



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

June 4, 2018

Hon. Sharon Prost
Chief Judge
Peter R. Marksteiner
Circuit Executive & Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington D.C. 204039

VIA FED EX

Dear Chief Judge Prost and Mr. Marksteiner:

I write on behalf of the Electronic Frontier Foundation (EFF) to request that the Federal Circuit amend its docketing policies to ensure timely public access to briefs. The Court's current practice is to docket briefs as "tendered" when they are first filed and to disable public access through PACER until the briefs are accepted by the Clerk's Office. Briefs are often withheld for many days because of this practice. We believe that the Federal Circuit's current policy is unnecessary and violates the public's common law and First Amendment right of access to court proceedings.

The Court's current ECF guide states: "Tendered, nonconfidential briefs are restricted to attorneys of record and the court until the brief has been reviewed and accepted by the court."¹ In practice, this means that the public is locked out from accessing briefs for many days. To take one example, in *Cisco Systems, Inc. v. Arista Networks, Inc.*, 17-2145, EFF (having appeared as amicus curiae) received an electronic filing notice email that Cisco's reply brief was tendered during the evening of Monday, February 5, 2018. EFF received an electronic filing notice email that Cisco's brief was actually filed (and thus publicly available) during the afternoon of Monday, February 12, almost a full week later. We have encountered similar delays in other cases.

The Court's current docketing practices make it more difficult for parties appearing as amicus curiae to file briefs that are helpful to the Court. Amicus briefs are due "no later than 7 days after the principal brief of the party being supported is filed." FRAP 29(a)(6). But under the Court's current practice, principal briefs are sometimes withheld from the public for more than 7 days. This means that an amicus curiae may not be able to review the party's brief before its brief is due (or has a very short time to review it). Amicus curiae are strongly encouraged not to simply duplicate party arguments. See, e.g., Lawrence S. Ebner, In-House Defense Quarterly, *How To Be A*

¹ CM/ECF User Guide Ver. 1.9.2, at 73, available at http://www.ca9.uscourts.gov/sites/default/files/cmecf/CMECF_User_Guide_Aty_9_2017.pdf

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Good Friend, Amicus Brief FAQs (Summer 2013) (“The most common error amicus briefs make is duplicating the legal arguments that the supported party already has made well in its own brief.”). Amici curiae will have trouble avoiding this pitfall if they cannot even read the relevant party brief. This disserves the Court.

As this Court is aware, the public has both a common law and First Amendment right of access to court proceedings. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–98 (1978). Indeed, the Federal Circuit has recognized that “[t]here is a strong presumption in favor of a common law right of public access to court proceedings.” See *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011). This includes a right to *timely* access to court documents. See *Associated Press v. Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that a 48 hour delay in unsealing was improper); *Courthouse News Serv. v. Brown*, No. 17 C 7933, 2018 WL 318485 (N.D. Ill. Jan. 8, 2018); *Courthouse News Serv. v. Jackson*, No. CIV A H-09-1844, 2009 WL 2163609, at *5 (S.D. Tex. July 20, 2009). Based on the public’s constitutional right of access, courts have struck down docketing practices that led to delays far *shorter* than those currently encountered at the Federal Circuit. See, e.g., *Courthouse News Serv. v. Brown*, 2018 WL 318485 at *1-2 (finding regular delays of one to three days unconstitutional). Unfortunately, the Federal Circuit’s current docketing practices mean that it routinely violates the public’s right of access by withholding tendered briefs for more than three days.

The Federal Circuit’s policy regarding tendered briefs should be amended to reflect the Court’s strong support for the right of access. The Court has explicitly cautioned against excessive sealing practices—for example, of a party’s legal arguments—that “bespeak[] an improper casual approach to confidentiality markings that ignores the requirements of public access, deprives the public of necessary information, and hampers [a] court’s consideration and opinion writing.” *In re Violation of Rule 28(d)*, 635 F.3d at 1360. This Court has also amended its Rules to impose stricter requirements on confidentiality designations. See Fed. Cir. Rules 27(m); 28(d). Consistent with this approach, the Court should do more to ensure it is meeting its obligations to the public by making tendered briefs accessible without unnecessary and unjustified delay.

There is no reason to delay public access to briefs that the parties have filed with Court as non-confidential. The Clerk’s Office reviews tendered briefs to confirm that they satisfy the Court’s rules, but the fact that some of these briefs may need to be refiled (perhaps because they use the wrong font, contain too many words, or lack a certificate of service) is no reason to keep them from the public. Similarly, the possibility that a party may inadvertently disclose confidential information does not justify withholding access to non-confidential briefs. See *Courthouse News Serv. v. Brown*, 2018 WL 318485 at *5. That is not the responsibility of the Clerk’s Office: the Court’s ECF guidelines make it clear to the parties that they, not the Clerk’s Office, must ensure confidential information

is not filed publicly.² Regardless, the current practice of delaying access to tendered briefs does nothing to diminish the risk of inadvertent disclosures that result from the parties' own errors (for example, because they fail to designate confidential material or file confidential briefs as such).

It is our understanding that no other federal appeals court routinely withholds access to filed briefs. We hope that the Federal Circuit reconsiders its practice of keeping "tendered" briefs from the public.

Very truly yours,

A handwritten signature in black ink, appearing to read "Daniel Nazer", written in a cursive style.

Daniel K. Nazer
Senior Staff Attorney

² The Court's ECF FAQ states: "Once you file a document, you cannot retract the filing or limit access to the filing. For this reason, it is essential that the appropriate confidential document event is selected for all confidential filings." *See* http://www.cafc.uscourts.gov/sites/default/files/cmecf/FAQ_-_Rev_Aug15.pdf (emphasis in original).