PUBLIC ACCESS TO COURT RECORDS: GUIDELINES FOR POLICY DEVELOPMENT BY STATE COURTS

Submitted for Consideration by
the Conference of Chief Justices and the Conference of State Court Administrators
at their Annual Conference in Rockport, Maine
July 28-August 1, 2002

By

The Joint Court Management Committee of
the Conference of Chief Justices and the Conference of State Court Administrators

Working in Conjunction with

July 16, 2002

A Product of the Project (SJI-02-N-007)
Developing a Model Written Policy Governing Access to Court Records
www.courtaccess.org/modelpolicy/

This document was developed by the National Center for State Courts and the Justice Management Institute, on behalf of the Conference of Chief Justices and Conference of State Court Administrators, under a grant from the State Justice Institute (SJI-02-N-007). The points of view expressed do not necessarily represent the official position or policies of the National Center for State Courts, the Justice Management Institute, or the State Justice Institute.

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INTRODUCTION

Historically most court files have been open to anyone willing to come down to the courthouse and examine the files. The reason that court files are open is to allow the public to observe and monitor the judiciary and the cases it hears, to find out the status of parties to cases, for example dissolution of marriage, or to find out final judgments in cases. Technological innovations have resulted in more court records being available in electronic form and permit easier and wider access to the records that have always been available in the courthouse. Information in court records can now be "broadcast" by being made available through the Internet. Information in electronic records can be easily compiled in new ways. An entire database can be copied and distributed to others. At the same time not all courts have the same resources or the same level of technology, resulting in varying levels of access to records across courts in the same state. These new circumstances require new access policies to address the concern that the proper balance is maintained between public access, personal privacy, and public safety, while maintaining the integrity of the judicial process. In order to provide guidance to state judiciaries and local courts in this area, and to provide consistency of access across a state, policy guidelines on access to court records have been developed.

The policy guidelines proposed here are based on the following premises:

- Retain the traditional policy that court records are presumptively open to public access;
- As a general rule access should not change depending upon whether the court record is in paper or electronic form. Whether there should be access should be the same regardless of the form of the record, although the manner of access may vary. The policy guidelines apply to all court records;
- The nature of certain information in some court records, however, is such that remote public access to the information in electronic form may be inappropriate, even though public access at the courthouse is maintained;
- The nature of the information in some records is such that all public access to the information should be precluded, unless authorized by a judge;
- Access policies should be clear, consistently applied, and not subject to interpretation by individual court or clerk personnel.

The policy guidelines are organized around the basic questions to be answered by such a policy: What is the purpose of the policy, and who has access to what information, how and when? The policy concludes with sections regarding notice about information collected, public education about accessing information, and obligations of the executive branch agencies and vendors providing information technology services to the court.

The objective of the policy guidelines is to assist and guide state or individual courts in drafting a policy on public access to court records. The guidelines are written to provide a starting point for drafting a policy, either by a state, for the state's judiciary, or by an individual court, if the state does not adopt a uniform statewide policy. There are

two primary goals for these policy guidelines. First, the guidelines seek to raise the major issues that need to be addressed by such a policy. Second, the guidelines attempt to provide specific language and terminology as a starting point for drafting a policy tailored to the needs of a state or individual court. These goals work together to help jurisdictions avoid starting the drafting process from scratch while providing at least one alternative for how to address each of the major issues. A state or individual court can begin with the policy guidelines language and consider adjusting it to conform to applicable federal and state law regarding access, privacy and an open judiciary (including statutory provisions allowing or restricting access to information), and to technology currently available to the court and clerk of court. In the end, the guidelines are more of a map than a specific set of directions.

If a state or individual court chooses to adopt or revise a rule based on these policy guidelines, the state or individual court needs to examine its existing access and record keeping laws and policies for all judicial records of any kind or use regarding:

- What is considered to be part of the court record;
- What records, documents or other things should not be accepted by the court;
- What personal and financial information is required to be provided on standard forms or pleadings and what specific details are really needed by the court to perform its judicial role;
- What information is being gathered by the court that the court does not require for a judicial purpose;
- What records, documents or other things are to be filed, lodged or provided to the court to which access is restricted, at least partially;
- Case types and categories of information to which public access is restricted, in whole or in part;
- Procedures and standards for sealing records, making them confidential, or otherwise restricting public access;
- Records retention schedules; and
- Liability and consequences for releasing restricted information, for providing erroneous or incomplete information derived from court records, or for improperly withholding publicly accessible information.

Some of these issues may already be addressed in existing statutes or rules. Others may be addressed in case law. Part of the process of considering adoption of a new policy should be a review of the existing laws and decisions in light of the purposes of the policy and either amending them or incorporating them into the new access policy. The review of existing law should be with an eye toward the effectiveness of the legal provisions, as well as from a law and policy perspective.

It is also important that a state or individual court periodically review the access policy to see if modifications of the policy are required.

The policy guidelines do not require courts to convert records to electronic form or to make records in electronic form available remotely, for example through the

Internet. The policy guidelines address public access to court records, not internal court record management practices. The decision whether to convert and maintain records in electronic form, and whether to provide remote access to these records is a decision for the state court system or individual court, after taking into consideration the resources made available to it and the myriad of demands on these resources. In addition not all courts are currently in a position to provide remote public access to court records. The level and type of technology in use in courts varies widely, across courts within states, as well as across states. The policy guidelines are drafted to provide guidance to courts as their technology is upgraded, and they acquire the ability to make information in court records available remotely.

PURPOSE

Section 1.00 - PURPOSE OF POLICY

(a) The purpose of this policy is to provide a comprehensive policy on public access to court records. The policy provides for access in a manner that:

(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.

(b) The policy is intended to provide guidance to 1) litigants, 2) those seeking access to court records, and 3) judges and court and clerk of court personnel responding to requests for access.

Commentary

The objective of this policy is to provide maximum public accessibility to court records, consistent with constitutional requirements and taking into account public policy interests that are not always fully compatible with unrestricted access. Eleven significant public policy interests are identified. Unrestricted access to certain information in court records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses. Denial of access would compromise the judiciary's role in society, inhibit accountability, and might endanger public safety.

These policy guidelines start from the constitutional presumption of open public access to court records. In order to restrict access there must be a showing of a compelling interest to overcome the presumption. Any restriction to access must also be implemented in a manner narrowly tailored to serve the compelling interest. Examples where there have historically been access restrictions include juvenile, mental health and grand jury proceedings. Additionally, certain interests, like right to privacy, may be found sufficiently compelling to allow restricting access to certain court records. How these issues interact varies from state to state. It is not the intent of this policy to either attempt to summarize the current state of the law, or propose specific changes in the law applicable in each of the several states. Rather, the intent of specifying the purposes in this section is to articulate those interests that might be relevant in determining whether there might be restrictions to open public access to information in a court record in a

particular situation and how to implement minimal restrictions to access most efficiently. As noted in the introduction, a state or individual court should carefully review its existing laws, rules and policies regarding all judicial records when developing or revising its access policy.

Subsection (a)(1) Maximizes Accessibility to Court Records. The premise underlying this policy is that court records should generally be open and accessible to the public. Court records have historically been open to public access at the courthouse, with limited exceptions. This tradition is continued in the policy guidelines. Open access serves many public purposes. Open access supports the judiciary in fulfilling its role in our democratic form of government and in our society. Open access also promotes the accountability of the judiciary by readily allowing the public to monitor the performance of the judiciary. Other specific benefits of open court records are further elaborated in the remaining subsections.

Subsection (a)(2) Supports the Role of the Judiciary. The role of the judiciary is to resolve disputes, between private parties or between an individual or entity and the government, according to a set of rules. Although the dispute is between two people or entities, or with the government, having the process and result open to the public serves a societal interest in having a set of stable, predictable rules governing behavior and conduct. The open nature of court proceedings furthers the goal of providing public education about the results in cases and the evidence supporting them.

Another aspect of the court's dispute resolution function is establishing rights as between parties in a dispute. The decision of the court stating what the rights and obligations of the parties are is as important to the public as to the litigants. The significance of this role is reflected in statutes and rules creating such things as judgment rolls and party indices with specific public accessibility.

Subsection (a)(3) Promotes Government Accountability. Open court records provide for accountability in at least three major areas: 1) the operations of the judiciary, 2) the operations of other governmental agencies, and 3) the enforcement of laws. Open court records allow the public to monitor the performance of the judiciary and, thereby, hold it accountable. Public access to court records allows anyone to review the proceedings and the decisions of the court, individually, across cases, and across courts, to determine whether the court is meeting its role of protecting the rule of law, and does so in a cost effective manner. Such access also promotes greater public trust and confidence in the judiciary. Openness also provides accountability for governmental agencies that are parties in court actions, or whose activities are being challenged in a court action. Finally, open court proceedings and open court records also demonstrate that laws are being enforced. This includes civil regulatory laws as well as criminal laws.

Subsection (a)(4) Contributes to Public Safety. Open public access contributes to public safety and compliance with the law. Availability of information about court proceedings and outcomes allows people to become aware of and watch out for people, circumstances or business propositions that might cause them injury. Open public access

to information thus allows people to protect themselves. Examples of this are criminal conviction information, protective order information, and judgments in non-criminal cases. At the same time it should be noted that there might be a problem with reliance on incomplete information from yet unresolved cases, where allegations might not be proved. Further, the reliance on court records for information about an individual, where positive identification cannot be verified, may also create problems for an individual incorrectly associated with a particular court record.

Public safety, physical and economic, is also enhanced to the extent open public access to court records contributes to the accountability of corporations, businesses and individuals. Court cases are one source of information about unsafe products, improper business practices or dangerous conditions. Knowing this information is readily availability to the public from court records is one incentive for businesses and individuals to act appropriately. Open access to this information also allows individuals and businesses to better protect themselves from injury.

Subsection (a)(5) Minimizes Risk of Injury to Individuals. Other circumstances suggest unrestricted access is not always in the public interest. The interest in personal safety can be served by restricting access to information that someone could use to injure someone else, physically, psychologically or economically. Examples of actual injury to individuals based on information obtained from court records include: intimidation of, or physical violence towards, victims, witnesses, or jurors, repeated domestic violence, sexual assault, stalking, identity theft, and housing or employment discrimination. While this does not require total restriction of access to court records, it supports restriction of access to certain information that would allow someone to identify and find a person to whom they intend harm. This is an especially serious problem in domestic violence cases where the abused person is seeking protection through the court.

Subsection (a)(6) Protects Individual Privacy Rights and Interests. The major countervailing public interest to open public access is the protection of personal privacy. The interest in privacy is protected by limiting public access to certain kinds of information. The presumption of access is not absolute. Considerations identified regarding privacy interests include: a specific, legally protected privacy interest, the reasonableness (personally and objectively) of the expectation of privacy, the seriousness of the invasion of privacy, and the legitimate public interest in disclosure.

Appropriate respect for individual privacy also enhances public trust and confidence in the judiciary.

It is also important to remember that, generally, at least some of the parties in a court case are not in court voluntarily. They have been brought into court by plaintiffs or the government. To that extent they have no choice about whether to participate, they have not consented to personal information related to the dispute being in the public domain. For those who have violated the law or an agreement, civilly or criminally, an argument can be made that they have impliedly consented to participation and disclosure by their actions. However, both civil suits and criminal cases are filed based on

allegations, so innocent people and those who have not acted improperly can still find themselves in court as a defendant in a case.

Finally, at times a person who is not a party to the action may be mentioned in the court record. Care should be taken that the privacy rights and interests of such a 'third' person is not unduly compromised by public access to the court record containing information about the person.

Subsection (a)(7) Protects Proprietary Business Information. Another type of information to which access may be restricted is that related to the operations of a business. There may be a compelling reason to protect trade secrets or other proprietary business information in a particular case. Allowing public access to such information could both thwart a legitimate business advantage and give a competitor an unfair business advantage. It also reduces the willingness of a business to use the courts to resolve disputes. States generally have laws about this, usually involving a case-by-case analysis by a judge at the request of one of the parties.

Subsection (a)(8) Minimizes Reluctance To Use The Court To Resolve Disputes. The public availability of information in the court record can also affect the decision as to whether to use the court to resolve disputes. A policy that permitted unfettered public access might result in some individuals avoiding the resolution of a dispute through the court because of an unwillingness to have information become accessible to the public by virtue of it being in the court record. This would diminish access to the courts and undermine public confidence in the judiciary. There may also be an unintended effect of encouraging use of alternative dispute resolution mechanisms, which tend to be essentially private proceedings. If someone believes the courts are not available to help resolve their dispute, there is a risk they will resort to self-help, a response the existence of the courts is intended to minimize because of the societal interest in the peaceful resolution of disputes.

Subsection (a)(9) Makes Most Effective Use of Court and Clerk of Court Staff. This consideration relates to how access is provided rather than whether there is access. Staff time is required to maintain and provide public access to court records. If records are in electronic form, less staff time may be needed to provide public access. However, there can be significant costs to convert records to electronic form in the first place and to maintain them. There may also be added costs for court personnel needed to provide appropriate security for court databases and to prevent hackers from improperly accessing and altering court databases. These additional staff costs may at least partially offset any savings from improvements in workflow or from less use of staff time to respond to records requests. In providing public access the court and clerk should be mindful of doing it in a way that makes most effective use of court and clerk of court staff. Use of staff may also be a relevant consideration in identifying the method for limiting access under section 4.60(a). Note that the policy does not require a court to convert records to electronic form, nor to make electronic records available remotely.

The design of electronic databases used by the court is also relevant here. Court records management systems should be designed to improve public access to the court record as well as to improve the productivity of the court's employees and judges and the clerk's office. What is the added cost of providing both? The answer to this involves allocation of scarce resources as well as system design issues. If the public can help themselves to access, especially electronically, less staff time is needed to respond to requests for access. The best options would be to design a system to accommodate access restrictions to certain kinds of information without court staff involvement (see discussion in Commentary to Section 3.20).

Subsection (a)(10) Provides Excellent Customer Service. The policy should also support excellent customer service while conserving court resources, particular court staff. Having information in electronic form offers more opportunities for easier, less costly access to anyone interested in the information. This consideration relates to how access is provided rather than whether there is access.

Subsection (a)(11) Does Not Unduly Burden The Ongoing Business Of The Judiciary. Finally, the access policy and its implementation should not unduly burden the court in delivering its fundamental service – resolution of disputes. This consideration relates to how access is provided rather than whether there is access. Depending on the manner of public access, unrestricted public access could impinge on the day-to-day operations of the court. This subsection relates more to requests for bulk access (see section 4.40) or for compiled information (see section 4.50) than to the day-to-day, one at a time requests (see section 1.00, subdivision (a)(9)). Making information available in electronic form, and making it remotely accessible, requires resources, both staff and equipment. Courts receive a large volume of documents and other materials daily, and converting them to electronic form may be expensive. As is the case with all public institutions courts have limited resources to perform their work. The interest stated in this subsection attempts to recognize that access is not free, that there may be more than one approach to providing, or restricting access, and some approaches are less burdensome than others.

ACCESS BY WHOM

Section 2.00 – WHO HAS ACCESS UNDER THIS POLICY

Every member of the public will have the same access to court records as provided in this policy, except as provided in section 4.40(b) and 4.50(b).

"Public" includes:

- **(a)** **any person and any business or non-profit entity, organization or association;**
- **(b)** **any governmental agency for which there is no existing policy defining the agency's access to court records;**
- **(c)** **media organizations; and**
- **(d)** **entities that gather and disseminate information for whatever reason, and regardless of whether it is done with the intent of making a profit, without distinction as to nature or extent of access.**

"Public" does not include:

- **(e)** **court or clerk of court employees;**
- **(f)** **people or entities, private or governmental, who assist the court in providing court services;**
- **(g)** **public agencies whose access to court records is defined by another statute, rule, order or policy; and**
- **(h)** **the parties to a case or their lawyers regarding access to the court record in their case.**

Commentary

The point of this section is to explicitly state that access is the same for the general public, the media, and the information industry. Access does not depend on who is seeking access, the reason they want the information or what they are doing with it. Although whether there is access does not vary, how access is permitted may vary by type of information (see sections 4.20 to 4.70). The exceptions to equal access referred to (section 4.40(b) and 4.50(b)) permit requests for greater access by an individual or entity based on specified intended uses of the information.

The section also indicates what groups of people are not subject to the policy, as there are other policies describing their access. How the equality of access implied in this section is achieved is addressed in section 3.20 and the associated commentary.

Subsection (b) and (g): The policy applies to governmental agencies and their staff where there is no existing law specifying access to court records for that agency, for example the health department. Under (g) if there are other applicable access rules, those rules apply.

Subsection (d): This subsection explicitly includes organizations in the information industry, watchdog groups, non-governmental organizations, academic institutions, private investigators, etc.

Subsections (e) through (h) identify groups whose authority to access to court records is different from the publics.' Generally other laws or policies define their access authority and this policy therefore does not apply.

Subsection (e): Court and clerk of court employees may need greater access than the public does to do their work and therefore work under different access rules. Courts should adopt an internal policy regarding court and clerk of court employee access and use of information in court records, including the need to protect the confidentiality of information in court records. See section 8.30 about the court's obligation to educate its employees about the access policy applicable to the public.

Subsection (f): Employees and subcontractors of entities who provide services to the court or clerk of court, that is, court services that have been "outsourced," may also need greater access to information to do their jobs and therefore operate under a different access policy. See section 7.00 and 8.30 about policies covering staff in entities that are providing services to the court to help the court conduct its business.

Subsection (g): This subsection is intended to cover personnel in other governmental agencies who have a need for information in court records in order to do their work. Generally there is another statute, rule or policy governing their access to court records and this policy does not apply to them, as it is intended to cover public access to court records. An example of this would be an integrated justice system operated on behalf of several justice system agencies where access is governed by internal policies or statutes or rules applicable to the integrated system.

Subsection (h): This subsection continues nearly unrestricted access by litigants and their lawyers to information in their own case, but no higher level of access to information in other cases. Note that the policy guidelines do not preclude the court from providing different means of access for parties and their attorneys to their own case, for example remote access, which is not provided to the general public. As to cases in which they are not the attorney of record, attorneys would have the same access as any other member of the public.

ACCESS TO WHAT

Section 3.00 – DEFINITIONS

Section 3.10 - DEFINITION OF COURT RECORD

For purposes of this policy:

(a) "Court record" includes:

(1) Any document, information, or other thing that is collected, received, or maintained by a court or clerk of court in connection with a judicial proceeding;

(2) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created by or prepared by the court or clerk of court that is related to a judicial proceeding; and

(3) Any information maintained by the court or clerk of court pertaining to the administration of the court or clerk of court office and not associated with any particular case, including internal court policies, memoranda and correspondence, court budget and fiscal records, and other routinely produced administrative records, memos and reports, and meeting minutes.

(b) "Court record" does not include:

(1) Other records maintained by the public official who also serves as clerk of court [Court should identify and list non-court records, for example: land title records, vital statistics, birth records, naturalization records and voter records];

(2) Information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined in section 3.10 (a) (1).

Commentary

This section defines the court record broadly. Three categories of information to which the access policy applies are identified. First are the documents, etc., that constitute what is classically called the case file. The second category is information that is created by the court, some of which becomes part of the court file, but some resides only in documents or databases that are not in a case file. The third category is information that relates to the operation of the court, but not to a specific case or cases. The definition deals with what is in the record, not whether the information is accessible. Limitations and exclusions to access are provided for in sections 4.20, 4.30, and 4.60.

The policy is intended to apply to every court record, regardless of the manner in which it was created, the form(s) in which it is stored, or other form(s) in which the information may exist (see section 4.00).

Subsection (a) (1): This definition is meant to be all inclusive of information that is provided to, or made available to, the court that relates to a judicial proceeding. The term "judicial proceeding" is used because there may not be a court case in every situation. The definition is not limited to information "filed" with the court or "made part of the court record" because some types of information the court needs to make a fully informed decision may not be "filed" or technically part of the court record. The language is, therefore, written to include information delivered to, or "lodged" with, the court, even if it is not "filed." An example is a complaint accompanying a motion to waive the filing fee based on indigency.

The definition is also intended to include exhibits offered in hearings or trials, even if not admitted into evidence. One issue is with the common practice in many courts of returning exhibits to the parties at the conclusion of the trial, particularly if they were not admitted into evidence. These policies will have to be reviewed in light of an access policy. It may be that this practice should be acknowledged in the access policy, indicating that some exhibits may only be available for public access until returned to the parties as provided by court policy and practice.

The definition includes all information used by a court to make its decision, even if an appellate court subsequently rules that the information should not have been considered or was not relevant to the judicial decision made. In order for a court to be held accountable for its decisions all of the information that a court considered and which formed the basis of the court's decision must be accessible to the public.

The language is intended to include within its scope materials that are submitted to the court, but upon which a court did not act because the matter was withdrawn or the case was resolved, for example settled, by the parties. Once relevant material has been submitted to the court, it does not become inaccessible because the court did not, in the end, act on the information in the materials because the parties resolved the issue without a court decision.

Subsection (a) (2): The definition is written to cover any information that relates to a judicial proceeding generated by the court itself, whether through the court administrator's personnel or the clerk's office personnel. This includes two categories of information. One is documents, such as notices, minutes, orders and judgments, that become part of the court record. The second is information that is gathered, generated or kept for the purpose of managing the court's cases. This information may never be in a document; it may only exist as information in a field of a database such as a case management system, an automated register of actions, or an index of cases or parties.

Another set of items included within the definition is the official record of the proceedings, whether it is the court reporter's notes and transcripts of what transpired at a

hearing, or an audio or video recording (analog or digital) of the proceeding. In some states the reporter's notes themselves may not be considered part of the record, but the transcript produced from them, if any, are. In other states the reporter's notes are owned by the court, whereas the transcripts are owned by the reporter. Whether the electronic version of notes produced by a computer-aided transcription system (CAT system), which does not constitute a verbatim transcript, fall within the definitions also needs to be addressed. A state or individual court considering adoption of the policy needs to align this section with applicable law regarding reporter's notes and transcripts or electronic recordings of proceedings.

A state or individual court should also address whether the policy applies to an audio or videotape of a court proceeding other than the official record. If the state has a rule regarding broadcasting audio or video coverage of trial court proceedings, the policy needs to specifically include or exclude such tapes in the definition of "court record," or specifically limiting access to them in section 4.30.

Subsection (a)(3): The definition of court record includes information and records maintained by the court and clerk of court that is related to the management and administration of the court or the clerk's office, as opposed to a specific case. This section is meant to apply quite broadly. The Commentary to subsection 4.30(b) discusses restriction of access to drafts and work products related to court administration or clerk's office administration. In many states these categories of information have traditionally not been considered part of the court record.

Subsection (b)(1): This subsection makes it clear that the policy only applies to information related to court judicial proceedings. The types of information described are not court records, nor is the court responsible for their collection, maintenance, or accessibility. If the official who also serves as clerk of court has responsibilities for other information and records, for example land records, which do not relate to specific judicial proceedings, this access policy does not apply to these records. The laws and access policies of the agency responsible for gathering and maintaining the information govern access to this information.

Subsection (b) (2): The definition excludes information gathered, maintained or stored by other agencies or entities that is not necessary to, or is not part of the basis of, a court's decision or the judicial process. Access to this information should be governed by the laws and access policy of the agency collecting and maintaining such information. The ability of a computer in a court or clerk's office to access the information because the computer uses shared software and databases should not, by itself, make the court records access policy applicable to the information. An example of this is information stored in an integrated criminal justice information system where all data is shared by law enforcement, the prosecutor, the court, defense counsel, and probation and corrections departments. The use of a shared system can blur the distinctions between agency records and court records. Under this section, if the information is provided to the court as part of a case or judicial proceeding, the court's access rules then apply, regardless of where the information came from. Conversely, if the information is not made part of the

court record, the access policy applicable to the agency collecting the data still applies even if the information is stored in a shared database. In reviewing the applicability of an access policy particular attention should be paid to information about pretrial proceedings, including bail decisions and search warrant requests.

Issues Not Addressed in the Policy

Some types of information related to the prosecution of a court case are not covered by these policy guidelines. This includes information exchanged between the parties as part of the litigation, but not delivered to or filed with the court. For example, information exchanged as part of discovery in states where discovery requests and responses are not filed in the court file. If information such as this is exchanged via the court, but not used by the court, the state or individual court should consider adding a provision to this section to address whether this information becomes accessible by virtue of it having been in the court's possession during the exchange.

Another category of such information is that associated with activity in cases that is not occurring within the judicial sphere, for example alternative dispute resolution (ADR) activities, including "private judging," in pending cases that are pursued by the parties with vendors that are independent of the court. Since the information is not delivered to the court, and does not form part of the basis of the court's decision, it does not fall within the definition of this section.

Courts in some states have responsibilities not directly associated with specific disputes. For example, a court may have some obligation to oversee the management of detention facilities. This section does not address information gathered by or presented to the court in fulfilling these types of obligations. If the courts in a state have such obligations, the access policy should indicate whether the information related to these duties are covered by the policy.

The definition in 3.10(a) includes all information that is given to the court, whether or not it could be used by the court to make a decision, or is relevant to the court's judicial making process. There is an issue implicit here that many courts do not now directly address, the exclusion from the record of legally irrelevant material. The court screens the introduction of materials at hearings and trials and generally relies on attorneys to screen materials submitted for filing. However, many cases these days do not involve an attorney for at least one of the parties, particularly in family law. Clerks generally are instructed not to reject materials offered for filing based on the content of the material. As a result there is nothing to prevent someone from making any information accessible to the public by including it in a document filed with the court. The wide scale public access possible with electronic records increases the risk of harm to an individual from disclosure, suggesting this issue be re-visited. The troubling issue is who decides whether something offered into the court record is relevant, and therefore to be accepted.

Another approach to the problem of the introduction of irrelevant material into the court record is to change, create, or expand the consequences for the introduction, or attempted introduction, of such information. One approach to the issue is to focus on the immunity and liability of people who offer materials into the court record as part of litigation. Currently there is quite broad immunity regarding documents "placed in the record." If immunity was more limited, or there was more explicit liability to third parties harmed by placing information into the court record, the record would be less likely to contain extraneous information that might be harmful to any of the interests stated in section 1.00 of this policy. A state or individual court considering the adoption of an access policy should review relevant state law and suggest changes that are designed to ensure that the court record contains only legally relevant information. Creating or expanding such liability is considered beyond the scope of this policy.

Section 3.20 - DEFINITION OF PUBLIC ACCESS

"Public access" means that the public may inspect and obtain a copy of the information in a court record.

Commentary

This section defines "public access" very broadly. The unrestricted language implies that access is not conditioned on the reason access is requested or on prior permission being granted by the court. Access is defined to include the ability to obtain a copy of the information, not just inspect it. The section does not indicate the form of the copy, as there are numerous forms the copy could take, and probably more possible as technology continues to evolve.

At a minimum inspection of the court record can be done at the courthouse where the record is maintained. It can also be done in any other manner determined by the court that makes most effective use of court staff, provides quality customer service and is least disruptive to the operations of the court, consistent with the principles and interests specified in section 1.00. The inspection can be of the physical record or an electronic version of the court record. Access may be over the counter, by fax, by regular mail, by e-mail or by courier. The section does not preclude the court from making inspection possible via electronic means at other sites, or remotely. It also permits a court to satisfy the request to inspect by providing a printed report, computer disk, tape or other storage medium containing the information requested from the court record. The issue of the cost, if any, that must be paid before obtaining a copy is addressed in section 6.00.

The section implies an equality of the ability to "inspect and obtain a copy" across the public. Implementing this equality will require the court to address several sources of inequality of access. Some people have physical impairments that prevent them using the form of access available to most of the public. The Americans with Disabilities Act may require the court or clerk to provide information in a form that is usable to someone with a disability. Another problem has to do with the existence of a 'digital divide' regarding

access to information in electronic form. The court should provide equivalent access to those who do not have the necessary electronic equipment to obtain access. Finally, there is the issue of the format of electronic information and whether it is equally accessible to all computer platforms and operating systems. The court should make electronic information equally available, regardless of the computer used to access the information.

Another aspect of access is the need to redact restricted information in documents before allowing access to the balance of the document (see subsection 4.60(a) and associated commentary). In some circumstances this may be a quite costly. Lack of, or insufficient, resources may present the court with an awkward choice of deciding between funding normal operations and funding activities related to access to court records. As technology improves it is becoming easier to develop software that allows redaction of pieces of information in documents in electronic form based on "tags" (such as XML tags) accompanying the information. When software to include such tags in documents becomes available and court systems acquire the capability to use the tags, redaction will become more feasible, allowing the balance of a document to be accessible with little effort on the part of the court.

Section 3.30 - DEFINITION OF PUBLIC ACCESS

"Remote access" means the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained.

Commentary

The objective of defining this term is to describe a means of access that is technology neutral that is used in the policy to distinguish means of access for different types of information. The term is used in section 4.70 regarding information that should be remotely accessible. The key elements are that: 1) the access is electronic, 2) the electronic form of the access allows searching of records, as well as viewing and making an electronic copy of the information, 3) it does not require a person to visit the courthouse, and 4) no assistance of court or clerk of court staff is needed to gain access (other than staff maintaining the information technology systems).

This definition provides a term to be used in the policy that is independent of any particular technology or means of access, for example, the Internet or a dial-up system such as the federal court's PACER system.[1] Remote access may be accomplished electronically by any one or more of a number of existing technologies, including dedicated terminal, kiosk, dial-in service, or Internet site. Attaching electronic copies of information to e-mails, and mailing or faxing copies of documents in response to a letter or phone request for information would not constitute remote access under this definition.

Section 3.40 - DEFINITION OF IN ELECTRONIC FORM

Information in a court record "in electronic form" includes information that exists as:

- **(a) electronic representations of text or graphic documents;**
- **(b) an electronic image, including a video image, of a document, exhibit or other thing;**
- **(c) data in the fields or files of an electronic database; or**
- **(d) an audio or video recording, analog or digital, of an event or notes in an electronic file from which a transcript of an event can be prepared.**

Commentary

The breadth of this definition makes clear the policy applies to information that is available in any type of electronic form. The point of this section is to define what "electronic" means, not to define whether electronic information can be accessed or how it is accessed.

Subsection (a): This subsection refers to electronic versions of textual documents (for example documents produced on a word processor, or stored in some other text format such as PDF format), and pictures, charts, or other graphical representations of information (for example, graphics files, spreadsheet files, etc.).

Subsection (b): A document might be electronically available as an image of a paper document produced by scanning, or another imaging technique (but not filming or microfilming). This document can be viewed on a screen and it appears as a readable document, but it is not searchable without the aid of OCR (optical character recognition) applications that translate the image into a searchable text format. An electronic image may also be one produced of a document or other object through the use of a digital camera, for example in a courtroom as part of an evidence presentation system.

Subsection (c): Courts are increasingly using case management systems, data warehouses or similar tools to maintain data about cases and court activities. The policy applies equally to this information even though it is not produced or available in paper format unless a report containing the information is generated. This section, as well as subsection (a), would also cover files created for, and transmitted through, an electronic filing system for court documents.

Subsection (d): Evidence can be in the form of audio or videotapes of testimony or events. In addition audio and video recording (ER - electronic recording) and computer-aided transcription systems (CAT) are increasingly being used to capture the verbatim record of court hearings and trials. In the future realtime video streaming of trials or other proceedings is a possibility. Because this information is in electronic form, it would fall within this definition and the policy would apply to it as well. As noted in the commentary to section 3.10(a)(2) there may be laws or rules governing ownership of, and access to, court reporter notes, in paper or in electronic form as captured by a CAT

system, or to electronic, audio or digital, recordings of proceedings with which a court's access polices must be consistent, including any fees for copies (see section 6.00).

Issues Not Addressed in the Policy

The section makes no statement about whether the information in electronic form is the official record, as opposed to, or in addition to, the information in paper form. A state or individual court considering adoption of an access policy might consider whether there is a need to declare which form, or forms, are deemed official.

Section 4.00 - APPLICABILITY OF RULE

This policy applies to all court records, regardless of the physical form of the court record, the method of recording the information in the court record or the method of storage of the information in the court record.

Commentary

The objective of this section is to make it clear that the policy applies to information in the court record regardless of the form in which the information was created or submitted to the court, the means of gathering, storing or presenting the information, or the form in which it is maintained. Section 3.10 defines what is considered to be part of the court record. However, the materials that are contained in the court record come from a variety of sources. The materials are offered and kept in a variety of forms. Information in electronic form exists in a variety of formats and databases and can be accessed by a variety of software programs. To support the general principle of open access, the application of the policy must be independent of technology, format and software and, instead, focus on the information itself.

Overview of Section 4.00 Provisions

Three categories of information accessibility are created in the following sections of the policy. The first reflects the general principle that information in court records is generally presumed to be accessible (section 4.10). The second category addresses information that will be available only at the courthouse, and not remotely (section 4.20). The third category identifies information prohibited from public access because of overriding privacy or other interests (section 4.30). Following these provisions are sections on bulk release of electronic information (section 4.40) and release of compiled information (section 4.50). Having defined what information is accessible and not accessible, there is a section that indicates how to request the prohibition of access to information generally accessible, and how to gain access to information to which public access is prohibited (section 4.60). Finally, there is a section that indicates what information should be accessible remotely (section 4.70).

Section 4.10 – GENERAL ACCESS RULE

(a) Information in the court record is accessible to the public except as restricted by section 4.30 or section 4.60(a).

(b) There shall be a publicly accessible indication of the existence of information in a court record to which access has been restricted, which indication shall not disclose the nature of the information protected.

Commentary

Subsection (a) states the general premise that information in the court record will be publicly accessible unless access is specifically restricted. There are two exceptions noted. One exception is information in the court record that is specifically excluded from public access by section 4.30. The second exception provides for those individual situations where the court orders a part of the record to be restricted from access pursuant to the procedure set forth in section 4.60.

The provision does not require any particular level of access, nor does it require a court to provide access in any particular form, for example, publishing court records in electronic form on a web site or dial-in database. (See section 4.70 on information that a court should make available remotely.)

The provision, by omission, reiterates the concept noted in the commentary to section 2.00 that access is not conditioned on proper use, nor is the burden on requestors to show they are entitled to access.

Subsection (b) provides a way for the public to know that information exists even though public access to the information itself is restricted. This allows a member of the public to request access to the restricted record under section 4.60(b), which they would not know to do if the existence of the restricted information was not known. Making the existence of restricted information known enhances the accountability of the court. Hiding the existence of information not only reduces accountability, it also erodes public trust and confidence in the judiciary when the existence of the information becomes known.

In addition to disclosing the existence of information that is not available, there is also a value in indicating how much information is being withheld. For many redactions this could be as simple as using ‘placeholders,’ such as gray boxes, when characters or numbers are redacted, or indicating how many pages have been excluded if part or all of a document is not accessible. Providing this level of detail about the information contributes to the transparency and credibility of the restriction process and rules.

There are two situations where this policy presents a dilemma. One is where access is restricted to an entire document and the other concerns a case where the entire

file is ordered sealed. This section requires the existence of the sealed document or file to be public. The problem arises where the disclosing of the existence of a document or case involving a particular person, as opposed to some of the information in the court record, reveals the very information the restriction order seeks to protect. One example would be the title of a document in a register of actions which describes the type or nature of the information to which access restrictions is being sought. These problems can be avoided, to some extent, by using a more generic description in the caption of a document, or using initials, a pseudonym, or some other unique identifier instead of the parties full or real name.

This section requires disclosure of the existence of the file in the interest of a more open judicial record. A state or individual court considering adoption of an access policy may decide to allow a court, using the procedures provided in section 4.60, to decide that even the existence of the information not be made public. This could be readily done by adding an exception clause to the end of this subsection, and specifically allowing the court to restrict access to the existence of information in section 4.60(a).

There may be technical issues related to this provision. Some automated case management systems now being used by courts may not have the ability to indicate the existence of information without providing some of the very information that is not to be publicly accessible. For example, it may not be possible to indicate that there is a document to which access is restricted without providing too much information about what type of document it is, or what it is about. Other systems may be designed not to indicate the existence of a document that has been sealed, or the existence of a case that has been sealed. It may be possible in some systems to add codes for a document or case to which access is restricted. While it may be possible to modify these old systems, it may not be cost effective to do so. Rather, the court might have to wait for a new system that includes these capabilities.

The policy is drafted for adoption either by a state, for the state's judiciary, or by an individual court, if the state does not adopt a uniform statewide policy. If a state adopts a policy, in the interest of statewide uniformity the state should consider adding a subsection such as the following to prevent local courts from adopting different policies:

> "**(c) A local court may not adopt a more restrictive access policy or otherwise restrict access beyond that provided for in this policy, nor provide greater access than that provided for in this policy**."

This not only promotes consistency and predictability across courts, it also furthers equal access to courts and court records.

Issues Not Addressed in the Policy

Many states have provisions, generally in criminal cases, where a party can request that a case, record or conviction be made to effectively 'disappear' from the court's records. Examples include expungements, 'adjournment in contemplation of dismissal,' or 'continuance for dismissal' and the 'sealing' or modification of certain types of convictions. Another example is the reduction of a felony conviction to a misdemeanor conviction after successful completion of probation. This type of change to the historical record becomes very problematic if the record being changed was available in electronic form at some point prior to any change. If these types of proceedings are to be retained, the access policy must somehow provide for equivalent protection regarding the electronic and paper records.

The section does not address situations where documents or other parts of the court record are publicly accessible for only a fixed period of time, pursuant to some policy decision embodied in a statute or rule. Examples include: 1) a presentence report in a criminal case that is only publicly accessible for a fixed period of time, after which the report is sealed and not available except by court order, and 2) a criminal case that is sealed pending the defendants successfully completion of a diversion program. A state or individual court adopting an access policy might consider adding a provision that prevents such information from continuing to be publicly available in electronic form when it is no longer available in paper form.

Some states have statutes or rules that provide for short records retention periods for some types of court records, at which time the paper record is to be destroyed. For example, traffic citations are to be destroyed after one year. In order to prevent the electronic record from being out of sync with the paper record, these retention period policies should be reviewed and, possibly revised. If the objective of the short retention policy was simply to eliminate paper in the clerk's office, the court should consider changing the retention policy, at least for electronic versions of the information. If, however, the short retention period also has an objective of clearing people's records of past violations, maintaining an electronic record after the paper record has been destroyed circumvents the policy. If access to the electronic record has existed while the paper record existed, it is impossible to ensure destruction of all copies of the electronic record that have been obtained by, or delivered to, third parties beyond the court's control. Several approaches are possible. One is to have a policy that the electronic record not be accessible to the public for such records. Alternatively, no electronic version of the record would be made in the first place.

The policy is also silent about keeping track of, or logging, who requests to see which court records. Most courts require some form of identification when a physical file is "checked out" from the file room for examination within the courthouse. Most courts do not keep this information once the file is returned. States or individual courts considering some form of logging of user's access need to balance the practical inconvenience, intrusiveness and chilling effect of logging against the potential uses of logs. Maintaining a record of who has accessed information can have a chilling effect on

access. Logs of access should also not be used as a basis for denying access. Who has access to such logs also becomes an issue that needs to be addressed. There are good reasons for maintaining logs of requestors, at least for certain types of information. For example, in a case of stalking it would be useful to know who accessed court information that may have aided the stalker in finding the victim. Logging is necessary to keep track of corrections of erroneous information that has been included in the court record, and for collecting fees, for example for a request for a printed copy of information in a court record. If a state or individual court decides to log access requests, they should inform requestors of the logging activity.

Section 4.20 – COURT RECORDS THAT ARE ONLY PUBLICLY ACCESSIBLE AT A COURT FACILITY

(a) The following information in a court record will be publicly accessible only at a court facility in the jurisdiction, unless access is restricted pursuant to section 4.30 or 4.60(a).

[Include a list of information available only at a court facility here.]

(b) A request to limit public access to information in a court record to a court facility in the jurisdiction may be made by any party to a case, an individual identified in the court record, or on the court's own motion. For good cause the court will limit the manner of public access. In limiting the manner of access the court will use the least restrictive means that achieves the purposes of this access policy and the needs of the requestor.

Commentary

This section suggests another category of information in terms of access. Section 4.10 states the basic presumption that records are publicly accessible. Section 4.30 identifies limited sets of information to which public access is prohibited. The objective of this section is to suggest that some information in the court record be available only at a court facility, not remotely. The access at the court facility may be electronic, through a terminal or kiosk connected to the court's database, or to the physical case file itself or a printout of information that exists only in electronic form. The limitation is to the manner of access, not whether there is access. It is anticipated that the categories of information to which access will be limited in this manner are not extensive.

The limitation of manner of access is one way of reducing the risk of negative impacts from public accessibility, such as injury to an individual, while maintaining traditional public access at the courthouse. There are alternatives means of achieving these protections. One alternative is to allow remote electronic access only through a subscription service (discussed further below). Another alternative adopted by several states is to limit remote, electronic access to one case at a time. All information remains

available at the courthouse, but it can be accessed through the electronic case management system only by a requestor specifying which case they want to see, that is, access is on a case-by-case basis. Note that some representatives of the media on the Advisory Committee were opposed to any type of tiered access approach.

Section (a). If a court is considering making information in court records available electronically and remotely, for example on-line through a web site, they should consider whether some categories of information might, instead, only be accessible at a court facility within the jurisdiction. The following categories of information have been identified by the Advisory Committee or by commentors as candidates for being available only at a court facility. Often there was considerable disagreement among the Committee members about whether categories should be on the list, or whether limiting language should be added to some of the categories. Rather than including categories of items on a list as is contemplated by this section, several members of the Advisory Committee thought limitations on access to the items should, instead, only be considered on a case-by-case basis, to limit access under a provision like 4.20(b) or to prohibit access under section 4.60(a).

- Addresses, phone numbers and other contact information for victims (not including defendants) in domestic violence, stalking, sexual assault, and civil protection order proceedings;
- Addresses, phone numbers and other contact information for victims in criminal cases;
- Addresses, phone numbers and other contact information for witnesses (other than law enforcement witnesses) in criminal, domestic violence, sexual assault, stalking, and civil protection order cases;
- Social security numbers;
- Account numbers of specific assets, liabilities, accounts, credit cards, and PINs;
- Photographs of involuntary nudity;
- Photographs of victims and witnesses involved in certain kinds of actions;
- Obscene photographs and other materials;
- Medical records;
- Family law proceedings including dissolution, child support, custody, visitation, adoption, domestic violence, and paternity, except final judgments and orders;
- Termination of parental rights proceedings;
- Abuse and neglect proceedings where access is not prohibited under section 4.30; and
- Names of minor children in certain types of actions.

All publicly accessible information would continue to be available at the courthouse. The phrase “at a court facility in the jurisdiction” is used in recognition that some jurisdictions have more than one courthouse and access could be at any courthouse within the jurisdiction. Restricting access to a court facility in a jurisdiction is problematic where the database is a statewide database used by all courts, or the database

and software are shared over a statewide intranet. A state adopting an access policy may need to accommodate this section to the database system in use in the state. A state may also decide not to limit the access to the courthouse within a jurisdiction, but allow access at any courthouse in the state.

The cross-reference to sections 4.30 and 4.60(a) makes it clear that this section does not imply that information to which access is prohibited pursuant to 4.30 or 4.60(a) would be publicly accessible at a court facility.

The approach proposed may be difficult to implement. To the extent it requires the court or clerk of court staff to look at each piece of information to decide whether it can be available remotely, it imposes added burdens on staff. "Reading" a document to determine whether it contains information on the list is unrealistic, suggesting sometimes access to documents will be limited because they contain such information, rather than attempting to redact the information. The burden is reduced to the extent the categories are straightforward in application, or if the parties indicate to the court that certain information fits into one of the categories. For example, the parties could be asked to complete a form with each filing indicating whether any information in the submission fits into one of the categories of this section. Advances in technology, for example using XML tagging, would greatly facilitate the implementation of this rule.

Another aspect of this approach is the inconvenience to some individuals who regularly access court records. For example, attorneys would be required to go to the courthouse to get this type of information even if it is in a neighboring jurisdiction, or across the state. While allowing electronic access would be more convenient, the convenience increases the risk of harm this section attempts to minimize.

It should be noted that this section would not prevent the information from being available in an electronic database operated by someone other than the court. If the information is publicly available in the courthouse, there is nothing to stop someone from coming to the courthouse, making notes of the information and entering it into an electronic database available remotely to anyone with access to the private database.

A policy that requires someone to physically go to the courthouse to obtain information is arguably creating unequal access, as compared to information that is remotely accessible. A counter-argument would be that there is no change to current access for the information, only expanded access for some types of information.

Alternative Approach - Remote Access by Subscription: An alternative to limiting access to the court facility for some categories of information is to allow remote electronic access to any publicly available information only to those who subscribe to such access. The subscription service would be available to any person or entity who signs up for the service by agreeing to abide by the conditions of the service agreement, and, possibly, paying a subscription fee. A password would be required for a subscriber to obtain access, allowing a level of accountability for access, and permitting some controls in the event of abuse. The only information that would be remotely available

without a subscription would be that provided for in section 4.70. With the subscription service there would be no identification or segregation of information in court records that ought not to be remotely available; everything not restricted by 4.30 or 4.60(a) would be available remotely to subscribers.

This alternative would provide greater protection of privacy rights and interest to the extent the requirement of becoming a subscriber deters access. At the same time it would more conveniently make available information to regular users such as lawyers (for cases in which they are not attorney of record), credit bureaus, the media, etc. There can be no absolute guarantee that by requiring a person to become a subscriber the person won't be able to acquire court information that allows them to do harm through the subscription alternative.

There are two possible approaches regarding limitations on potential subscribers. One approach, consistent with the intent of sections 2.00 and 4.00, would be that signing up for subscription access could not be limited based on who was seeking access or the reason they wanted access. Rather, the expectation is that simply requiring identification, a fee, and agreement of compliance with certain conditions will forestall or minimize access that might lead to misuse of information or injury to individuals. This approach would not eliminate the possibility of misuse or injury, nor is it likely to be as effective in reducing the risk of misuse or injury as the restrictions to access contemplated by section 4.20, which focus on the specific pieces of information, like victim contact information, that are sought by those intending injury.

The other approach would involve some restrictions on becoming a subscriber. The ability to impose limitations could be based on the fact that access to records at a court facility would not change, so there is no reduction in historical levels of public access. Limitations on who could subscribe could be based on who the subscriber is, what they propose to do with the information, or could impose conditions on use of information obtained from court records. While it is always possible for someone to misrepresent who they are, or their intent, the requirements would reduce, but certainly not avoid, misuse of information, and the risk of use of information to cause injury. There is also the problem of a valid subscriber establishing a search engine accessible to others who are not subscribers, thus thwarting the possible protections. As with the first approach, the protection comes from limiting who has access, not limiting access to the specific types of information that can be used to inflict injury.

As technology advances, increasing the courts' ability to screen information in documents, or when a court determines that there is little risk of injury from posting certain categories of documents, then these categories of information could move from access only through the subscription service to broader remote public access under 4.70.

Alternative Approach – Experimenting With Remote Access: Another approach would be to authorize one or a few jurisdictions in a state to make court records remotely accessible and to monitor the access and use. The intent of the monitoring would be to identify the extent of use of access and benefits and to see what adverse impacts arise and

what might be done to avoid or minimize them. The federal courts are engaging in such an experiment regarding information in criminal cases.[2] The monitoring would be most useful if it involved logging of access to court records during the experiment. Logging would allow tracing to establish specific causal relationships if some injury occurred using information in a court record. It would also allow actual users of remote access to be surveyed to find out what information they sought and why, not for purposes of prior restraint, but to identify the real uses and benefits of making information in court records remotely available.

One risk of this approach is someone obtaining information from a court record remotely and using the information to inflict injury on, or even kill, someone. The most obvious risk is to victims, especially in domestic violence, sexual assault, or stalking cases, or witnesses in cases. This risk could be minimized by not making contact information for these categories of people available remotely, which is the objective of section 4.20.

Section (b) provides a procedure whereby a person can request a court to limit the manner of access for certain information about them by ordering that it be available only at a court facility. This subsection is similar to the process set forth in 4.60(a) allowing a person to request that public access to certain information be prohibited. However, the option of only restricting remote access is a less restrictive approach, since the information would still be available at a court facility.

Issues Not Addressed in the Policy

The section does not address what access is permitted between the time a request to restrict access is made and the court rules on the request. This is particularly critical if the request is made simultaneously with the filing of the information. It is also more critical where the parties represent themselves and are unaware of appropriate procedures. A state or individual court considering adoption of an access policy might consider adding a provision that access will be restricted to the extent requested during the time a request is pending before the court. In order to avoid the use of such a provision to achieve at least temporary restriction a court should establish procedures that provide for prompt consideration of a request to restrict access. Alternatively a court could require that a party file a motion to restrict access with the information to be protected in a sealed envelope being lodged, but not filed, with the court. If the court grants the request, the information can be filed with restrictions to access. If the request is denied, the party has the option of filing the information without restriction, or not filing it.

The section does also not address possible remedies for violating restrictions on access.

A state or individual court adopting an access policy might also consider limiting remote access to other categories of court records where doing so furthers the purposes of the policy. The court might differentiate access to information based on the veracity of

the information. For example, the court could limit remote access to unsworn allegations, while allowing remote access to sworn declarations and pleadings. The differentiation would be based on the categorization of the document, not the contents of the document; in the example above unsworn documents versus sworn documents.

Section 4.30 –COURT RECORDS EXCLUDED FROM PUBLIC ACCESS

The following information in a court record is not accessible to the public:

(a) Information that is not to be accessible to the public pursuant to federal law;

(b) Information that is not to be accessible to the public pursuant to state law, court rule or case law as follows:

[List those categories or types of information to which public access is to be restricted]

A member of the public may request the court to allow access to information excluded under this provision as provided for in section 4.60 (b).

Commentary

The objective of this section is to identify those categories of information to which public access will be prohibited. The concept of the section is that for certain types of information an existing statute, rule or case law expresses a policy determination, made by the Legislature or the judiciary, that the presumption of public access has been overcome by a compelling reason, and that the prohibition of public access applies on a categorical, as opposed to a case-by-case, basis. The policy guidelines contemplate that a state or individual court considering adoption of an access policy would examine its statutes, rules and case law and identify categories of information, if any, to which public access has been prohibited. The state or individual court might also consider the subjects described in the commentary below as possible additional items for the list. Those categories meeting the appropriate constitutional standard should be specified in this section of the policy.

The last paragraph of the section simply provides a cross-reference to the section that describes the process and standard for requesting access to information to which access is prohibited pursuant to this section.

The section suggests two sources of restrictions on access to information. The first is federal law, although there are few, if any, such limitations. The second source are those categories, if any, identified at the state level. The following commentary provides several lists of categories that currently exist in one or more states or have been suggested through the public comment process associated with the development of these policy guidelines.

Subsection (a) Federal Law: There are several types of information that are commonly, if incorrectly, thought to be protected from public disclosure by federal law. Although the laws or regulations may prohibit a federal agency, federal employees, or certain other specifically designated parties from disclosing certain information, the

prohibition generally does not extend to disclosure by state courts where the information becomes part of the court record.[3] It may be that the federal laws or regulations apply to individuals who introduce restricted information onto the court records, perhaps requiring the individuals to request the court to restrict access under sections 4.20 or 4.60(a). Each category is discussed below.

Social Security Numbers. Although there may be restrictions on federal agencies disclosing Social Security Numbers (SSNs), they do not apply to state or local agencies such as courts.[4] One provision of the Social Security Act[5] does bar disclosure by state and local governments of SSNs collected pursuant to any law enacted on or after October 1, 1990. Assuming the section is applicable to state courts (there is some question about this), it would only apply to laws authorizing courts to collect SSNs that were adopted after this date. One possible example of this may be the law passed in the mid 1990's to facilitate child support collection[6] that requires inclusion of SSNs in orders granting dissolution of marriage, establishing child support or determining paternity. There does not appear to be any consensus as to whether the non-disclosure provision applies to, or is superseded by, the newer collection requirement.

Federal income or business tax returns. Federal law prohibits disclosure of tax returns by federal agencies or employees, but the prohibition does not extend to disclosure by others.

Educational information protected by federal law. A federal law protects information about students receiving federal aid from disclosure by a university or public school system, but it does not address disclosure of such information in a court record.[7]

Health and medical information. The Health Insurance Portability and Accountability Act of 1996[8] (HIPAA) law and regulations adopted pursuant to it[9] limit disclosure of certain health related information about people by certain health-care entities. Whether the limitation extends to state court records is not clear. There are also federal restrictions regarding information in alcohol and drug abuse patient records[10] and requiring confidentiality of information acquired by drug court programs.[11]

Criminal History Information. There are federal regulations and state laws generally restricting the use of criminal history information contained in criminal records repositories maintained by executive branch agencies, particularly non-conviction information, to criminal justice purposes.[12] The provisions do not extend to information once it becomes part of a court record in a case; nor do they extend to court records containing criminal conviction information.

Research Involving Human Subjects. There are federal regulations establishing practices and, in certain circumstances, prohibiting disclosure of certain personal identifier information gathered in the course of federally funded research on human subjects.[13] This does not apply to information gathered by a state court in the normal course of judicial business,[14] but it might apply to individuals requesting information

from court records for research purposes under section 4.40 (bulk access) or 4.50 (compiled access).

Subsection (b) – State statutes, rules and case law: Most states already have statues or rules identifying certain types of information to which public access is restricted. There may also be case law upholding restrictions to access to a category of information. As noted above a state or individual court adopting an access policy should review existing state law (statutes, court rules and case law) and identify information to which access is now restricted and determine whether to include the category of information in this section of the access policy, or seek to change the law restricting access to the category of information.

Information that may not be accessible to the public pursuant to state law, whether in a statute or rule of court, generally falls into two categories. First are case types where the entire court record is generally not publicly accessible. Examples include:

- Juvenile dependency (abuse and neglect) proceedings;
- Termination of parental rights and relinquishment proceedings;
- Adoption proceedings;
- Guardianship proceedings;
- Conservatorship proceedings;
- Mental Health proceedings; and
- Sterilization proceedings.

Second are documents, parts of the court record, or pieces of information (as opposed to the whole case file) for which there may be a compelling interest that they not be publicly accessible. Examples include:

- Name, address, telephone number, e-mail, or places of employment) of a victim, particularly in a sexual assault case, stalking or domestic violence case;
- Name, address or telephone number of witnesses (other than law enforcement personnel) in criminal or domestic violence protective order cases;
- Name, address or telephone number of informants in criminal cases;
- Names, addresses or telephone numbers of potential or sworn jurors in a criminal case;
- Juror questionnaire information;
- Wills deposited with the court for safekeeping;
- Medical or mental health records, including examination, diagnosis, evaluation, or treatment records;
- Psychological evaluations of a party, for example regarding competency to stand trial;
- Child custody evaluations in family law or juvenile dependency (abuse and neglect) actions;
- Description or analysis of a person's DNA or genetic material, or biometric identifiers;

- Financial information that provides identifying account numbers on specific assets, liabilities, accounts, credit cards, or P.I.N. numbers of individuals or business entities. (See further comments below);
- State income or business tax returns;
- Proprietary business information such as trade secrets, customer lists, etc. (See further comments below.);
- Grand Jury proceedings (at least until the indictment is presented and the defendant is arrested);
- Presentence investigation reports;
- Search warrants and affidavits (at least prior to the return on the warrant);
- Arrest warrants and affidavits (at least prior to the arrest of the person named);
- Applications and supporting documents that contain financial information filed as part of a request to waive court fees or to obtain appointment of counsel at public expense;
- Applications for accommodations under the Americans with Disabilities Act;
- Proceedings to determine the mental competency of a defendant in a criminal case or juvenile in a delinquency case;
- Judicial Work Product (see further comments below);
- Court administration and clerk of court work product (see further comments below);
- Certain court administration records (see further comments below);
- Proprietary interests of the government (see further comments below); and
- Personnel records of public employees.

Additional categories of information to which a state or individual court might also consider restricting general public access include:

- Names and address of children in a juvenile dependency proceeding;
- Names and addresses of children in a dissolution, guardianship, domestic violence, sexual assault, harassment, or protective order proceeding;
- Addresses and phone numbers of litigants in cases;
- Photographs depicting violence, death, or children subjected to abuse;
- Certain exhibits in trials such as photographs depicting violence, death, children subjected to abuse or depictions of medical information;
- Information gathered or created during the investigatory phase that is related to the performance, misconduct or discipline of a lawyer (where the judiciary has authority over lawyer admittance and discipline and there are not other provisions covering access to this information);
- Information gathered or created during the investigatory phase that is related to the performance, misconduct or discipline of a judicial officer (where the judiciary has authority over judicial officer discipline and there are not other provisions covering access to this information); and
- Information gathered or created during the investigatory phase that is related to alleged misconduct by entities or individuals licensed or regulated by the judiciary.

The categories of restricted information vary considerably across states. The list provided above is meant to be exemplary, and not exhaustive or definitive.

Financial Information: While information about the existence and amount of an asset may be relevant to a court decision and therefore publicly accessible, there is no general need to disclose the particular account numbers or means and codes for accessing the accounts. In those instances where the account numbers, or other information included within the definition of this subsection, may be relevant or otherwise possibly subject to public access, access can be requested under section 4.60.

Restricting information in this area is probably the most difficult to implement. Existing court records already contain large amounts of detailed financial information, particularly in family law and probate proceedings. Court forms often require this information, although it is not clear that the court always needs the details to make its decisions. Many parties, particularly those without legal representation, are not aware that this information may be accessible to the general public. There is also the problem of a party intentionally including this type of information in a document filed with the court, effectively misusing the court process. A state or individual court considering adoption of an access policy should review its forms and the information parties are required to provide to minimize the gathering of information to which public access ought not generally be provided. Alternatively the parties could be required to exchange the detailed information, but the forms filed in the court record would only contain summary information.

Proprietary Business Information: This is intended to protect proprietary business information on a categorical basis. When a state adopts a rule based on this policy, it should consider a cross-reference to the statutes that define proprietary information, or reference the standard in case law, so that this policy is consistent with other law in the state about restricting access to this type of information. An alternative approach would be to leave this sort of information to individual, case-by-case analysis regarding restricting access under section 4.60(a).

Judicial Work Product: This category is intended to exclude public access to work product involved in the court decisional process, as opposed to the decision itself. This would include such things as notes and bench memos prepared by staff attorneys, draft opinions and orders, opinions being circulated between judges, etc. A specification about this should include independent contractors working for a judge or the court, externs, students, and others assisting the judge but who are not employees of the court or the clerk of court's office.

Court Administration and Clerk of Court Work Product: The type of information here could include information collected, and notes, drafts and other work product generated during the process of developing policy relating to the court's administration of justice and its operations or the operation of the clerk of court. The exception is intended to cover the "work product" and "deliberative process" but not the final policy, decision or report as defined in section 3.10 (a) (3). In some states the clerk of court function is

provided by an executive branch agency, often by an elected clerk. Because the activity concerns the court record, this policy applies to such offices even though they may be part of the executive branch.

Courts should adopt a policy of issuing proposed court administration policies for public comment prior to adoption, except in emergency situations, to obtain public input to its policy development process.

Another category of court work product are the notes produced by court reporters, whether in paper form or electronic form (from a CAT system). Whereas the transcript produced from notes is a public record, the state or court should address whether the notes themselves are publicly accessible.

Other non-case specific information in court administration records that is excluded from general public access in some states but publicly accessible in other states include:

- Telephone logs of judges and court staff;
- Logs of Internet access by judges and court staff;
- Minutes of Judges' meetings; and
- E-mails or other correspondence of judges and court staff.

Certain Court Administration Records: Information related to court personnel, litigation involving the court, or court security. This category includes certain information whose release would infringe generally accepted privacy protections for court staff or job applicants, compromise the safety of judges, court staff and those that visit the courthouse, or compromise the integrity of the court's information technology and record keeping systems.

Court personnel information could include:

- Personnel and medical records of court employees;
- Information related to pending internal investigations of court personnel or court activities;
- Applicants for positions in the court; and
- Personal identifier information about people applying or serving as unpaid volunteers to assist the court, such as serving as a guardian ad litem, court-appointed special advocate for a child, etc.

Information about court litigation could include:

- Information about pending litigation where the court is a party (and the information has not become part of the record in the case); and
- Work product of any attorney or law clerk employed by or representing the judicial branch that is produced in the regular course of business or representation of the judicial branch.

Information about court security could include:

- Court security plans and procedures;
- Logs of arrival and departure times of judges or court staff kept by court security systems;
- Records of when judges are scheduled to be on leave;
- Court information system cabling and network diagrams;
- Security information related to the court's information technology capabilities; and
- Software used by the court to maintain court records, whether purchased, leased, licensed or developed by or for the court.

Proprietary Interest of the government: This category is intended to protect information that is the property of a state or local government entity that, if it were owned by a business, would be subject to the protection of the law. The intent is to provide the government the same level of protection as is provided to businesses. Examples of information here would be computer software developed by the government, and reports or collections of information that are protected from disclosure by state statute or information owned by state or individual governmental units constituting trade secrets or whose release would otherwise infringe on the government's proprietary interests.

Section 4.40 – REQUESTS FOR BULK DISTRIBUTION OF COURT RECORDS

Bulk distribution is defined as the distribution of all, or a significant subset, of the information in court records, as is and without modification or compilation.

(a) Bulk distribution of information in the court record is permitted for court records that are publicly accessible under section 4.10.

(b) A request for bulk distribution of information not publicly accessible can be made to the court for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes where the identification of specific individuals is ancillary to the purpose of the inquiry. Prior to the release of information pursuant to this subsection the requestor must comply with the provisions of section 4.50(c).

Commentary

This section addresses requests for large volumes of information in court records, as opposed to requesting information from a particular case or reformulated information from several cases (see section 4.50). The section authorizes bulk distribution for information that is publicly accessible. It also sets out a method of requesting bulk distribution of information to which public access is restricted.

There are advantages to allowing bulk access to court records. Allowing the public to obtain information from court records from a third party may reduce the number of requests to the court for the records. Fewer requests mean less court staff resources devoted to answering inquiries and requests.

However, there are costs associated with making the records available. There may also be technology, as well as cost, issues in providing bulk distribution of information. For example, a court's systems may not be able to identify and separate publicly accessible information from restricted information in creating a copy of information for bulk distribution. Permitting bulk distribution of information in this circumstance assumes providing the data will not interfere with the normal operations of the court. There is also the 'cost' of reduced public confidence in the judiciary from the existence of inaccurate, stale or incorrectly linked information available through third parties but derived from court records.

In allowing bulk data to be disseminated a court should be mindful not to gather information that it does not need to fulfill its judicial role, even if those requesting bulk information are interested in obtaining this information.

Subsection (a). Bulk transfer is allowed for information that is publicly accessible under this policy. There is no constitutional or other basis for providing greater access to

bulk requestors than to the public generally, and this section implies there should be no less access.

As noted in section 3.20, public access, including bulk access, is not dependent upon the reason the access is sought or the proposed use of the data. Court information provided through bulk distribution can be combined with information from other sources. Information from court records may be linked with other information and may be used for purposes that are unrelated to why the information was provided to the court in the first place.

Many states that have considered the bulk data issue for information in electronic form have adopted access policies that only allow case-by-case access, one case at a time, and no bulk distribution, even of otherwise publicly accessible information. However, existing technology and software, using repeated queries and 'screen scraping,' can accomplish bulk distribution from 'one-case-at-a-time' systems fairly rapidly. The policy, therefore, explicitly provides for bulk distribution in recognition of this potential.

It is significant to note that transferring information in the court record into databases that are then beyond the court's control creates the very real likelihood that the information will, over time, become incomplete, inaccurate, stale or contain information that has been removed from the court's records. Keeping information distributed in bulk current may require the court to provide "refreshed" information on a frequent, regular and periodic basis. This may raise issues of availability of court resources to do this. Although creating liability or penalties on the third party information provider (something beyond the scope of this policy) might reduce the risk of stale or incorrect information being distributed, meeting this standard still requires the court to provide updated and new information on a frequent basis.

A particular problem with bulk distribution of criminal conviction information has to do with expungement policies. If the intent of an expungement policy is to "erase" a conviction, the public policy may be impossible to implement if the information is already in another database as a result of a bulk transfer of the information. An approach needs to be devised that accommodates expungement and bulk distribution.

Potential mass access to electronic court information further highlights the question of the accuracy of the court's records. This is particularly important for databases created by court or clerk of court employees. The potential for bulk distribution of the information in a court database will require courts and clerks to be even more vigilant about both the accuracy of their databases and the timeliness of entering information into them. Policies relating to the internal practices of the court and clerk regarding data entry quality and accuracy are beyond the scope of this access policy.

A counter-intuitive aspect of bulk data release has to do with the linking of the information from court records with information from other sources. In order to correctly link court information with information from other sources, the information vendor must

have pieces of information that allow accurate matching of court information about someone or an entity with information from other sources. This type of personal identifier information is often the most sensitive in terms of privacy. If a court were interested in minimizing the risk of bulk data it provides being incorrectly linked to information from other sources, it might provide more personal identifier information, not less, in those situations where linking is contemplated. However, courts should not be gathering information it does not need for judicial purposes. Generally, court records do not contain key linking information, for example birth dates or social security numbers, for individuals.

As noted many states that have considered the bulk data issue have adopted access policies that only allow access to one case at a time, and no bulk data access. This reduces the likelihood of "stale" information existing in databases because a query directed to the court's database, one at a time, will be searching more current court data than a query to a database consisting of a bulk download of court information that may not be current, depending upon when the data was transferred. Not providing bulk distribution also eliminates the need to establish mechanisms to provide frequent and regular updates. If a state or individual court adopts a bulk access policy more restrictive than that in the policy guidelines, it might consider different bulk access rules for different types of information. For example, bulk access might be allowed for indexes, but not for the contents of the case management system or for electronic versions or images of documents filed in cases.

Subsection (b). One reason court records are publicly accessible is to allow the public to monitor the performance of the judiciary. One method of monitoring performance is to examine the information in a set of cases to see whether the court's decisions across cases are consistent, predictable, fair and just. This sort of examination requires access to all information considered by the court in making its decision, as it is difficult to say ahead of time that any piece or category of information is not relevant and therefore should not be made available. Subsection (b) provides a process for obtaining bulk data for information not publicly accessible. The section states that the request for bulk access should be made to the court, i.e., allowing bulk access is a judiciary decision. A state or individual court that adopts an access policy should provide more detail about where and to whom a request should be delivered, and who makes the decision on the request.

Subsection (b) includes the term "journalistic." This term is not defined in the policy guidelines. A state or individual court adopting an access rule should consider addressing this issue. Given the ease of "publishing" information on the Internet, the term may have broad application. However, any concern may be diminished by the reference to section 4.50(c) regarding use of the information, and protections provided for individual identifying information.

Issues Not Addressed in the Policy

One issue not addressed in this section is what can be done to keep the information released in bulk in sync with the information in the court's record. One option would be to make the requestor receiving information by bulk distribution responsible for the currency and accuracy of any information before making it accessible to clients or the public. Alternatively, the information provider could be required to inform the clients or public of the limitations of the data. Another option would be for courts to refuse to continue supplying bulk data to a certain organization, or on a certain subject, if abuses occur regarding maintenance of accuracy or currency.

Conversely, the court could 'certify' entities or individuals to receive bulk data based on compliance with certain practices that improved the accuracy and currency of the information they receive and the accuracy of linking the information with information from other sources. Certification might be limited to entities subject to regulation, for instance under the Fair Credit Reporting Act, at the federal or state level.

An alternative approach would be to strengthen or establish liability on the part of the information provider for errors or omissions in the information, or for disseminating information that is no longer publicly available from the court. Having obtained the information from the government would not be a defense. However, analyzing and proposing language for this sort of liability is beyond the scope of this policy.

Another concern with release of bulk data is the extent to which the electronic records are an atypical subset of data from all court records. The skewing arises from what is available in electronic form, versus paper form. As electronic versions of information start to become available, it generally is only in complex cases or a certain class of cases. Bulk data consisting of only electronic records may, therefore, not be representative of all cases. Skewing could also be due to the fact that very little information prior to a certain date is available in electronic form. If scanning or other conversion into electronic form is not done for historical records, then the electronic record may only be the recent cases or only the newer information in older cases, depending upon how a court implements the conversion of records to electronic form.

Another consideration related to the nature of bulk release is that a "dump" of the information in electronic form creates a snapshot of the information, whereas the database from which the information is extracted is dynamic, constantly changing and growing.

The Guideline does not address the need for, or extent of, regulation of those obtaining bulk data who, in turn, provide information from court records to others. There are federal laws[15] regulating some information providers, and states may have some laws. Another approach to preventing misuse of information in court records would be through regulation of information providers who are given information from court records.

Section 4.50 - ACCESS TO COMPILED INFORMATION FROM COURT RECORDS

(a) Compiled information is defined as information that is derived from the selection, aggregation or reformulation by the court of some of the information from more than one individual court record.

(b) Any member of the public may request compiled information that consists solely of information that is publicly accessible and that is not already available pursuant to section 4.70 or in an existing report. The court may compile and provide the information if it determines, in its discretion, that providing the information meets criteria established by the court, that the resources are available to compile the information and that it is an appropriate use of public resources. The court may delegate to its staff or the clerk of court the authority to make the initial determination as to whether to provide compiled information.

(c) (1) Compiled information that includes information to which public access has been restricted may be requested by any member of the public only for scholarly, journalistic, political, governmental, research, evaluation, or statistical purposes.

(c) (2) The request shall a) identify what information is sought, b) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education, and c) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited.

(c) (3) The court may grant the request and compile the information if it determines that doing so meets criteria established by the court, is consistent with the purposes of the access policy, that the resources are available to compile the information and that it is an appropriate use of public resources.

(c) (4) If the request is granted, the court may require the requestor to sign a declaration that:

- **(i) The data will not be sold or otherwise distributed, directly or indirectly, to third parties, except for journalistic purposes,**
- **(ii) The information will not be used directly or indirectly to sell a product or service to an individual or the general public, except for journalistic purposes, and**
- **(iii) There 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.**

The court may make such additional orders as may be needed to protect information to which access has been restricted or prohibited.

Commentary

This section authorizes access to compiled information. The section describes how the compiled information is requested, the requirements for obtaining compiled information, and possible limitations on using the information.

The primary interests served by release of compiled information are supporting the role of the judiciary, promoting the accountability of the judiciary, and providing public education regarding the judiciary. Compiled data allows analysis and comparison of court decisions across cases, across judges and across courts. This information can also educate the public about the judicial process. It can provide guidance to individuals in the conduct of their everyday life and business. Although some judges may have legitimate concerns about misuse of compiled data, for example in comparing the decisions of judges, such an analysis is one approach to monitoring the performance of the judiciary.

Compiled data also allows the study of the effectiveness of the judiciary and the laws enforced in courts. For example, the studies of delay reduction leading to improved case management and faster case processing times were based on analysis of compiled data from thousands of cases in over a hundred courts across the country.

In allowing compiled data to be disseminated a court should be mindful not to gather information that it does not need to fulfill its judicial role, even if those requesting compiled information are interested in obtaining this information.

Subsection (a) provides a definition of compiled information. Compiled information is different from case-by-case access because it involves information from more than one case. Compiled information is different from bulk access in that it involves only some of the information from some cases and the information has been reorganized or aggregated; it is not just a copy of all the information in the court's records. Essentially compiled information involves the creation of a new court record. In order to provide compiled information a court generally must write a computer program to select the specific cases or information sought in the request, or otherwise use court resources to gather the information.

Generating compiled data may require court resources and generating the compiled information may compete with the normal operations of the court for resources, which may be a reason for the court not to compile the information. It may be less costly for the court and less of an impact on the court to, instead, provide bulk distribution of the requested information pursuant to section 4.40, and let the requestor, rather than the court, compile the information.

Subsection (b) addresses requests for information that is publicly available. Since public resources are used in responding to the request, the question for the court is whether responding meets criteria established by the court for providing such information, whether the expenditure of public resources is appropriate, and whether the court will choose to expend available resources on the request. A fee, if any, for providing the compiled information would be covered by section 6.00.

The reference in subsection (b) to section 4.70 and existing reports is intended to limit the section's application to requests for compiled data that are not already routinely prepared and made public. Party name indices, or a screen that reports the results of a name search of either civil or criminal cases, are examples of compiled information that already exist.

Subsection (c) addresses requests for information that is not publicly accessible. Since the information is not publicly accessible, the subsection is concerned about the purpose for requesting the information (subdivision (1)) and the court must consider more factors than whether resources are available and appropriately spent on compiling the information (subdivisions (2) and (3)). If the request is granted, subdivision (4) provides for protections of the restricted information.

Subsection (c) includes the term "journalistic." This term is not defined in the policy guidelines. A state or individual court adopting an access rule should consider addressing this issue. Given the ease of "publishing" information on the Internet, the term may have broad application. However, any concern may be diminished by the reference to section 4.50(c) regarding use of the information, and protections provided for personal identifier information.

The exception for "journalistic purposes" in subdivisions (c)(4) is included as a recognition that what journalism sells is information, and prohibiting a journalist from selling the information may defeat the purpose of providing the information to the journalist in the first place.

Subdivision (c)(4) identifies provisions for preventing improper disclosure of restricted or prohibited information. A state or individual court's policy might also consider a requirement of a nondisclosure agreement that includes injunctive relief and indemnities for improper disclosure. In order to get a court order releasing the information the appropriate nondisclosure agreement must be signed by the requestor. A state or individual court should also review what penalties, if any, are available for unauthorized disclosure, including contempt, under existing law. Note that there may be federal restrictions on release of personal information applicable to an entity requesting the data (see discussion in Commentary associated with 4.30(a) on "Research Involving Human Subjects").

One concern with the distribution of compiled data is the interpretation of the data. Analysis of the data without an understanding of the meaning of the data elements or codes used, or without an understanding the limitations of the data, can result in

conclusions not substantiated by the data. To some extent this can be addressed by explanatory information provided with the transmittal of the compiled information. There are two issues here. One is the courts may not be asked to help recipients of compiled data understand and verify the data. The other issue is enforcement of restrictions on the use or dissemination of information provided. One option is for courts to refuse to continue supplying compiled data to a certain organization, or on a certain subject, if abuses occur. Another option is to create, or strengthen, penalties for the release of information to which access is restricted under this policy.

Another concern with release of compiled data in electronic form is the extent to which the electronic records are an atypical subset of data from all court records. The skewing arises from what is available in electronic form, versus paper form. As electronic versions of information became more available, it is generally only in complex cases or a certain class of cases. Compiled data from the electronic record may, therefore, not be representative of all cases. Skewing could also be due to the fact that very little information prior to a certain date is available in electronic form. If historical records are not scanned or otherwise converted into electronic form, the electronic records will only be recent cases or newer information in older cases. There are no obvious ways to avoid this problem, assuming the cost of producing electronic versions of all existing records is prohibitive.

Another consideration in the release of compiled information is that the extracted set of information is a snapshot of the information, whereas the database from which the information is extracted is dynamic, constantly changing and growing.

Section 4.60 – REQUESTS TO PROHIBIT PUBLIC ACCESS TO INFORMATION IN COURT RECORDS OR OBTAIN ACCESS TO RESTRICTED INFORMATION

(a) A request to prohibit public access to information in a court record may be made by any party to a case, the individual about whom information is present in the court record, or on the court's own motion. The court must decide whether there is a compelling interest to prohibit access according to applicable constitutional, statutory and common law. In deciding this the court should consider at least the following:

(1) Risk of injury to individuals;
(2) Individual privacy rights and interests;
(3) Proprietary business information; and
(4) Public safety.

In restricting access the court will use the least restrictive means that will achieve the purposes of this access policy and the needs of the requestor.

(b) A request to obtain access to information in a court record to which access is prohibited under section 4.30 or 4.60(a) of this policy may be made by any member of the public or on the court's own motion upon notice as provided in subsection (c). The court must decide whether there is a compelling interest to continue to prohibit access according to applicable constitutional, statutory and common law. In deciding this the court should consider at least the following:

(1) Risk of injury to individuals;
(2) Individual privacy rights and interests;
(3) Proprietary business information;
(4) Access to court records; and
(5) Public safety.

(c) The request shall be made by a written motion to the court. The requestor will give notice to all parties in the case except as prohibited by law. The court may require notice to be given by the requestor or another party to any individuals or entities identified in the information that is the subject of the request. When the request is for access to information to which access was previously prohibited under section 4.60(a), the court will provide notice to the individual or entity that requested that access be prohibited either itself or by directing a party to give the notice.

Commentary

This section lays out the basic considerations and processes for prohibiting access to otherwise publicly available information (often referred to as sealing), or opening access to restricted information (whether prohibited under section 4.30 or section 4.60(a)). Requests to restrict remote public access, as opposed to prohibit public access altogether, are provided for in section 4.20. The language incorporates the presumption of openness, and the need for a compelling interest to overcome the presumption. The section also specifies the mechanism for making the request and directs the court to use the least restrictive approach possible when restricting public access.

The section specifically lists several of the policy interests stated in section 1.00 that the court is to consider in deciding whether there is a compelling interest justifying restriction of, or providing, public access. The Advisory Committee was closely divided as to whether to list any specific policy interests in the subsections. The concern was to avoid creating the impression that any of these policy interests always constituted a compelling interest, and also to avoid creating the impression that these were the only possible compelling interests; none may apply and there may be others. Moreover, the consideration needs to be made by the court on a case-by-case basis. The language in the subsections is intended to provide guidance in developing a policy. The intent of the policy guidelines is not to rewrite the law of each state regarding prohibition of access, nor is it practical to try and report the applicable law for each state, and the variations within each state based on type of information or type of case.

Subsection (a) allows anyone who is identified in the court record to request prohibition of public access. This specification is quite broad, including a witness in a case or someone about whom personally identifiable information is present in the court record, but who is not a party to the action. While the reach of the policy is quite broad, this is required to meet the intent of subsection 1.00 (a)(6) regarding protection of individual privacy rights and interests, not just the privacy rights and interests of parties to a case. Protection is available for someone who is referred to in the case, but does not have the options or protections a party to the case would have.

Subsection (a) provides only for prohibiting access to information, not prohibiting access to the existence of the information. Section 4.10(b) specifically provides that the existence of information to which access is prohibited will be publicly accessible. A state or individual court considering adoption of an access policy should consider whether to expand this subsection to also allow prohibiting access to the existence of such information (see discussion in Commentary to section 4.10(b)).

Subsection (a) does not have any restrictions regarding when the request can be made, implying it can be done at any time.

This subsection provides that it is the judge who decides whether access will be prohibited. Even if all parties agree that public access to information should be prohibited, this is not binding on the judge, who must still make the decision based on the applicable law and factors listed.

The last paragraph to subsection (a) requires the court to seek an approach that minimizes the amount of information that cannot be accessed, as opposed to an “all or nothing” approach. This is directed at the question of what to do about a document or other material in the court record that contains some information to which access should be prohibited along with other information that remains publicly accessible. The issue becomes one of whether it is technically possible to redact some information from a document and to allow the balance of the document to be publicly available. Less restrictive methods include redaction of pieces of information in the record, sealing of only certain pages of a document, as opposed to the entire document, or sealing of a document, but not the entire file. As noted previously (see commentary under section 3.20) newer technologies permit tagging of information in an electronic records in a way that readily allows electronic redaction of pieces of information in an electronic document, and courts are encouraged to obtain this capability when acquiring new systems. As discussed in the commentary to section 4.10 other approaches to restricting access to names could include using initials or a pseudonym rather than a full or real name. As discussed in section 4.20 another approach might be to preclude remote access to information, while retaining access at the courthouse.

In addition to whether it is technically possible, there may be an issue of whether it is feasible to redact information in a record, and whether the court or clerk has the resources to do so. The work needed to exhaustively review a large file or document to find information to be redacted may be prohibitive, such that access to the whole file or document would be restricted, rather than attempting redaction.

Subsection (b) specifically allows a court to consider providing access to information to which access is categorically prohibited under section 4.30, as well as specific information in a court record to which access has previously been prohibited by a court pursuant to section 4.60(a). Allowing a court to order public access to categorically prohibited information may currently not be possible in many states. Allowing later reconsideration of a court’s prior decision to prohibit access in a particular case under section 4.60(a) may also be new. The basis for this authorizing this is to address a possible change in circumstances where the reasons for prohibiting access no longer apply, have changed, or there is new information suggesting now allowing public access. Examples include such things as a person now being a “public figure,” the conclusion of a trial, the passage of time reducing the risk of injury, etc. A state considering adopting or revising its access policy should consider adding such provisions.

Section (b) suggests an explicit standard and procedure for reviewing a previous decision to prohibit public access to information. A state or individual court considering adoption of an access policy should clearly define the standard and burden of proof for lifting a prohibition on access.

Subsection (b) provides that “any member of the public” can make the request for access to prohibited information. This term is defined broadly in section 2.00, and includes the media and business entities as well as individuals.

Subsection (c) contemplates a written motion seeking to prohibit, or gain, access. Although a motion is specified, the section is silent as to the need for oral argument or testimony, leaving this up to the court. Notice is required to be given to all parties by the requestor, except where prohibited by law.[16] The subsection gives the court discretion to require notice to be given to others identified in the information that is the subject of the request. If public access to the information was restricted by a prior request, the subsection requires the court to arrange for notice to be given to the person who made the prior request. The process for seeking review by an appellate court is not specified in the policy, as the normal appeal process for a judicial decision is assumed to apply.

Issues Not Addressed in the Policy

The section does not address what access is permitted between the time a request to prohibit access is made and the court rules on the request. This is particularly critical if the request is made simultaneously with the filing of the information. It is also more critical where the parties represent themselves and are unaware of appropriate procedures. A state or individual court considering adoption of an access policy might consider adding a provision that access will be prohibited to the extent requested during the time a request is pending before the court. In order to avoid the use of such a provision to achieve at least temporary restriction a court should establish procedures that provide for prompt consideration of a request to prohibit access. Alternatively a court could require that a party file a motion to prohibit access with the information to be protected in a sealed envelope being lodged, but not filed, with the court. If the court grants the request, the information can be filed with prohibition to access. If the request is denied, the party has the option of filing the information without prohibition of access, or not filing it.

The section does also not address possible remedies for violating prohibitions on access.

Section 4.70 – COURT RECORDS IN ELECTRONIC FORM PRESUMPTIVELY SUBJECT TO REMOTE ACCESS BY THE PUBLIC

The following information in court records should be made remotely accessible to the public if it exists in electronic form, unless public access is restricted pursuant to section 4.20, 4.30 or 4.60(a):

(a) Litigant/party indexes to cases filed with the court;
(b) Listings of new case filings, including the names of the parties;
(c) Register of actions showing what documents have been filed in a case;
(d) Calendars or dockets of court proceedings, including the case number and caption, date and time of hearing, and location of hearing;
(e) Judgments, orders, or decrees in a case and liens affecting title to real property.

Commentary

Several types of information in court records have traditionally been given wider public distribution than merely making them publicly accessible at the courthouse. Typical examples are listed in this section. Often this information is regularly published in newspapers, particularly legal papers. Many early automated case management systems included a capability to make this information available electronically, at least on computer terminals in the courthouse, or through dial-up connections. Similarly, courts have long prepared registers of actions that indicate for each case what documents or other materials have been filed in the case. Again, early case management systems often automated this function. The summary or general nature of the information is such that there is little risk of harm to an individual or unwarranted invasion of privacy or proprietary business interests. This section of the policy acknowledges and encourages this public distribution practice by making these records presumptively accessible remotely, particularly if they are in electronic form. When a court begins to make information available remotely, they are encouraged to start with the categories of information identified in this list.

While not every court, or every automated system, is capable of providing this type of access, courts are encouraged to develop the capability to do so. The listing of information that should be made remotely available in no way is intended to imply that other information should not be made remotely available. Some court's systems may also make more information available remotely to litigants and their lawyers than is available to the public, but this is outside the scope of this policy (see section 2.00(h)).

Making certain types of information remotely accessible allows the court to make cost effective use of public resources provided for its operation. If the information is not available, someone requesting the information will have to call the court or come down to the courthouse and request the information. Public resources will be consumed with court staff locating case files containing the record or information, providing it to the requestor, and returning the case file to the shelf. If the requestor can obtain the

information remotely, without involvement of court staff, there will be less use of court resources.

In implementing this section a court should be mindful about what specific pieces of information are appropriately remotely accessible. Care should be taken that the release of information is consistent with all provisions of the access policy, especially regarding personal identification information. For example, the information remotely accessible should not include information presumptively excluded from public access pursuant to section 4.30, prohibited from public access by court order pursuant to 4.60(a), or not available remotely pursuant to 4.20. An example of calendar information that may not by accessible by law is that relating to juvenile cases, adoptions, and mental health cases (see commentary associated with section 4.30 (b)).

Subsection (e): One role of the judiciary, in resolving disputes, is to state the respective rights, obligations and interests of the parties to the dispute. This declaration of rights, obligations and interests usually is in the form of a judgment or other type of final order. Judgments or final orders have often had greater public accessibility by a statutory requirement that they be recorded in a "judgment roll" or some similar practice. One reason this is done is to simplify public access by placing all such information in one place, rather than making someone step through numerous individual case files to find them. Recognizing such practices, the policy specifically encourages this information to be remotely accessible if in electronic form.

There are circumstances where information about charges and convictions in criminal cases can change over time, which could mean copies of such listings derived from court records can become inaccurate unless updated. For example, a defendant may be charged with a felony, but the charge may be dismissed, or modified or reduced to a misdemeanor when the case is concluded. In other circumstances a felony conviction may be reduced to a misdemeanor conviction if the defendant successfully completes probation. These types of circumstances suggests that there be a disclaimer associated with such information, and that education about these possibilities be provided to litigants and the public.

WHEN ACCESSIBLE

Section 5.00 – WHEN COURT RECORDS MAY BE ACCESSED

(a) Court records will be available for public access in the courthouse during hours established by the court. Court records in electronic form to which the court allows remote access under this policy will be available for access at least during the hours established by the court for courthouse access, subject to unexpected technical failures or normal system maintenance announced in advance.

(b) Upon receiving a request for access to information the court will respond within a reasonable time regarding the availability of the information and provide the information within a reasonable time.

Commentary

This section of the policy requires a court to specify when court records are accessible. The policy directs, as a minimum, remote access be available at the same times as records are accessible at the courthouse. It does not preclude or require "after hours" access to court records in electronic form. Courts are encouraged to provide access to records in electronic form beyond the hours access is available at the courthouse, with a goal of 24 hours a day, seven days a week. However, it is not the intent of the policy to require courts to expend money or other resources to make remote access possible outside of normal business hours. The section acknowledges that access to electronic records may occasionally not be available during normal business hours because of unexpected interruptions to information technology systems, crashes, and during planned interruptions such as for back-up of databases, software upgrades or maintenance, or hardware upgrades or maintenance.

Subsection (b) addresses the question of how quickly the information will be made available. There are a number of factors that can affect how quickly the court responds to a request and provides the information, assuming it is publicly accessible. The response will be slower if the request is non-specific, is for a large amount of information, is for information that is in off-site storage, or requires significant amounts of court resources to respond to the request. The objective is to have a prompt and timely response to a request for information.

Issues Not Addressed in the Policy

A state or individual court considering adoption of an access policy should consider adding provisions designating a custodian of the record to respond to requests, or denials of requests. The custodian (often designated as the information steward, chief information officer, chief privacy officer, or ombudsperson) would be the person responsible and accountable for the implementation of the access policy. There are many roles for the custodian, from responding to requests for access, responding to denials of

access, responding to requests for bulk access (under section 4.40) or compiled access (under section 4.50), determining or reviewing fees to be charged for access, or addressing perceived delays in fulfilling requests.

Designating a custodian would be especially important where there has been a history of problems regarding access, or denial of access, but may introduce a delay or add a layer of bureaucracy in jurisdictions where there has not been a problem. Courts should educate all judges, court employees and the clerk of court staff regarding the requirements of the Guidelines (see section 8.30) and expect them to comply with the policies provision. Having one individual specifically responsible for responding to requests and complaints may allow other staff to feel they have been relieved from compliance with, and vigilance about, the Guideline's provisions. However, if there have been ongoing problems, designating an individual may be one way to address the problems and bring others into compliance.

Another issue that might be covered in a policy is a provision that gives litigants or the public the ability to access information in electronic form where they do not have the ability or equipment to obtain access. If information is only available in electronic form, the court should provide terminals or computers in the courthouse through which the public can obtain access, or make the information available through public libraries or other information access sites. See also the Commentary to section 3.20 regarding equal access to information.

FEES

Section 6.00 – FEES FOR ACCESS

The court may charge a fee for access to court records in electronic form, for remote access, or for bulk distribution or compiled information. To the extent that public access to information is provided exclusively through a vendor, the court will ensure that any fee imposed by the vendor for the cost of providing access is reasonable.

Commentary

This section recognizes that providing access to information in court records does consume court resources. Access is not without public cost. The cost of access is either absorbed by the taxpayers in funding the courts, or by those requesting access. The policy question for the court is what type and level of access should be funded by the taxpayer and at no cost to the requestor. It is assumed that any fee imposed will not be so prohibitive as to effectively deter or restrict access or create unequal access to justice. The section provides that if access is provided through a vendor, any fee imposed should be reasonable, particularly if access is exclusively through a vendor.

In some states, the preparation and access to the transcript of proceedings is within the authority of the court reporter, not the court. In such instances the existing state laws and rules governing the cost of the transcript, in paper or electronic form, are assumed to apply. The policy assumes the court or court reporter will use existing laws and practices to determine the amount of the fee. If there are no existing provisions for determining a fee, a state or individual court considering adoption of an access policy should address which costs are allowable for purposes of determining the fee.

Fees for bulk access pursuant to section 4.40 or compiled access pursuant to section 4.50 which require special programming or actions because the information is not regularly available in the form requested might be calculated differently from access fees for information regularly provided to the public or for "one at a time" access. One aspect of the cost could be the cost of staff time to produce a requested report where the staff are busy with court projects, and the work on the special report would be done at overtime rates.

Issues Not Addressed in the Policy

No provision is made in the section for waiver of any fee based on inability to pay. In most states there are provisions in existing law guiding waiver of fees, which would presumably be applicable for any access fee.

The policy is silent about whether providing access to the court record can be a revenue source for the court or level of government funding the court.

OBLIGATION OF VENDORS

Section 7.00 – OBLIGATIONS OF VENDORS PROVIDING INFORMATION TECHNOLOGY SUPPORT TO A COURT TO MAINTAIN COURT RECORDS

(a) If the court contracts with a vendor to provide information technology support to gather, store, or make accessible court records, the contract will require the vendor to comply with the intent and provisions of this access policy. For purposes of this section, "vendor" includes a state, county or local governmental agency that provides information technology services to a court.

(b) By contract the vendor will be required to comply with the requirement of sections 8.10, 8.20, 8.30, and 8.40 to educate litigants, the public, and its employees and subcontractors about the provisions of the access policy.

(c) By contract the vendor will be required to notify the court of any requests for compiled information or bulk distribution of information, including the vendor's requests for such information for its use.

Commentary

This section is intended to deal with the common situation where information technology services are provided to a court by another agency, usually in the executive branch, or by outsourcing of court information technology services to non-governmental entities. The intent is to have the policy apply regardless of who is providing the services involving court records. Implicit in this policy is the concept that court records are under the control of the judiciary, and that the judiciary has the responsibility to ensure public access to court records and to restrict access where appropriate. This is the case even if the information is maintained in systems operated by the executive branch of government, including where the clerk of court function is provided by an elected clerk or a clerk appointed by the executive or legislative branch and not the court. The policy provides a standard applicable to vendors as well as the courts.

Subsection (a): "Information technology support" is meant to include a wide range of activities, including records management services or equipment, making and keeping the verbatim record, computer hardware or software, database management, web sites, and communications services used by the court to maintain court records and provide public access to them. It would also apply to vendors who are only providing access to a copy of electronic court records maintained by the court itself or by an executive branch agency.

Vendor compliance is particularly important where the vendor's system is the only means of accessing the information. The court must ensure that the vendor is not using the exclusive control of access to limit access, whether through fees, technology

requirements, or a requirement to sign a "user agreement," particularly if it imposes restrictions on the use of the information that the court could not impose.

The relationship between the court and the vendor should include a process for monitoring the vendor's compliance with the policy and its record for providing appropriate access and protecting restricted information.

Subsection (b): The requirements of the policy regarding a vendor educating its employees or subcontractors, litigants, and the public is in addition to any incentive to do so provided by the liability or indemnity provisions of applicable law or the contract or agreement with the court.

A state or individual court considering adopting an access policy should review applicable law regarding misuse or abuse of information by vendors, court, or clerk of court employees so as to draft a policy that is consistent with, and supports the underlying policy of, existing liability laws.

Subsection (c): This subsection requires vendors to notify the court of requests for bulk information (pursuant to section 4.40) or compiled information (pursuant to section 4.50). The court must receive this notice in order to properly control the release of information in its records.

Issues Not Addressed in the Policy

A state or court using a vendor should consider including in the contract for the service provisions such as: 1) requiring regular updates of the information in the vendor's database to match the information in the court's database, 2) forwarding complaints received about the accuracy of information in the database, and 3) establishment of procedures to ensure that information to which access is restricted or prohibited are, in fact, restricted or prohibited from public access.

In considering adoption of an access policy a state or individual court should consider whether it wants to control, through its contract with the vendor, "downstream" access and distribution of information from court records that is held or maintained by the vendor. For example, the court could require that the vendor require anyone to whom it distributes information from court records to comply with this policy, or other laws such as the Fair Credit Reporting Act.

OBLIGATION OF THE COURT TO INFORM AND EDUCATE

Section 8.00 – INFORMATION AND EDUCATION REGARINDG ACCESS POLICY

Section 8.10 - DISSEMINATION OF INFORMATION TO LITIGANTS ABOUT ACCESS TO INFORMATION IN COURT RECORDS RDS

The court will make information available to litigants and the public that information in the court record about them is accessible to the public, including remotely and how to request to restrict the manner of access or to prohibit public access.

Commentary

This section of the policy recognizes that litigants may not be aware that information provided to the court, by them or other parties in the case, generally is accessible to the public, including, possibly, bulk downloads. Litigants may also be unaware that some of the information may be available electronically, possibly even remotely. To the extent litigants are unrepresented, this problem is even more significant, as they have no lawyer who can point this out. To address this possible lack of knowledge this section requires a court to inform litigants about public access to court records. Providing notice to all litigants may also lessen unequal treatment and inequity of access based on wealth.

The section also specifically requires the court to inform litigants of the process for requesting restrictions to the manner of access under section 4.20 and about how to request prohibition of public access to information in their case pursuant to section 4.60. It should include information about the unlikelihood of prohibiting access to some types of information. This would be especially important in cases involving domestic violence, sexual assault, stalking, requests for protective orders, or witnesses, where there is a greater risk of harm to individuals.

Issues Not Addressed in the Policy

The policy does not specify how information will be given, nor the extent of detail required. These issues need to be addressed by a state or individual court adopting an access policy. There are several approaches to accomplishing this. The notice could be a written notice or pamphlet received when filing initial pleadings. The pamphlet could refer the litigant to other sources of information, including a web site. The court could also provide materials, including videotapes, through a self-help center or service, or an ombudsperson. Consideration should also be given to providing the information in several common languages. Finally, the court could encourage the local bar to assist in educating litigants.

Information provided to litigants could include the following points:

- Any information a litigant includes in a document or other material filed with the court in a case is open to public access pursuant to applicable law, including this access policy;
- The information may be available remotely, such as by searching the courts database of information through the Internet;
- Any person may request access to the information you file with the court, regardless of the reason they want access or the use they will make of the information;
- Because there are few restrictions on what parties can say in documents filed with the court, there may be information accessible to the public that you feel is inaccurate, incomplete, untrue or unsubstantiated; and
- Court records generally have very long retention periods, so the information in the records will be publicly available for a long time.

The section specifically requires the court to provide information to litigants, and to the public generally. Similar arguments can be made for informing jurors, victims, and witnesses that information about them included in the court record is publicly accessible. A state or individual court adopting a policy should consider including a provision to provide notice to these groups. While it is relatively easy to provide information to jurors, providing information to victims and witnesses is much more problematic, as often only the lawyers, or law enforcement agencies, not the courts, know who the victims and potential witnesses are, at least initially.

Section 8.20 - DISSEMINATION OF INFORMATION TO THE PUBLIC ABOUT ACCESSING COURT RECORDS

The Court will develop and make information available to the public about how to obtain access to court records pursuant to this policy.

Commentary

Public access to court records is meaningless if the public does not know how to access the records. This section establishes an obligation on the court to provide information to the public, including jurors, victims, witnesses and other participants in judicial proceedings, about how to access court records.

There are a number of techniques to accomplish this, and a court may use several simultaneously. Brochures can be developed explaining access. Access methods can also be explained on court web sites. Tutorials on terminals in the courthouse or on web sites can be used to instruct the public on access without the direct assistance of court or clerk's office personnel.

Subjects the public could be informed about include: 1) why court records are open, 2) where and how to obtain access, 3) when access is available, 4) how to request

access to restricted information, whether restricted categorically or by specific court order, and the criteria the court will consider to allow access, 5) how to request restriction of access and the criteria the court will use to restrict access, 6) requests for bulk or compiled information, 7) possible fees for obtaining access or copies, and 8) consequences for misuse or abuse of access. If the court maintains logs of who requested information, this should be made known to users as well. Finally, it would be useful to point out to the public that the database is not 100% accurate, that there may be errors, and that the data may change as information is purged, sealed or modified as time goes on.

Section 8.30 – EDUCATION OF JUDGES AND COURT PERSONNEL ABOUT THE ACCESS POLICY

The Court and clerk of court will educate and train their personnel to comply with this policy so that Court and clerk of court offices respond to requests for access to court information in a manner consistent with this policy.

The Presiding Judge shall insure that all judges are informed about the policy.

Commentary

This section mandates that the court and clerk of court educate and train their employees to be able to properly implement the access policy. Properly trained employees will provide better customer service, facilitating access when appropriate, and preventing access when access is restricted. When properly trained, there is also less risk of inappropriate disclosure, thereby protecting privacy and lowering risk to individuals from disclosure of sensitive information. Training should also be provided to employees of other agencies, or their contractors, who have access to information in court records, for example as part of shared integrated criminal justice information systems.

The section also requires the Presiding or Chief Judge to make sure that judicial officers serving the court are aware of the access policy and its implications to their work and decisions.

One concern about court records is that the information in the records is accurate, timely, and not ambiguous. The problem exists equally with paper court records and court records in electronic form, but the possibility of broad scale access to electronic records heightens the risk. This risk is minimized if the court's practices for generating and maintaining the court record are sound, and the employees are well trained in the practices. Specific policies on accuracy and validation of data entry is not part of this policy, but should be addressed in internal policies and procedures.

The specifics of what courts should instruct employees about is not included in this access policy. Suggested subjects include at least the following: 1) intent of the policy, 2) awareness of access and restriction provisions, governing employees of other public entities as well as the public, 3) appropriate response to requests for access, 4)

process for requesting access or requesting restriction to access, 5) fees, 6) importance of timely and accurate data entry, and 7) consequences for misuse or abuse of access or improper release of restricted information. A court should also adopt personnel policy provisions indicating consequences for misuse, abuse or inappropriate disclosure of information in court records.

In addressing the means of access the court or clerk of court should be mindful of complying with the Americans with Disability Act. Means of access should be developed for those who are unable to access the information in electronic form just as they should be developed for paper records.

Section 8.40 – EDUCATION ABOUT PROCESS TO CHANGE INACCURATE INFORMATION IN A COURT RECORD

The Court will have a policy and will inform the public of the policy by which the court will correct inaccurate information in a court record.

Commentary

Court records are as susceptible to errors or incomplete information as any other public record. This section requires that courts have a policy (whether a rule or statute) specifying the method for reviewing information in court records and making any changes or additions that will make the record more accurate or complete. This section requires the court to inform the public of the policy. There may be different process for a 'data entry' error, as opposed to other alleged errors in information.

This policy does not provide a standard for when information must be changed or supplemented. It is not the intent of the policy as drafted to create a method for modifying a court record; rather, it relies on the existing procedures for introducing and challenging evidence or other information that is part of the court record.

The information provided to the public pursuant to this section should indicate: 1) that only a court order, not the clerk, nor a vendor, can make the change, 2) the criteria the court will use in deciding whether to change the record, 3) the likelihood of a change being made, and 4) that there will be a record of the request for the change as well as a record of what was changed.

ENDNOTES

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[1] The PACER ("Public Access to Court Electronic Records") system is a system that includes both the dockets and some actual case files documents in federal cases.
[2] See http://www.privacy.uscourts.gov/ b4amend.htm.
[3] Section 7 of the Privacy Act of 1974 (5 USC § 552a) provides that an individual cannot be refused any right, benefit, or privilege because of a refusal to disclose a SSN, and that any agency that requests a SSN shall inform the individual whether or not the disclosure is mandatory, and the authority for requesting the SSN. However, neither provisions addresses disclosure of the SSN to the public.
[4] See "Social Security Numbers; Government Benefits from SSN Use but Could Provide Better Safeguards," United States General Accounting Office, GAO-02-352, May 2002, pp. 57-58. Note there is federal legislation pending in 2002 (S. 848 - Feinstein) that would prohibit the display of SSNs to the public.
[5] 42 USC § 405(c)(2)(C)(viii)(I), which provides: "Social security account numbers and related records that are obtained or maintained by an authorized person pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security number."
[6] 42 USC § 405(c)(2)(C)(ii).
[7] 20 USC § 1232g.
[8] Public Law No. 104-191, sections 261-264
[9] "Standards for Privacy of Individually Identifiable Health Information," 45 CFR Part 160 and 164. The regulations became effective April 14, 2001, but compliance is not required until April 14, 2003.
[10] 42 CFR, Part 2 – Confidentiality of Alcohol and Drug Abuse Patient Records.
[11] 42 USC § 290dd-2. See "Federal Confidentiality Laws and How They Affect Drug Court Practitioners," National Drug Court Institute, April 1999.
[12] See "Report of the National Task Force on Privacy, Technology, and Criminal Justice Information," Bureau of Justice Statistics, NCJ-187669, August 2001.
[13] 28 CFR, Part 46 and 45 CFR section 46.
[14] 28 CFR § 46.101(b)(4).
[15] For example the Fair Credit Reporting Act, 15 USC §§ 1681 et seq.
[16] 18 USC § 2265(d)(1) – full faith and credit given to protective orders.