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Chief Justice Judith Nakamura
237 Don Gaspar Ave.
Santa Fe, NM 87501

Hello Chief Justice Nakamura,

I am writing in response to the Supreme Court's decision to decline our request for a press queue on behalf of the media. I believe the process through which that decision was made was unfair. More specifically, we were sandbagged.

I would respectfully ask Your Honor to hear me out and consider whether our petition was dealt with in good faith and whether the outcome is fair and just.

For a storyteller, where to start is a big decision. I will start with the March 2 OAS meeting.

Good Faith

In late January, after a series of instructive conversations with our lawyer Pat Rogers, Chief Clerk Joey Moya steered him to the Online Access Subcommittee where the chair is Jim Noel, a longstanding opponent of the access we seek. Unfolding events can be best seen through the emails that follow.

Feb. 13, 2020: Rogers emails Moya and Noel with a letter asking for a press queue and repeats an earlier offer to "meet at your convenience to address any additional questions."

Feb. 14: 8:32 AM: Moya emails Noel, Judge Karen Mitchell, Odyssey business manager Suzanne Winsor and others, "I suggest we schedule Mr. Rogers to appear before OAS at our April meeting and use the interim to investigate further with Tyler. I also think we should discuss the issue and options at least once before we ask him to attend a meeting. I would want the right person or persons from Tyler to be available when we discuss this at an OAS meeting. ... I suggest at a minimum that we schedule a conference call or informal meeting to discuss this in more detail and hear what Suzanne hears from Tyler."

This email foreshadows a procedure for making a recommendation to the Supreme Court where Tyler will be invited to the table for the press queue discussion and the representative for the press will be sidelined.

8:51 AM: Noel replies to Moya, Mitchell, Winsor and IT project manager Laura Orchard, "I'm good with April. So let's discuss at the March meeting. Laura – could we put an item on the agenda to discuss this and let's try to address the points that Joey put in his email along with a couple others."

8:54 AM: Orchard emails Rogers, "I have relayed your request to the OAS chair, Jim Noel, and he recommends that you plan to attend the Monday, April 6, 2020 meeting."

To be clear, the plan was to discuss the substance of our petition without our advocate being able to hear the discussion – or answer questions raised – while at the same time sending him to a *different* meeting. He was intentionally being kept out of the loop.

As part of my daily routine, I take a swim every morning and evening, and that is often when I try to solve the day's dilemmas. During my swim a couple days ago, I was trying to figure what words would best describe the subcommittee's plan. Was it a game of hide-and-seek, a run-around or something closer to the French expression, "Do you take me for a pigeon?"

As I finished my swim, I settled on the concept of good faith. And here the lack of it.

Materials To Be Gathered

Despite their efforts to steer him to the later meeting in April, Rogers showed up at the March meeting. I had asked him to attend to get a sense of the players.

Beforehand he emailed Orchard on Feb. 24, "Is there an OAS website somewhere? The SC site has minutes from 2016, no agendas, etc. Can you send the notice and agenda for the March meeting?"

The simple question prompted a flurry of emails within the subcommittee, but the end result was that the agenda was *not* sent to Rogers. When seen much later, it included the item, "Press Review Queue Discussion."

The same day Rogers asked for the agenda, Noel approached him outside a courtroom where he was arguing motions. Noel said he wanted to talk. As Rogers reported to me, Noel sounded out his arguments and the two men had a cordial discussion over the merits of the press queue. Noel failed to tell him that the press queue was on the OAS agenda six days hence.

On March 2, at 1:30, Rogers walked into the JID building and into the meeting. As he put it: "They looked at me like I had a third eye in the middle of my forehead." He discovered that the press issue was in fact on the agenda, but he told the subcommittee he was willing to consider the whole thing "a mistake."

There followed a roughly 30-minute discussion that, according to Rogers' notes, included Noel expressing his theory that the word "filed" really means "accepted;" a question from former AP reporter Barry Massey about how the federal system works with Rogers explaining that the federal courts provide access on receipt; a comment from Bar representative Ian Bezpalko about the Schaefer ruling in the Eastern District of Virginia; and frequent references to "information from Tyler."

Rogers left the meeting with contact information for the local Tyler representative. But the following morning IT director Wilkinson emailed him to say Reilly would not talk to him and Rogers should "lobby the Tyler Technologies Headquarters." Tyler headquarters has no duty to provide Rogers with information and in fact has a financial interest in opposing the press queue.

After the meeting, the subcommittee began collecting an extensive list of materials for consideration, including a set of answers from Tyler which was given to the subcommittee members in mid-March. The answers, which eminently deserved a challenge, were withheld from Rogers until two months later, when it was too late.

That tactic does not represent good faith by New Mexico officials in considering a press petition for better access.

Request for the Materials

We are the point in this tale where the table is being set for the April 6 OAS meeting, with JIFFY members to be invited, a Tyler representative to be invited, a long list of press queue related topics to be discussed and an extensive set of materials already circulated.

April 6, 9:49 AM: Rogers emails Orchard, "Do you have a copy of the draft minutes I can review? I want to make sure we address all the questions/issues raised last month."

10:06: Orchard replies, "Attached are the draft minutes from the Mar 2, 2020 meeting."

11:06 : Rogers replies, "Ms. Orchard, the draft minutes concerning the CNS request reflect directions to provide a number of documents before the meeting. Could you send copies of any documents that have been forwarded to you for distribution for the meeting today?"

11:08: Orchard emails Winsor," I don't know how much of this information I'm supposed to make available to Pat Rogers – do you?"

11:13: Winsor replies, "I think you need to ask Judge Noel about this."

11:16: Orchard emails Noel and copies Mitchell, Winsor and IT chief Dick Wilkinson: "I've received a request from Pat Rogers for the backup documents for the Press Review Queue discussion. What do you recommend?

With that question, the written record falls silent.

Pausing the narrative, normally, in any committee that was acting in good faith, the materials would have been provided without our asking. We were invited to the meeting and expected to address the press access issue under consideration. We should be able to respond to any materials considered by the subcommittee. Without them, we would go into the meeting entirely unprepared and ignorant of the information already circulated and considered by everyone else in the room.

That is not good faith. It's more like taking us for a pigeon.

Press Queue Abruptly Tabled

The meeting began at 1:30 that afternoon and the much prepared for agenda item – "Discuss Draft Recommendation for JIFFY/Supreme Court" – was promptly aborted.

I attended the meeting via zoom. At the outset, Noel said the matter was being taken off the agenda because of the Covid pandemic without elaboration. Rogers asked that the matter be rescheduled. Noel abruptly rejected that request, saying he would not entertain any new matters until the Supreme Court issued instructions.

The minutes of the meeting say that both Rogers and I were "dismissed" at that point. In fact, neither of us was dismissed. Based on comments made during the meeting, the chair was able to see how many were participating. I stayed on until the bitter end at 4:00 and said thanks to all still assembled.

More importantly, the remaining agenda and attendant discussion had nothing to do with Covid. The pandemic only came up in a tangential manner, as it related to a travel budget. Covid was a pretext for what amounted to an arbitrary tabling of our petition.

After all the build up, the circulation of materials, the call for attendance by JIFFY members – this was clearly a big deal – why was all that work and preparation suddenly tossed in the air on a pretext.

In an alternative world, where a good faith process was underway, where the circulated materials were provided to us in advance of the meeting – then the ensuing discussion could have led to a judicious examination of a press access issue and possibly a favorable recommendation to the Supreme Court.

But, unfortunately, those were not the rules of the game.

There is a straight line between the effort to exclude our voice from the press queue discussion at the March meeting and the abrupt and pretextual tabling of the issue at the April meeting. They both show a steady determination to undercut any ability by Rogers to fairly respond to questions and issues raised by our petition. They show an equal determination to provide a recommendation to the Supreme Court – *without* including the voice of the press.

That is not good faith.

Materials Held Back

Rogers then continued on his quest to see the circulated materials.

April 6, 5:54 PM: Rogers emails to Orchard, "I heard or misheard a reference to a meeting of some sort, tomorrow? The last Jiffy minutes indicated the next Jiffy meeting is May 2? And the OAS will meet May 4? Lastly would you send any documents your received concerning the CNS request for access?"

April 7, 8:13 AM: Orchard emails, "Jim, Pat Rogers has made a second request for the backup documentation put together for the OAS agenda item that was not discussed yesterday. I don't know how long Pat stayed on the call but *I believe t*he only meeting mentioned for today was in reference to the Supreme Court deadline for materials at the April conference."

8:37 AM: Noel replies, "Will get back to you when I have a break."

2:10 PM: Orchard emails Rogers, "Please submit your request for documents as an IPRA request to ipra@nmcourts.com."

He was being sent down the slow road. What was the reason. Why not simply provide the materials. Based on subsequent events, it is apparent that it was to allow a recommendation to be formulated and delivered to the Supreme Court before we could respond.

We finally received the materials on Friday May 22, a little over six weeks after Rogers requested them and two months after they were circulated to subcommittee. We had no time to react to the materials which contain information that is startling, and misleading, before the Supreme Court considered the matter the following week.

Fait Accompli

But by the end of that next week, on Friday May 29, Mr. Moya sent a letter delivering the *coup de grace* to the press queue. He said his referral of our petition to the subcommittee was "in error" and that the Supreme Court had declined our request. So we were presented with a *fait accompli*. Our ship was sunk.

Ah, but was it an error. Is that right. Were we sent down to the subcommittee and run through months of rigamarole because of a mistaken recommendation, a simple "error." Or was there in fact a recommendation made to the Supreme Court that we could not see or respond to.

There had to be. There are repeated references within the subcommittee minutes to drafting a recommendation for the Supreme Court. The materials circulated to the subcommittee even include an early draft of such a recommendation. The aborted agenda item specifically refers to a "Draft Recommendation for JIFFY/Supreme Court."

So I believe some recommendation was made. It belies credibility that the Court would consider and reject our petition with no report, no recommendation, no material whatsoever to consider. If there was such a recommendation, we were kept in the dark. We had no chance to answer or clarify points made in any recommendation to the Court.

Separately, it also seems that part of the subcommittee's gamesmanship most likely included an informal, off-the-record meeting among OAS members or JIFFY members, or both, in order to come up with a recommendation. Given the circumstances, the past efforts to keep the matter outside our view, the emails from Moya and others calling for just such an informal meeting, the many documents gathered in the buildup to the April meeting, the April agenda item, "Discuss Draft Recommendation for JIFFY/Supreme Court," followed by the abrupt tabling of that item, given all those events, it seems likely that there was a non-public, in essence secret, meeting.

A meeting where we were not present, could not hear, could not answer, could not speak. As with the entire course of these events, that does not represent good faith. Not close.

The Materials

Moving past the subcommittee's procedural gamesmanship and on to the heart of the matter, the materials most likely formed the foundation for a recommendation to the Court. That foundation is very shaky and, in my view, quite concerning. And it should concern the Court.

I have always believed that facts, more than theory, drive judicial decisions. I suspect the Court approached our request with an open mind and that two factual issues determined the outcome: cost and practicability. The main document addressing those core issues is Artie Pepin's Nov. 30, 2018 memo to the Court which confirms that Tyler has set up the press queue without cost in other states and that courts in those states have been successfully operating press queues.

The memo also contained a survey that was revealing. As a reporter, I always looked forward to reporting on surveys, lists and polls. Because the skill in making those stories interesting is in finding the gems within the statistics, the details that are funny, or telling, or unusual. And the survey attached to the memo includes a couple of those gems – answers that stand out because they are hearteningly clear in saying on-receipt access is doable, practicable. The red color is from the original.

Survey question: What is the timing: are documents provided upon submission or after acceptance.

Answer from Dan Becker, Utah's state court administrator: Public documents are available upon filing.

Q: If you were required to provide same-day access to civil complaints and all exhibits and other attachments when filed (before any review or acceptance process by the court) on paper or electronically, could you do so?

A: Yes.

Q: What challenges would this pose?

A: None.

Q: What would be required to meet these challenges?

A: NA

The answers from Connecticut are less crisp. But they get to the same point. They are bolded in the original.

Survey question: If your courts were required to provide same-day access to civil complaint... What would be required to meet these challenges?

Answer from Melissa Farley, a divisional director within the Connecticut Judicial Branch: **When civil documents are e-filed, there is no acceptance process. They are immediately part of the record. In other states, when a document e-filed, the court has to first approve it, but that is not the situation with the Connecticut Judicial Branch. The Connecticut Judicial Branch already provides same day access for most civil cases. The public can view them immediately.**

I learned journalism on the job at the Los Angeles Daily Journal before moving on to write for the Boston Globe and the New York Times. When in my reporting I would find something that was funny or contradictory, I was taught to *not* say it that way, but rather to use the aloof term "ironic."

But I preach to our reporters that they should write as they would tell a story to a family member in the kitchen. So I will say, it's kinda funny that this survey, intended to support a brief saying on-receipt access was impracticable, in fact brought out testimony from two high-level state administrators saying it was no problem.

Eight States Provide On-Receipt Access

In his memo and attachments, Pepin shows that Utah and Connecticut have no difficulty providing on-receipt access. He also shows through his questions that he well understands the difference between filing and acceptance. "If you were required to provide same-day access ... when filed (before any review or acceptance process by the court) on paper or electronically, could you do so?" He does not conflate the concept "filed" and the later "acceptance."

That understanding is important because opponents of on-receipt access often try to redefine filing to mean acceptance.

Eight states, in addition to nearly all federal courts, now provide on-receipt access to efiled documents. They do so through either press queues which precede acceptance or through automatic acceptance where filing and acceptance occur at the same time. Press queues are in place in California, Nevada, Georgia and New York. Auto-acceptance is in place in Connecticut, Alabama, Utah and, most recently, Hawaii.

Much of that is verified in the 2018 memo. He writes, "I confirmed that Nevada, Georgia, and California have had Tyler install at no cost to the courts a press queue."

The memo also includes as its final attachment an email from Tyler representative Colleen Reilly: "We did build a configuration for Clark County, Nevada to see filings before they are accepted by the court. Since that time, there are a few counties in Georgia who are using the same approach. The configuration is in our database."

As far as cost, Pepin and Reilly are straight-forward. Pepin says the press queues have been installed "at no cost to the courts." Reilly says, "There is no cost associated with this work."

The subtext to her email is not immediately apparent. But the reason Tyler has provided the press queue for free is because Tyler's policy is not to charge a second time for work already done for another court. The executive summary for Tyler's contract with Vermont spells the policy out, "As customizations requested by clients become part of the Odyssey code base, all clients have the option of enabling these options once incorporated as part of an Odyssey release."

All this leads to a simple conclusion. Tyler has put the press queue in place in three states and it's free. It's also simple to install. Says Reilly on last page of the Pepin memo, "The court would tell us the location and the case types that would be made accessible, and we do the configuration."

Press Queue Is Practicable

From the conclusion that a press queue is practicable, it follows that a press queue should be put in place.

The January Ninth Circuit opinion in *Courthouse News v. Planet* affirmed a First Amendment injunction against Ventura Superior which was enforcing a no-access-before-process policy. "The record shows that Ventura County's no-access-before-process policy bears no real relationship to the County's legitimate administrative concerns about privacy and confidentiality, accounting protocols, quality control and accuracy, efficient court administration, or the 'integrity' of court records," said the opinion.

As I was working on this letter in late June, the Ninth Circuit sent out a brief order regarding our fee application, saying we had prevailed: "Significantly, however, through this litigation, Courthouse News Service (CNS) established that a First Amendment right of access to civil complaints at the time of filing exists, and that this right is reviewed under the Press Enterprise II standard."

In a separate opinion on the opposite side of the nation, Judge Henry Coke Morgan Jr. in the Eastern District of Virginia ruled in February, after a four-day trial, that access must be provided on the day of filing where it can be done. "The First Amendment requires that such documents be made available contemporaneously with their filing. Contemporaneously means the same day unless that's not practicable," he ruled from the bench.

Contrary to those two opinions, New Mexico's courts are currently pursuing a no-access-before-process policy and they have a practicable alternative that provides same-day access through a press queue.

Over the course of my efforts to reinstate traditional press access in the New Mexico courts, I have respectfully pointed to the First Amendment precedent and implored New Mexico officials to respect that precedent. Since my first letter to Judge Nan Nash in 2015, I have described the deterioration in access in New Mexico with the advent of efiling and asked for a return to the tradition of excellent press access provided by New Mexico before efiling.

As I wrote to the judge at the time, "We would greatly and respectfully appreciate any help the Court can provide in returning press review of new civil actions filed in New Mexico's principal trial court to the traditional status quo of first-class public access."

Five years on, I am still asking for that help.

Public Access in New Mexico Courts

The evolution in New Mexico courts away from a strong endorsement of public access towards a more restrictive policy roughly matches up with a wave of interest in privacy from court administrators around the U.S. The movement crystallized in a set of conferences in Williamsburg from 2013 to 2016 called "Privacy and Public Access," sponsored by the Conference of State Court Administrators and attended by state clerks and administrators from all parts of the nation.

While the intellectual dust storm from those conferences has largely dissipated, the idea of "practical obscurity" has lingered. The notion is that public access should not apply to online records because they are fundamentally different from paper records, which in practice were obscure. The overriding philosophy is that online access to public records should be restricted.

Before that philosophy took hold, New Mexico's Public Access Subcommittee posted the minutes of its meetings. The concerns of the press, including a records request from a reporter for the Albuquerque Journal, were fairly noted, considered and accommodated during that period.

Minutes from the April 2009 meeting include the following entry: "Mr. Mead read the sixth paragraph on page 4, as follows: III. Background on the Public Availability of Electronic Court Records. 'A citizen has a fundamental right to have access to public records. The citizen's right to know is the rule and secrecy is the exception.'"

The upshot is that the subcommittee was committed to public access and its minutes are informative. They give a reader a sense of what was discussed, what decisions were made and how the votes went. But the attitude appears to have changed when the Public Access Subcommittee left the scene and the Online Access Subcommittee took over. The following email exchange illustrates the new attitude.

Feb. 24, 4:43 PM: Rogers emails Orchard, "Is there an OAS website somewhere?"

Feb 25, 8:28 AM: Orchard emails seven officials, "I need some guidance on how to respond to Mr. Rogers."

8:53 AM: Wilkinson, the chief tech officer, emails all seven, "I prefer that no JID staff has continued contact with Mr. Rogers or his client outside of the public meeting setting. ... This seems to be at an Artie level."

11:44 AM: Mitchell to the group, "I thought our agendas and minutes were posted, but in looking at the inside and outside website I found: Inside: I could not find a link to OAS under Committees at all. Outside: Under Court Administration, I found 1) a link to PAS (Public Access Committee in 2008-2010 material) 2) OAS line but all that is posted there is the public hearing transcript from the Dec. 8, 2016 meeting.

Two weeks later, Orchard emails Rogers to say the 2020 agendas are posted. *But not the minutes*. The agendas are limited to what the committee plans to discuss. The minutes are much more substantive. They describe the debates within the committee, what motions were made and passed, and how members voted. The failure to make them public confirms that the new "access" subcommittee takes a very different view of public access than its predecessor.

Appearance of Justice

Even though the OAS minutes are not posted, one set of minutes did make its way into the materials. Included in Pepin's memo are the November 2016 OAS minutes. In reference to Noel they say, "Jim moved to adopt a recommendation that the press and the public have the same access and that both must come to the courthouse to obtain access; the recommendation will be not to define 'news media' or provide differential access to press and public.... The motion failed on a vote of five opposed, being Greg, Judge Mitchell, Barry, Joe, and Weldon, to three in favor, being Jim, Ian, and Judge Alaniz."

The minutes are telling because the press queue sought by Courthouse News in 2020 includes precisely both elements that Mr. Noel opposed back in 2016 – online access to court records by the media.

The minutes go on to illustrate his diehard stance on the issue: "Barry moved that we create a separate line on the Online Case Access Policy for the news media, using the approved definition and granting the same access to the news media that is given to attorneys. Joey seconded the motion. The motion passed on a voice vote with Jim Noel abstaining."

Pepin in his own words also describes "an email ... stating CEO Jim Noel's opposition to CNS' request for immediate electronic access in the Second Judicial District." Attached to his memo as exhibit F is a 2016 email in which Noel acknowledges that Reilly, the Tyler representative, has confirmed press queues in other states. But Noel goes on to argue, "I disagree with Mr. Rogers' conclusion that such documents are subject to public inspection." He adds, "I am reluctant (if not adamantly opposed) to such access by CNS."

Of much lesser importance but nevertheless necessary to rebut, the email then characterizes a talk with me, saying I asked for "immediate" access. My written letters, which parallel my many conversations on the topic, ask for a return to traditional access, which was on the day of filing. As described, the conversation sounds confrontational, but my notes made immediately after the call reflect a conversation that was cordial and engaging where Noel disagreed but said he was a supporter of public access. He also said the matter was not in his hands but resided with the JIFFY committee.

My point here is a limited one. The appearance of justice is not served by leaving an official with a history of strong opposition to the press queue in charge of making a fresh and evenhanded recommendation to the Court, on the very same issue.

Tradition of Access

Overall Courthouse News has had to fight to hang on to traditional access in state courts in all corners of the nation, even within states that have strong traditions of press access like California. The state court opposition is truly myriad. It pervades individual bureaucracies and national organizations.

As a point of comparison, that opposition is almost entirely absent from federal courts. The absence naturally leads to the question: what is so terrible about on-receipt access, if the federal courts have no difficulty with it.

Among their familiar tactics, opponents of on-receipt access resort to denigration of the press. I expect judges to see through these small calumnies, but I am also compelled to answer attacks on our news service's motivation or credibility. In his memo, Pepin says our news service "places a high monetary value on immediate access to pleadings."

I will let Judge Morgan answer that one: "I think that the point the plaintiff's making is that it has its news value as soon as it happens. If you don't get it when it's fresh, it's like stale bread. So I think the plaintiff's point on that is well-taken."

Morgan's comments were forged in the fires of a four-day trial where he was looking at me from about ten feet away while I testified under oath. I think he had a good idea of why I pursue First Amendment access, in the face of just about the entire administrative apparatus of state courts in America.

Because of the role in filing the Ninth Circuit amicus brief played by the Conference of State Court Administrators, where Pepin was president, as well as the National Center for State Courts, I went back to find the brief. I note that Pepin says in his memo he was not able to get a hold of it because he was going through Westlaw which is controlled by Thomson Reuters, another multi-billion-dollar publisher. But the brief is available on the federal courts PACER site.

The brief takes the now defunct position that there is no constitutional right to pre-judgment civil records. And it ends on a note of denigration, reflecting what I heard at the Williamsburg conferences, saying press access serves as "an open invitation for those who would use such records to gratify private spite or promote public scandal."

I laughed a bit when I saw that. One look at the Courthouse News website should be enough to show that we are very much pursuing the news in its traditional sense. Morgan in the Eastern District correctly described the traditional access we seek: "Plaintiff, and other members of the press and public, have historically enjoyed a

tradition of court clerks making most newly filed civil complaints publicly available on the day that they are filed."

Ghost of Williamsburg

On the substance of our request for on-receipt access through a press queue, the Pepin memo says, "CNS wants to get copies on everything for efiling before it is entered in a court queue." That statement is incorrect in two ways.

We are not simply asking to "get copies" -- as though we were a copy service – but we are instead seeking to review the new filings and report on them. That box of new filings in Albuquerque was a traditional source of news for local newspapers. "When manual filing was the norm, copies of filed documents were physically set aside in a box for CNS, and they had access to those filed documents the day they were filed," said Noel in his tentative recommendation to the Supreme Court, contained in the materials circulated to the subcommittee. He then conflated efiling and later acceptance.

The second mistake, where the memo says we want access "before it is entered in a court queue," is more basic. In order to submit a complaint, a lawyer enters information in a form that asks for jurisdiction, nature of suit, fee payment and electronic signature, similar to what a paper intake clerk looks for. The lawyer then submits that form and the complaint through Tyler's efiling software. The submitted document is at that point filed and it goes automatically into the docketing clerk's queue. When the clerk gets to it, the new complaint is docketed, or in modern terms, "accepted into the case management system" or "processed."

Through the press queue, reporters get a filtered look at the new complaints that have been filed and are now sitting in the clerk's queue waiting to be processed. So it is incorrect to say we want to see the new case "before it is entered in a court queue."

The discordant aspect of that statement is that while it conflates filing and acceptance, the old survey by Pepin does not. The survey questions demonstrate instead an accurate understanding of the filing sequence – "when filed (before any review or acceptance process by the court)."

Further New Mexico's civil procedure rules are unequivocal on this point: "For purposes of electronic filing only, the date and time that the filer submits the electronic filing envelope will serve as the filing date and time for purposes of meeting statute of limitations or any other filing deadlines, notwithstanding rejection of the attempted filing or its placement into an error queue for additional processing."

While that should be a sufficient explanation, it is important to understand that this argument against press access works off a recurring analogy. It first cropped up at the Williamsburg conference and has been repeated by administrators ever since. The analogy goes like this: 'You reporters want to go up to people waiting in line at the paper filing window, and ask them what they are about to file.'

The analogy is not well considered. We ask to see the new e-filed cases after they have been submitted by the filer, in other words, after they have been filed, after they have crossed over the virtual counter and are sitting in the clerk's processing queue. Tyler's own user manual illustrates the flow accurately by drawing a filer followed by a courthouse followed by a processing clerk. We want to see the new cases at the point where they have reached the courthouse, where the illustration says, "Court receives."

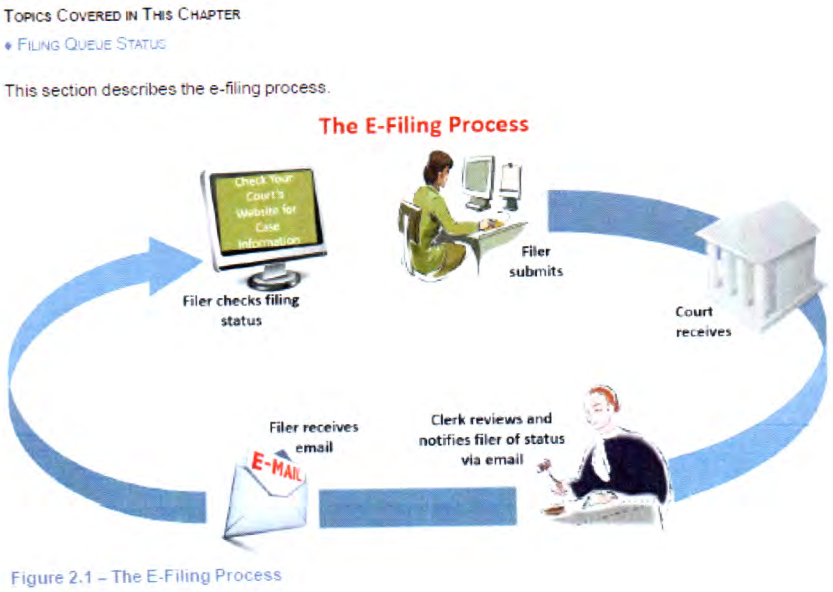


Figure 2.1 – The E-Filing Process

Despite the inaccuracies, minor insults and false analogies, the simplest arguments are the most powerful and they should rule the debate. The fact is that courts in eight states and throughout the federal system provide press access at the time of the efiling's receipt and have done so for years. So it is practicable.

Two Toll Booths

When trying to analyze these conflicts over access, I often say to our lawyers, "Follow the money." Tyler's recent behavior at first mystified me. They have in the past been agnostic about press queues. But then I considered my own advice.

Late in April, when we were still operating in the dark and asking that the press queue be put back on the agenda, I took a look at the May OAS agenda. I noted, with true irony, that one of the items involved Re:SearchNM.

A vendor's dream is to control the bridge to the courthouse. In that dream, the vendor reaches paradise when it sets up two toll booths, one for the documents going into the courthouse and one for the documents coming out. Lexis Nexis achieved vendor nirvana in Colorado a decade ago.

Colorado became the first state in the nation to mandate efiling statewide by turning the whole operation over to Lexis, a division of multi-billion-dollar Anglo-Dutch corporation Reed Elsevier. Lexis controlled the filing mechanism, the docket system and access to the records. They charged the filer to file the case, they charged the state to run the docket, and they charged lawyers and journalists to look at records. We had a reporter go the Colorado Springs courthouse and ask to review the new complaints. The clerk showed him a manila folder containing a Lexis cover sheet and nothing more. The reporter had to go to Lexis, and of course pay, to see those public records.

Colorado's IT director at the time was in close touch with Lexis and he told us in the presence of a Supreme Court justice that Lexis viewed Colorado as "a cash cow." Largely as a result of our lobbying effort, the Colorado legislature discovered it could save millions of dollars by running the system itself, which the state now does. Paradoxically, Colorado left public access in the hands of Lexis and a second smaller company. Even so, at the intercession of the Supreme Court, the press has been able to view new filings on computers in the Supreme Court Library. That access was cut off earlier this year because of the pandemic, but we are set to very shortly to receive online access equivalent to what we had in the library.

A decade after Lexis's monopoly over Colorado's public record was broken, Tyler has established a similar monopoly over the public record in New Mexico. It controls the virtual bridge over which new filings are delivered to the courthouse. It controls the efile manager that receives those filings and puts them in the clerk's docketing queue. It controls the docket. And it controls public access.

The blueprint for putting up a second toll booth on courthouse bridge is not new. It was drafted by Lexis in Colorado a decade ago, and it amounts to a sale of public access. The vendor charges lawyers and journalists and the public for access to court records and sends all or most of that income to the courts. The vendor then sells "special services" to lawyers and keeps that income for itself. But for many years, Tyler showed no interest in the second toll booth. It sold a public access "module" as part of its Odyssey suite, and the court took it from there.

That has changed in the last couple years after Tyler launched the "re:Search" sites. Like any $13 billion corporation would, it was going after another market. In Texas and Georgia where re:search sites have been running for a while, Tyler follows the blueprint. Money generated from fees charged for viewing public documents goes to the courts themselves. Tyler then charges law firms for special services such as alerts on litigation in fields of interest.

Those services can be purchased on a piecemeal basis or as part of a subscription that, for medium to large firms, costs $900 a year. Tyler has recently started offering the same subscriptions in New Mexico. Their selling point is the various alerts and reports that a lawyer can generate from the filings that run through the Tyler system. That is the second toll booth.

Private Control of the Public Record

The problem with this kind of control over the public record manifests itself in different ways. During the Covid crisis, for example, we were not allowed into the courthouse in Austin. That court does not put documents online, so our only choice was to go to re:SearchTX and pay Tyler to see the records.

Total control of the filing system also allows the vendor to charge lawyers above market rates. Tyler in New Mexico charges a toll of $13 per efiling, I understand from Rogers, whereas competing vendors in California charge a toll around $5.50. Among the myriad ways to leverage the toll booths, the vendor can also charge interest rates on credit card payments well above the wholesale rate.

In the past, Courthouse News was in competition with Lexis on some of its publications, and now, with the launch of the re:search sites, we are in competition with Tyler. The re:search subscriptions allow a law firm to track its clients as well as create reports on new litigation from individual courts. That is what we do. Tyler's market is also the same as our market, the nation's law firms.

As a result, Tyler now has a strong financial interest in preventing a press queue. The press queue interferes with their monopoly on the ability to alert automatically and immediately upon acceptance -- the selling point of their subscriptions. The situation was exactly the same in Colorado a decade ago when I and lawyers from Bryan Cave met with the Supreme Court Chief Justice and other members of the court to explain the monopoly that Lexis was exploiting.

The publisher was alerting on new filings before they were published on the public docket. After we pointed that out, the court's former IT director, Bob Roper, told Lexis they had to wait until the docket was made public. So Lexis began alerting, through automated software, precisely when the new cases hit the docket. That was long before we could check the dockets for the whole state and report on the new cases ourselves. They had an iron-clad advantage. We could not compete.

The courts of New Mexico have set up the same type of system, allowing a private vendor to exploit the public record. Like Lexis in Colorado, Tyler in New Mexico is on the inside. Its agents work hand in glove with state court administrators, a symbiosis demonstrated here by the subcommittee's reliance on Tyler representatives in considering the press queue. Our small news service, on the other hand, is made up of journalists whose salaries are paid through the law firm subscriptions, the very subscriptions Tyler is now directly competing with.

In sum Tyler has a clear financial interest in the matter the press queue. In New Mexico, unfortunately, that financial interest works hand-in-hand with the restrictive philosophy of officials who, based on their historic opposition to on-receipt access, are also looking to sink the press queue.

During another swim, I was thinking about this combination of circumstances, and an old Right Guard commercial with Hulk Hogan came to mind. He is posing like a French painter on the beach in front of an easel with palette in hand. And with panache, he urges his audience to avoid "odiferous emanations."

The teaming up between court officials hostile to the press queue and representatives of a $13 billion corporation with a parallel financial interest – that deal needs a whole lot of Right Guard.

Tyler's Answers

Faced in 2016 with a district court ruling in *Courthouse News v. Planet* that said the right of access attaches on receipt, Pepin sent a questionnaire to administrators eliciting answers about the dangers of on-receipt access. Faced in 2020 with evidence showing on-receipt access through a press queue is both free and practicable, the subcommittee designed a similar questionnaire for, as Moya said in the Feb. 24 email, "the right person from Tyler."

Q. "What are the court processes in those other states that make this possible?"

A: "Upon submission, a copy of the document is sent to this separate tool and provided to participants in that tool. They have the ability view the documents until the clerk picks it up for review. It is important to note that while the request is from Courthouse News Service, the local media will demand the same access particularly if you call it Press Review Queue," answers a Texas manager for Tyler.

Like that occasional gem in the old COSCA survey, this is one such gem. The answer is correct. The press queue allows the press to see the new cases after they have arrived at the courthouse, and indeed are filed, but before a clerk puts them into the docket. And the press queue is aptly named. It is for members of the press corps so they can review the new filings once they are filed, as the press has done since time out of mind.

Q: "How documents are dealt with (motion to seal, redactions, etc.)?

A: "Any motion to seal would take place AFTER the filing has been accepted by the Court so one would assume this means that if you provide early availability, the media would have access documents before the motion to seal has been considered."

That answer is incorrect. As any competent lawyer will observe, the procedure for filing a sealed document is to file the motion and lodge the sealed document. It is not to first file the sealed document and then file the motion, as the manager claims.

New Mexico's civil procedure rules are clear: "The movant shall lodge the court record with the court ... when the motion is made. ... The movant shall label the envelope or container lodged with the court 'CONDITIONALLY UNDER SEAL.'... the clerk shall ... retain but not file the court record unless the court orders it filed."

In addition, a press queue has been operating for ten years in Clark County, Nevada. If there had ever been this kind of problem, it would have resulted in a shut-down of the press queue, as is true in all the other courts that operate press queues. Rather than relying on any instance of fact, the Tyler manager engages in mistaken guesswork.

Q: "Any opinions about going in this direction?"

A: "This tool opens up the filer, the court and Tyler to the liability of sensitive documents unlawfully getting out to the public."

The legal opinion of Tyler's e-solutions manager is incorrect. New Mexico, like Virginia and nearly all states, places responsibility for the contents of a filed document on the filer and not on the clerk.

In his ruling in Virginia, Judge Morgan addressed a related argument by the Virginia clerks: "Defendants claim that their interests in the orderly administration of their office and protecting confidential information outweigh the public's First Amendment right to contemporaneous access. The Court first observes that under Virginia law, the filer is responsible for redacting confidential information."

The same is true in New Mexico, as set out in its civil procedure rules: "Any attorney ... shall be responsible for taking all reasonable precautions to ensure that the protected personal identifier information is not unlawfully disclosed ... The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply. The court clerk is not required to screen court records released to the public."

Williamsburg Ghost Returns

Q: "How are they making electronic access equivalent to paper access?"

A: "In the paper world this tool is essentially the same as providing the authorized participants (like Courthouse News, local media) the ability to stand between the clerk's desk and the filers/runners and view the filers' documents while they wait in line to file their documents with the clerk."

This is the ghost of Williamsburg that will not go away. It stays around, in my view, because it has a purpose. It suggests the access sought by journalists through the press queue is something new and crazy – while they wait in line! Outrageous!

Tyler's own user manual contradicts the analogy. We are asking to see the new filings where the manual has drawn a miniature courthouse next to the words, "Court receives." It is there the journalists seek access, like they had with the wooden box, after the filer pushes the new filing across the virtual counter, not, as the old ghost says, before.

Q: "Cost of delivering solution?"

A: "There will be a cost to the State of New Mexico because it is an add-on service."

The answer deserves a challenge. It runs counter to the overall Tyler policy of not charging a second time for software that has already been developed. And it runs counter to the experience in three other states that use Tyler's Odyssey software.

It also flatly conflicts the Pepin 2018 memo that installation of the press queue is without cost.

In considering this issue, it is important to stay on the terra firma of local Tyler representative Colleen Reilly's initial, candid, matter-of-fact account of the cost-free ease with which a press queue can be set up here in New Mexico. "The court would tell us the location and case types that would be made accessible, and we would do the configuration," she wrote. And she confirmed that, "There is no cost associated with this work."

That is information this Court can and should rely upon. The deceptively contrived catalogue of dangers interjected privately and belatedly is not. It serves Tyler which now has a financial interest in shooting down the press queue. It also serves the interest of officials inside the administration who follow a restrictive philosophy on press access. This very questionable information was circulated to members of the subcommittee who were in the process of preparing a "Draft Recommendation for JIFFY/Supreme Court."

The answers were kept away from us until it was too late. So we did not have a chance to challenge them. They are the expression of two intertwined interests, that of a private corporation seeking to advance its financial interests, and that of court officials pursuing their opposition to on-receipt access. The answers poisoned the process of making a recommendation to the Court.

I believe that should be a matter of substantial concern to the Court.

A Little Help

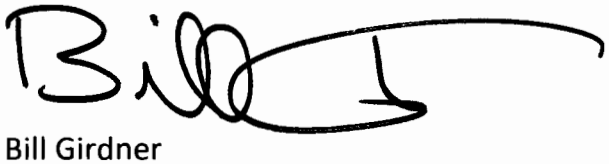
My continuing question, as we fight these battles for press access, is how court administrators can with impunity refuse access on the day of filing where it is practicable. New Mexico is certainly not alone in this respect. As shown by the coordination between the members of COSCA and the National Center for State Courts, state court administrators fight against same-day access at an institutional level as if the

press were taking away something they owned. The entire administrative superstructure of the state courts, all supported by public funds, is battling this one news service over First Amendment access. It does feel at times like a David v. Goliath struggle

After many years observing that tenacious opposition, I have come to believe it continues because state court clerks and administrators are indeed powerful agents of the state and thus are able to insulate themselves from any repercussions for denying First Amendment access to public records. They can pay for their resistance with a huge bank account, the one that belongs to the public. And in some instances, that is simply how it ends up. I can't afford to fight every clerk who refuses to give the press traditional access. Nor can any news outlet, today more than ever.

But when that state power is combined with the interests of a mega-rich private software company that has its fingers in so many public pies, the forces on the other side become almost overwhelming. So I could use a little help. I would ask that Your Honor and the Supreme Court appoint a member of the Bar or a retired judge to examine the underlying facts and give our petition a fair shake.

Sincerely and respectfully,



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