the right to obtain. Also, some attorneys that I know have been prohibited from using scanners to copy documents. I would like to see some language, at least as to attorneys, their authorized representatives, and parties that makes it clear that even though they are not members of the public, they still have the same rights. I suggest the following language, which would apply to all four categories: "Notwithstanding, those designated as not being members of the public, they have the same public rights specified by this Rule. Those in categories (1) - (4) may have additional rights or ability to access documents and information as provided by other rules, laws, case law, or other authority."

4. There should be a fee waiver of copies for attorneys of all indigent clients.

A portion of my practice includes representing indigent criminal defendants and there exists a disparity. Assistant District Attorneys and the Committee for Public Counsel Services (CPCS) employees do not have to pay for copies. However, bar advocates, who do the same work for CPCS as independent contractors, are required in some counties to pay $1 per page for copies. After paying the fee, which in some instances may be $200 or more, bar advocates must submit bills and wait to be paid back through the vendor voucher system. All attorneys representing clients determined to be indigent by the court should have the fees waived for copies.

Thank you for this opportunity. I hope you find my comments helpful. Please do not hesitate to contact me, if I may be of assistance in any way.

Sincerely,

/s/ Mary T. Rogers

Mary T. Rogers

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April 29, 2016

Honorable Peter Lauriat
Chair, Public Access to Court Records Committee
Superior Court Administrative Office
One Pemberton Square, 13th floor
Boston, MA 02108

RE: Opposition to on-line access to criminal records

Dear Judge Lauriat:

I am writing on behalf of the Massachusetts CAP Council of the United Auto Workers, AFL-CIO (UAW), which proudly supported CORI legislation in 2010 to give unemployed workers with past criminal records the opportunity to obtain employment and rebuild their lives.

The UAW opposes online access to criminal records from the trial court website even if records may only be searched by docket numbers rather than names. Limited and temporary access to records can still wreak havoc. This would happen because once the court makes the information available to the world online, the data can be circulated, posted, and even sold to others online without limitation. Internet access to court records would turn back the clock on reform and make it harder for countless people to get jobs. It also will make the right to seal records a useless remedy.

Internet release of all information is at odds with our sealing laws that permit sealing after five years for a misdemeanor, ten years for a felony, and have no waiting period for sealing non-convictions. Access to cases online is contrary to our CORI laws, which limit access to data based on the requestor's level of access, the type of disposition nature, and whether the charge was felony or misdemeanor. Putting court records online also would wreak havoc because court records sometimes have errors and the Internet would disseminate the errors to a larger audience given the expansiveness of the worldwide web.

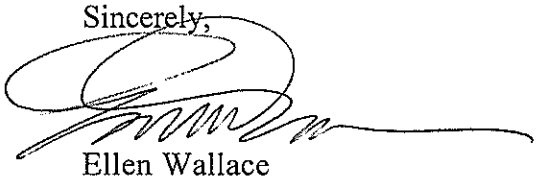
It is a reality of life that many inappropriate communications occur through use of the internet. Giving the public unfettered access to the MassCourts database would, for example, give angry, abusive and vindictive people the ability to harass former defendants, former spouses and other individuals they simply do not like by posting MassCourts information online or otherwise distributing the negative information to employers or business competitors. The convenience of access to data from one's home creates possibilities for mischief that are not as likely to be present when retrieval of the information involves a trip to a courthouse.

Our members who work at legal services programs report that the Housing Court put eviction records online several years ago and it has harmed tenants. Some landlords blacklist any potential tenant whose name appears in the database. This demonstrates stigma, harm and misuse of data that results from online access.

Opportunities for jobs and housing are the road out of poverty. Access to court records online would create too many possibilities for misuse of information. Thus, I urge the courts to not put any criminal records online and to stop the current practice of making Housing Court records available online.

Thank you for your time and effort.

Sincerely,



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May 4, 2016

By email to: rules.comments@jud.state.ma.us

Hon. Peter M. Lauriat, Chair
Public Access to Court Records Committee
Superior Court Administrative Office
Three Pemberton Square, 13th Floor
Boston, MA 02108

Dear Judge Lauriat:

On behalf of the Massachusetts Newspaper Publishers Association, thank you for this opportunity to comment on Proposed Trial Court Rule XIV, Uniform Rules on Access to Court Records. Clearly, the committee has put a great deal of thought and effort into drafting this rule and is to be commended for its work. What follows are our comments on specific aspects of the rule that relate to the work of the news media.

1. There should be no distinction between the court records available online and those available in person.

Massachusetts' courts have long recognized the general principle in favor of public access to judicial proceedings. "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.).

As is noted in the SJC's *Guidelines on the Public's Right of Access to Judicial Proceedings and Records*, "Access fosters informed public discussion of governmental affairs." The Guidelines further note, "The general principle of publicity is embodied in multiple legal authorities: the First Amendment to the United States Constitution; article XVI of the Massachusetts Declaration of Rights (as amended by article LXXVII); legislative enactments; common law; and court rules.

In the year 2016, it is no longer realistic to define "access" in a restrictive way that requires physical presence. Yet that is what this rule does. Under this rule, full access to court records is available only to those who are willing and able to travel to the

courthouse. That transforms access from a right to a luxury. It effectively disenfranchises members of the public who work, who lack transportation, who have physical restrictions, who live in remote areas, or who cannot easily get to the courthouse for any number of other reasons.

Transparency in court proceedings and records fosters public understanding of and trust in the judicial process. The greater the transparency, the greater the trust. In this Internet age, full transparency cannot be achieved without online access.

Massachusetts law creates a presumption in favor of public access to court proceedings and records. The proposed rule turns that presumption on its head. The proposed rule creates a presumption against broad access, a presumption that optimal access is a bad thing.

For these reasons, the MNPA urges this committee to eliminate the distinction between the records available in person and those available online.

2. Criminal cases should be searchable by name and docket number, not solely by docket number.

There is a strong public interest in allowing journalists to be able to search criminal dockets by name. In reporting a news story, the existence of other criminal cases involving the same individual who is the subject of the story can be highly material, both to the story and to the members of the community affected by the story.

The notes to Rule 5(a)(2) justify the limitation on criminal case information by reliance on the CORI law. Yet there is nothing in the CORI law – or anywhere else in Massachusetts law – that prohibits or limits public access to names in criminal dockets. To the contrary, the very foundational document of this Commonwealth, the 1641 Massachusetts Body of Liberties, expressly said, “Every inhabitant of the Country shall have free liberty to search and review any rolls, records or registers of any Court or office,” and that principle has carried forward to today.

On June 15, 2015, attorney Jonathan M. Albano, on behalf of The Boston Globe, submitted comments to this committee in which he presented a detailed analysis of the law pertaining to public access to both names and numbers on criminal dockets. Rather than repeat his analysis, I refer the committee to his comments.[1] To summarize his legal conclusions:

- The CORI Act does not apply to or limit access to paper court records. Rather, G.L., c. 6, § 172(m)(2), provides in relevant part: "Notwithstanding this section or chapter 66A, the following shall be public records: … chronologically maintained court records of public judicial proceedings." In fact, the 2010

[1] Retrieved from: http://www.mass.gov/courts/docs/admin/comments-morgan-lewis-bockius.pdf.

amendments to CORI struck language from the law that restricted public access to any "alphabetical or similar index of criminal defendants."

- The same provisions of the CORI Act that make paper court records public also apply to electronic court records. In fact, the law makes no distinction between paper and electronic.
- The CORI Act's restrictions on public access do not apply to electronic judicial records. Rather, the provisions of the CORI Act govern access to records of the Department of Criminal Justice Information Services, but not to records of the courts.

The notes also justify this exclusion of criminal records by reference to *Commonwealth v. Pon*, 469 Mass. 296, 307 (2014). That case dealt with a limited class of court records – those involving criminal cases that have been closed after nonconviction. The notes acknowledge the limits of *Pons*, but then go on to say, "[T]here is nonetheless a concern that permitting a broad criminal record search through the Internet Portal would frustrate the privacy and rehabilitation concerns identified and protected by the Legislature and Supreme Judicial Court."

This amounts to legislating by court rule. Nothing required by the legislature in the CORI law or the SJC in *Pons* justifies a wholesale ban on public access to full criminal docket information through the portal. Both of those bodies have spoken on what the limits should be on access to criminal offender information and neither has gone as far as does this proposed rule. To the contrary, the *Pons* decision recognizes that the limited class of records it addresses are exceptions to the historically recognized right of public access.

Thus, it would be appropriate for the rule to exclude sealed records under *Pons*. But neither that case or the CORI law provide grounds for the sweeping exclusion mandated by the proposed rule.

For these reasons, the MNPA urges the committee to revise the proposed rule to allow search through the public portal by both names and docket numbers.

3. Exemptions of criminal case types from remote access should be made only by rulemaking after public notice and comment.

As previously noted, there is a strong presumption in Massachusetts law in favor of public access to court records. Any closure of court proceedings or restrictions on public access should be allowed only when there is a strong overriding interest. "The presumption of openness 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." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

Rule 5(a)(2)(iii) permits Trial Court departments to request permission from the chief justice of the Trial Court to exempt certain criminal case types or categories of information from remote access. This gives the chief justice virtually unfettered

discretion to restrict remote access to case types or categories. The rule provides no guidelines as to when, why or how this discretion should be exercised.

Given the fundamental, constitutional importance of public access, the MNPA submits that any requests for exemptions from access under this rule should be considered as formal amendments to the rule. No exemptions should be approved without notice to the public and an opportunity to comment.

4. Remote access should be allowed to PDF files, images, audio and audiovisual.

Rule 5(a) does not allow public access through the Internet portal to audio, audiovisual or image files, including PDF files. The note to Rule 5(a) states: "The Chief Justice of the Trial Court has authority to expand remote access to include audio, audiovisual, or electronic images when technology and policy allow."

Given that PDF files will be available through the attorney portal under Rule 5(b), it follows that the technology currently allows PDF files also to be available through the public portal. The notes do not explain why the rule withholds PDF files from the public portal, except to suggest that any limitations on access through the public portal are the result of law and privacy concerns.

Here again, the MNPA maintains that whatever records are available to the public by entering a clerk's office should also be available to the public through the Internet portal. It cannot be said enough that both the public and the courts benefit from broad public access to court proceedings and records. There is no reason Massachusetts cannot follow the lead of the federal judiciary through its PACER system and allow full access to PDF documents.

Further, once the portal's technology allows access to audio, audiovisual and image files, they should also be added.

5. The ability to use personal handheld and sheet-fed scanners is a benefit to the media and the public.

Rule 2(j) allows requesters to duplicate court records using handheld devices and sheet-fed or flatbed scanners. This is extremely important for members of the news media as well as for the public at large.

The MNPA commends the committee for including this provision and urges the committee to retain it in its final recommended rule.

6. Limit information sought from requesters for compiled data.

Rule 3 permits requests for compiled data from any member of the public for scholarly, educational, journalistic or governmental purposes. Under the rule, a request must

identify the compiled data that is being sought and the purpose for requesting the compiled data.

The MNPA commends the committee for including this provision. However, the MNPA urges the committee to place limits on the extent to which a requester may be required to identify the request's purpose. It should be sufficient for a member of the news media to identify the request as being for a journalistic purpose, without having to provide further details about the nature of the journalistic purpose or the specific story being researched.

Conclusion

On behalf of the MNPA, thank you for the opportunity to submit these comments. Should you have any questions about any of our recommendations or wish to discuss them further, please do not hesitate to contact me.

Respectfully Submitted, May 4, 2016

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PHILLIP KASSEL
EXECUTIVE DIRECTOR

April 28, 2016

Honorable Peter Lauriat
Chair, Public Access to Court Records Committee
Superior Court Administrative Office
One Pemberton Square, 13th floor
Boston, MA 02108

Re: Proposed Rule on Internet Access to Docket Entries

Dear Justice Lauriat:

I am writing on behalf of the Mental Health Legal Advisors Committee to urge the Committee not to put criminal and housing court records online. MHLAC is an independent state agency that works to enhance and protect the rights of persons with mental health concerns and to safeguard their ability to live full and independent lives free of discrimination. Due to their illness and behavior that is often outside their control, many of our clients are disproportionally subject to criminal sanctions and imprisonment or violate tenancy rules and lose their housing. They often, however, are able to overcome their mental health issues but find that their past limits their ability to live full lives. Easy access to their criminal and housing histories will create another barrier to their recovery.

I understand the impetus to share information with the general public and the value of the internet in accomplishing such ends. But just because something can be done doesn't mean that it should. Though no statute or rule prohibits online disclosure of records, it is nonetheless unwise to facilitate access by use of a vehicle for disclosure as uncontrollable as the internet. Many powerful public policy considerations militate against ready access to these records.

It is well established that the criminal justice system disproportionately affects persons with mental illness, including many people of color. MHLAC clients are often punished for acting out behaviors related to their illness. Middlesex County Sheriff Koutoujian pointed out on various occasions that jails are the largest mental health facilities in the country. Half of those entering the jail he oversees identify as mentally ill. Of course, they are also disproportionately represented among those released from incarceration, who face the re-entry challenges all former prisoners face, exacerbated by the impact of mental illness. Online access to records would only worsen their chances for success.

Department of Mental Health treatment prioritizes housing and employment as means of assisting mentally ill people with productive and independent lives. The easy access to criminal records proposed by the new rule, even if restricted to searches by docket number, would undermine these objectives and increase the incidence of homelessness among persons with mental illness, who already predominate in this population. If supportive housing vendors that contract with the DMH only need to go on line to determine a potential renter's criminal history, many needy non-violent people will remain homeless and unable to resurrect their lives. We have seen group home and community residence permits denied by town officials due to discriminatory attitudes and the myth that persons with mental health disorders are largely dangerous.

This concern constitutes more than speculation. In fact, housing court records are already online and have caused large scale harm and homelessness for vulnerable people that already have difficulty finding affordable housing. Masscourts, an unreliable data base with many erroneous entries, is used as a screening tool by landlords to discriminate against any tenant with a prior housing case regardless of the reason for the housing court involvement. Placing criminal records that are also replete with errors within easy reach of the community at large will only exacerbate this problem.

On line posting will make it harder for our clients to obtain and maintain employment, which, as DMH treatment priorities suggest, is an important element of any plan to manage mental health disabilities. Any employer that knows how to use an internet search engine will be able to find justification to hire someone else, even if less qualified. Some persons subject to such discrimination are currently able to benefit and improve their potential for living independently by having criminal records sealed. But records posted on line, even temporarily, live eternally in one form or another. This undercuts criminal record sealing laws and traps people in poverty and hopelessness.

More specifically, the rule could more clearly indicate that records of civil commitment proceedings are forbidden from disclosure without specific court authorization. The heading "Mental Health Reports" doesn't flag that the exclusion pertains to records of civil commitments. We suggest that the heading be changed to "Civil Commitments and Mental Health Reports." To further ensure clarity, the text should add a citation to G.l. c. 123, § 36A (insuring privacy of all "reports of examinations made to a court . . ." and "petitions for commitment, notices, orders of commitment and other commitment papers" except when a court orders otherwise).

Finally, any future standing committee on access to records that includes attorneys from outside the trial court should include several legal aid attorneys that specialize in housing, criminal record sealing, and representation of vulnerable populations adversely affected by release of records. Thank you for your consideration of these comments.

Sincerely,

Phillip Kassel
Executive Director
pkassel@mhlac.org

Zimbra **rules.comments@jud.state.ma.us**

Proposed Trial Court Rule XIV : Uniform Rules on Access to CourtRecords

From : Michael Nam-Krane <michael@bostonjustice.net> Mon, Jan 04, 2016 06:57 PM

Sender : michael namkrane [redacted]

Subject : Proposed Trial Court Rule XIV : Uniform Rules on Access to CourtRecords

To : rules comments <rules.comments@jud.state.ma.us>

I greatly appreciate the effort to standardize these issues.

I am an attorney who represents indigent clients. I do not see a provision to allow those who cannot afford the $1 per page fee to get copies.

Even for myself the $1 per page fee can really add up. I have also met resistance to using a scanner in order to save on the fee.

May I suggest that the fees be waived, e.g. upon the presentation and an affidavit of indigency or a CPCS notice of assignment?

Thank you

Michael A. Nam-Krane
PO BOX 301218
Boston, MA 02130
617.553.2366
Fax: 617.344.3099
www.bostonjustice.net/

Zimbra **rules.comments@jud.state.ma.us**

Rule 2

From : Michael Nam-Krane <michael@bostonjustice.net> Wed, Mar 02, 2016 09:29 PM
Sender : michael namkrane [redacted]
Subject : Rule 2
To : rules comments <rules.comments@jud.state.ma.us>

Hon. Peter M. Lauriat, Chair
Public Access to Court Records Committee
Superior Court Administrative Office
13th Floor
Three Pemberton Square
Boston, MA 02108

Re: Comments to Proposed Trial Court Rule XIV

Dear Honorable Peter M. Lauriat and Members of the Trial Court Committee on Public Access to Court Records:

I submit the rule should reflect a reasonable fee and not the exorbitant $1.00 per page fee. $1.00 a page frustrates access to justice. I suggest the fee be set at something lower than 25 cents and should be the same for all courts.

Thank you

Michael A. Nam-Krane
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May 4, 2016

Hon. Peter M. Lauriat, Chair, Public Access to Court Records Committee
Superior Court Administrative Office
Three Pemberton Square, 13th Floor,
Boston, MA 02108

Re: Proposed Trial Court Rule XIV Uniform Rules On Access To Court Records

To Hon. Peter M. Lauriat:

The following comments are submitted on behalf of the National Consumer Law Center's low-income clients. We write in response to your request for comments on the proposed rules for providing access to court documents and records on the internet. In particular, we oppose providing online access to criminal records and believe that doing so would undermine valuable state and federal protections and harm consumers.

The National Consumer Law Center (NCLC) is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys and their clients, as well as community groups and organizations that represent low-income and older individuals on consumer issues. NCLC is also the author of the Consumer Credit and Sales Legal Practice Series, consisting of twenty practice treatises with on-line supplements. One volume, *Fair Credit Reporting* (8th ed. 2013), is a standard resource on privacy and the FCRA.

In April 2012, we issued the report: *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* (see attached). In that report, NCLC detailed how mistakes on criminal background checks by third party consumer reporting agencies cost workers' jobs and skirt federal law (the Fair Credit Reporting Act). The report describes a number of ways in which background screening companies make mistakes that greatly affect a consumer's ability to find employment. Attorneys and community organizations that work with consumers with faulty background reports state that they repeatedly see background reports that:

- Mismatch the subject of the report with another person;
- Reveal sealed or expunged information;
- Omit information about how the case was disposed or resolved;
- Contain misleading information; and
- Mischaracterize the seriousness of the offense reported.

Many of these errors can be attributed to common practices by background screening companies, such as:

- Obtaining information through purchase of bulk records, but then failing to routinely update the database;
- Failing to verify information obtained through subcontractors and other faulty sources;
- Utilizing unsophisticated and imprecise matching criteria;
- Failing to utilize all available information to prevent a false positive match; and
- Lack of understanding about state-specific criminal justice procedures.

Because federal courts and some state courts make their criminal records available online, a number of background screening companies are using computer programs to "scrape" court websites to populate their databases at little to no cost.[1] As a result, a number of companies are able to gather and sell this data while providing few or no protections to consumers, and skirt state and federal laws. While we appreciate that the proposed rule would permit the public to access to criminal records only by docket number and not by name, this does not provide a sufficient safeguard against web scrapers who will use programs able to generate all possible docket numbers and download the information into large databases. Once companies gather this data, there is no guarantee that they will delete it if the records become sealed or expunged. There is also no assurance that these companies will timely (if ever) update their records to reflect the final disposition in a case, which can have a devastating effect for people whose charges have been reduced or dropped, or who have been exonerated.

The internet has a greater potential for misuse and, for criminal defendants, deprives them of benefits intended by the Legislature in sealing their cases. Once information is online, it has a life of its own. Massachusetts is unique in that it has strong protections for people with criminal records. Making criminal court records public will undermine the state's unique and powerful protections. Therefore, we urge the committee to ensure that the public is not able to view criminal court records on the internet.

Thank you for your consideration of these comments. Please feel free to contact Persis Yu if you have any questions or comments. (Ph: 617-542-8010; E-mail: pyu@nclc.org).

[1] Web scraping is a term for various methods used to collect information from across the Internet. Generally, this is done with software that simulates human Web surfing to collect specified bits of information from different websites. *Source: Techopedia: Web Scraping*, *available at http://www.techopedia.com/definition/5212/web-scraping.*

BROKEN RECORDS

HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES

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April 2012

ABOUT THE AUTHORS

Persis S. Yu is a staff attorney at the National Consumer Law Center (NCLC) who focuses on the Fair Credit Reporting Act, student loan law, and other consumer credit issues. Prior to joining NCLC, Persis was a Hanna S. Cohn Equal Justice Fellow at Empire Justice Center in Rochester, New York. Her fellowship project focused on credit reporting issues facing low-income consumers, specifically in the areas of accuracy, housing, and employment. Persis is a graduate of Seattle University School of Law, and holds a Masters of Social Work from the University of Washington and a Bachelor of Arts from Mount Holyoke College.

Contributing Author **Sharon M. Dietrich** is the Managing Attorney in Community Legal Services of Philadelphia's Employment and Public Benefits Units. She specializes in employment issues faced by ex-offenders and unemployment compensation issues. Ms. Dietrich has been presented numerous awards for her work, including the 2006 Kutak-Dodds Prize from the National Legal Aid and Defender Association, the Civil Legal Aid Attorney of the Year Award from the Pennsylvania Bar Association (2006), and the Andrew Hamilton Award from the Philadelphia Bar Association (2005). Prior to her employment with CLS, Ms. Dietrich served as law clerk for Ann Aldrich, U.S. District Judge for the Northern District of Ohio. Ms. Dietrich is a summa cum laude graduate of Albright College and a graduate of the University of Pennsylvania Law School.

ACKNOWLEDGMENTS

The authors thank Maurice Emsellem, Madeline Neighly, and Michelle Rodriguez of the National Employment Law Project; Lisa Bailey and Patricia Warth from the Center for Community Alternatives; Christopher Wilmes of Hughes Socol Piers Resnick & Dym, Ltd.; and many others for providing their valuable time and expertise on this subject. We also thank NCLC colleagues Carolyn Carter, Jan Kruse, and Chi Chi Wu for valuable comments and assistance, and Deborah Durant for research assistance.

The findings and conclusions presented in this report are those of the authors alone.

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ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and disadvantaged people, including older adults, in the U.S. NCLC advances economic fairness through policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services; and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices and help financially stressed consumers build and retain wealth.

BROKEN RECORDS

HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES

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EXECUTIVE SUMMARY

Since 2007, the United States has experienced the worst unemployment rates since the Great Depression. Adding to this job crisis, criminal background checking companies are making it even more difficult for workers to obtain employment. Approximately ninety-three percent of employers conduct criminal background checks for some potential applicants, and seventy-three percent of employers conduct criminal background checks for all potential applicants. The widespread dissemination of criminal record histories limits employment opportunities for an estimated sixty-five million adults (nearly one in four adults) in the United States who have some sort of criminal record.

Moreover, criminal background checks often contain incorrect information or sealed information. Samuel M. Jackson was allegedly denied employment after a prospective employer ran an InfoTrack background check. InfoTrack reported a rape conviction from 1987—when Mr. Jackson was four years old. The rape conviction actually belonged to fifty-eight-year-old male named Samuel L. Jackson from Virginia, who was convicted of rape in November 18, 1987. That Samuel Jackson was incarcerated at the time the InfoTrack report was run.

Whether these checks should be used for employment screening is a matter of public debate. However, there is little debate that if these records are to be used, they *must* be accurate.

Despite its promotion as a public safety service, the sale of criminal background reports has become a big business generating billions of dollars in revenue. The Internet has facilitated the emergence of scores of online background screening companies, with many claiming instant access to millions of databases.

Under the Fair Credit Reporting Act (FCRA), background checking agencies are required to maintain procedures to ensure the accuracy of information they report about consumer. Unfortunately, the FCRA, as currently interpreted and enforced, fails to adequately protect consumers when it comes to employment screening. Even applicants who successfully remove errors from their background check are frequently denied employment.

Despite the importance of the accuracy of criminal background reports, evidence indicates that professional background screening companies routinely make mistakes with grave consequences for job seekers.

This report describes a number of ways in which background screening companies make mistakes that greatly affect a consumer's ability to find employment. Although the mistakes discussed in this report are not inclusive of all errors found on background checks, attorneys and community organizations that work with consumers with faulty background reports state that they repeatedly see background reports that:

- Mismatch the subject of the report with another person;
- Reveal sealed or expunged information;

- Omit information about how the case was disposed or resolved;
- Contain misleading information; and
- Mischaracterize the seriousness of the offense reported.

Many of these errors can be attributed to common practices by background screening companies, such as:

- Obtaining information through purchase of bulk records, but then failing to routinely update the database;
- Failing to verify information obtained through subcontractors and other faulty sources;
- Utilizing unsophisticated matching criteria;
- Failing to utilize all available information to prevent a false positive match; and
- Lack of understanding about state specific criminal justice procedures.

Even the National Association of Professional Background Screeners agrees there are some simple procedures that background checking companies can take to enhance the quality of their information. Unfortunately, few companies actually are willing to commit to even the limited recommendations of their own trade association. Criminal background checking is big business, and ensuring accurate and complete information reduces profits.

Based upon the issues identified in this report, we recommend that the Consumer Financial Protection Bureau (CFPB) use its rulemaking authority under the Fair Credit Reporting Act to:

- Require mandatory measures to ensure greater accuracy.
- Define how long an employer has to wait in between sending an initial notice and taking an adverse action, i.e., rejecting an applicant or terminating an employee.
- Require registration of consumer reporting agencies.

The Federal Trade Commission should use its FCRA enforcement authority to:

- Investigate major commercial background screening companies for common FCRA violations.
- Investigate major, nationwide employers for compliance with FCRA requirements imposed on users of consumer reports for employment purposes.

Finally, as the source of most of the data reported by background screening agencies, states have a huge role to play in ensuring the accuracy of criminal background checks. States should that ensure that state repositories, counties, and other public records sources:

- Require companies that have subscriptions to receive information by bulk dissemination from court databases to have some procedure for ensuring that sealed and expunged records are promptly deleted and ensure that dispositions are promptly reported.

- Audit companies that purchase bulk data to ensure that they are removing sealed and expunged data and, if a company fails such an audit, revoke its privilege to receive bulk data.

With the explosive growth of this industry, it is essential that the "Wild West" of employment screening be reined in so that consumers are not guilty until proven innocent. Currently, lack of accountability and incentives to cut corners to save money mean that consumers pay for inaccurate information with their jobs and, thus, their families' livelihood.

Table 1 WHO CAN REIN IN FAULTY BACKGROUND SCREENING REPORTS?

Background screening companies routinely make mistakes when issuing criminal background checks. The result? Job seekers pay with their livelihood, while employers waste money and potentially miss hiring qualified employees as the result of sloppy work that skirts the Fair Credit Reporting Act (FCRA). This list contains common errors or bad practices found in reports from all corners of the United States. Adoption of the suggested remedies would greatly increase accuracy on reports by improving accountability.

Inaccuracy/Poor Practice	Solution	Responsibility
Report Includes Sealed or Expunged Records	Develop procedures to ensure that purchasers of bulk public data delete sealed and expunged records, and perform audits to ensure compliance.	State legislatures, administrative agencies, and/or courts
Mismatched Report (providing a report on the wrong person)	Provide guidelines on matching criteria; require consumer reporting agencies to use all available data; and prohibit name only based matching.	Consumer Financial Protection Bureau (CFPB)
Incomplete Record (i.e., omits disposition data)	Requiring verification and updating of criminal records that lack disposition data for records more than one year old.	CFPB
Misleading Reporting (i.e., a single charge listed multiple times)	Prohibiting multiple reports of the same case regardless of source.	CFPB
Inability Of Applicant/ Employee to Correct Errors in the Report Prior to an Adverse Action	Require employers to allow sufficient time (i.e., 35 days) to fix report before taking adverse action.	CFPB
Screening Companies Disclaim Responsibility Under the FCRA	Require registration of all consumer reporting agencies and investigate major industry players for common FCRA violations.	CFPB and Federal Trade Commission (FTC)
Employers Fail to Provide FCRA Notices	Investigate employers for FCRA compliance.	FTC
Misclassifies Grade or Classification Of Offense	Investigate background screening companies for inaccurate reporting in violation of FCRA.	FTC

I. INTRODUCTION

Since 2007, the United States has experienced the worst unemployment since the Great Depression. During the month of March 2012 (the most recent data available), 12.7 million people remained unemployed.[1]

Adding to this job crisis, criminal background checking companies are making it even more difficult for workers to obtain employment. According to a 2010 survey by the Society for Human Resource Management, approximately ninety-three percent of employers conduct criminal background checks for some potential applicants, and seventy-three percent of employers conduct criminal background checks for all potential applicants.[2]

The widespread dissemination of criminal record histories limits employment opportunities for estimated sixty-five million adults (nearly one in four adults) in the United States who have some sort of criminal record.[3] There are many criticisms of this practice.

First, the use of criminal background checks disproportionately affects people of color. In fact, the Equal Employment Opportunity Commission (EEOC) has stated that denying employment based solely on the existence of a criminal history has a disparate impact on African Americans and Latinos.[4] African Americans account for 28.3 percent of all arrests in the United States, although they represent just 12.9 percent of the population; that arrest rate is more than double their share of the population. In contrast, the arrest rate for whites actually falls below their share of the population.[5]

Second, the widespread use of criminal background checks sets persons with criminal records up for future failure. Research demonstrates that the single greatest predictor of recidivism is the lack of stable employment.[6] Moreover, "providing individuals the opportunity for stable employment actually lowers crime recidivism rates and thus increases public safety."[7]

Third, background checks do not necessarily provide users with the information they think it does. There is little research that shows any correlation between the existence of a criminal record and the propensity to commit crimes at the workplace.[8] Furthermore, criminologists and practitioners agree that recidivism declines steadily with time clean.[9]

Finally, criminal background checks often contain incorrect information or sealed information.[10] Whether these checks should be used for employment screening is a matter of public debate. However, there is little debate that if these records are to be used, they must be accurate.

This report is focused on the last critique—accuracy. Currently, actual accuracy rates are not possible to obtain.[11] Commercial background checking companies are not required to be licensed, nor is there any one source identifying all of these companies. Therefore, as of 2012, there is no centralized location to obtain the kind of data required to generate accuracy data. Furthermore, as will be described in greater detail, too many employers fail to comply with notice requirements under the Fair Credit Reporting Act (FCRA). This hinders the ability to conduct a reliable survey of consumers to determine whether

they have been denied employment because of a commercial background check report. For these reasons, the focus of this report is on the types of problems found on background reports and the systematic practices that allow these inaccuracies to occur.

This report discusses in detail:

- Overview of the background check industry;
- The current laws in place to protect consumers;
- The types of problems often found on criminal background checks;
- Attempts by criminal background checking agencies to evade consumer protections;
- Ways that criminal background checking agencies could improve their procedures; and
- Recommendations for policy makers to improve protections for consumers.

II. OVERVIEW OF THE INDUSTRY

A. Criminal Background Checks Are Big Business

The rise in criminal background checks is in part due to employers' fears after the terrorist attacks of September 11, 2001. Immediately after September 11, commercial background check vendors reported significant increases in business.[12] Kroll, Inc. reported that the number of background checks it conducted increased twenty percent from 2001 to 2002.[13] ChoicePoint (now LexisNexis) reported that its monthly volume of background checks increased eightfold in the five months following September 11, 2001.[14]

Despite its promotion as a public safety service, the sale of criminal background reports has become a big business. In the company's decade of operation, ChoicePoint's annual revenue grew from approximately $400 million in 1997 to approximately $1 billion in 2008 before it was purchased by Reed Elsevier Group (the parent company of LexisNexis).[15] As a *BusinessWeek* article reported:

> Background screening has become a highly profitable corner of the HR world. At the screening division of First Advantage (FADV), based in Poway, Calif., profits soared 47% last year, to $29 million; revenue grew 20%, to $233 million. HireRight (HIRE), based in Irvine, Calif., reported that earnings jumped 44%, to $9 million, last year on revenues of $69 million. To grab a piece of this growing market, Reed Elsevier Group (RUK), the Anglo-Dutch information provider, agreed to acquire ChoicePoint for $4.1 billion in February—at a 50% premium to its stock price.[16]

In addition to the large national corporations, there are countless smaller local and regional companies providing criminal record information to local employers and property managers. Currently there are no licensing requirements to become a background checking agency and there is no system for registration. Thus, the total number of commercial reporting agencies currently operating is unknown. Anyone with a computer, an Internet connection, and access to records can start a background screening business.

Largest Players in the Background Screening Industry

- Accurate Background, Inc.
- ADP Screening and Selection Services, Inc. (subsidiary of Automatic Data Processing, Inc.)
- First Advantage
- HireRight
  - Owned by Altegrity, Inc.
  - Altegrity also acquired US Investigations Services, LLC (USIS), and Kroll, Inc.
- IntelliCorp Records, Inc.
- LexisNexis
  - A Reed Elsevier Group company
  - Acquired ChoicePoint in 2008 for $4.1 billion
  - Claims to screen more individuals than any other background screening company
- Sterling Infosystems, Inc.
  - Acquired Acxiom's background screening unit, Acxiom Information Security Systems, in January 2012 and claims that it is the second largest background screening company in the world
  - Also recently acquired: Bishops Investigative Services, Abso Inc., Screening International, and Tandem Select

B. Local Law Enforcement's Piece of the Action

In some cities, local law-enforcement agencies sell their own criminal background information, creating a lucrative source of revenue. A common law enforcement practice is to create a computer network for sharing information regarding bookings, arrests, and releases from county jails.[17] In Michigan, the Michigan Sheriff's Association formed a not-for-profit corporation to implement a database that stores hundreds of pieces of information about each person.[18] In 1998, the Association decided to make what it determined to be "Public Arrest Data" available to the general public. It entered into an agreement with Buckeye State Networks, LLC, which made the latter the exclusive distributor of this arrest data to private sector users.

Likewise, in the 1970s, the Onondaga County Sheriff's Department in upstate New York urged the various law enforcement agencies across the county to enter arrest information into a shared database called CHAIRS (Criminal History Arrest Incident Reporting System).[19] CHAIRS later decided to sell the information in the database for a $10 fee to employers, volunteer organizations, and landlords throughout Onondaga County.[20]

The Sheriff's Office in Monroe County, New York, took a different approach. A local trade association agreed to pay $80,000 per year to fund one full time clerk in the Sheriff's office to pull criminal records for the association.[21]

A major problem is that there are significant problems in local law enforcement records. According to a report by the Center for Community Alternatives in Syracuse, NY, a CHAIRS report is not an official criminal history report; rather, it simply is a list of all of a person's arrests in Onondaga County. The report does not include any information about whether or not these arrests resulted in a criminal conviction, a non-criminal conviction, or a dismissal.[22] The Center for Community Alternatives found that, in a review of seventy reports generated between August 2008 and April 2010, 64.3 percent of the CHAIRS reports reviewed contained at least one arrest that should not have been publicly disclosed under New York's Criminal Procedure Law. [23] Despite this disclosure of legally undisclosable information, Onondaga County Sheriff Kevin Walsh has defended the sale of these reports. Sheriff Walsh argues that CHAIRS reports provide a benefit because they are much cheaper than the $125 fee charged by the state Division of Criminal Justice Services, or the $65 fee charged by the state's Office of Court Administration.[24]

C. The Internet Frontier

The Internet has facilitated the emergence of scores of online background screening companies, with many claiming instant access to millions of databases.[25] As SEARCH, a nonprofit membership organization comprised of criminal justice repositories from each of the fifty states, stated:

> When coupled with the automation of criminal justice records and the increasing power and decreasing cost of computers, the Internet creates the potential for small vendors, who would otherwise be unable to hurdle barriers to entry or, at most, would be only local players, instead to become national information providers.[26]

In fact, these online vendors have become major players in the background check business. Stephen JohnsonGrove, Deputy Director for Policy at Ohio Justice & Policy Center—a non-profit law office that seeks statewide reform of the criminal justice system—rated **backgroundchecks.com** as one of the top three background checking companies he sees.[27] On its website, **backgroundchecks.com** claims that "[w]ith a database of over 345 million criminal records" it "has now become the leader in the acquisition of data from across the country and the delivery of instant online access to public records."[28]

This growth in online vendors has occurred despite widespread public sentiment about the privacy of criminal records information. A 2000 survey by Bureau Justice Statistics that found that most adults (ninety percent) and eighty percent of young adults say that they "prefer that State agencies not use the Internet to post criminal history information that is already a matter of public record."[29] The increasing accessibility of criminal history records on the Internet also compounds the already rampant discrimination against persons with criminal records.[30] It exacerbates the disparate impact against minorities and recidivism caused by lack of employment.

The Fair Credit Reporting Act (FCRA)

Enacted in 1970 by the U.S. Congress, the FCRA has the goal of protecting the privacy of consumers and ensuring that information is as accurate as possible. The FCRA's regulatory structure attempts to achieve those goals by imposing duties and requirements on three categories of entities:

(1) Consumer reporting agencies (CRAs): those that gather and issue consumer reports;

(2) Furnishers: those that provide information to consumer reporting agencies; and

(3) Users: those who obtain these reports and use them.

D. Increased Access to Public Data

The explosion of background screening agencies, big and small, is largely due to easier access to public data. Over the past decade, criminal records have become available and used for non-law enforcement purposes to an unprecedented extent.[31] Records are made available to the public (including background screening agencies) through a variety of sources: state criminal record "central repositories" (often maintained by the State Police), the courts, private vendors which prepare reports from public sources, and even correctional institutions and police blotters (the daily written record of events in a police station often published in local newspapers).[32]

In the past, background screeners would send "runners" to the courts to manually review criminal history information. With recent technological advances, court clerks are now able to increase that accessibility by maintaining and disseminating court documents in an electronic format.[33] Today it is much more common for background screening companies to purchase large quantities of data electronically from the court or state and to populate their own databases with it.

III. CONSUMER RIGHTS UNDER THE FAIR CREDIT REPORTING ACT

Generally, the use and dissemination of criminal background checks are regulated by the federal Fair Credit Reporting Act (FCRA) and, to a lesser extent, state fair credit reporting acts.[34] Although the FCRA is generally thought to apply to traditional credit history reports, the provisions of the Act also apply to the use and dissemination of any "consumer report," which includes criminal history records issued by commercial databases and used for employment purposes.[35]

A. Duties of Background Screening Companies as CRAs

As with all consumer reporting agencies (CRA), background checking agencies are required to maintain procedures to ensure the accuracy of information they report about consumers. Though the law does not require reports to be free of any possible inaccuracy, it does require a CRA to have "reasonable" procedures to ensure "maximum possible accuracy."[36] Most courts consider a consumer report to be inaccurate when it is "misleading in such a way and to such an extent that it can be expected to [have an] adverse [effect]."[37]

When consumer reports are used for employment screening, the CRA has additional duties. When reporting potentially negative public record information to an employer, the CRA must do either one of two things:

- At the time that it provides the information to its customers, send the consumer a notice with the following information:
  - that the CRA is reporting criminal record information; and
  - who the report is being sent to (including name and address); or
- Maintain "strict procedures" designed to ensure that criminal record information is complete and up to date.[38]

Many background screening companies choose the option of sending a notice to the applicant to avoid the need for strict procedures.[39] However, a significant number do not, or do not provide it contemporaneously with the employer's report. To date, no court has determined exactly what "strict procedures" entail. However, as one federal district court in Pennsylvania has stated, "Without an extensive analysis of what constitutes 'strict' as opposed to 'reasonable' procedures, it stands to reason that 'strict' is necessarily a more stringent standard."[40]

With respect to the requirement for "reasonable procedures," courts generally conduct a balancing test, weighing the potential harm from inaccuracy against the burden of safeguarding such accuracy.[41] Where the potential harm is great and the burden small, a CRA's duty to prevent inaccurate or incomplete information is at its greatest.[42]

Courts have generally permitted background screening agencies to assume that court records are correct.[43] However, they do not have blanket immunity to rely on court records. For example, in one case where the CRA reported criminal background information on the wrong person, the court determined that reliance on court records did not relieve the CRA of the duty to correctly determine which public records belong to which individual consumers.[44]

Under the FCRA, a consumer has a right to request a copy of his or her consumer report and to dispute any inaccurate information.[45] Courts generally hold CRAs to a less stringent standard of accuracy when the consumer has not yet submitted a dispute. As one court stated, "[t]he consumer is in a better position than the credit reporting agency to detect errors appearing in the court documents dealing with the consumer's own prior litigation history."[46] However, in the court cases that articulate this relaxed standard of accuracy, the credit reporting agency is usually one of the "Big Three" (Experian, Equifax and TransUnion).

Relying on consumers to detect errors may be rational in traditional credit reporting, but it does not work in the criminal background context. **There are too many criminal background checking agencies for a consumer to regularly order his or her own reports to review them for errors.** Unlike the "Big Three" credit bureaus, there is no central source to find and request a copy of the report. And, even if a consumer were to try, few criminal background checking agencies have any advertised mechanism for consumers to get a copy of their own background check.[47]

There are too many criminal background checking agencies for a consumer to regularly order his or her own reports to review them for errors. Unlike the "Big Three" credit bureaus, there is no central source to find and request a copy of the report.

B. Duties of Employers Using Criminal Background Checks

The FCRA also imposes duties on employers who use consumer reports to determine eligibility for employment.[48] Employers must give a series of notices if they reject an applicant based upon any information found in a background check.

First, the employer must clearly and conspicuously disclose to the applicant or employee that it will be requesting a consumer report and must obtain the employee's consent in writing to the release, and it must certify to the CRA that it has done so, and that it will make certain disclosures if adverse action is taken based in any part on the report.[49]

Second, before rejecting a candidate an employer must:

> Give the candidate a "pre-adverse action" notice including:
>
> i. A copy of the actual background check; and
>
> ii. A copy of "A Summary of Your Rights Under the Fair Credit Reporting Act".[50]

If an employer does reject a candidate based (in whole or in part) on a background check, it must then provide the candidate with an "adverse action" notice that includes:

- The name, address, and phone number of the background checking agency that supplied the report;
- A statement that the background checking agency that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- A notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within sixty days.[51]

C. Inadequacies in Employer Compliance with the FCRA

The use of criminal background reports in employment causes unique consumer protection issues. While the remainder of this article deals with inaccuracies by consumer reporting agencies, it is worth noting that the first breakdown of consumer protection laws often occurs because many employers fail to comply with notice requirements.[52]

A user's failure to comply with notice requirements creates a "catch-22." The purpose of the FCRA notices is to ensure that the individual who is the subject has the opportunity to learn why he or she was denied employment (or adversely affected), has the opportunity to correct any errors before a decision is made, and has knowledge of his or her rights. When employers fail to comply, those seeking employment have no way of knowing that their rights have been violated, so they may never seek to enforce those rights.[53]

Even when employers do give potential employees the required pre-adverse action notice, they often fail to give the applicant adequate time to dispute any mistakes. According to the Federal Trade Commission (FTC) Staff Summary released in July 2011, there is no specific period of time an employer must wait after providing a pre-adverse action notice before taking adverse action against the consumer.[54] A prior FTC Staff Opinion had deemed five days to be reasonable, but the minimum length will vary depending on the particular circumstances involved.[55] The FTC staff author noted that the "purpose of the provisions [are] to allow consumers to discuss the report with employers before adverse action is taken."[56]

Advocates that work in the reentry community report that, on average, it takes at least two weeks to correct a consumer report and some indicate that it takes over a month.[57] This indicates that the time that the FTC had suggested prior to 2011 was inadequate to protect potential employees' rights. But the new Staff Summary may encourage or even embolden employers to allow even less time.

In fact, at least some employers are well aware of the fact that a job applicant cannot reasonably correct his or her report in the time allotted. In an email exchange, a Colgate employee stated, "The process for [the applicant] will to go back to the county court who reported conviction and prove to them that it was not him. Sterling was not able to estimate how long this would take because it really depends on the court. We are only legally required to wait 5 business days."[58]

The reality is that the FCRA, as currently interpreted, fails to adequately protect consumers when it comes to employment screening. Even applicants who successfully remove errors from their background check reports are frequently denied employment. In fact, when surveyed, several advocates indicated that they had never seen applicants get the job after correcting the report.[59] The reporting of sealed/expunged record is especially problematic for job applicants, because even if they can get a report corrected in time, there is little that can be done to "unring the bell."

Employment is unlike a denial of credit, where a consumer can simply apply for another loan or credit card if wrongly denied based upon a credit report. A denial based upon a faulty criminal background check means the denial of a potential livelihood. Jobs are scarce and new opportunities for employment do not come along that often. With a person's source of income on the line, and evidence that employer compliance with federal protections is spotty at best, it is essential that criminal background screeners do everything they can to ensure the information they give employers is accurate.

IV. LACK OF ACCURACY IN BACKGROUND CHECK REPORTS

Despite the importance of the accuracy of criminal background report, evidence indicates that professional background screening companies routinely make mistakes with grave consequences for job seekers. Advocates from across the country report that they repeatedly see reports that:

- Contain information about a different person (i.e., a "mismatch" or false positive);
- Report sealed or expunged records;
- Are incomplete (i.e., omit disposition data);
- Display data in a way that is misleading (i.e., report a single charge multiple times); and/or
- Misclassify the type of offense.[60]

This section will discuss each of these types of errors and the ways that these errors can be avoided.

A. Mismatched Reports

A very common problem with criminal background reports is false positive matches or mismatched identifications. Mismatched reports contain the criminal history of a person other than the subject of the report, due in large part to unsophisticated matching criteria.

PublicData.com

- Internet-based background screening company
- Searches *either* a subject's name *or* date of birth to compile matching criminal history records
- "Will NOT modify records in any database upon notification of inaccuracies."

With state-maintained databases, a biometric identification system, such as fingerprint data, is typically utilized to match a person to a record.[61] Biometric identification significantly reduces the chances of incorrectly connecting someone to the criminal record of another. In contrast, private criminal history background check companies typically match information in their databases using non-biometric information, such as name and date of birth. Moreover, due to privacy concerns, many courts will not release Social Security numbers. Therefore, many private background screening companies rely solely on first name, last name, and date of birth.

For obvious reasons, this practice poses significant trouble for people with common names. Consider the misfortunes of Catherine Taylor, an Arkansas woman with no criminal history. On several occasions, Catherine Taylor has had her housing and employment threatened because of mismatched background checks. On one occasion, the mismatched report was generated by **PublicData.com**. According to its website, **PublicData.com** is a public records disseminator.[62] It is an Internet-based background

The Case of Catherine Taylor, Arkansas: Mismatched Report

Ms. Taylor has no criminal history, but on several occasions she has had her housing and employment threatened because of mismatched background checks.

Company: ChoicePoint (now LexisNexis)

ChoicePoint allegedly reported the criminal record of another Catherine Taylor with the same date of birth. That Catherine Taylor lived in Illinois. According to Ms. Taylor's complaint, ChoicePoint had access to other identifying information which would have distinguished these two women; however, the particular ChoicePoint product in this case was designed to give an instant result, and thus was not designed to access that information.

ChoicePoint acknowledged that next time the company generates a report on the Arkansas Catherine Taylor, the same thing will happen again.

screening company in which the user can enter *either* a subject's name *or* date of birth to compile matching criminal history records.[63]

PublicData.com vehemently denies being a consumer reporting agency, and attempts to disclaim any responsible for any inaccuracies in its database. However, company owner Dale Bruce Stringfellow admitted in a deposition that "they bought databases or quantities of information from governmental agencies who would be presumably clerks of court—criminal record divisions of clerk of court, and they have made that information available to [PublicData's] subscribers."[64] The fact that these reports were used for employment or other FCRA purposes should make **PublicData.com** a consumer reporting agency under the Act.

PublicData.com also refuses to comply with the FCRA's dispute requirements, admitting that it "will NOT modify records in any database upon notification of inaccuracies."[65] Therefore, even if Ms. Taylor alerted **PublicData.com** to its error, the company would do nothing to correct her records. Nor does **PublicData.com** do anything as simple as cross-referencing the name with the date of birth.

Even where name and date of birth do match, errors still occur. On another occasion in which Ms. Taylor was allegedly denied employment based upon an erroneous criminal background check, the company that ran the report was ChoicePoint (now LexisNexis). Ms. Taylor has the misfortune of sharing the same last name and date of birth with another Catherine Taylor, a woman living in Illinois with a lengthy criminal history.

ChoicePoint Representative Teresa Preg acknowledged that: "If an in-person court search was conducted at that time and [the court] files were pulled," ChoicePoint would have been able to determine that the two women were not "the same subject."[66] However, an in-person court search was not used in this case. Rather ChoicePoint relied on bulk data dissemination to populate its database. According to ChoicePoint, the majority of state repositories will not release social security numbers. Thus, according to the ChoicePoint representative, nothing can be done to prevent this particular problem with this particular product.

In Ms. Taylor's case, ChoicePoint had additional information—such as her address, Social Security number, and credit report—which would have indicated that she was not the person in Illinois with the criminal record. Despite the fact that ChoicePoint had access to this information, the particular ChoicePoint product in this case was designed to give an instant result, and thus *was not designed to access that information*.[67]

> *"If an in-person court search was conducted at that time and [the court] files were pulled," ChoicePoint would have been able to determine that the two women were not "the same subject."*
>
> —Teresa Preg, ChoicePoint representative (deposition)

Furthermore, ChoicePoint acknowledged that next time the company generates a report on the Arkansas Catherine Taylor, the same thing will happen, i.e., a report generated from this particular ChoicePoint product will include the information on the Illinois Catherine Taylor, even though ChoicePoint is aware of the problem. In fact, ChoicePoint claims that it cannot alter the data provided by the state repository. Therefore, even though ChoicePoint knows that the person with Arkansas Catherine's address and Social Security number is not the person with the Illinois criminal record, ChoicePoint has no mechanism to prevent the two records from merging.

Despite the acknowledged mismatch, the ChoicePoint representative said that it was "reasonable for [the potential employer] to rely on the information that is matching the information they provided us."[68] Incredibly, the representative stood by ChoicePoint's report, stating that it was reasonable to report the Illinois woman's history as the Arkansas woman's history because "of the interactive matching criteria of the first and last name and the potential that this individual was in fact the same subject."[69]

ChoicePoint is not alone in utilizing scant information to generate matches even where additional information is available. In a case in Illinois, a man named Samuel M. Jackson was allegedly denied employment after the employer requested a background check by InfoTrack Information Services, Inc. (InfoTrack), an employment screening company headquartered in Chicago, Illinois. In that case, the employer provided InfoTrack with Mr. Jackson's name and date of birth.[70] According to the complaint, the background check report that InfoTrack submitted to the employer allegedly contained seven "possible matches" from InfoTrack's nationwide sex offender database that "related to three different individuals."[71]

The Case of Samuel M. Jackson, Chicago, Illinois: Mismatched Report

Company: InfoTrack

Mr. Jackson was allegedly denied employment after a prospective employer ran an InfoTrack background check. InfoTrack reported a rape conviction from 1987—when Mr. Jackson was four years old. The rape conviction actually belonged to fifty-eight-year-old male named Samuel L. Jackson from Virginia who was convicted of rape in November 18, 1987. And that Samuel Jackson was incarcerated at the time the InfoTrack report was run.

Mr. Jackson is a white man and was born in 1983. According to the complaint, InfoTrack had Mr. Jackson's date of birth, yet it reported information for three people, none of whom shared that same date of birth. The complaint further alleged, "three of the 'possible matches' were for a fifty-eight-year-old African American male named Samuel L. Jackson from Virginia who was convicted of rape in November 18, 1987. Plaintiff was not yet 4 years old at the time."[72] InfoTrack admitted to reporting information relating to a Samuel L. Jackson, but it denied knowing the other characteristics.[73]

However, although the exact source of InfoTrack's information is not stated in the court documents, the U.S. Department of Justice has a national sex-offender registry database through its website. A name search of this website provides not only name and location, but also, race, date of birth, height, race, date of offense, and in many cases, a picture of the offender.[74] In this specific case of Mr. Jackson, the DOJ database also indicates that the person InfoTrack listed as a possible match is presently incarcerated in Virginia—and thus unlikely to be applying for jobs in Illinois.[75]

As described in section III.A, *supra*, a consumer reporting agency that provides employers with negative public records information must either notify the consumer or follow strict procedures to ensure information is complete and up to date. InfoTrack admitted that it did not provide Mr. Jackson with a notice prior to submitting the report to the potential employer, but denied that it failed to follow strict procedures to ensure the completeness and accuracy of the report.[76] Despite this assertion that it follows strict procedures, InfoTrack's own website provides the following warning for records found using its Nationwide Criminal Database Search/Nationwide Sex Offender Registry Database Search:

> To ensure FCRA compliance, records found must be re-verified. Database searches are inherently incomplete and are to be used in conjunction with county level criminal searches.[77]

Even though it denied any wrongdoing in that case, court records show that InfoTrack settled the case with Mr. Jackson for $35,000.[78]

Mismatching people based upon a name-only match is an unbelievably common occurrence across background screening agencies. Some of the problems are attributed to a lack of available identifying information. For example, many jurisdictions will not provide background screening agencies with full Social Security numbers. Given these challenges, it is reasonable to expect that background screening companies will take measures to go beyond the face of the records to determine whether they are reporting information about the correct person. Such measures do exist. As Ms. Preg of ChoicePoint stated: "If an in-person court search was conducted at that time and [the court] files were pulled," the mistake would not have happened. Companies could also make better use of other available matching data, such as race, gender, height, and incarceration status.

Additional measures are especially necessary where the subjects of the reports have common first and last names. The frequency of names is widely available through the Census Bureau's website, and a simple algorithm could be developed to flag people who are likely to have first and last name matches with other people.[79] In fact, such algorithms already exist. A search the website, **howmanyofme.com**, estimated that there was one "Persis Yu" in the country, but approximately 45,198 "John Smith"s, 1,557 "Catherine Taylor"s, and 1,185 "Samuel Jackson"s. Therefore, while a first and last name search may be sufficient for someone with this author's name, a first and last name search will never be sufficient for a John Smith or Catherine Taylor.

Even more troubling is that background check companies have the necessary information to make a better match, but they do not design their products to utilize this information. As the deposition of ChoicePoint's Teresa Preg indicates, these companies appear to consider making information available instantly for employers and/or utilizing less costly methods to be a higher priority than ensuring accurate information for the workers whose livelihoods are affected.

B. Sub-sub-sub Contracting

Another common practice in the background screening industry is to subcontract out the search for criminal records. However, the subcontracting does not stop with one vendor, but continues as the vendors themselves subcontract the work to other vendors.

As the court described in Christensen v. Acxiom Info. Sec. Sys., Inc. (Axciom):

> The erroneous information in question was acquired via a chain of requests. Mount Mercy requested information from Per Mar; Per Mar requested information from Acxiom; Acxiom requested information from a subcontractor named Ramona Batts ("Batts"); and Batts either requested information from an unidentified person then in her employ, or called the courthouse to obtain information over the telephone (Batts is not sure which way she handled this search, because she has no documentation and cannot recall the name of the employee, but she is sure that she did not go in person to the Uvalde County courthouse to handle the search in person).[80]

This practice of sub-sub-sub contracting reduces accountability and increases the likelihood of erroneous information. Moreover, background check agencies exercise scant quality control over the information provided by vendors. For example, the Per Mar representative testified that when Per Mar receives requests for consumer reports, the searches are parceled out to various vendors, but that Per Mar does not check the reports submitted by these vendors for accuracy. Instead, Per Mar relies on its vendors for accuracy.[81]

Likewise, Curt Schwall, Compliance Unit Leader at Acxiom, testified that Acxiom does not make a regular practice of checking the accuracy of negative criminal information reported by its subcontractors. When Acxiom received the information in question from Batts, an Acxiom employee typed up the consumer report. Another employee reviewed the report for compliance with the FCRA and state law. Most importantly, however, no one from Acxiom checked the accuracy of the information supplied by Batts.[82]

Acxiom's supervision and training of its subcontractors is similarly limited. Schwall testified that subcontractors such as Batts are required "to sign off on our training literature, sign a searcher agreement, and undergo quality testing." However, there was no indication that subcontractors were actually required to take a training class or undergo a training program. The quality testing consisted of periodic audits, but Schwall could not recall any of those audits. Schwall also testified that Acxiom also ran a background check on Batts.[83]

Batts testified that she was sure that Acxiom provided her some training related to the FCRA, but she could not recall its substance. Batts did not go to Acxiom's facilities for any training, nor was she provided with any videotaped training. Acxiom did not provide Batts with any information about how to read the public record. Acxiom's retainer agreement and "public record searcher contract" with Batts contain no information about compliance with the FCRA. Batts was not given any directives about reinvestigation of contested information. Batts does believe that her searches were audited by Acxiom, because she received several "certifications of excellence" from the company.[84]

Batts testified that Acxiom was "desperate for researchers," and that she agreed to do research in Uvalde County even though "it was too far" away. She also testified that she handled a large volume for Acxiom, at one time doing "doing 50 to 100 names a day," with Acxiom wanting results within twenty-four hours.[85]

Because of the vast number of public record sources in different jurisdictions that some background checking companies rely upon, it is not inherently unreasonable for them to use vendors. However, the background checking company must take responsibility to ensure that its vendors are adequately trained, supervised, audited and the information submitted by vendors must be reviewed for accuracy. Furthermore, having multiple layers of subcontracting is problematic because the practice makes it nearly impossible for any one agency to be accountable for the accuracy of the information.

C. Reporting Sealed or Expunged Records

Revealing sealed or expunged data is one of the most damaging mistakes that a background checking agency can make. Unlike some other types of errors, revealing a sealed

or expunged record is nearly impossible to dispute with the employer. If the agency has mixed the job applicant's file with another person, the applicant can argue it was not him; if the applicant was ultimately exonerated, she can assert that he or she was innocent. But in the case of a sealed conviction, the applicant cannot claim that the accusation is false, but merely that the employer should not know about it. It is impossible at that point to "unring the bell."

In most states, people accused or convicted of crimes have the legal right to seal or expunge their criminal records under certain circumstances.[86] This means that the records will either be destroyed or removed from public access. Although every state has different laws and procedures for sealing or expunging records, most states will seal some records related to juvenile offenses. Many states will also seal or expunge arrest or conviction records for minor crimes like possessing marijuana, shoplifting, or disorderly conduct after a certain amount of time.[87] Sealing or expunging records is intended to give people a fresh start. When background checking agencies reveal sealed or expunged information, they deprive a job applicant to their legal right to a second chance.

One main reason these errors occur is because many consumer reporting agencies obtain their data in bulk and do not or cannot update it.

What's the Matter with Bulk Data?

Bulk data dissemination is the practice in which public sources, often the courts, sell their data on a wholesale basis to the consumer reporting agencies. The problem arises when background screening agencies fail to update these records properly.

1. Bulk Dissemination of Records

Bulk data dissemination is the practice in which public sources, often the courts, sell their data on a wholesale basis to the consumer reporting agencies.[88] The problem arises when background screening agencies fail to update these records properly.

It is impossible to know how many expunged or sealed records are contained in the databases of consumer reporting agencies. However, a small sampling by one media outlet indicates the incidence could be significant. In June 2011, the *Salt Lake City Tribune* requested the reports of thirty people with expunged records from LexisNexis. The *Tribune* found that five out of thirty people still had criminal records that appeared on LexisNexis.[89]

A few court officials have recognized the problems created by bulk dissemination, and dissented against the practice. Tom Wilder, district clerk for Tarrant County, Texas, says expunged records are one reason he refuses to sell his county's public records to database companies in bulk.[90]

North Carolina also stopped selling its criminal records in bulk, hoping to eliminate the sloppy record-keeping practices among background screening companies.[91] Unfortunately, Mr. Wilder and North Carolina are among the minority, as most counties and states do sell public data in bulk.

Legal cases show the potential harm created by the failure to update information. For example, according to his complaint filed in court, in March 2007, Herbert VanStephens was offered a position as a store manager, conditioned on the results of a criminal background check.[92] The background check report issued by ChoicePoint indicated that in December 2002, a Cook County judge sentenced Mr. VanStephens to court supervision on a criminal charge of felony theft.[93] However in September 2006, Mr. VanStephens's criminal records were expunged from the Cook County Criminal Court database.[94]

ChoicePoint reported Mr. VanStephens's expunged record in April 2007, nearly seven months after it had been expunged from the Cook County database. According to ChoicePoint's contract with Cook County, Illinois, as well as the Cook Count Bulk Data Dissemination Policy, consumer reporting agencies are required to ensure that "all court record data will be updated and made current as of the date of dissemination [to third-parties]." Furthermore, "[t]he term, made current, as used herein shall include, but is not limited to, disseminating only court record data that is in full compliance with all statutes, court rules, and court orders (e.g. those pertaining to sealing, impounding, and expunging of court records)."[95] ChoicePoint receives information from Cook County on a weekly basis.[96] Therefore, if ChoicePoint had followed the terms of its contract with Cook County, Mr. VanStephens's information would never have been revealed.

ChoicePoint is not alone in this behavior. According to a federal lawsuit filed in Northern Illinois, in one November 2007 report issued by U.S. Commercial Services, Inc. (USIS), now HireRight, that company reported that some of its data dated from as far back as 2002, even though USIS had last updated its records in September 2007.[97] According to copies of the court records filed with the complaint, none of the records reported in the USIS report were publicly available on the date that the background check was completed.[98]

Failing to update bulk data is a systematic problem with both civil and criminal records. From approximately 2007 until 2010, Equifax failed to purchase data about satisfied, vacated, or appealed civil judgments in the state of Virginia from its vendor, LexisNexis.[99] Sometime after 2006, Equifax and its vendors stopped the more careful process of in-person manual reviews of civil courthouse records, and began collection of judgment information solely from automated resources when the Supreme Court of Virginia began providing bulk dissemination of data using electronic media.

Under the terms of the contract between LexisNexis and Equifax, LexisNexis was obligated to collect and report the existence of judgments. However, it only was obligated to collect information about the disposition of judgments if LexisNexis determined that it was "commercially reasonable" to do so. According to the complaint in the class action suit filed against Equifax and LexisNexis, LexisNexis never concluded that it was commercially reasonable to collect and report dispositions of judgments.[100]

Furthermore, when LexisNexis did receive a large batch of termination records, Equifax refused to purchase them because the purchase price exceeded the amount Equifax had budgeted for that purpose.[101]

The failure of consumer reporting agencies to purchase updated data is not limited to Virginia. In 2005, Tena Mange, spokeswoman for the Texas Department of Public Safety, which serves as a repository for public records from around the state, said the department refreshed its data daily—hourly in the case of sex offenders—but that ChoicePoint bought the data only once a month.[102] According to the district clerk for Tarrant County, Texas "[e]ven if [the background screening agencies] update weekly, their information is going to be out-of-date and a background check may not reflect what happened in the case. . . . It's not fair to the individual who has a right to get something off their record."[103] Unfortunately, many expunged cases are reported for a much longer period of time than a few days or weeks.

2. *State Regulation of Bulk Dissemination*

How to manage disseminated criminal records is an issue that many states have struggled with in the past decade.[104] Some state legislatures prohibit courts from disseminating their records in bulk (e.g., Idaho, Kansas, Nebraska, South Dakota, and Washington).[105] Some states take a more nuanced approach. In Arkansas, the requestor must agree, under the penalty of perjury, not to sell the bulk or compiled court records[106] and may only use the requested documents for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes, in which the identification of specific individuals is ancillary to the purpose of the inquiry."[107]

In Arizona, there are two types of dissemination agreements: one for court records that include "protected personal identifiers" and one for those that do not include these identifiers.[108] Bulk court records with the personal identifiers require far more protective measures than if the requestor requested bulk data without that information. Background checking companies that purchase data with the "protected personal identifiers"—home address, exact birth date, driver's license number, and last four numbers of a social security number—must undergo periodic audits and correct sealed or corrected data within two days.[109]

This dual system has the perverse potential to encourage background screening agencies to request less information, which would then adversely affect their ability to maximize matching ability. Background screening agencies that purchase records without protected personal identifiers avoid both audits and the rules regarding correcting sealed and otherwise restricted information. At the same time this system provides a disincentive for background screeners to purchase the data that would allow them to best match the records with the subject of the background check.

North Carolina is currently one of the few states actively enforcing accuracy standards. According to an Associated Press report, "[s]tate officials say some companies paid $5,105 for the database but refused to pay a mandatory $370 monthly fee for daily updates to the files—or they would pay the fee but fail to run the update."[110] North Carolina officials also discovered that some background check companies refused to fix errors pointed out by the state or to update stale information. As a result, North Carolina revoked the licenses of CoreLogic SafeRent, Thomson West, CourtTrax, and five others for repeatedly disseminating bad information or failing to download updates.[111]

State laws on the dissemination of court records currently vary, but states have the opportunity to enact laws which could restrict the dissemination of some data or impose requirements on the background screening companies (and others) that purchase the data. However, it is also important to note that states must also have adequate resources to enforce these policies.

D. Incomplete Dispositions

Another common mistake by background check companies is to omit final disposition data, that is, the companies report the fact that charges were filed, but not whether the person was convicted. Because of this omission, people who have been exonerated of the charges against, or had the charges dropped or reduced, appear to have pending criminal complaints against them.

The reporting of the disposition of pending charges can be very important to the person against whom the charges were brought. Even in cases where there has been a conviction, often the conviction will be for fewer than all of the original charges. Overcharging is a common practice, and more serious charges are often dropped as part of a plea bargain. Disposition reporting is even more important to an individual against whom all charges were dropped. Moreover, employers are reluctant to hire a worker with an ongoing legal problem. In fact, even in states that restrict consideration of criminal records for employment purposes, employers are typically allowed to deny employment to people with pending charges.[112]

As with sealed and expunged information, background screening companies fail to report the final disposition of a case because they fail to update their data. For example, people who had pending charges when the background screening company obtained its bulk data may appear to have pending charges indefinitely. This problem also occurs because background screening companies rely on sources that are known to have poor accuracy.

Under the FTC's interpretation of the FCRA, unless they provide contemporary notice to the consumer, background screening companies that furnish reports based on previously acquired public record information (purchased periodically from a third party) must verify that any such information is complete and up to date.[113]

Unfortunately, government-operated repositories are often known to have poor accuracy rates. In the 1970s, the U.S. Department of Justice ("DOJ") implemented regulations establishing minimum criteria for the handling of criminal history information by federally funded state and local criminal justice agencies.[114] These regulations led to virtually all states passing legislation governing the dissemination of criminal records to some extent.[115]

In 2006, the U.S. Attorney General reported that only half of the records in the Interstate Identification Index (III or "Triple I") system, which contains the records from all of the states and territories, included a final disposition.[116] Failure to include a disposition means that countless individuals who were ultimately acquitted or obtained dismissal of criminal charges, and whose records were sealed by the courts, could be reported as having arrests against them in perpetuity.

The state repository systems fare only nominally better. A 2008 study found that only thirty-three states reported that more than sixty percent of arrests in their criminal history databases include recorded final dispositions.[117] Twenty-three states, Guam, and the Virgin Islands reported having a backlog for entering disposition data into the criminal history database. Twenty states have reported a total of more than 1.6 million unprocessed or partially processed court disposition forms, ranging from fifty-two in Illinois to 724,541 in Utah.[118]

With respect to the dissemination of records from the central repository, these state laws vary widely, from "open record" states in which records are readily available, to "closed record" states in which dissemination is closely regulated.[119] In contrast, there has been a historical presumption of open access to court records.[120] While commercial vendors may prepare criminal record reports from any publically available source, their primary source of information is the courts, because court records usually do not share the central repositories' limitations on the availability of criminal record information.[121]

However, instead of approaching courts directly, background screening companies rely upon state court administrations which are not the keeper of the official court records. For example, in a case filed against ADP Screening and Selection Services, Inc. (ADP) in New York State, the plaintiff claimed that, in late 2008, a job offer had been rescinded because an ADP background check wrongly showed a pending arrest from 2006.[122] According to the complaint, that arrest, which was more than two years old at the time, was not pending. In fact, the plaintiff claimed that all references to the arrest had been sealed by the court in February 2008, some six months before she applied for the position.[123]

A review of the background report filed with the complaint shows that the record originated with a local county court.[124] However, the report also shows that ADP received this record from the New York State Office of Court Administration. As previously noted, background check agencies have the option of either providing a notice to the consumer that public records information was being reported for employment purposes, or to follow strict procedures to ensure that the records were complete and up-to-date. In its answer, ADP admitted that it did not provide a notice;[125] therefore, ADP was required to follow strict procedures.

From the ADP report, it appears that ADP verified the record near the date that it reported the information to the potential employer. However, ADP verified the information with the state Office of Court Administration, not with the court itself. Failure to recognize that the centralized court database is not actually the keeper of the official court records is a common mistake among background screening agencies.

In another case, the background screening company, Abso, Inc., received criminal records from the Kentucky Administrative Office of the Courts (AOC). In her affidavit to the court, Denise Best, the Kentucky Office Operations Manager for Abso, Inc. indicated that "Abso requested [plaintiff's] records from the Kentucky AOC because the Kentucky AOC is the official, and therefore, primary source repository for state-wide court records."[126] However, the Kentucky AOC does not provide official court records. In fact,

"the report generated by the Kentucky Administrative Office of the Courts indicates that it is not an official court record in bold type."[127]

Using a standard of "reasonable" rather than "strict" procedures, the court held that ABSO could rely on the information because it originated from "in Abso's experience, a presumptively reliable source" from which they had not previously received inaccurate reports.[128] Yet it is clear that court administrations are not the original source of information, because the nature of their existence is to compile information from other sources. Therefore, to ensure that final dispositions are reported, background screening companies should not report open or pending charges without additional verification directly from the court itself.

In sum, background screening companies could improve disposition reports by:

- Updating their databases;
- Selecting the most reliable sources of public information; and
- Independently seeking verification where appropriate.

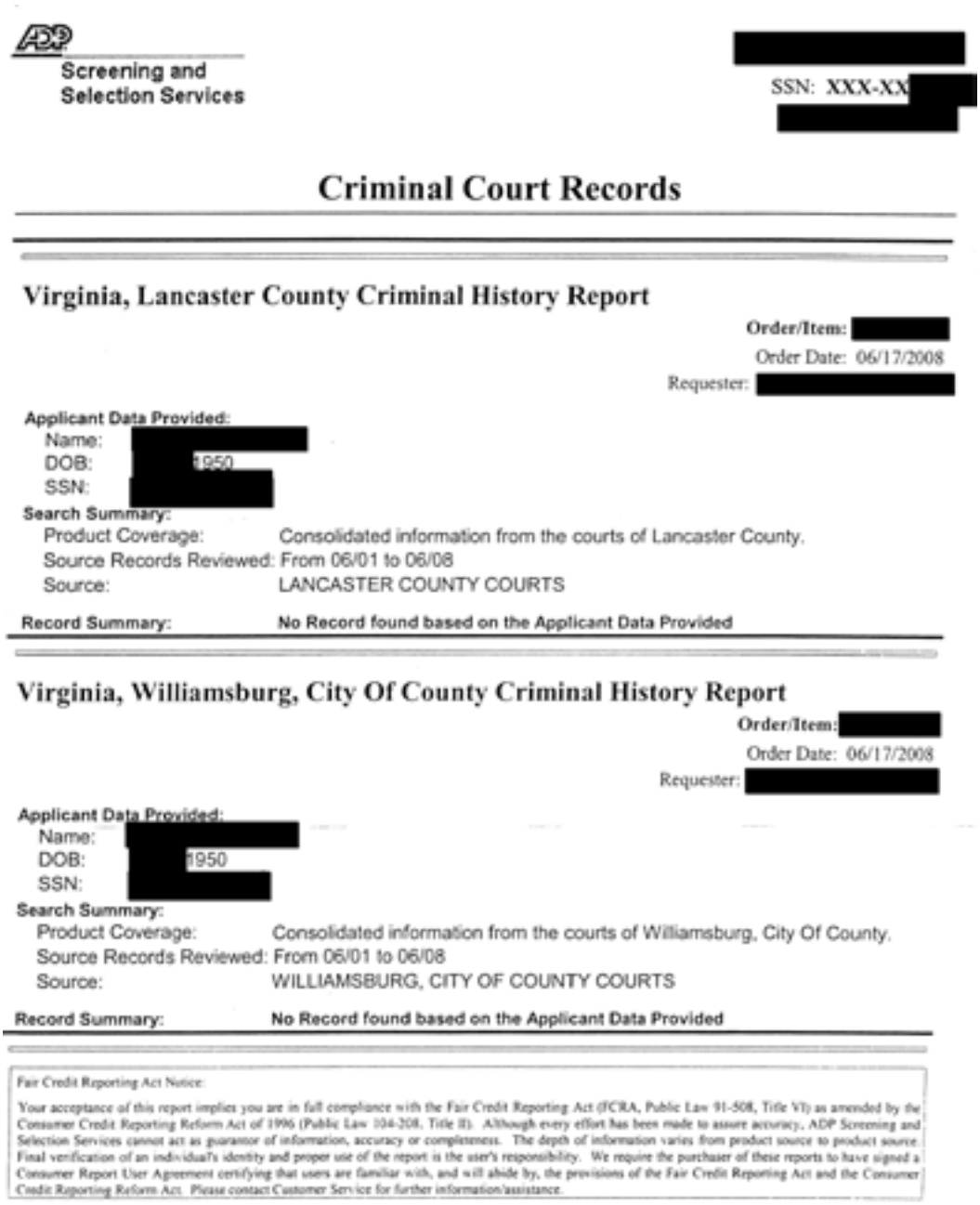
E. Misleading Reporting

Another common problem is misleading reporting. Some background screening agencies dedicate considerable space on their reports to tout the jurisdictions they search, but devote significantly less space to the results of those searches.

For example, an ADP report (see redacted report on next page) on a Philadelphia resident dedicated one and a half pages to listing three different county courts in Virginia in which ADP conducted the search. In font smaller than all the other fonts in the records, the report states: "No record found based upon the Applicant Data Provided." Therefore, any employer who only gave the report a quick glance could easily think that the person *did* have a record in those jurisdictions, when in fact he did not.[129]

Background screening agencies are also known to report single arrests or incidents multiple times. On the same ADP report, ADP reported ten charges twice (from only two cases)—once as reported from the court's database and a second time from the Commonwealth of Pennsylvania Common Pleas Case Management System database. The ADP report was 28 pages long, yet essentially presented information about two cases. Information was provided redundantly for every single count (including birth date, gender, race, and physical description). This voluminous presentation suggested that the person had a massive rap sheet, when in fact there were only two cases.[130]

The problem of multiple reporting of a single conviction has happened repeatedly to Bahir Smith in Philadelphia, PA. Mr. Smith is a truck driver, which is an industry that subjects him to many criminal background checks. Mr. Smith only has one arrest on his criminal record. Yet according to his complaint, in March 2009, USIS issued a report comprised of nine pages and listed that single arrest three different times.[131] Nearly a year later, USIS allegedly issued another report, in which that same case was listed four times.



ADP
Screening and
Selection Services

[redacted]
SSN: XXX-XX[redacted]

Criminal Court Records

Virginia, Lancaster County Criminal History Report

Order/Item: [redacted]
Order Date: 06/17/2008
Requester: [redacted]

Applicant Data Provided:
Name: [redacted]
DOB: [redacted]1950
SSN: [redacted]

Search Summary:
Product Coverage: Consolidated information from the courts of Lancaster County.
Source Records Reviewed: From 06/01 to 06/08
Source: LANCASTER COUNTY COURTS

Record Summary: No Record found based on the Applicant Data Provided

Virginia, Williamsburg, City Of County Criminal History Report

Order/Item: [redacted]
Order Date: 06/17/2008
Requester: [redacted]

Applicant Data Provided:
Name: [redacted]
DOB: [redacted]1950
SSN: [redacted]

Search Summary:
Product Coverage: Consolidated information from the courts of Williamsburg, City Of County.
Source Records Reviewed: From 06/01 to 06/08
Source: WILLIAMSBURG, CITY OF COUNTY COURTS

Record Summary: No Record found based on the Applicant Data Provided

Fair Credit Reporting Act Notice:

Your acceptance of this report implies you are in full compliance with the Fair Credit Reporting Act (FCRA, Public Law 91-508, Title VI) as amended by the Consumer Credit Reporting Reform Act of 1996 (Public Law 104-208, Title II). Although every effort has been made to assure accuracy, ADP Screening and Selection Services cannot act as guarantor of information, accuracy or completeness. The depth of information varies from product source to product source. Final verification of an individual's identity and proper use of the report is the user's responsibility. We require the purchaser of these reports to have signed a Consumer Report User Agreement certifying that users are familiar with, and will abide by, the provisions of the Fair Credit Reporting Act and the Consumer Credit Reporting Reform Act. Please contact Customer Service for further information/assistance.

The same problem, also involving USIS, happened to A. Garcia in Chicago, IL. USIS listed one case in his report three separate times. A review of the report indicates that each of those entries was the result of USIS running a search on a different date. Each entry looks slightly different. Therefore, it appears that USIS simply included what it found each time, and did not review the information to see if it matched with a record already in the report.[132]

In all of these reports, a simple review of the information would have revealed that the same case was being reported several times. At best, the duplicate reporting is the result of sloppy practices by background screening companies, such as failing to recognize the same case reported by multiple sources or by poor report formatting. At worst, it could be an example of padding to make the report appear more consequential, and persuade employers that they got their money's worth.

Another type of misleading practice occurs when background screening agencies attempt to subvert the time limits for information in the FCRA by telling potential employers that the company has information that it could not share. For example, SterlingInfo included the following paragraph in applicable background checks:

> This applicant has an arrest/incident on his/her criminal history that is NOT a conviction, and is over 7 years old. In accordance with Federal guidelines, we need to verify that this applicant will make at least $75,000 per year in order to make this information available to you. If you wish to receive this information, please let us know that the applicant meets this salary threshold by emailing **SalaryConfirmation @sterlingtesting.com**.[133]

SterlingInfo has defended this practice by claiming that "[D]efendant did not disseminate any arrest records of plaintiff in violation of 15 U.S.C. §1681(c). To the contrary, defendant merely advised its client that arrest records older than 7 years existed."[134] However, a federal district court in Pennsylvania found that the existence of adverse information was itself adverse information, and therefore, subject to the FCRA.[135]

F. Misclassification of the Type of Offense

Sometimes criminal background screening agencies just get the information wrong. Every state has its own criminal justice system, and each state works differently. Advocates from across the country report that they often see mistakes on commercial background reports due to a fundamental misunderstanding of how that state reports and classifies information. Specifically, commercial background screening agencies repeatedly misreport the level or classification of the offense. Additionally, they rarely know what to do with offenses that are classified as less than a misdemeanor or are non-criminal offenses (violations of law that are not classified as crimes, such as traffic tickets).[136]

In a background check on a Pennsylvania man, Phenix Group, Inc. incorrectly reported the grade of a conviction. Although the man was charged with a felony and two other misdemeanors, those charges were dropped. Instead, he pled guilty to two "summary offenses" for public drunkenness and defiant trespass. In Pennsylvania, summary offenses are below the level of a misdemeanor and may not be used by employers in hiring decisions. Because of this mistake, when he applied for a job, his application was rejected.[137]

In New York, the Center for Community Alternatives sees background screening companies misclassify records based upon the court where the case was adjudicated. Although the bulk of the cases prosecuted in New York Superior Court are felonies, some cases originate in Superior Court as part of its "integrated domestic violence" program.

Patricia Worth, Co-Director of Justice Strategies, Center for Community Alternatives, has seen background screening companies report this type of record as a felony conviction. In one case, the original arrest was only a misdemeanor, and the conviction was for a non-criminal violation. However, despite the fact that the Penal Law code indicated that it was a non-criminal violation, the background checking agency reported the conviction as a felony. Apparently, the agency assumed that because the case was prosecuted in Superior Court, it must be a felony.[138]

V. ATTEMPTING TO CONTRACT OR DISCLAIM AWAY FCRA DUTIES

Another disturbing trend among background checking agencies is their attempts to circumvent the Fair Credit Reporting Act through disclaimers and clever contracting.

In a deposition with Keith Alan Clifton, President of TenantTracker, which provides criminal records for the purpose of tenant screening, Clifton admits that he advises his clients that the records might not be accurate.

> **Question:** Do you—when you publish a report in response to a customer's inquiry, do you expect the customer to be able to rely upon the accuracy of that report?
>
> **Clifton:** Within the context of how I've provided the service under our contract.
>
> **Question:** Well, are you saying that there are certain qualifiers or disclaimers of accuracy in your contract?
>
> **Clifton:** Yeah.
>
> **Question:** So when you contract with your customer, you're contracting and advising your customer not to rely upon the accuracy of your report?
>
> **Clifton:** I'm advising them that they need to be a part of the process and that to ensure accuracy we have to work together.
>
> **Question:** And do you believe that such a contractual provision complies with the Fair Credit Reporting Act?
>
> **Clifton:** Yeah, I do.[139]

In the deposition, Clifton goes on to describes the process in which he instructs the user how to determine whether the subject of the report is the same person that the user is conducting the search on. In the case described above, TenantTracker had information indicating that the name and race of the individual searched did not match the subject of the report. However, TenantTracker did not fix the report until the user (its customer) indicated that the report did not seem to match the person it was seeking information about.

Dale Bruce Stringfellow, the authorized representative of **PublicData.com** (which takes the position it is not a CRA) explains the company's reporting of criminal records in this way:

> "What we've done as adults is we've looked through these listings and said, okay, well, there's a Catherine Taylor, but PublicData does not assert that the Catherine Taylor with the birth date that shows up is—is your client. And so we don't—we don't behind the scene make any—any claims such as that."[140]

Thus, according to Stringfellow, because PublicData never actually claims that the information it gives to the user pertains to the person about whom the user requested information, the company is not responsible for the accuracy of the information. [141]

This attempt to disclaim FCRA duties by contract is not limited to small-time operations. In fact, ChoicePoint (now LexisNexis), one of the largest background screening agencies, also attempts to contract away its FCRA duties. According to ChoicePoint representative Theresa Preg, depending on the service the user purchases, ChoicePoint's only duty is to give the user the information it has.

> **Preg:** [T]he product that was purchased by American Red Cross is an instant search against the criminal records database and an instant certainly [sic] of the Social Security number verification. [This] is in order to provide American Red Cross with as much information as possible and the fact that a subject may or may not have a criminal record, we would match, use our search criteria and the matching identifying information of at least the three identifiers and return that information with additional data and allow them to make any further determination with the consumer directly or through ChoicePoint if there's any question regarding the information that's provided back to them in this instant format.
>
> **Question:** Now, at the top of this report, . . . you have included a notice stating that the report does not guarantee the accuracy or truthfulness of the information; is that true?
>
> **Preg:** That is true, that's on the report.[142]

Likewise, in its advertising, InfoTrack admits that results of its Instant Sex Offender registry might be inaccurate. InfoTrack's website states: "To ensure FCRA compliance, records found must be re-verified."[143]

Unfortunately, some courts have permitted this type of legal sidestepping. These courts have held background screening companies not to be liable even though the background check provided criminal records of a different person.[144] As one court reasoned, the company provided an "accurate reporting of court records," even if the records were not attributable to the intended subject.[145] The court relied on the fact that the report warned that the list contained "possible" matches as opposed to "confirmed identical matches" and that the disclaimer sufficiently "identifie[d] the nature of the information and its limitations."[146]

There are several problems with this reasoning, which permits background screening agencies to use disclaimers to circumvent the Fair Credit Reporting Act.

First, the notion that users "need to be a part of the process and that to ensure accuracy we have to work together" is both unrealistic and harmful to the worker who is

the subject of the reports. Employers seldom read the disclaimers and believe that the report they have bought is accurate and stands on its own. The worker does not typically have a choice as to which company runs the report or which product the employers should use. The worker is at the mercy of the economic whims and demands of both the employer and the background screening agency.

Second, the consumer has no way to enforce the background check agency's requirements on the user. The "everyone works together to ensure accuracy" approach does not work if the employer does not have the desire or the expertise to live up to its end of the bargain. Though they may have some contractual duty to the background screening agency, employers have no duty to the worker that is the subject of the report—either contractually or under the FCRA.

Finally, the most egregious problem is that the accuracy of the background reports appears to be commensurate with the price of the service the employer is willing to pay. As demonstrated with PublicInfo, ChoicePoint, and InfoTrack as previously described, there is clearly a demand for instant access to criminal records. However, this instant access comes at the price of accuracy.

VI. WHAT WOULD REASONABLE PROCEDURES LOOK LIKE?

The purpose of this report is not to argue that background screening companies are bad, but that there are serious concerns about the accuracy of their products. The National Association of Professional Background Screeners (NAPBS) has made an attempt to bring order to the Wild West of background screening companies. According to its materials, the NAPBS has established an accreditation program, the Background Screening Agency Accreditation Program (BSAAP), to advance "professionalism in the employment screening industry through the promotion of best practices, awareness of legal compliance, and development of standards that protect consumers."[147]

Background screening companies that voluntarily participate in the BSAAP agree to follow the NAPSB's Standards and to submit to an auditing process. If all background screening companies followed the NAPSB Standards, many elements of which simply require compliance with the FCRA, there would be many fewer errors on criminal background reports.

Less than one percent of background screening agencies are actually certified by NAPBS—meaning less than one percent undergo voluntary audits by their own trade association and commit themselves to comply with Standards that contain many legally mandated elements.

Although these Standards are a good start for the industry and indeed probably legally required, they certainly do not go far enough to adequately protect consumers. Many of the requirements are vague and simply reflect the language in the Fair Credit Reporting Act. Additionally the Standards merely call for the existence of procedures to deal with accuracy issues, as opposed to dictating what those procedures should be.

Notable elements of the NAPSB Standards

1. The [consumer reporting agency] CRA shall have procedures in place for handling and documenting a consumer dispute that comply with the federal FCRA.
2. When reporting potentially adverse criminal record information derived from a non-government owned or non-government sponsored/supported database pursuant to the federal FCRA, the CRA shall either: A) verify the information directly with the venue that maintains the official record for that jurisdiction prior to reporting the adverse information to the client; or B) send notice to the consumer at the time information is reported.
3. The CRA shall designate an individual(s) or position(s) within the organization responsible for compliance with all state consumer reporting laws that pertain to the consumer reports provided by the CRA for employment purposes.
4. The CRA shall have procedures in place to inform clients that they have legal responsibilities when using consumer reports for employment purposes. The CRA shall recommend that clients consult their legal counsel regarding their specific legal responsibilities.
5. The CRA shall follow reasonable procedures to assure maximum possible accuracy when determining the identity of a consumer who is the subject of a record prior to reporting the information. The CRA shall have procedures in place to notify client of any adverse information that is reported based on a name match only.
6. The CRA shall designate a qualified individual(s) or position(s) within the organization responsible for understanding court terminology, as well as understanding the various jurisdictional court differences if the CRA reports court records.
7. Should the CRA receive information from the verification source subsequent to the delivery of the consumer report, and as a direct result of the initial inquiry, that conflicts with originally reported information, and that new information is received within 120 days of the initial report (or as may be required by law), the CRA shall have procedures in place to notify the client of such information.

Also, despite the fact they are legally required and as barebones as the NAPBS Standards are, *very few background screening companies have voluntarily become accredited under this program*. Out of the 2,137 members in its online directory, the NAPBS only lists 21 accredited companies in its directory. Thus, less than one percent of background screening agencies are actually certified by NAPBS—meaning less than one percent undergo voluntary audits by their own trade association and commit themselves to comply with Standards that contain many legally mandated elements.

In addition to the requirements in the NAPBS Standards, adopting other practices would do much more to ensure the fidelity of criminal background checks.

A. Avoiding Duplicate Reporting of a Single Case

Background screening companies should develop reliable matching criteria that allow duplicate reporting of a single case to be identified and avoided. Specifically, this software should search for indications that two records are in fact the same case. Such matching criteria would include:

1. Arrest date
2. Disposition date
3. Jurisdiction—state; court and/or county
4. Convicted—yes/no
5. Number of charges
6. Offense type—felony, misdemeanor, other
7. Case number
8. Name of charges
9. Disposition
10. Sentence

In many cases, not all ten data fields will match or will be available. However, not all ten criteria should need to match in order for the background screening company to reliably determine that the cases are the same. As few as five or six criteria could be enough to establish a match.

B. Avoiding Mismatched Data

Background screening companies should use all available criteria to match a consumer with a record in a criminal database. These criteria should include a combination of name, date of birth, social security number, former residences, gender, race, and physical description (such as height and weight). Although not all of these criteria will be available in every public database, background screening companies should obtain all that are available, and should match as many as possible to the subject of the report. In addition, background screening companies should view non-match of certain criteria, at a minimum, as a red flag that a record should be more extensively reviewed before concluding that there is a match.

Because not all matching criteria serve the same function, the criteria should be split into three categories as shown below.

Level 1: Criteria that can match a specific individual.	Level 2: Criteria that can disqualify a potential match.	Level 3: Criteria that should raise a red flag.
• Full Name • Date of Birth • Full Social Security Number (all nine digits)	• Gender • Race • Physical Description	• Address/State does not match any former residence of the consumer • Middle initial or Suffix do not match • Consumer has a common name

A user should obtain information on all of these criteria from the consumer when seeking permission for the background check. This will permit maximum possible accuracy in matching by the background screening companies.

A background screening company must match either the full Social Security number or at least the two other Level One criteria plus a Level Two criterion. Note that Social Security numbers are the only unique identifiers (and even they can be misrecorded, stolen, or falsified). There are many cases in which even a name and date of birth match will be inadequate, because of coincidence matches (especially with common names). This is particularly true in fifty-state background checks. Matching of Level Two criteria should be attempted to bolster the accuracy of a match not including a Social Security Number.

Name-only matches should never be used. Tens of thousands of people share certain common names.

Name-only matches should never be used. Tens of thousands of people share certain common names. A name-only match is never sufficient.

If any Level Two criteria are available but do not match, that record should be excluded from any criminal background report. For example, an arrest record that matches a consumer's name and date of birth, but lists a female when the consumer is a male should not be included in a criminal background report.

If any Level Three criteria are available and do not support a match, a red flag should be raised as to the accuracy of a match between the consumer and the record. For example, an arrest record matches the consumer's name and date of birth, but the consumer has a common name, John Smith, and has never lived in California, the source of the arrest record. In such a situation, the background screening agency should scrutinize the record and only include it if a totality of the other factors weighs towards its inclusion. This process would require human intervention, not just database matching.

C. Ensuring that Records Are Complete and Up-to-Date, and No Sealed or Expunged Information Is Provided

Background screening companies should verify criminal record information with the *original* source of the information immediately prior to reporting it. Background screening companies should also send the consumer a notice that they intend to report the negative information *before* they send the information to the prospective employer, so that incomplete information can be addressed prior to dissemination.

Additionally, background screening companies that use stored bulk data should implement synchronization software that permits the "synching" of data so that previously reported cases that have been sealed or expunged can be identified and removed. Synching of data between two separate sources has become ubiquitous, and tens of millions of consumers regularly use software that permits a smart phone or an MP3 player to synchronize with a personal computer. Background screening companies should be required to do the same. Synching software can include "conflict detection," which permits the modification of a file to be identified.

Alternatively, background screening companies should request that their public agency sources of criminal case information produce lists of expunged cases for the companies to correct their databases. For example, in April 2010, the Administrative Office of Pennsylvania Courts (AOPC) announced that it would affirmatively produce weekly lists of expunged cases for subscribers to its bulk distributions of criminal case data. This so-called "LifeCycle File" informs subscribers of information that should be removed from a database. It contains updates for all of the courts for which AOPC provides electronic information. Information contained in the file includes the court, the docket number, the outcome, and the date. AOPC requires its bulk subscribers use this information to remove expunged cases.

Finally, all arrest data that are more than one year old and lack final disposition data should be verified with the official source of the information to see whether a final disposition has occurred.

VII. RECOMMENDATIONS

As this report demonstrates, background screening companies frequently include inaccurate, misleading, and incorrect information on criminal history reports prepared for employment purposes. Both federal and state governments have a role to play in reigning in the "Wild West" of criminal background screening.

A. Federal Recommendations

The rulemaking scheme for the FCRA was drastically altered with the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[148] The Dodd-Frank Act established a new agency, the Consumer Financial Protection Bureau (CFPB), and transferred the bulk of the rulemaking authority for the FCRA to the CFPB .[149] The Dodd-Frank Act also granted general rulemaking authority to the CFPB, enabling it to ''prescribe such regulations as are necessary to carry out the purposes of this title'' and ''as may be necessary or appropriate to administer and carry out the purposes and objectives of this title, and to prevent evasions thereof or to facilitate compliance therewith.''[150] This is an authority that the Federal Trade Commission, which previously enforced much of the FCRA, was never granted.

The CFPB should use its FCRA rulemaking ability to:

1. Define reasonable procedures to ensure maximum possible accuracy under Section 1681e(b) of the FCRA to include:
   a. Requiring verification and updating of criminal records that lack disposition data for records more than one year old.
   b. Requiring all consumer reporting agencies to use all available data to determine matches.
   c. Prohibiting name-only based matches.

d. Prohibiting multiple reports of the same case regardless of source.
e. Clarifying what information can be included with convictions and arrests in order to prevent concurrent charges from being treated as additional convictions.

2. Define "strict procedures" under 1681(k) to require verification of all criminal records that lack disposition data.
3. Produce guidelines on matching criteria, especially for consumers with common names.
4. Define how long an employer has to wait between sending a pre-adverse notice under 1681b(b)(3) and taking adverse action. The period should allow adequate time to correct the record, such as thirty-five days.
5. Require registration of consumer reporting agencies.

Since the FCRA was adopted in 1970, the Federal Trade Commission (FTC) has been the agency primarily responsible for interpreting the Act. While the Dodd-Frank Act shifted the authority to publish FCRA rules and guidelines to the CFPB, the FTC will retain enforcement authority over much of the background check industry under the FCRA.

The FTC should use its FCRA enforcement authority to:

1. Investigate major commercial background screening companies for common FCRA violations.
2. Investigate major, nationwide employers for compliance with FCRA requirements imposed on users of consumer reports for employment purposes.

B. State Recommendations

As the source of most of the data reported by background screening agencies, states have a huge role to play in ensuring the accuracy of criminal background checks. Therefore, state legislatures, administrative agencies, or court systems should implement the following policies:

1. State repositories, counties, and other public records sources should require companies that have subscriptions to receive information by bulk dissemination from court databases to have a procedure for ensuring that sealed and expunged records are deleted.
2. State repositories, counties, and other public records sources should audit companies that purchase bulk data to ensure that they are removing sealed and expunged data. Companies that fail such audits should have their privilege to receive bulk data revoked.

VIII. CONCLUSION

This report describes a number of ways in which background screening companies make mistakes that greatly affect a consumer's ability to find employment. Although the mistakes discussed in this report are not inclusive of all errors found on background checks, attorneys and community organizations that work with consumers with faulty background reports report that they repeatedly see background reports that:

- Mismatch the subject of the report with another person;
- Omit disposition information;
- Reveal sealed information;
- Contain misleading information; and
- Mischaracterize the seriousness of the offense reported.

Many of these errors can be attributed to common practices by background screening companies, such as:

- Retrieving information through bulk record disseminations and failing to routinely update the database;
- Failing to verify information obtained through subcontractors and other faulty sources;
- Utilizing unsophisticated matching criteria;
- Failing to utilize all available information to prevent a false positive match; and
- Lacking understanding about state specific criminal justice procedures.

As discussed, even the National Association of Professional Background Screeners agrees there are some simple procedures that background checking companies can take to enhance the quality of their information. Unfortunately, few companies actually are willing to commit to even the limited recommendations of their own trade association.

With the explosive growth of this industry, it is essential that the "Wild West" of employment screening be reined in so consumers are not guilty until proven innocent. Lack of accountability and incentives to cut corners to save money mean that consumers pay for inaccurate information with their jobs and, thus, their families' livelihood.

Criminal background checking is big business, and ensuring accurate and complete information has costs. With the explosive growth of this industry, it is essential that the "Wild West" of employment screening be reined in so consumers are not guilty until proven innocent. Lack of accountability and incentives to cut corners to save money mean that consumers pay for inaccurate information with their jobs and, thus, their families' livelihood.

ENDNOTES

1. Bur. of Labor Statistics, U.S. Dep't of Labor, The Employment Situation—March 2012 (2012), *available at* **www.bls.gov/news.release/pdf/empsit.pdf**.
2. Soc. for Human Res. Mgmt., Background Checking: Conducting Criminal Background Checks (Jan. 22, 2010), *available at* **www.shrm.org/Research/SurveyFindings/Articles/Pages/ConductingReferenceBackgroundChecks.aspx**.
3. Michelle Natividad Rodriguez & Maurice Emsellem, The Nat'l Employment Law Project, 65 Million Need Not Apply, The Case for Reforming Criminal Background Checks for Employment (Mar. 2011). Many people who have a criminal record that shows up on a background check have never been convicted of a crime; in fact, one-third of felony arrests never lead to conviction. U.S. Bur. of Justice Statistics, Felony Defendants in Large Urban Counties, 2004 (Apr. 2008).
4. Equal Employment Opportunity Comm'n, Fact Sheet on Employment Tests and Selection Procedures, **www.eeoc.gov/policy/docs/factemployment_procedures.html** (last visited Dec. 27, 2011).
5. Rodriguez & Emsellem, *supra* note 3 at 5.
6. Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 Am. Sociological Rev. 529 (2000).
7. Rodriguez & Emsellem, *supra* note 3 at 3.
8. *Id*. at Endnote 4. In their 2010 survey, the Society for Human Resource Management found that 55 percent of employers report using criminal background checks in order to reduce their legal liability for negligent hiring. Society for Human Resource Management, Background Checking: Conducting Criminal Background Checks (Jan. 22, 2010), *available at* **www.shrm.org/Research/SurveyFindings/Articles/Pages/ConductingReferenceBackgroundChecks.aspx**. Yet according to one study of negligent hiring claims, only 10 percent of claims filed in 2003 involved the hiring of persons with a criminal histories and only 50 percent of those plaintiffs received favorable decisions. April Frazier, Nat'l HIRE Network, Negligent Hiring: Myth or Reality for Employers (2008), *available at* **www.eastcounty1stop.org/docs/neg_hiring_1_30_08.pdf**.
9. Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, 263 NIJ Journal 10, 12-13 (2009).
10. *See, e.g.*, Ctr. for Cmty. Alternatives, A Report to the Alliance of Communities Transforming Syracuse (ACTS): The Use of CHAIRS Reports as Criminal Background Checks (Mar. 2011), *available at* **www.communityalternatives.org/pdf/CHAIRS-FullReport-FINAL-March 2011-1.pdf**; Sharon Dietrich, Cmty. Legal Servs., Inc., Philadelphia, PA, Expanded Uses of Criminal Records and Its Impact on Re-entry (March 3, 2006); Louis Prieto, Persis Yu, & Jason Hoge, *Using Consumer Law to Combat Criminal Record Barriers to Employment and Housing Opportunity*, Clearinghouse Rev. (Jan-Feb. 2011).
11. *See generally* SEARCH, the Nat'l Consortium for Justice Info. and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (2005) (hereinafter National Task Force Report on Commercial Sale of Criminal Record Information) at 7, *available at* **www.search.org/about/news/2005/reports.asp**.
12. *Id.* at 4.
13. *Id*. at 32.
14. Ann Davis, *Firms Dig Deep Into Workers' Pasts Amid Post-Sept. 11 Security Anxiety*, Wall St. J (Mar. 12, 2002).

15. Reed Elsevier Press Release, *Reed Elsevier to acquire ChoicePoint, Inc.* (Feb. 2008), *available at* **www.reed-elsevier.com/mediacentre/pressreleases/2008/Pages/ReedElseviertoacquireChoicePoint,Inc.aspx**.
16. Chad Terhune, *The Trouble with Background Checks*, Bus. Wk. (May 29, 2008), *available at* **www.businessweek.com/magazine/content/08_23/b4087054129334.htm**.
17. *See, e.g.*, Lewis v. Ohio Prof'l Elec. Network L.L.C., 248 F. Supp. 2d 693, 696 (S.D. Ohio 2003); Center for Community Alternatives, *supra* note 10.
18. Lewis, 248 F. Supp. 2d at 696.
19. Center for Community Alternatives, *supra* note 10 at 3-4.
20. *Id.* at 3-4.
21. Agreement between County of Monroe, the Monroe County Sheriff, and the Foundation for Quality Care Upstate (Feb. 17, 2009) (on file with author).
22. Center for Community Alternatives, *supra* note 10 at 3.
23. *Id*. at 11.
24. The Post-Standard Editorial Board, *Stop Selling Them: Unreliable CHAIRS Reports Do More Harm Than Good*, Syracuse Post-Standard, April 14, 2011, *available at* **http://blog.syracuse.com/opinion/2011/04/stop_selling_them_unreliable_c.html**.
25. SEARCH, National Task Force Report on Commercial Sale of Criminal Record Information, *supra* note 11 at 29.
26. *Id*.
27. National Consumer Law Center, Informal Survey of National Employment Law Project's Criminal Records Listserv Members (Nov. 2011) (on file with author) (hereinafter NCLC Survey).
28. **Backgroundchecks.com**, About Us, **www.backgroundchecks.com/info.mvc/about-us** (last visited December 9, 2011).
29. Bureau of Justice Statistics, U.S. Dep't of Justice, Privacy, Technology, and Criminal Justice Information: Public Attitudes Toward Uses of Criminal History Information (July 2001) at 45.
30. Keith Finlay, Nat'l Bur. of Economic Research, Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-Offenders and Non-Offenders (May 12, 2008).
31. Dietrich, *supra* note 10 at 1.
32. SEARCH, National Task Force Report on Commercial Sale of Criminal Record Information, *supra* note 11 at 29.
33. Texas Judicial Counsel, Public Access to Court Case Records in Texas: A Report with Recommendations (Aug. 2004), *available at* **www.courts.state.tx.us/tjc/pdf/final%20public%20access%20council%20report.pdf**.
34. *See generally* National Consumer Law Center, Fair Credit Reporting §§ 2.3 and 3.2.4 (7th ed. 2010 and Supp.).
35. *Id*. *See also* Prieto, et al., *supra.* note 10.
36. 15 U.S.C. § 1681e. *See also* National Consumer Law Center, Fair Credit Reporting § 4.4.5 (7th ed. 2010 and Supp.).
37. *See generally* National Consumer Law Center, Fair Credit Reporting § 4.2.3 (7th ed. 2010 and Supp.).
38. 15 U.S.C. § 1681k.
39. *See generally* National Consumer Law Center, Fair Credit Reporting § 4.4.7 (7th ed. 2010 and Supp.).
40. Smith v. HireRight Solutions, Inc., 711 F. Supp. 2d 426, 439 (E.D. Pa. 2010). *See also* National Consumer Law Center, Fair Credit Reporting § 4.4.7 (7th ed. 2010 and Supp.).
41. *See generally* National Consumer Law Center, Fair Credit Reporting § 4.4.5 (7th ed. 2010 and Supp.).

42. *Id.*
43. Henson v. CSC Credit Servs., 29 F.3d 280, 286 (7th Cir.1994) (holding that a "credit reporting agency is not liable under the FCRA for reporting inaccurate information obtained from a court's Judgment Docket, absent prior notice from the consumer that the information may be inaccurate"). *See also* Haro v. Shilo Inn, 2009 WL 2252105 (D. Or. 2009).
44. *See* Adams v. Nat'l Eng'g Serv. Corp., 620 F. Supp. 2d 319, 334 (D. Conn. 2009).
45. 15 U.S.C. §§ 1681h(a)(1), 1681j(a)(1)(A). *See generally*, National Consumer Law Center, Fair Credit Reporting §§ 3.5.1 and 8.5.4 (7th ed. 2010 and Supp.).
46. Henson, 29 F.3d at 285.
47. A search of the following websites did not reveal a way for a consumer to obtain a copy of his or her background check: Accurate Background, Inc., **www.accuratebackground.com/resources.php?sec=145**; Automatic Data Processing, Inc., **www.adp.com** (last visited Dec. 27, 2011); IntelliCorp Records, Inc., **www.intellicorp.net**.
48. 15 U.S.C. § 1681b(b)(2). *See generally*, National Consumer Law Center, Fair Credit Reporting § 7.2.4 (7th ed. 2010 and Supp.).
49. *Id.*
50. 15 U.S.C. § 1681b(b)(3).
51. 15 U.S.C. § 1681m.
52. *See, e.g.*, Williams v. Staffing Solutions Southeast, Inc., d/b/a Prologistix, No. 10-cv-00956 (N.D. Ill. Feb. 11, 2010); Liccione v. Wilson Farms, No. 09-cv-06544 (W.D.N.Y. Oct. 29, 2009).
53. Prieto et al., *supra* note 10 at 474-476.
54. Federal Trade Comm'n, 40 Years Of Experience With the Fair Credit Reporting Act: An FTC Staff Report With Summary of Interpretations (July 2011) at 52-53.
55. *Id*. This Summary effectively withdraws the prior FTC Staff Opinion stating that 5 days is reasonable.
56. Lewis, FTC Informal Staff Opinion Letter, June 11, 1998.
57. NCLC Survey, *supra* note 27.
58. Defendant's Motion for Summary Judgment, Exhibit F (e-mail from Courtney Gentile to Kandy Clark and Dorothy Gerner), Poore v. Sterling Testing Sys., Inc., 410 F. Supp. 2d 557 (E.D. Ky. 2006).
59. NCLC Survey, *supra* note 27.
60. *Id*.
61. Bur. of Justice Statistics, U.S. Dep't of Justice, Survey of State Criminal History Systems, 2008, (2008) at viii.
62. **PublicData.com**, *Frequently Asked Questions*, **www.publicdata.com/faq.htm** (last visited October 12, 2011).
63. Deposition of Dale Bruce Stringfellow, Jr. at 43, Taylor v. The Source for PublicData, LP d/b/a **PublicData.com** and IntelliCorp Records, Inc., No. 07-CV-00880 (E.D. Ark. October 23, 2008).
64. *Id*. at 72:2-8.
65. **PublicData.com**, *supra* note 62.
66. Deposition of Teresa Preg at 66:4, Taylor v. Equifax, et al, No. 4:06CV0496-GTE (E.D. Ark. Dec. 2006).
67. *Id.* at 63-64.
68. *Id.* at 62:6-9.
69. *Id.* at 62:6-18.
70. Answer at 1-2, Jackson v. InfoTrack, No. 11-cv-5801 (N.D. Ill. Sept. 16, 2011).
71. Class Action Complaint at 3, Jackson v. InfoTrack, Case No. 11-cv-5801 (N.D. Ill. Aug. 23, 2011).
72. *Id*.

73. Answer at 5, Jackson v. InfoTrack, No. 11-cv-5801 (N.D. Ill. Sept. 16, 2011).
74. The Dru Sjodin National Sex Offender Public Website, **www.nsopw.gov** (last visited Dec. 27, 2011).
75. Search of The Dru Sjodin National Sex Offender Public Website for Samuel L. Jackson, on December 1, 2011.
76. Answer at 8-9, Jackson v. InfoTrack, No. 11-cv-5801 (N.D. Ill. Sept. 16, 2011).
77. InfoTrack, Pre Employment Background Screening: Criminal Background Screening, **www.infotrackinc.com/screening-products.php** (last visited Oct. 6, 2011).
78. Notice of Acceptance of Offer of Judgment, Jackson v. InfoTrack, No. 11-cv-5801 (N.D. Ill. Nov. 29, 2011).
79. U.S. Census Bur., Population Division, *Genealogy*, **www.census.gov/genealogy/names/**.
80. Christensen v. Acxiom Info. Sec. Servs., Inc., 2009 WL 2424453 at *3 (W.D. Ark. 2009).
81. *Id* at *4.
82. *Id*.
83. *Id*.
84. *Id*.
85. *Id*.
86. Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. Times, October 17, 2006, *available at* **www.nytimes.com/2006/10/17/us/17expunge.html?pagewanted=all**.
87. *Id*.
88. SEARCH, National Task Force Report on Commercial Sale of Criminal Record Information, *supra* note 11 at 10-11.
89. Nate Carlisle, *Some Utahns find their expunged criminal past is still present*, Salt Lake City Trib., June 5, 2011, *available at* **www.sltrib.com/sltrib/news/51753949-78/expunged-criminal-expungement-utah.html.csp**.
90. *Id*.
91. The Associated Press, *AP IMPACT: When Your Criminal Past Isn't Yours*, N.Y. Times, Dec. 16, 2011, *available at* **www.nytimes.com/aponline/2011/12/16/technology/AP-US-TEC-Broken-Records.html?hp=&pagewanted=all**.
92. Complaint at 2-3, VanStephens v. ChoicePoint Work Place Solutions, Inc., No. 08 CV 952 (N.D. Ill. Feb. 14, 2008).
93. *Id*.; Answer at 3, VanStephens v. ChoicePoint Work Place Solutions, Inc., No. 08 CV 952 (N.D. Ill. Mar. 31, 2008).
94. Complaint at 3, VanStephens v. ChoicePoint Work Place Solutions, Inc., No. 08 CV 952 (N.D. Ill. Feb. 14, 2008).
95. Complaint, Ex. A (Cook County Contract with ChoicePoint), VanStephens v. ChoicePoint Work Place Solutions, Inc., No. 08 CV 952 (N.D. Ill. Feb. 14, 2008); Cook Co. Gen. Admin. Order No. 2002-03 Subject: Bulk Electronic Data Dissemination Policy, *available at* **www.cookcountycourt.org/rules/admin_orders/admin_orders_2002.html#02-3**
96. Deposition of Preg, *supra* note 66 at 116:9.
97. Complaint, Ex. C: USIS Background Check, Garcia v. USIS Commercial Services, Inc., No. 08-cv-01710 (N.D. Ill. May 8, 2008).
98. Complaint, Ex. B Rap Sheet, Garcia v. USIS Commercial Services, Inc., No. 08-cv-01710 (N.D. Ill. May 8, 2008).
99. Deposition of Ken Mittendorff, assistant director of the Dep't of Info. Sys., at the Supreme Ct. of Virginia, Office of Exec. Sec'y at p 69:22-70:5, Soutter v. Equifax Info Serv., 2011 WL 1226025 (E.D. Va. Mar. 30, 2011).
100. Soutter, 2011 WL 1226025 at *2.

101. *Id*. at *3.
102. Kim Zetter, *ChoicePoint's Checks Under Fire*, Wired Mag. (March 23, 2005), *available at* **www.wired.com/politics/security/news/2005/03/66983?currentPage=3**.
103. Carlisle, *supra* note 87.
104. *See, e.g.*, Comm'n on Public Access to Court Records, Report to the Chief Judge of the State of New York (Feb. 2004), *available at* **www.nycourts.gov/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf**; North Dakota Supreme Court Comm., Court Tech. Comm., Requests for Bulk Data From District Court Case Information Systems (Mar. 12, 2003), *available at* **www.ndcourts.gov/court/committees/ct_tech/bulk.htm**; Texas Judicial Counsel, *supra* note 33.
105. Idaho Ct. R. 32(g)(27); Kan. Ct. R. 196(e); Neb Ct. R. § 1-801; S.D. Codified Laws §15-15A-11 (2005); Wash. Gen. R. 31(g)(3).
106. Ark. Sup. Ct. Admin. Order 19 § 6(B)(1)(b) (2010).
107. Ark. Sup. Ct. Admin. Order 19 § 6(B)(1)(a) (2010).
108. Ariz. Admin. Code §§ 1-605(D)(2), (D)(3) (2011).
109. 109 *Id*.
110. The Associated Press, *supra* note 91.
111. *Id*.
112. *See, e.g.*, New York Human Rights Law, N.Y. Exec. Law § 296 *et seq*. (McKinney 2010).
113. Federal Trade Commission, *supra* note 54 at 81, *citing* Allan, FTC Informal Staff Opinion Letter, May 5, 1999.
114. Criminal Justice Information Systems Regulations, 28 C.F.R. Part 20.
115. Paul L. Woodard and Eric C. Johnson, U.S. Dep't of Justice, Bur. of Justice Statistics, Compendium of State Privacy and Security Legislation: 2002 Overview, NJC 200030 (Nov. 2003)
116. U.S. Dep't of Justice, The Attorney General's Report on Criminal History Background Checks (June 2006).
117. Bur. of Justice Statistics, Survey of State Criminal History Systems, 2008, *supra* note 61 at 3.
118. *Id*. at 7.
119. SEARCH, National Task Force Report on Commercial Sale of Criminal Record Information, *supra* note 11 at 40.
120. *Id*. at 45.
121. *Id*. at 22-23.
122. Amended Complaint at 3-4, Doe v. ADP Screening and Selection Servs., Inc., No. 10-cv-06485 (W.D.N.Y. June 13, 2011).
123. *Id*.
124. Amended Complaint, Ex. A, Doe v. ADP Screening and Selection Servs., Inc., No. 10-cv-06485.
125. Amended Answer at 5, Doe v. ADP Screening and Selection Servs., Inc., No. 10-cv-06485 (W.D.N.Y. July 5, 2011).
126. Defendant ABSO's Motion for Summary Judgment, Affidavit of Denise Best, Stewart v. ABSO, Inc., 2010 WL 3853114 (W.D. Ky. 2010)
127. Stewart, at *10.
128. *Id*.
129. Community Legal Servs., Inc., Stories of Persons Hurt by Background Reports Produced by Commercial Vendors (Nov. 17, 2009) at Ex. B.
130. *Id*.
131. Complaint at 4-6, Smith v. HireRight Solutions, Inc., 2010 WL 2270541 (E.D. Pa. 2010).
132. Complaint, Ex. C: USIS Background Check, Garcia v. USIS Commercial Services, Inc., No. 08-cv-01710 (N.D. Ill. May 8, 2008).

133. Complaint at 3, Serrano v. Sterling Testing Sys., Inc., 557 F. Supp. 2d 688 (E.D. Pa. 2010).
134. Defendant's Memorandum of Law Motion To Dismiss, Serrano, 557 F. Supp. 2d 688.
135. Serrano, 557 F. Supp. 2d at 692.
136. NCLC Survey, *supra* note 27.
137. Phenix Group, Inc. (report on file with author).
138. Telephone Interview with Patricia Worth, Co-Director of Justice Strategies, Center for Community Alternatives (Oct. 17, 2011).
139. Deposition of Keith Alan Clifton at 44, Taylor v. Tenant Tracker Inc., 2010 WL 5174583 (E.D. Ark. Dec. 15, 2010).
140. Deposition of Stringfellow, *supra* note 63 at 87.
141. *Id*.
142. Deposition of Preg, *supra* note 66 at 64.
143. InfoTrack, Nationwide Criminal Database Search/Nationwide Sex Offender Registry Database Search, **www.infotrackinc.com/screening-products.php#nc** (last visited Dec. 15, 2011).
144. Wilson v. Rental Research Servs., Inc., No. 3-96-820, at 11 (D. Minn. Nov. 10, 1997*). See also* Taylor v. Tenant Tracker Inc., 2010 WL 5174583, (E.D. Ark. Dec. 15, 2010); Fiscella v. Intelius, Inc. 2010 WL 2405650 (E.D. Va. 2010).
145. Wilson, No. 3-96-820, at 11 (D. Minn. Nov. 10, 1997).
146. *Id*.
147. NAPSB, Background Screening Agency Accreditation Program Policies and Procedures (Oct. 2009) *available at* **www.napbs.com/files/public/Consumer_Education/Accreditation/BSAAP_PP122109.pdf**.
148. Pub. L. No. 111-203 (July 21, 2010).
149. Pub. L. No. 111-203 § 1088 (July 21, 2010); 75 Fed. Reg. 57252 (Sept. 20, 2010).
150. Pub. L. No. 111-203, § 1088(a)(1)(E), 124 Stat 1376 (July 21, 2010).

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NEW ENGLAND RISK SOLUTIONS LLC

January 19, 2016

Honorable Peter M. Lauriat
Chair, Public Access to Court Records Committee
Superior Court Administrative Office
13th Floor
Three Pemberton Square
Boston, MA 02108

Dear Mr. Lauriat and Members of the Committee on Public Access to Court Records:

I am George Gialtouridis, owner of New England Risk Solutions LLC, a Massachusetts-based company which provides public records information services through data retrieval. I would like to express my support for the proposed rules to improve public access to records of the Massachusetts Court system. Specifically, proposed Trial Court Rule XIV, Uniform Rules on Public Access to Court Records.

My company provides intermediary services to data technology and business information solutions industries. We collect and document tax lien, small claims and civil case information, making it available to our customers in an expedient and cost effective manner. The data that we provide is integral to many information technology and data analytics products that assist in risk management, fraud prevention and solutions to eliminate waste and abuse in business and government.

Accordingly, the timely and accurate reporting of court information and case dispositions is a vital part of our services. In the evolving digital age, having electronic access to complete case information is beneficial to both my company and society at large, because it reduces the manpower and time spent physically collecting records in towns throughout the Commonwealth. At a time when government resources are often scarce, electronic access to court records will save taxpayers and municipal record custodians valuable time and money.

On behalf of my company and others like us, we applaud your efforts to provide greater access to and transparency in government records. The proposed rules are an important step towards ensuring that the Courts keep pace with today's dynamic digital world.

Respectfully Submitted,

George Gialtouridis

OFFICE OF JURY COMMISSIONER

for The Commonwealth

May 4, 2016

Hon. Peter M. Lauriat, Chair
Public Access to Court Records Committee
Superior Court Administrative Office, 13th Floor
Three Pemberton Square
Boston, Massachusetts 02108

Re: Proposed Trial Court Rule XIV – Uniform Rules on Public Access to Court Records

Dear Judge Lauriat:

The Office of Jury Commissioner (OJC) has reviewed proposed Trial Court Rule XIV governing public access to court records and submits this correspondence as comment on the proposed Rule.

The proposed Rule raises several issues with respect to juror records.

The Rules Do Not Apply to the OJC. First, the proposed Rule governs access to court records of the Trial Court. Proposed Rule 1(b). The OJC is not part of the Trial Court. While the Office of Court Management's Court Administrator provides administrative management to the OJC, the OJC is a department within the judicial branch, supervised and controlled by the Supreme Judicial Court. M.G.L. c. 211B, §9A(viii); M.G.L. c. 234A, §5.

However, there will likely be people working with this Rule who will not know (and cannot be expected to know) that the OJC is not part of the Trial Court and, therefore, not subject to the Rule. This may lead to the inadvertent disclosure of juror information that is not publicly available.

While day-to-day administrative management of jurors at the courthouse typically rests with members of the Trial Court's Security Department, there are some court locations where members of the Clerk's Office or Judges' Lobby perform this task. Further, attorneys and members of the public seeking assistance with juror records often direct their requests to the Clerk's Office, particularly in smaller courts where the jury pool is not open every day, or where the jury pool officer may be assigned to a courtroom after the initial orientation of jurors. This may lead court personnel and the public to believe that OJC juror records are made "and/or maintained by the Clerk" and, therefore, subject to public access in accordance with the Rule. These records include juror attendance records and documents used in the juror selection process (case cover sheet, case information sheet and courtroom panel worksheet).

Attendance Records. Juror attendance records will show the names of all jurors appearing for service, as well as those who were expected to appear but did not (there is no checkmark next to the names of non-appearing jurors). Jury pool attendants record attendance for jurors appearing in the jury pool. Daily pool attendance records are maintained by the jury pool attendant in accordance with the requirements of M.G.L. c. 234A, §72. Courtroom clerks generally record daily trial attendance. Daily trial attendance records are returned to the jury pool attendant for processing in NextGen and retention in accordance

with the requirements of M.G.L. c. 234A, §72. Neither jury pool attendance sheets nor daily trial attendance sheets are maintained in case files, nor should they be.

Ultimately, data recorded for non-serving jurors serves as the basis upon which the OJC initiates criminal proceedings against delinquent jurors. Pending applications for criminal complaint, including the facts supporting the allegations, are not public unless a clerk-magistrate or judge concludes that the legitimate interest of the public outweighs the privacy interest of the accused. Therefore, it is reasonable to conclude that the records upon which the OJC bases its allegations of non-performance of juror service are likewise not available for public inspection. Juror attendance records (and the underlying data) have never been made available for public inspection by the OJC.

Impanelment Documents. Documents used in the juror selection process include the case cover sheet, case information sheet and courtroom panel worksheet. These documents[1] are generated in NextGen by the jury pool attendant and delivered to the courtroom clerk at the beginning of a jury trial. During the juror selection process, the clerk marks the case information sheet to show which jurors are excused, challenged (and by whom), sworn and not reached. The clerk may also use the courtroom panel worksheet to record the juror identity number of each juror who responds affirmatively to questions posed during voir dire. These records are not maintained in the case file. At the conclusion of juror selection, the necessary documents are returned to the jury pool attendant for processing. They are maintained by the jury pool attendant in accordance with the requirements of M.G.L. c. 234A, §72.

It could be argued that these documents are made by the clerk in connection with a case or proceeding and, therefore, subject to public access in accordance with the Rule. The OJC opposes this notion. The documents used in the juror selection process (and the underlying data) have never been made available for public inspection by the OJC absent a court order. In addition to showing the names of the sworn jurors, these documents show the names of jurors who were excused, challenged (including who challenged them), and those not even reached for questioning during the juror selection process. The only publicly available information concerning jurors connected to a case is the names of impanelled jurors who render a verdict in criminal cases. Commonwealth v. Fujita, 470 Mass. 484 (2015).

Compiled Data. Compliance with requests for bulk data and compiled data under the Rule also raise similar issues. Because the OJC is not part of the Trial Court, the definitions of, and requests for, "bulk data" and "compiled data" do not apply to the OJC's records. However, references to "jurors" in the NOTES may lead people to believe that the OJC's juror records are subject to the Rule.

Grand Juror Financial Questionnaires. Although the "Addendum: Records Excluded from Public Access" is not an exhaustive list of documents excluded from public inspection, the addendum refers to jurors' confidential questionnaires and criminal records, but does not mention grand juror financial questionnaires. Completed questionnaires must be kept on file in the office of the clerk of court for one year after the discharge of the grand jury. M.G.L. c. 234A, §52. The questionnaires are not public records. Id. The Committee may want to consider adding the grand juror financial questionnaires to the "Addendum: Records Excluded from Public Access."

Clerk's List of Jurors. Lastly, the proposed Rule raises an issue with respect to public access to the clerk's list of jurors.

Prior to the implementation of NextGen, the OJC's juror management software system, the OJC mailed a clerk's list of jurors in paper form to the clerk at each jury court location in the state about two weeks prior to each juror service date. The clerks kept the documents on file for three years. After the OJC implemented NextGen in 2005, the clerk's list of jurors became available on demand at the court. This enabled the OJC to print and provide the list(s) when needed and relieved the courts of the obligation to

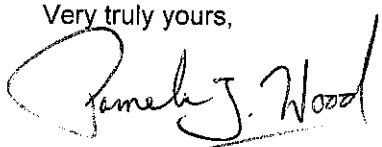
[1] Any document, other than the clerk's list of jurors, generated by the OJC's juror management software system that identifies individual jurors should be prevented from inadvertent disclosure.

store the paper documents. In practice, a request for the list is made at the clerk's office. The clerk notifies the jury pool officer or attendant. The jury pool officer or attendant generates the list on NextGen and delivers it to the clerk's office where it is provided to the person who requested the list.

In accordance with this current practice, clerks' lists of jurors are not generated and sent to the court unless requests are made for them. Because no list is generated, there is no list for a clerk to maintain in accordance with the Rule. Data used to compile the list is maintained in the OJC's juror management software system until such time as a request for the list is received by the clerk. This data is not subject to the Rule because it is maintained by the OJC, not the clerk. The OJC's data is not subject to the Rule because the OJC is not a department of the Trial Court. Only the actual clerks' list of jurors is subject to the Rule, and it only becomes subject to the Rule when it is delivered to the clerk.

The OJC appreciates the attention and assistance of the committee in considering the importance and necessity of preventing the inadvertent disclosure of juror information that is not available for public inspection. If any further information is required, the OJC will be pleased to provide it upon request.

Very truly yours,



Pamela J. Wood
Jury Commissioner
for the Commonwealth

Zimbra **rules.comments@jud.state.ma.us**

brief comments on proposed Public Access Rule 5(c)

From : Sacks, Peter (AGO) <peter.sacks@state.ma.us> Wed, Feb 24, 2016 04:03 PM
Subject : brief comments on proposed Public Access Rule 5(c)
To : rules comments <rules.comments@jud.state.ma.us>

Dear Friends,

I am on the SJC's Standing Advisory Committee on the Rules of Civil and Appellate Procedure and am currently chairing a subcommittee that is working on a proposed new rule, SJC Rule 1:24, Personal Identifying Information. The new rule is based on the nonbinding Supreme Judicial Court Interim Guidelines for the Protection of Personal Identifying Data in Publicly Accessible Court Documents that took effect in 2009. See http://www.mass.gov/courts/case-legal-res/rules-of-court/rule-changes-invitations-comment/invitation-to-comment-proposed-amendments-sjc-rule-124-september-2015.html .

In connection with that work, Chris Burak at the SJC called to my attention Section 5(c) of the proposed Uniform Rules on Public Access to Court Records, because Section 5(c) is somewhat related to the subject matter of proposed SJC Rule 1:24. Section 5(c), which as you know is part of the rule governing electronic access, provides:

> (c) Nonparty Information. Information that specifically identifies an individual who is a witness in a criminal case, victim of a criminal or delinquent act, or juror shall not be stated in the caption of a filing.

I had the following brief comments on this provision:

1. Should Section 5(c) say, in effect, "identifies as such an individual who is ..."? I.e., if the caption contains a name, but doesn't say or inescapably imply that the named person is a witness, victim, or juror, and that fact can only be gleaned from the text of the filing (which won't be visible on-line), would that be permissible, or prohibited? For comparison, the current draft of our Rule 1:24 provides, in part: "**Parent's Birth Surname, if Identified as Such**. If the birth surname of a person's parent, identified as such, must be included [in a publicly-accessible court document], all but the first initial of the birth surname shall be redacted."
2. I assume Section 5(c) applies only to filings in the specific case where the individual is serving as a witness, victim, or juror — or perhaps to closely related cases — but surely not to completely unrelated cases where the person's status as a witness, victim, or juror in another case is essentially irrelevant. Does that need to be clarified?

3. Should the rule also protect potential witnesses, who may be the subject of motions in limine, etc., before it's known whether they'll actually serve as witnesses?

I hope these limited comments are helpful. Please let me know if I can be of further assistance.

Thanks,

-- Peter

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Comments on proposed Uniform Rules on Public Access to Court Records

From : Kievra, Robert <robert.kievra@telegram.com> Wed, May 04, 2016 04:34 PM

Subject : Comments on proposed Uniform Rules on Public Access to Court Records

To : rules comments <rules.comments@jud.state.ma.us>

Cc : Donahue, Jennifer <Jennifer.Donahue@sjc.state.ma.us>

To whom it may concern:

On behalf of the Telegram & Gazette, I submit the following comments on the Proposed Uniform Rules on Public Access to Court Records

Rule 2 (b) REQUEST

The committee should add a requirement that written request forms must be kept separate from case files and discarded after a period of one year.

In the notes section for Rule 2 (b) Request, I would ask the committee to replace "should" with "shall" in the following sentence: "Each Clerk may elect to dispose or retain completed forms, but if retained, the forms should not be maintained in the court record or file."

Rule 2 (f) COMPUTER KIOSK

The committee should clarify whether someone using a computer kiosk will be able to print docket information from the terminal.

Under the notes section for Rule 2 (j) Requester's Self-Service Duplication of a Court Record, I would ask the committee to clarify whether credentialed media will be barred from using cell phones for self-service duplication if that particular trial court facility has adopted a policy barring the public from bringing cellular telephones and other personal electronic devices into a court facility.

Rule 5 (a) (2) Remote accessibility to information in electronic form through the public portal - criminal cases,

I would ask the committee to adopt language that would permit a user to search by defendant name, which the draft regulations do not seem to permit.

Thank you for your consideration,

Bob Kievra

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WORCESTER, MASSACHUSETTS

THOMSON REUTERS

May 4, 2016

To: Massachusetts Trial Court Committee on Public Access to Court Records

Re: Proposed Trial Court Rule XIV, Uniform Rules on Access to Court Records

Dear Members of the Committee on Public Access to Court Records:

I am writing on behalf of Thomson Reuters and our 25,000 U.S. employees who provide critical legal information to professional and government customers through Westlaw and other products. We believe the Proposed Trial Court Rule XIV strikes a reasonable balance between access and privacy rights, and appreciate the opportunity to comment.

We would like to offer our perspective on three of the proposed provisions:

Rule 3. Requests for Compiled Data
We believe that commercial requests for compiled data should be treated with equal consideration to requests for "scholarly, educational, journalistic, or governmental purposes." We think it would be reasonable to hold all providers accountable for ensuring that their data is as current and accurate as that available from the courts. We request the following changes:

RULE 3. REQUESTS FOR COMPILED DATA

(a) Procedure for Making Requests. Requests for compiled data may be made by any member of the public for scholarly, educational, journalistic, governmental or commercial purposes. Such requests shall be made to the Court Administrator in such form as the Court Administrator may prescribe. Each request must (i) identify what compiled data is sought, and (ii) describe the purpose for requesting the compiled data.

(d) Conditions. The Court Administrator may condition approval of a request for compiled data on the requester agreeing in writing to certain limitations on the use of the data, ~~such as that it not be used for a commercial purpose~~ consistent with ensuring accurate representation of the underlying cases.

Rule 4. Requests for Bulk Data
We also believe that public bulk data should be made available in instances where doing so would not pose a burden to the court, or where the cost of providing the data could be recouped through a reasonable fee to the requester that reflects the cost of providing the data.

Rule 5. (a) (2) Remote Accessibility to Information in Electronic Form Through the Public Portal – Criminal Cases

610 Opperman Drive
Eagan, MN 55123

THOMSON REUTERS

We would like to see statewide criminal cases made available on the Public Portal and hope that this rule is adopted.

Thank you for the opportunity to participate in this dialogue. We remain a willing resource and partner.

Sincerely,

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