
NEW YORK COMMISSION
ON
PUBLIC ACCESS TO COURT RECORDS,
PUBLIC HEARING.

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MR. ABRAMS: Good afternoon. I'm Floyd Abrams. I'm the Chairman of the New York Commission on Public Access to Court Records. We welcome you all here.

With me today are a number of the distinguished members of our commission, including The Honorable Victoria Graffeo of the New York Court of Appeals, Hugh Campbell, Gary Spivey, Richard Griffin, Elizabeth Bryson, and Thomas Gleason.

When Chief Judge Kaye impaneled this commission last year, she asked us to advise the court system on a sometimes painfully difficult issue that arises out of the technological advances of recent years. It starts with the proposition that judicial records are, by their nature and as a general proposition of law, public records, and that as a general matter of federal constitutional law and state constitutional law, public records must be available to the public.

The new advances in technology, however, the Internet in particular, not only make it easier to disseminate public information than ever before, but it raises some new issues, which have led to the establishment of this commission. The glories of the Internet -- the ease of availability of

information, the 24/7 availability of information, the unconstrained nature of who may receive the information -- also raise potential problems.

We were established as a commission to try to recommend answers to some of those problems which are set forth in the materials that have been distributed throughout the state setting forth the questions that we are especially interested in. All of them, in one way or another, relate to the question of whether Internet access should lead us to take greater care, different steps, to protect privacy and other interests so as to accommodate those interests without overcoming the genuine and constitutionally rooted interest of the public in knowing about judicial records and what's in them.

We've reached no conclusions, and there are a number of different directions that this commission can go in in terms of what recommendations it makes. That's what makes the testimony so important. And we very much appreciate those of you that have come.

Announcing the formation of the commission, Judge Kaye put our task this way. She said: "In keeping with society's increasing reliance on technology, the court system will begin to make case

files available electronically within the next few years. But while providing greater access to this information, we must also be diligent to protect a litigant's right to privacy. We recognize that court records can contain sensitive information, such as Social Security and home telephone numbers, tax returns, medical reports, even signatures. I have charged this commission with the hard task of examining any potential pitfalls, weighing the demands of both open access and individual confidentiality, and making recommendations as to the manner in which we should proceed."

The only other thing I would say is that it is important to note at the start that not all case records are public records. Some examples of records that are not and have never been publicly available under New York law without a court order making them so are set forth in the hearing notice. They include records in matrimonial matters, child custody proceedings, presentencing reports and memoranda in criminal cases, documents containing HIV-related information or the identity of victims of sexual offenses, and other documents that are filed under seal under New York law. Our mandate is

not to revisit the laws and policies that provide for confidential treatment of these materials. Our mandate is to examine the interplay of the law, of the reality that the Internet is with us, and it and/or certain successors to it will be with us in the future, and to try to make certain recommendations about what to do about material that is public, not what to do about material that is already nonpublic.

That said, I want to start calling on our witnesses. I'd like to ask the witnesses who have written statements to make them available to us. I'd like to ask that witnesses speak for no more than ten minutes, and you get a special gold star if you do it in five minutes. It does give us more of an opportunity to question you if we have a little more time on our side of the line.

I'd like to call first Mr. David Swarts, the Erie County Clerk.

MR. SWARTS: Good afternoon. On behalf of the residents and citizens of Erie County, I welcome you to Erie County and Buffalo, New York, and thank you for the opportunity to come by today to make presentation.

I was -- as I was writing up my comments, which I am not going to give you because they will never reach the level of intellect that I read in some of the other ones that have been delivered of previous conferences, I was thinking that you said ten minutes. Well, there are 51 county clerks in the State of New York who are like me, elected officials, so they divide 51 into ten, we're not given much time. But I'll try to limit my comments to the ten minutes.

What I thought would be important today would be to give you an overview of what county clerks do. You're very familiar with what county clerks do in New York City. Eleven counties, particularly downstate, obviously, have a different function in many respects from the myriad functions that county clerks upstate have. So I'd like to give you an overview of that first, if I could.

We are the registrar of the county. We handle all sorts of land records, corporations, judgments. We are responsible for the historical and archival records in the county. We -- many of us issue pistol permits or are responsible for the administration of the pistol permit process. Some

of us are commissioner of jurors, some of us are records management officers for the county. Fifty-one of the 62 counties are responsible for acting as agents for the New York State Department of Motor Vehicles and running motor vehicle transactions. We are the clerk of the county in Supreme Court. We are utilizers and sometimes developers of technology in terms of access to the public records that we have.

We are, as I said, elected officials. We are, all of us, committed to providing not only access to the records that we have, but also to ensure that we maintain a high level of customer service for all of the folks that we interact with. We interact with the general population, at least in Erie County, and I'm probably -- it's probably pretty much the same throughout the state. We interact on a regular basis with more residents in a county than any other government agency. Last year in the Erie County Auto Bureau, we performed -- or the Erie County Clerk's Office, we performed 2.5 million customer service transactions. It's a huge operation. We interact at all different levels.

We are perceived to be revenue producers for

the county. Our offices generate revenue every year, and we're expected to do that by the administration, by the boards of supervisors, or by the county legislatures. I might add that most of the functions I'm responsible for we generate on the plus side of the ledger; however, when I look at the actions and proceedings, or the court function, I have to let you know that we operate on the negative side of the function -- the ledger. The last year we took in \$3.2 million in Erie County in court fees; we retained for our services \$78 thousand and some change, and it cost me about \$400 thousand a year to operate actions and proceedings. And this ratio is probably -- probably pretty much the same for county clerks across the state. We have a good relationship with the Office of Court Administration, and on behalf of the county clerks I've been instructed by the court committee to let you all know that we would like to maintain and to expand that relationship where possible.

We have been involved with technology on the ground floor, the clerk's office. Obviously as the receivers of all sorts of official documents, we're under enormous pressure by the presenters of those

documents, many of them representing businesses who have resources to implement technology, for us to go in that direction. There's been an awful lot of pressure. And what I'd like to, for a few moments, give you an overview of what we've done in the county clerk's office, because it's very similar to what other counties are doing now and where you're ultimately going with the questions that you're posing here today and with this commission.

In 1993, faced with all sorts of problems related to space, staffing, proper utilization of staff efficiencies, economies of scale, whatever the question may be, we looked at this operation in the clerk's office and said, we must utilize technology, and we began the process of looking at our office. We involved the users of the office -- we've created a users' committee -- we involved the employees in the office, so that they can help us design a product that would be accepted, where the users and the staff would have some sense of ownership. And since 1993, we -- we have really, I think, implemented one of the most sophisticated county clerk systems, technologically, in the State of New York.

We were the first -- one of the first, if not the first county clerk's office in the state to utilize optical imaging technology. We were the first in the county to allow for our records to be accessible, data and images, over a secure worldwide net, IBM first, then AT&T. Then we went to an intranet, where through subscription we would allow access to our records. And a couple years ago we went the next step, along with Broome County and Monroe County in the State of New York allowing access to data images over the Internet.

We -- and how we basically do this is that we scan all the documents as they come in real time -- first thing that happens, we present the document, the document is entered in the system. As soon as the enter button is hit, what happens is the data is available not only in our offices, but available to anyone on the Internet. On the same day, anything that's imaged will ultimately be paired to the -- the data, and so that you have within 24 hours on our system, in office, the real production, live data available over the Internet.

We charge for that, though. Not all of it. You can have unfettered access to -- with no cost,

to the data side of the information that we collect; but if you want to see the image on the Internet, you will pay \$5 per image. Or, you will pay \$500 a month for unlimited access to images. Now, there are no rules for this, there's no -- there are no standards in the statutes as to what we charge, so basically we're left out there in the market to basically decide what the costs will be.

And why do we do all of this? Well, we had space issues and demands from the public, and so on.

I'm going to skip that part, because I reiterated and I don't want you all to fall asleep as I'm proceeding here.

When we decided to go on the Internet and make our records available, whether it's in the County of Erie or any of the number of other counties in the State of New York that are doing the same thing now or will be doing the same thing now, the issues that you face -- facing in this -- by this commission were things that we were very much concerned about.

Privacy. We're concerned about -- there are natural barriers when people have to come down to the courthouse or the county clerk's office to get that information. Once it's out there, there are

all sorts of issues that we were concerned about. I mean, I frequently get requests from the public asking me to delete their names from the official record that we give to The Buffalo News, or to the Business First, or any other publication. And their justifications are they've been abused, they've been harassed, they've been stalked, they're a private investigator, they work for the FBI, they work for the District Attorney's Office, they prosecute cases. Any number of things, all of them which are extremely legitimate.

And we were faced with that issue. And quite frankly, we internally made a decision to delete the names that went to The Buffalo News and to Business First, and obviously those of you who are attorneys, who are judges, realize that I just violated the First Amendment. And, of course, when that was brought to our attention, we stopped doing that. And now it's basically the responsibility of the attorney, whoever the parties to the action may be, to go to the news, the media outlets and ask that that information be deleted from the record that is presented in the newspaper.

And I believe that this is the type of stuff,

the type of problems that you will face in a much more complicated basis than what I experience at this particular level.

In terms of your questions, the first question, technology is driving the public, obviously, to want more and more information. I daily get requests by E-mail asking me to provide these people, who I don't even know, who are somewhere else, other parts of the world, other parts of the county, with all sorts of information. And I don't know what they're doing with that information. It's certainly not my responsibility. But it's a question that comes to my mind because, as I said, one of our responsibilities is the auto bureau. We issue identity all the time. And we're very concerned about the ability of an individual to utilize public documents to create another identity. And particularly so we're much more sensitive to that since 9/11. We regularly have now officials from the New York State police, INS, from agencies since 9/11 under the Homeland Security Administration coming into our offices, monitoring the information that we receive from the public to ensure that the identity that we're creating is the

person who is there. And this is certainly, as I read through the reports, an issue that is of grave concern.

We block out Social Security numbers, we do not allow access to credit cards or banks, and so on. On the pistol permits, for example, the only thing that's available to the public on the Internet is the name and the address. We are precluded by law from providing anything else. TP 584, 5272, the forms that are filed with real estate transactions have Social Security numbers on them. We do not put those on our system. If a document comes in and one of our cashiers or examiners notices that there's a Social Security number on that document or if they notice a credit card number, they've been instructed to ask the filer, do you want this to go on record? Because of course, it's now part of our record, and when the person who may be abused or whose rights have been violated or whatever the case may be, comes back, we initially -- we are the ones who get questioned. We take the brunt of the burden on this.

We -- getting to the next question, the fourth question I'm basically on now. We don't make public

policy; but as I indicated, we're on the front line and will receive certain criticism from the public whether and if this type of information is available. I've already said that.

Courts. The question there was what's the responsibility of the courts and the attorney? Obviously greater responsibility to ensure that the rights of the individual are protected; but at the same time to insulate the receiver of those documents, the public entity, from the ultimate criticism that they're going to get. And we are on the front line. We get that, and these county folks are elected officials and they need to protect themselves from that.

A whole series of practical things -- and this is my last area, okay? As I said before, clerks want a role; it's a question of the cost of the system. My system, over the last 11 years, is costing Erie County well over \$5 million. The new system that they just put in New York State, the Equa system, costs \$75 million. Huge costs associated with this. I guess the question, what will the role of the clerks be in this? What -- who will maintain the records of the OCA? Who's going

to maintain the electronic record? Who maintains the old paper records?

As I said before, we put all of the court records, the data is on the system. And I will give this to you, you can take a look at the -- our screens, if you'd like. Just hand them up to you. And you can see everything that an individual can get on the -- on the system. The defendants' names, party name, certainly by reference number or index number. You can get all sorts of information related to the parties to the action, about the property, the notations. You can get all sorts of things. This is available right now.

We do not, as I said before, allow for access to the images of court records, too costly to do that, and certainly would raise all sorts of questions about whether or not we have the ability. Who scans the documents? Who rescans the documents? Who resolves the conflicts that invariably happen when you start putting this information on the Internet? Where's the centralized storage for this? Have one mainframe located someplace else? Are you going to have regional storage facilities? Are you going to have a situation where every county,

whether it's a county clerk or some other entity receiving these documents? How are you going to relate to E-recording and all of the complications associated with that? These are things that certainly I'm sure this commission has thought about, certainly will think about as it deliberates in making its final recommendation to Judge Kaye.

I was at a conference a couple years ago on privacy, where a lot of these issues were raised. And I was amazed to learn what was available on the Internet in other states. And the presenter from Florida absolutely floored me when I became personally aware of what one could get on the Internet. Not the information that you have -- not only the information that you have in front of you, but the details of cases, matrimonial cases that ultimately occurred on the Internet. And I was offended by that as a citizen, notwithstanding the rights guaranteed under the Constitution. But I believe there's a point at which we have to use some judgment to protect the rights of the individual. And I believe that my view, while it may not be constitutionally correct, is probably the view of the majority of the people in this country. And I

understand that since that forum, the State of Florida has revised its access somewhat, and I'm sure that it's a result of the criticism or whatever that occurred to their original plan.

That's the end of my comments. Thank you for listening; and if you have any questions, I would be more than happy to try to answer them.

MR. ABRAMS: Thank you very much. I'm sure we will have a lot of questions. What you've said is enormously valuable and stimulating to us.

Could you talk a little bit more about the blocking out efforts that your office makes. Do you block out Social Security numbers only on a pistol permit, or from the -- from all the records that you scan in?

MR. SWARTS: Well, what happens is on a pistol permit document, when we index that document, we index all sorts of information. But we limit the fields for public access only to the fields that involve the name and the address. Any of the other information is not linked. When -- we also image those documents, the papers that come in, but you're unable to access the two. We block those out. The technology prevents -- it allows us the ability to

prevent access to that.

If a presenter, Mr. Griffin, came in and presented a document to us on some kind of land transaction or whatever the case may be, and it contained Social Security numbers, we would ask, if it is caught by the examiners -- not really our responsibility, it's presented there -- we would ask as a matter of course on record, do you want to block it out? If the answer is "I don't care," we will run it right through the system. And clearly, you know, that raises some issues. On the 5272s -- 5217s and TP 584, those documents that accompany land documents, we do not image at all. We transfer those to the real property department and they are not available, and I'm pretty certain that the statutes prevents them from being available in our system. So that's --

MR. ABRAMS: Have you had any complaints from the public, including the press, about the policies that you've described to us?

MR. SWARTS: Well, people generally express concern when they realize what's available on the system. We frequently get folks walking into the office, E-mailing me, or calling, complaining that

they didn't know that the amount of consideration for the piece of property that they bought is going to be in the Buffalo News on Monday morning, and they read it, and they call and they're very upset. We let them know that it is a public record, and the newspaper purchased that -- purchases that, which they are allowed by statute to do, and we're just complying with the law. It doesn't dissuade them from their outrage, but it -- you know, it is what it is.

HON. V. GRAFFEO: Thank you, Mr. Swarts. Do you -- can I ask you a question? Are you currently scanning all of the documents that would come in as court records to be filed under index number?

MR. SWARTS: No, we don't scan any court record. If I did that, I would have to have probably another 15 people.

HON. V. GRAFFEO: That was going to be my question. I was going to get to resources. What kind of equipment and personnel you would need to undertake that kind of effort, because I presume you have some idea of the quantity that comes in.

MR. SWARTS: We have -- last year we sold around 16,000 index numbers in the County of Erie.

Okay? And that -- all of those cases obviously are started with some kind of paper. And then with all of the motions, the orders, the decisions, all of those, the actions, they ultimately get into that -- that file. Some are small, some are big.

I'll give you an example of what happened the other day in the registrar's office. We took in 1200 transactions related to mortgage real estate transactions on Monday. Large volume for us. The data was available immediately because we take those in immediately. It took us two days, to today, to pair them, because the volume was so great.

Now, if we were to do that with court records on an annualized basis, I would need double the staff, at least, to handle the documents that come in, to scan them, to ensure that the quality of the documents -- a lot of the documents that are presented to us are not uniform. They are light in color, the notary stamps may not be properly darkened enough for us. We're getting a lot of copies that come off of printers that are very light, and we're under all sorts of pressure. If you can imagine, an attorney who wants something on file right away, and we say to them, well, you know,

this isn't going to work out very well, it won't show up on the record. Particularly with land records this happens. Do you want this to go on anyway? And they say yes, and then we note on the record that the filer requested that this go on despite the quality of it. If it's really bad, we won't accept it.

HON. V. GRAFFEO: When you ask -- or when one of your employees asks someone if they want to eliminate some information that appears, say your Social Security number, does your staff actually do that redaction?

MR. SWARTS: It will not do that. Filer will take care of it. We won't touch it.

HON. V. GRAFFEO: So you're not engaging in the redaction of any information of what's filed?

MR. SWARTS: No, no. We don't believe we have the authority to do it. Obviously what we're doing is a courtesy. Our staff gets very concerned about this information, because they're people.

HON. V. GRAFFEO: Do you have any court records that are being electronically filed in Erie County?

MR. SWARTS: No, we're not part of that project.

HON. V. GRAFFEO: The pilot program, you don't have that?

MR. SWARTS: No. But just getting back to your original question, I mean it is -- the costs of this would be very, very high, and that's the reason why we did not do it. As a matter of fact, because of -- we're going through this court construction project now, and we have to try and find a place for all of these court records, these paper records. On one hand, I would love to see them electronic, all sorts of practical problems and reasons why that should be the case. With these paper records that we have right now, trying to consolidate them all into one place is the major task before us. And I have to tell you, it's a huge, huge volume of records. Huge. And so if we're going to image all those, big issues.

MR. GLEASON: You mentioned for a couple of records or parts of records that were private. One was this filing with tax or Social Security information for real property transactions, and the other, I guess, part of the pistol permit, you accept for filing but you don't make it public?

MR. SWARTS: Right.

MR. GLEASON: Can you give us information on any other documents that you receive for filing that are not made available to the public?

MR. SWARTS: Well obviously you mentioned in your opening comments, the matrimonials, cases that are closed by court order. I'm trying to think of any other document -- well, marriage records that are less than 75 years, we are not allowed to make public. What else?

MR. GLEASON: The marriage records are not made public?

MR. SWARTS: Not to general scrutiny.

MR. GLEASON: Oh, really?

MR. SWARTS: Unless they're over 75 years. I can't think of anything else offhand. Outside of the courts.

MR. GLEASON: What would be filed in the marriage? The marriage certificate?

MR. SWARTS: Well, we don't accept marriage certificates; we're only on the dissolution end of it. I wanted the authority to do both of those. Both the married people and do the divorce thing, give them a cut rate, we could make a little more money. I haven't got the legislators to agree to do

that. But we -- the older records, these are historical, archival records we have. We only have marriage records through 1935.

MR. GLEASON: Those divorce or marriage?

MR. SWARTS: Marriage records. We have no other violation records kept for that small. Some of the naturalization records, historically I think there are some records on what the public has access to; but other than that, it's basically available to the public.

MS. BRYSON: With my colleagues' consideration, I actually have a few questions, because I'd like to understand better -- I'd like to understand better what your -- the mechanics of the process are.

You indicated that you use optical scanning. When the records are scanned in, do you scan them in as text or do you scan them in as images?

MR. SWARTS: Okay. What happens is you're presenting a document to us. What the examiner does, they examine the paper, make sure it's correct to form, proper notarization, all that, count the number of pages. And immediately they begin entering that information, parties to the action, whether it's a land record or an index number that

we're issuing. And they fill in the appropriate screens, keep scrolling through it. And then the computer calculates the fees. And as soon as they hit the enter button, that information is available on -- on the system.

Many of the documents are fully indexed at the point of entry. Some of the documents, if there are multiple parties to an action, we don't expect the examiner, cashier to enter all the names. They'll enter the first party names and then move on. Then periodically, regularly, throughout the day, those documents are picked up, they're brought to the prep area where staples have to be removed, count the number of pages again to make sure that the cover sheet that we create is the cover sheet that's associated with that particular document. And then if there are seals on them, to chalk them out to make sure they come up on the screen. We do some initial quality control to make sure that the quality of the print is legible, that the darkness of the print is sufficient so the scanner can pick it up. Then they're brought in the scan room.

At the bottom of the cover sheet is a bar code which is the identifier information that then also

links it to the image. The image then is -- the documents are sent through the system, the document is fully imaged, and then it is sent to our computer, to the DASD, where it stores for three or four days. And then ultimately it is transferred to a disk CD-ROM and resides in our jukebox. And as soon as the images goes through that scanner, then the technology allows for that data and image to be linked together, together.

So you can go into our system on-line, put my name in, and get all of my mortgage debts. And then you can at the same time, if you pay the \$5, bring up the image. If you're in the office, you have absolute access to everything we have in the system, and --

MS. BRYSON: So it appears that the actual image itself is an image, not a text searchable?

MR. SWARTS: No, it's just an image of that document. You could not go --

MS. BRYSON: In order to get the information that purports to be on that image, you have to go through the index, the data file?

MR. SWARTS: Right. You actually have to pull up that image and read it. You're not going to be

able to pull up -- if you're looking for certain phrases or names or that kind of thing, you will not be able to do it on our system.

MS. BRYSON: Can you explain how you control your access, the \$5, the \$500? Is there an application process? Is there any limits? Have you ever had a situation where someone's been denied access because they've abused it?

MR. SWARTS: All of those. What happens is if you want to get access to the image right now, you have to contact us, our data processing department, establishes an account, you're issued a password and another access code. And that allows you to get into that image. And our system, our computer system calculates every time you use that system and charges you \$5 for that image.

Now, if the image is one page, it's five bucks; if it's 50 pages, it's \$5. You can print it, do whatever you want with it after you paid that money. Once you hit the plateau of \$500, then you have unlimited access to -- to all of the images that are there. We -- I -- we have never received -- I've never received a formal complaint from anyone regarding charging for that information. And I

think part of the reason for it is that the information is fully available at no cost in the office. The data on the system is available at no cost. But as we explain to our users, most of them are here, although we're getting more and more customers from around the world, particularly as the mortgage market expands infinitely. But they view it as incredibly useful and time saving for them. And we have many of our customers who actually pay us up front 500 bucks every month.

Now, abuse. We had a company that took license with the phrase in our agreement that said "unlimited access." Well, they had someone on their staff that went through and actually entered our system and downloaded all of the data, which was certainly not what anyone intended. And we found out by coincidence, because we monitor the performance levels regularly, we can watch on the screen to see how much time space is available and all of those kind of things. And the system was slowing down. All of the users in the office were complaining, it took forever to pull up simple data, it took forever to see an image.

So we went to this program, and we saw this one

user who was utilizing 90 percent of the time available space on the system. And so we cut them off. And then we didn't know if there was a glitch in the system or what the problem was. This happened for a couple days, and then ultimately we -- we realized who it was. We went and we discovered and we brought in all of the legal people and so on and so forth, and they paid us large amounts of money to rectify the problem. But people have been able to do that.

MS. BRYSON: Have you had any -- other than the sort of I-wish-you-hadn't-exposed-my-personal-information-on-the-Internet kind of concerns, have you had any circumstances where someone said that they were affirmatively harmed as a result of this? Either their identity was stolen, or they had a circumstance where they were threatened or -- or stalked or, you know, something beyond embarrassment?

MR. SWARTS: Yeah.

MS. BRYSON: Can you explain what circumstances?

MR. SWARTS: On numerous occasions, I can't tell you the number of times that attorneys would

come in with clients, oftentimes female, who had gone through divorces, who were being stalked, abused, court orders against former husbands to stay away. I remember one time a woman coming in bruised, having been beaten up by -- whether spouse or whomever, and -- and these people complaining about this information being available. And I can recall one person, the attorneys coming in -- many examples, but I can remember one, where an attorney came in after the fact when we denied -- when we had to change that policy that we were implementing because the papers did not feel it was necessary to delete that from what they presented, a person was harmed, was physically harmed as a result of that.

MR. ABRAMS: Could I just be clear, what the document was that led to this?

MR. SWARTS: This particular one was a land record. So what happened was in the newspaper, every Monday morning in The Buffalo News, they print the transactions, property sales from the week before, and there's location, names, the amount of consideration. And it was one of these particular instances.

MR. SPIVEY: Did you say that you could -- a

customer could access certain images, and when they did so, certain information was not available to them when they looked at the image, like the Social Security number, that might have been on the original document?

MR. SWARTS: Well, again, documents that have Social Security numbers on them, official documents which require Social Security numbers, we do not put on the system at all. There are times when documents are presented to us where personal information is on them, particularly the two that I mentioned, Social Security numbers as well as credit card numbers. Credit card numbers less frequently, Social Security numbers not that common, but it happens. Where our examiners will mention if they see it to the attorney, there's a Social Security number here, do you want to block this out? Now not technologically, because it could be anywhere on that document, but actually cross it out. Black it out with a Magic Marker, whatever the case may be. And if they choose to do that, then that's fine. If not, you know, the record will be scanned.

MS. BRYSON: I have one other question. In establishing your procedures internally within the

court and within the various offices that you obviously manage, have you established any procedures that would either train the staff or which would provide guidance to the staff on when they should ask those questions about, you know, in this instance you should ask whether or not Social Security number? Is this something that you found is sort of intuitive or something that you've found requires some training?

MR. SWARTS: I think it's a little bit of both. Intuitive. Some folks -- some of our folks are a lot more interested in that for whatever personal reasons. But also, all of our examiners receive manuals that are filled with all sorts of data on how they should conduct their -- their jobs; and in there, you know, we do, when they're presented, we talk about things like keeping 584 and the Social Security numbers and that information isn't public information. And you don't have access, you can't -- our staff -- no one on our staff, except for a few supervisors, can pull up information on pistol permits. There's security codes and -- you know what I'm talking about, that prevent just general access to that. So it's -- it's -- it's a

little bit of instruction as well as common sense at work here. But I do believe -- in the Auto Bureau, for example, though, it's much, much more strict because we're under a different -- different pressures there.

MS. BRYSON: Thank you.

MR. ABRAMS: Your last question from me: Look ahead to the future --

MR. SWARTS: We exceeded our ten minutes.

MR. ABRAMS: I know it. Look ahead to the future and a day when Erie County, perhaps the whole state, does have electronic filings, and which electronic filings are the norm and not simply a prediction. In that world, what -- how would you answer or think about the answer to our question two, the first line, which asks: Why should any information that is currently deemed public be subject to greater restrictions if made available for public access on the Internet by the Uniform -- by the Unified Court System? Are there distinctions that, if it were up to you, you would make in a world of electronic filings which would treat the Internet differently or treat differently the answer to the question, what shall the public be entitled

to see in this filing?

MR. SWARTS: I think that, as I look at this question, those points -- Social Security, credit card numbers, date of birth, and so on -- I'm real sensitive to that stuff because I see people walking into the Auto Bureau day in and day out trying to maintain, create, or enhance an identity. And as we become more technologically savvy, there will be more and more people who will utilize the Internet not to accomplish E-recording, efficiencies, and economies of scale and all those other kinds of things. They'll be going at it to create identities. And I think that this commission and -- clearly has a huge task before it.

E-recording is going to happen. The next phase of where we're at is to establish a front-end system so that we can accept electronically recorded documents, and that raises all sorts of issues for us, and particularly with the court records. If you do that, and we have a role in that, I'm concerned because the first place that people are going to come to complain about this information being available will be the individual where that information is accessible. And if it's going to be

the county clerks, that's where it's going to come.

So it seems to me every measure ought to be considered to limit that. I mean, there are free speech people that will say it's there, it's public. But I think the world has changed dramatically; and even though the Internet provides us with all of these great opportunities, it also has a number of very, very serious problems that need to be addressed, and I would hope that you would do that. Block it out.

MR. ABRAMS: Thank you, Mr. Swarts. You can be assured that we will be calling on you to talk to you more, to get more views. Thank you very much.

MR. SWARTS: Thank you very much. And all of you have a great day. Thank you.

MR. ABRAMS: Lucy Dalglish.

MS. DALGLISH: Thank you, Mr. Chairman. I'm going to take the admonition of ten minutes very much to heart because I have to catch an airplane. So my apologies, I'm going to really have to bolt at 2 o'clock.

My organization, the Reporters' Committee for Freedom of the Press, is a national legal defense and advocacy organization for journalists. We were

founded 33 years ago, and we're based in Washington, D C. Personally, I'm a former journalist and a former trial lawyer.

We in the Reporters' Committee have been keeping an eye on these issues nationwide. We've already testified before the Federal Judiciary and before the Maryland Court of Appeals, and filed comments in Florida, California, and other states. And I served on the advisory committee that came up with the proposed guidelines for the National Center for State Courts.

In a sense, you in New York have it much easier than a lot of other states because it's, as already been mentioned, there are a lot of records that are public in other states that are not public records in New York, and you do not have to make the decision having to do with Family Court records and certain criminal information that is already nonpublic. Along the way, while you're making these decisions, I hope you will find our web site at www.rcfp.org to be useful. This web site summarizes what the other states are doing in this area, and it also summarizes dozens of award winning stories that were done with court information. And I have

prepared printouts of all of that, and I will leave it with your associates in the back before I leave.

In general, I'd like to talk for a moment about our philosophy of how you should handle these records. Specifically, I would hope that any rules that you come up with would explicitly recognize in the preamble that -- the common law and constitutional right of access to court proceedings and the attendant right of access to court records. In devising New York's rules on electronic access, we also hope that you will recognize that the right of access and the right of privacy are not exactly equal under the law. Nevertheless, sometimes we do recognize privacy rights are so profound they must be protected.

We believe that the Federal Judiciary reached the right balance in 2001 when it drafted its own rules for how to handle electronically stored information in civil cases. Under those rules, if it is open to the public when it's in a file cabinet at the courthouse, it is also open to the public via the Internet or through the Federal PACER System. Any concerns about private or sensitive information should be handled the way it is now, with a

protective order from a judge following public notice. The judge should follow the fundamental principles of due process that mandate public access not be limited unless there are specific compelling reasons supported by evidence and not just mere conjecture to deny public access to any court records.

We think we -- the federal government also has a pretty good solution to the identity theft problem. The federal rules, which are in the process of being implemented, require lawyers to file documents and only file the last four digits of Social Security numbers and credit card numbers and bank account numbers with the publicly filed documents, whether they be in paper or electronic form. If a number is so important that the court has to have that number, those numbers are -- are collected in a separate sheet or separate document that is in the paper file in a special place, and it is in the electronic file only accessible to the parties, the court, and the lawyers. And in this way, they think they're going to be able to stop some of the problems that could come up because of identity theft.

We disagree with the federal government's position on birth dates and phone numbers being excluded. Let me explain to you why that is. It helps journalists and other members of the public distinguish between people who have the same name, for one thing.

Let me give you an example. A number of years ago when I was practicing law in Minneapolis, there was a case where a gentleman by the name of Peter Vitale was arrested with a number of other folks indicted by the Feds on a major drug ring. He was about 30 years old. He came from a large family of Vitales. The -- and they said in the court documents that he owned a TV repair shop.

Well, young Mr. Vitale owned a TV repair shop up on Snelling Avenue up in the north part of St. Paul. His father, Peter Vitale Sr., owned a similar shop on South Snelling in the Highland Park neighborhood. Guess who all the TV stations went over and did the story about and identified as the defendant in this particular case? If they had access to the birth dates, they would have been able to figure out that it was Peter -- that this Peter Vitale Sr. that they were staking out was the wrong

Peter Vitale.

So we would argue for more information rather than less to -- simply to preclude some of those identity problems.

As far as fees go, you asked us to talk about that. We would recommend that there be no fees for just mere access to the public records. But if a fee is necessary for a copy or printout, a system such as the Federal PACER System could be very effective. The cost must be minimal and not devised to recoup the costs of setting up the computer system. The average citizen should be able to afford to use the system. It should not -- the documents should not be charged whatever market value some private business is willing to pay for the document.

Just a note here, that there are a number of examples of full documents being posted now in major criminal cases, and I would encourage you to log onto the web site for the eastern -- Federal Eastern District of Virginia and go through the filings and see the system they have set up in the Moussaoui trial. The clerk of the court recognized immediately that this was going to be a fiasco if he

or she didn't get it under control. So now anybody has the ability and, of course, unless the Judge has sealed the document, there are certainly a lot of sealed documents in that case, but if you want it, you go to the Moussaoui site on the web site, you go through the docket, there's a description of the docket, you click on it, and the whole thing pops up. And it is greatly reducing the workload in the clerk's office in that very important case.

You asked the question, how should searches be available? Well obviously a full text search is going to be the most valuable to anyone, and that's the goal that we should all be shooting for. But I don't think -- I'm not aware of any state that has that full capability right now, and I think that's in the long term. But certainly as a -- at a bare minimum, cases should be available filed by docket numbers, by party names, and you should also have the ability to search by calendar date. Because as you know, a lot of reporters will go in on a daily basis and just look and see what was filed on that particular date, and there are a lot of other people who use the information in that way also. With the ultimate goal being full text-searchable documents.

I had, when I was testifying in front of the Maryland Court of Appeals, I had one of the justices look at me, he says, I just don't understand why we should be buying this big expensive system just for the benefit of the media. And as I pointed out to him, you know, this is going to happen whether there's a media or there isn't a media, because eventually your court system is going to be taking in documents electronically, it's going to be managing the documents electronically, and you're going to be doing this regardless of whether or not it's of benefit to the media or other private interests.

I just finally wanted to say that one of the reasons we decided at the Reporters' Committee that it was so important for me to come up here from Washington is that as -- as you're probably very well aware, what New York does has a great impact across the country, and people are watching you folks. And it's very important that you do a very thorough job, and I know you're very well aware of that, but everyone is watching to see what happens. Because what happens in New York is going to set the tone for what happens in the rest of the country.

And I apologize for that breathless presentation, and I probably have time for one or two questions, if it's necessary. But I will leave this -- I will leave these documents, and I'm certainly happy to talk to any of you on the phone at any time.

MR. GLEASON: My standard question I ask: When would you consider the constitutional right of access to attach in terms of something that's filed? Point in time? Is it immediately when it hits the clerk's office? Or would it be possible, consistent with your view of the constitution, for a filing to be maintained confidential for some short period of time after the filing?

MS. DALGLISH: Maintained by who?

MR. GLEASON: By the clerk. In other words, it would be filed perhaps by the parties, available to the parties and not available to the public for some period of time after filing in an Internet filing system. Would you believe that to be constitutional?

MS. DALGLISH: No, I really wouldn't.

MR. GLEASON: Do you have any authority for the proposition that the constitutional right attaches

at the moment of filing with the clerk?

MS. DALGLISH: Not off the top of my head; but I think if you gave me a couple of hours, I probably could. I don't know -- I'm not aware of any cases that specifically say that that's when it attaches, because quite honestly I'm not aware of any situations where the paper documents, that they were not public at the time the clerk got them.

MR. GLEASON: One of the differences, you might say, in an electronic filing system is that you have that being off the service dissemination mechanism. So perhaps much more would be filed on the electronic system than might be filed in the clerk's office on a paper case according to today's practice. And the problem that might arise on the Internet filed cases is if something is confidential and it is immediately available on the Internet without delay, then any objection to the information in the document that the other side might want to make would be lost because the document might immediately be public.

MS. DALGLISH: Well, I think -- I mean, my response to that would be to have rules set up that have a procedure for if there's something that could

be disputable about whether or not it's confidential, or if you are going to submit something as a confidential document, I mean it should have some sort of protective order set up ahead of time to handle situations like that.

But I -- I -- as -- in general, I do not favor treating documents -- treating information differently whether or not it's filed electronically or in a paper. And I think any rules you come up with should have -- have the lawyers thinking forward and not filing that information knowing that it's not going to be available, like, you know, telling -- telling lawyers ahead of time, we're not going to accept full Social Security numbers in publicly filed documents. And I think you handle it that way at the outset rather than trying to redact things, take things out of the public file that's in the file cabinet -- that's available in the file cabinet but not available electronically.

MR. ABRAMS: Thank you very much. Thanks for coming up from Washington. Have a good flight.

MS. DALGLISH: You're very welcome.

MR. ABRAMS: Sharon Stern-Gerstman.

MS. STERN-GERSTMAN: Good afternoon. I am the

chair of the Committee on Civil Practice Law and Rules for the New York State Bar Association. I am speaking for the committee only and not for the Bar Association as a whole.

Our committee has a great deal of interest in electronic filing and access to court information through electronic means. The questions that the commission has posed regarding privacy issues are of great concern to the members of our committee, particularly our members with considerable experience with electronic filing in New York in federal courts. Nonetheless, these issues principally concerning privacy do not fall within any particular expertise of our committee; and in contrast, the question of electronic filing is indeed within our jurisdiction. And frankly, that was a question that we could agree upon, whereas the six questions that you posed we could not agree upon.

Therefore, I'd like to limit my remarks to the effect on electronic filing itself. We readily await the work of this commission in recommending to what extent court records should be available through the Internet, but we do not feel that any

recommendation or decision upon that recommendation is a necessary prerequisite to the ability to file by electronic means. While there is currently a limited electronic filing project in place, our committee is on record supporting an expanded use of electronic filing. We supported the electronic filing recommendations of the Chief Administrative Judge in his report on the New York State Unified Court System Filing by Electronic Means. That's a report of April 1, 2002, and I assume that the commission has seen this report.

I am providing, however, and you should have a copy in front of you of our report which regards that legislation. That was Senate Bill 7492, and there were accompanying regulations that were proposed by the Chief Administrative Judge which would have permitted electronic filing and concomitant access to the electronic file in the permitted types of cases under the pilot as long as one party consented to the electronic filing reserving, however, to the court the discretion to remove the case from electronic filing and access. For the permitted types of cases in the pilot, and these as were proposed included commercial claims,

tax certiorari claims, and mass torts, we felt that that was adequate protection. Further discussion of this issue is found in the OCA report and in our report which you have in front of you.

Finally, we are also aware of the potential for privatization relating to the obtaining of court records via the Internet or other search engines. We are concerned that the debate on public access may be clouded by the ability of entrepreneurial entities to expand into this area, and we urge you not to relinquish the role of the courts as the keeper of dockets and papers pertaining to filed cases to private enterprise.

And if I can answer any questions from you, I'll be happy to do so.

MR. ABRAMS: I have negative question. I just wanted to make sure I understand what it is that your committee cannot agree upon.

MS. STERN-GERSTMAN: We -- we looked carefully at the six questions that this commission proposed.

MR. ABRAMS: I see. Right.

MS. STERN-GERSTMAN: Many of them we felt involved our personal preferences or professional preferences, but not necessarily related to our

expertise in Civil Practice Law and Rules. And we felt under those circumstances that we should not speak as a committee beyond the statement that I've given you and the report that we have, that we delivered to you.

HON. V. GRAFFEO: Has your committee taken any position in an electronic filing system as to whether there's any personal identifying information that should be truncated or eliminated? Similar to what the last speaker talked about in connection with the federal rules?

MS. STERN-GERSTMAN: We have not, except to the extent that those issues are touched upon in the OCA report of 2002, because we did support the report as a committee, the first half of the report which deals with electronic means. As you can see by the report in front of you, we had some issue about the facsimile filing portion of the report and the legislation. But with respect to the electronic filing portion of it, we were totally in support of the bill with -- coupled with the regulations that were proposed by the Chief Administrative Judge, and the portion of the report, the first half of the report that -- that dealt with electronic filing.

And I believe that there are some safeguards that are in that report.

MR. GRIFFIN: Sharon, I'm disappointed, I've been waiting for weeks to ask you questions on privacy. Thanks.

MS. BRYSON: If you can speak just briefly, because it does appear that you've taken a position with respect to the facsimile filing, and since we just received that, can you give us a little understanding as to the -- I mean, I certainly have my own personal views as to the utility or usefulness of facsimile filing, but I'd like to get your committee's insights to that.

MS. STERN-GERSTMAN: Yes. I will tell you the -- the bill permitted facsimile filing in all 62 counties for not only commencement of the action but also for every motion -- basically every piece of paper that needed to get before the court was permitted to be filed by facsimile.

My -- in my professional life, I work for a Supreme Court Justice. There is another person on my committee who also works for a Supreme Court Justice in an upstate county. We both felt, and the committee agreed with us, that this would

probably -- the day before motion term, the various Supreme Court Judges in the upstate counties would have to basically close down if -- either the facsimile machine would be going 24 hours, or there was an alternate method that was offered, that was spoken about, where the facsimile would go immediately onto electronic means and then in order to access those motion papers, that we would have to print them out, and that would be the only -- that would be the sole delivery of those motion papers to chambers. The only restriction being as long as a particular paper was not in excess of 35 pages, that it could be sent by facsimile. You could send 90 34-page documents, and we have -- have to download them all that way. We felt that that would -- that would really cripple the upstate practice, in any event, of receiving papers ahead of the time that oral argument -- and the return date. And as a result, what we urged in that report was simply the elimination of the language that would have permitted all subsequent filing to commencement by facsimile.

MS. BRYSON: Just to be clear, it really addressed the practical concerns of receipt of the

facsimile by the court rather than addressing the privacy concerns that we're concerned about?

MS. STERN-GERSTMAN: Yeah, it had no concerns with the privacy, but just practical.

MR. ABRAMS: Thank you very much.

MS. STERN-GERSTMAN: Thank you.

MR. ABRAMS: Appreciate your testimony. Carol Heckman.

MS. HECKMAN: Good afternoon. My name is Carol Heckman, and I'm here on behalf of the Federal and Commercial Litigation section of the New York State Bar Association.

I'm asking if the rules of the commission permit it, for permission to file with you at a later time our position on this -- these questions. I was assigned to work on this topic. We haven't yet developed our position, represent the committee's position. I have my own personal views because I've published some articles on the area of access to judicial records, but I would like an opportunity to discuss this with the section and give the section's --

MR. ABRAMS: We would certainly welcome any submission by the section.

MS. HECKMAN: Do you have a time frame?

MR. ABRAMS: I love to play judge. Three weeks from today.

MS. HECKMAN: Three weeks from today. Okay. Thank you.

MR. GLEASON: Could I ask a question?

MR. ABRAMS: You don't have to go, though.

MS. HECKMAN: I thought I'd get to work. I only have three weeks.

MR. GLEASON: I just have a question. As a commercial practitioner, do you have any feel for how lawyers feel about having their papers immediately available on the Internet, in the electronic filing system?

MS. HECKMAN: Well, I guess my own feeling about it is that the -- the right of access is a presumption; and there's a balancing involved which, if there's good cause shown, you can take away that access. I'm not sure I understand what the difference is between Internet access and traditional access unless there's material in the papers that would be irrelevant to make a determination on the case, which would simply be inappropriate to have out there on such an easily

accessible basis as the Internet.

So for example, Social Security numbers and date of birth, which have nothing to do in most cases with the adjudication of a matter, if they're available on the Internet, could be the subject of abuse.

MR. GLEASON: Question slightly different. In New York County now where there is -- where commercial cases can be filed on the electronic filing system and made available over the Internet, utilization of that program has been limited. And many attorneys speaking about that program who practice in the commercial part in New York County say that issues regarding the client's concern about their papers being out in the Internet and their work product being out in the Internet leave them in some cases to say well, given a choice, we'd rather -- even if our papers are public in the county courthouse, we'd rather not have them on the Internet. Do you have a feel for that in your practice?

MS. HECKMAN: I don't personally have a problem with it because we're getting more and more access to everything on the Internet. If I want a copy of

those -- someone else's papers, I can get them fairly readily now. And my feeling is when you get to the point of filing something in court, you should be prepared for the likelihood that it will be not just available in the traditional way, but E-mailed around, for example. And a day doesn't go by when I don't get someone else's papers via E-mail. So I'm not particularly bothered by that. I'm only speaking for myself.

HON. V. GRAFFEO: Miss Heckman, do you have any familiarity with the federal rules?

MS. HECKMAN: Yes.

HON. V. GRAFFEO: Is there any aspect of them that you would commend to us? Is there any requirements that you think are too burdensome or you would ask us not to consider?

MS. HECKMAN: I would ask you to consider applying the same rules that the federal courts have applied. I mean, the common law analysis, and in the criminal area the constitutional analysis, seems to be the same, whether it's federal court or state court. And the federal courts have applied rules -- not talking about Internet rules, but just general rules -- regarding protective orders and showing of

cause and right of access that are identical, from what I can see, to what the state court rules.

HON. V. GRAFFEO: Can you search by subject matter or general category in the federal system? Do you know? Or can you only search by party name or index number?

MS. HECKMAN: As far as the electronic filing?

HON. V. GRAFFEO: Yes, the electronic filing.

MS. HECKMAN: Party name and index.

MR. ABRAMS: It would be very helpful for us when you do make the submission if you would address the federal rules.

MS. HECKMAN: You're talking specifically the rule on the Internet?

MR. ABRAMS: Yes.

MS. HECKMAN: Electronic filing? Okay. We'll take a look at that. Yes.

MS. BRYSON: While we're talking about things that would be helpful to us, and obviously --

MS. HECKMAN: I have three weeks.

MS. BRYSON: In three weeks, we can't dictate to you obviously what -- what you present, but certainly a couple of issues that have come up in our other hearings that you may want to consider or

the committee may want to consider -- and this is true confessions as a -- as a 20-year commercial litigator, and I'm interested in these issues as well -- would include the trade secrets issue in terms of, you know, the secret recipe for Coca-Cola accidentally getting out as an exhibit or something, for example.

MS. HECKMAN: Would that already be covered by a protective order?

MS. BRYSON: In the instance where there is a dispute between two parties -- Coca-Cola may be a bad example. But there may be a dispute between two parties where it's incidental to the -- you know, maybe a proceeding between two brothers over the sale of a business, and they may have a trade secret of a third party because they're a franchisee. That may get into an exhibit, and certainly the franchisee is supposed to protect the interests of the franchiser, but they may not, in fact, do that because of the heat of battle, for example. The protective order mechanism may not be in place.

Another issue that I think is fascinating is the issue of attorneys who claim that the court papers they write are entitled to copyright

protection or in some way are, you know, engendered with privacy concerns because of their -- their commercial interest in their work product.

The crux of the issue with respect to the burden on attorneys to be the gatekeeper for their client's personal information. And then the timing issue that Mr. Gleason mentioned of whether or not the practicalities or the need or the concerns about having a lag time between the filing of the paper in court versus the uploading of that same document on the Internet. If any of those would be of interest to your committee, we would certainly be of interest in hearing them.

MS. HECKMAN: Okay.

MR. ABRAMS: Thank you very much.

MS. HECKMAN: Thank you.

MR. ABRAMS: Judy McBearty.

MS. McBEARTY: Good afternoon. Mr. Chairman, members of the commission, I don't think anybody will have a problem hearing me. I have a tendency to talk a little loud anyway.

I come before you today in two roles. I am the President of the New York State Association of Chief Clerks in the Surrogate's Court, and of course I am

the Chief Clerk of the Surrogate's Court in Otsego County in the Village of Cooperstown. Otsego and Oswego seem to get mixed up an awful lot.

When I first heard of your commission, I think bells went off, because we are the keeper of public records. Nobody knows about the Surrogate's Court. You probably saw it when you walked in the building, the row of file cabinets off on one side. But we are a court of public record. Unified Court System, we work for the Office of Court Administration, so many of our rules will come from there. When I heard about your commission, the first thing I did is sent out an E-mail to all of my 62 county and chief clerks and deputy clerks and asking them for their opinion. Because though I could give my own opinion to you today, it's them I'm coming here to represent.

And let me begin by saying that electronic access to our court records is the future of our courts. This project, upon its completion, will tremendously benefit the public and the courts. What a change. Let me just say first for the public, because we do serve the public. No more checking to find out what our record room hours are.

Our records could be available 24/7, I'm saying public records, right in their own home and office, and we all know what that's like in our own homes.

Genealogical research is a major part of the Surrogate's Court. Service to the public. Every year, especially during the summer months, hundreds and hundreds of people, and I'm sure in other counties thousands of people, travel to their county seats to see these records. They're searching for their family roots, searching for their history, they're searching for membership in the DAR. For whatever reason, they're there, or for a project. Having access to these court records via the Internet will allow many of them to narrow down their search area. They'll know what county to go to.

As far as the courts are concerned, for myself and my staff and everyone else, we're cutting down on a lot of phone calls, cutting down on a lot of staff time. We're helping people know what court they really should call instead of calling this county seat and that county seat.

Second for the courts is this whole system of being able to scan our records. We're buried in

paper. Everybody makes fun of the Surrogate's Court, that we're just -- everything's paper. We're the biggest paper trail, we have the most file cabinets, the most files. You have to understand our records go back -- my records in my court go back to 1792. I have the first books that were ever made in my county for the first Court of Common Pleas. So we are -- we're paper heavy, there's no two ways about it.

To give you an idea how bad it is, in my own building there was an argument about who would have their office underneath our record room because they were afraid of the weight over their heads, that the floor might collapse. They had to draw the short straw and decide who will be there.

I am in no way technological. My first introduction to putting court records on computer was from Judge Traficanti when he was a Surrogate Judge. He did a seminar. Judge Traficanti had a Surrogate Court program, and it was the first computer program, I believe it was in 1984 or 1985, and it was -- oh, it was the best thing since sliced bread. You just came back from that so excited. Recently, I had the opportunity to have a

demonstration from the Seventh Judicial District. They have come up with a new DB Master Surrogate Court Program and a scanning similar to what your county clerk has just talked about here. It's going to be a similar type of program. I came away so impressed.

I just felt that we're headed in the right direction. We started the first step, and we're going to the next step. And I believe right now people from Monroe County are showing the program in New York County, my own Sixth Judicial District is looking at it. We'll be doing the same thing.

Right now we have a database that we can put up for our public to come in and view records on a look only computers, basic. It's like looking at a file, that's it. You can see the who, the date of death, who was appointed to represent that estate, basic information. And it's wonderful, absolutely wonderful. And everybody's very positive about the new system. But then again I have to drop the other shoe and say okay, what's the bad side? The concerns in every single concern that came back to me was focused on the privacy and the confidentiality.

Right now the Surrogate's Court, as a court of record, does have sealed records. We do adoptions, we have tax returns, we seal those. And of course anything by order of the judge is sealed. But over the 15 or 20 years -- the past 15 or 20 years, we've had more uniform rules, we've required more things to be filed. We never looked at it to say wait, should this still be in the public record? We've asked people for more identifying information, and we've left it in that file cabinet. And it's never really been -- and you have made us say, the red lights have gone up and we've said wait a minute, there's work that has to be done.

One of the things is, just to give you an example, is a guardianship proceeding. Anyone who has a child who's mentally retarded or developmentally disabled, upon reaching the age of 18, that parent no longer has any legal right over that child. They can't make medical decisions, financial decisions, educational, where they live. Nothing. Because legally a hospital can say to them, he's 18 years old, he has to make his own. You can't sign these support -- these papers for us to continue life support or anything else, God

forbid. So they have to come to the court. And when they come to the court, they have to do something. They have to prove the mental incompetency. So sitting in our record room is not only this young man or young woman's birth certificate, is all of their psychological background papers and testings, their medical information.

Right now I'm looking at doing a basic court order within my court asking my judges, looking over HIPAA and, of course, counsel's office came down with an interpretation for that. But it's sensitive material. I don't know if I want anybody reading those psychological profiles.

The same thing if you were appointed guardian because your granddaughter received a lot of money from someone. Uncle Ed out somewhere. Fortunately my grandson inherits \$50,000, and I become the guardian of that property. And I'll go to the court and I'll get appointed. But every year I have to file a financial statement on that with bank account numbers. Every year -- say I am not doing well. I don't have enough money, and my grandson, he wants to go with his band trip to somewhere. I come to

the court and I'm going to ask them for money. To do that, the new forms that we have, I have to fill out a financial statement about myself, my personal finances, to show why I can't pay for this out of my own money.

So we're talking about definitely confidential information. And I think in an era when we have this theft of identity electronically, we have to realize that people can have real concerns. And would we want our personal financial information, or our child's or our grandchild's, being viewed by anybody? Most people are honest, but we have to look at the part that might not be and might want to use this information differently.

I have to say that as far as the scanning of records that is being done in the Seventh, they have come up with a system to impound information. My point is, are -- are we purging our records enough and impounding enough information? Are we violating any law? I don't know. Nobody has looked at what we allow the public to see. That, I think, was the big concern.

Second, of course, is revenue. We charge a search fee for anyone who wants us to search a

record for them. And it goes -- the rate goes up by the -- how old the record is and how current it is. And those rates all increase July 14th this year. We also charge a copy fee.

As president of my association, I meet regularly with Judge Pfau, and we have quarterly meetings, and I'm very, very aware of the budgetary restraints and the cutbacks. As you know, we've all been designated with so many vacancies within each district of positions we can't fill. So when you say revenue to my clerks, they're like oh no, we can't lose the money. That validates us. No, that's important.

We have to reach our -- we're supposed to bring in this revenue, and their question to me was, what kind of fee would we charge? Who would? Will it -- will the public Internet just be -- have case information, which I'm saying we could do right now, which is an index, date of death, file number, and you can search on any of these things, and then an advisement to contact the court of record for copies? Or is it going to be a fee-based service, I believe like was discussed previously, where you pay a monthly fee and you can access records, or you pay

to go on-line, which I learned all about when I went on the Ellis Island site and learned how they did it.

I have to say that you're facing a daunting task. Having to address each of these important issues, considering all the pros and cons, after looking over all the information -- and I have to tell you, I -- first I thought this was simple. But when I looked at the information that you put out prior to this, I was overwhelmed myself. I did not realize so many different paths that we could take and how many resources there are out there.

So I decided to break it down using your questions, just in summary. Would the value of the information that Surrogate's Court had, is access to this information valuable to the public and others? I have to say yes, it is. The Surrogate Court records are an extension research tool you have to realize for attorneys, not only for genealogists, abstractors, it works hands in hand with your county clerk's office. We are back and forth, our records complement each other. Since my records go back to 1792, it's a history of our past. Basically it's a history and it's the story of our present. It's

where we are now.

Next I had to consider the responsibility to ensure not only the confidentiality of the record, but the integrity of that record. To me, this is the hardest thing. I don't know how you do it. How much information you put out. What constitutes sensitive information and what constitutes case information? And that's why the standard we're going to set today -- and I think that's where we come back to. We're setting a new standard. It hasn't been looked at in over 20-something years.

And of course the last thing is the courts, and I think that was alluded to by your county clerk here. The cost of implementing this is going to be sizeable. The good thing is that many of us are computer literate, many of us do have computer systems. It's going to be an upgrading and the adding of the scanning, but I think the State of New York Office of Court Administration and the courts in the state, especially upstate courts, are in very good shape for this.

Like I said, I have everything on computer, my early records, but I started in 1985, so -- but I have to think of the man-hours, time that this is

all going to take. And that's a concern to me.

The commission's goal to set a guideline for public access to the court records, and I have to say fair, just, and uniform. Surrogate's Court are uniform. We like to do everything the same. So that's one of the things I'm concerned about. I don't want someone to go to one district or county and have one set of rules in their file; across the county line, go somewhere else and have another rule. We work very hard when we meet as chief clerks annually to not do that. And sometimes it's out of our control. But as far as this issue goes, and what's public access and what goes on in that Internet record, it would make our lives much easier if it could be uniform.

I would -- last I will say is the public has a right to access to our court records, and today's technology's going to allow us to do that. The only thing I say is we have to balance it. We have to balance the right to the access with the public's right to maintain their confidentiality. And I hope I didn't go over my time, but -- yes?

MR. GRIFFIN: You indicated that in your court accountings are sealed; is that correct?

MS. McBEARTY: No, they're not.

MR. GRIFFIN: I mean the tax returns.

MS. McBEARTY: Tax returns, the ones that came in on the ET 90s, yes, unless they waived the sealing of them.

MR. GRIFFIN: Is that by statute?

MS. McBEARTY: Yes, by statute. The same thing with the adoptions.

MR. GRIFFIN: What about accountings?

MS. McBEARTY: No.

MR. GRIFFIN: So that if I'm interested in somebody's estate, how much money they had and what sort of securities and all sorts of information, that's available now publicly?

MS. McBEARTY: Yes, sir.

MR. GRIFFIN: And that would go, presumably, on the Internet?

MS. McBEARTY: Yes, sir.

MR. GRIFFIN: That's also true, is it not, in terms of wills --

MS. McBEARTY: Yes.

MR. GRIFFIN: -- that are probated, they're public, so you can find out who the beneficiaries --

MS. McBEARTY: And people don't understand

that. I mean, we'll have someone come in who's lost a loved one, and they come in with that original will, and there's a tug of war because they don't understand that it has to be filed. And I -- I'm really -- every day you meet people who are surprised to find out what's public record. They don't know it.

MR. GRIFFIN: But this would be the financial and other information that someone would put in an accounting, as well as the will and related documents, as well as the petitions for guardians --

MS. McBEARTY: Yes.

MR. GRIFFIN: -- that you made reference to, if there is total Internet access, all of that is going to be available?

MS. McBEARTY: Right. We have more control over the actual data file than over the scanned document. I find that, I think you do, looking at what impounding you can do on your regular Surrogate Court program, I think you have more flexibility there. I think most of my clerks are extremely concerned about putting the actual record out, you know, like I said.

MR. GRIFFIN: Do you have any instances where

someone is handling a very substantial estate in the community and they don't want every -- or the newspaper to be able to report all the details, that they applied to the judge to seal that record?

MS. McBEARTY: Yeah, and they don't usually. And it has to be extenuating circumstances. I have had circumstances where I have to seal a record because say an order of protection granted in Family Court or Supreme Court, and the individual who has a court order of protection had signed, say, a paper waiving and consenting with her address on it or something. Then I would hope, yes, it would be.

MR. GRIFFIN: So the procedure of applying for -- for sealing is not going to be available to many people to preserve privacy --

MS. McBEARTY: No.

MR. GRIFFIN: -- as a practical matter?

MS. McBEARTY: No.

MR. ABRAMS: And I take it it has not been available?

MS. McBEARTY: No, it has not.

MR. ABRAMS: At this time the sort of information that you are talking to us about is available?

MS. McBEARTY: Uh-huh.

MR. ABRAMS: Anybody can walk in and get it and put it on the Internet?

MS. McBEARTY: Yes, can come in, yes, copies, everything. Yes.

MR. SPIVEY: We hear -- often hear the argument that what's available at the courthouse should be available -- these documents be made available on the Internet. I thought I was hearing from you the position that the prospect that this information's going to be available on the Internet is causing you to re-examine what might -- should be available at the courthouse in the first instance. Is that what you're saying?

MS. McBEARTY: I think -- yeah. As you said, if it's public record, where is the public record? It's only public record if you come in my office, or is it public record not on the Internet? So that's the thing there.

But yes, it's making many of us, with the changes that are going on in federal law regarding privacy, and I'm -- and New York State Counsel's Office has been very busy looking over, like I said, especially when you get to medical information. I

think we're becoming concerned. We're a public record, but have we as so much of the public at this point that that part shouldn't be? Should it be up to a certain point? Once the judge has this information and makes his decision, you do have your public record, should part of this be sealed, just like a judge might seal certain exhibits or things he takes in? So I think that's something that concerns many of us.

I haven't had a problem yet, and I hope I don't. But I find myself concerned. I have no problem with people knowing what's on file. I would love having my court calendars, you know, there, so people have access to that. That would be wonderful. And I don't think anybody has a problem with the indexing system. We're just concerned about once you go beyond the actual data information into the entire entry -- that whole document scanned in, it's a world of difference. So it's making us look at whether we have to start impounding, purging, and not putting -- letting people put information in, because it is worrisome.

MR. ABRAMS: Yes.

MS. BRYSON: Can you just describe the

impounding and purging concepts, because I think that for many of the commissioners the technological side of it is important for us to understand.

MS. McBEARTY: Right.

MS. BRYSON: Certainly for me to understand, what do you mean by impounding? How is that different from sealing, and how is that different from redacting? I mean, if you could explain what those concepts mean.

MS. McBEARTY: The simplest way of looking is when I enter a record on the computer, I have the option of denoting certain information, those fields not to be included in the public record. And that's where I -- and also I have the option when I -- well, I should say Seventh District does, because they're the ones who showed me how they do it so well, they have -- they have the ability not to put that death certificate in as the record. They impound it. It stays separate, it does not go with the rest of the file, because that's considered extremely confidential and sensitive information on there. You're getting into cause of death, and there's many things you do not want people to know about that.

So first of all, in the computer system, you do have the availability to select fields, select information that will go out to the public. I can do that now in my old program with the read only file, so they can just get basics. And as far as the scanning documents, the way I understand, you may be able to do the same thing, certain documents. What I'm concerned about is you have to make sure your staff's pretty good to know what documents have sensitive information that shouldn't have been intaked, taken in, in the beginning, and you let it come in and it goes in, bar code in, it's out there. So that's a concern.

MS. BRYSON: So the impounding, you're not altering the original document --

MS. McBEARTY: No.

MS. BRYSON: -- that had been filed publicly, unlike the clerks that talked earlier?

MS. McBEARTY: No.

MS. BRYSON: What you're saying is with respect to the interface that you have electronically --

MS. McBEARTY: Right.

MS. BRYSON: -- that you can select certain fields that are, in effect, deselected from public

view, and that you have certain documents that you can say okay, here's a list of ten documents, I'm going to select these three documents that will not be available for public view except at the courthouse. Will those documents still be available at the courthouse even though -- or that information still be available at the courthouse even though it's not available electronically?

MS. McBEARTY: Everything is available now. Everything in that file.

MS. BRYSON: So you're making a distinction between what is available electronically and what is available in the courthouse already?

MS. McBEARTY: Uh-huh. Uh-huh.

MS. BRYSON: Thank you.

MR. ABRAMS: Do I understand you're not making Internet distinction?

MS. McBEARTY: No.

MR. ABRAMS: You're making a distinction about what it is you scan and do not scan?

MS. McBEARTY: Uh-huh.

MR. ABRAMS: Is that correct?

MS. McBEARTY: What's happening is I think in preparation for Internet access, some of the Seventh

District is looking at what should not be scanned in with the public record, and that's something I think every court has to do now and not later, I think.

HON. V. GRAFFEO: On the guardianship proceedings, a lot of the accountings are filed with bank account numbers, locations, and they're placed in the files now?

MS. McBEARTY: Yes.

HON. V. GRAFFEO: Are they actually accessible to the public?

MS. McBEARTY: Yes.

MR. CAMPBELL: Would they be made accessible to the public by being placed on the Internet?

MS. McBEARTY: By law they can be. It's all public record unless we differentiate or pass a rule that says they will not.

MR. CAMPBELL: If someone files a will for safekeeping --

MS. McBEARTY: Yes.

MR. CAMPBELL: -- what would happen to that will?

MS. McBEARTY: That would never be part of the public record until that person, either he himself appears in person and retrieves the original will or

we have proof of death, and then it can only be unsealed by the Surrogate Court judge.

MR. CAMPBELL: Okay.

MR. GLEASON: Could you clarify for me what you said about the death certificates? Are death certificates now not public records?

MS. McBEARTY: Some courts are not leaving them in the public record. They're using them for the actual proceeding as proof to the judge, but they're not putting them in the public record -- or I believe Monroe County is not putting them in for scanning. They're not doing that because they consider them to be too confidential.

MR. GLEASON: Is that true in every county, though?

MS. McBEARTY: No, it isn't.

MR. GLEASON: So would it be true, then, in some counties the death certificate and the causes of death is a matter of public record and in other counties it is not?

MS. McBEARTY: Correct. Correct. Yes. The death certificate is filed with the proceeding, and it is part -- if you came to my court, it is there. It is still there. But, of course, I'm not scanning

any documents, I'm not doing an Internet file. But it is in the paper file, yes.

MR. CAMPBELL: What about wrongful death compromises, when they come into the courts?

MS. McBEARTY: Yes, public records.

MR. CAMPBELL: With the medical records attached to them?

MS. McBEARTY: Whatever comes in and whatever's transferred as a decision and order from Supreme Court would also be filed because the court has to approve the actual distribution. So yes, that would be there also.

MR. CAMPBELL: Thank you.

MR. ABRAMS: Thank you very much.

MS. McBEARTY: Okay. Thank you.

MR. ABRAMS: Let me -- would you like a brief break to survive?

COURT REPORTER: That would be fine.

(A short break was taken.)

MR. ABRAMS: Our five minutes has come and gone. Our next witness is Mr. Bell.

MR. BELL: Good afternoon. My name's Stephen Bell; I'm the managing editor of The Buffalo News. Thanks for coming to Buffalo today.

Our editor, Margaret Sullivan, sends her regards. We talked quite a lot this week in the preparation of this statement about the importance of the work that you're all doing.

The significance of the issue of how open New York State's courts should be is borne out by Chief Judge Judith Kaye's creation of this commission and the -- by the distinguished members of the panel and your representations in this field, and I thank you for the opportunity to be heard.

The history of technology seemed replete with examples of how the advances preceded clear societal systems, rules, and customs for dealing comfortably with the innovations. The Buffalo News feels strongly that because technology will improve public access to court records, this commission should in no way restrict that access under the guise of slowing down or blunting the technology's promise. In other words, as current real restrictions disappear, such as locating a case file in a dusty storeroom, finding a clerk to retrieve it, having a pocketful of quarters to copy the needed documents, we would urge the commission not to introduce speed bumps to the free flow of information to the public.

Newspapers, and especially their reporters, thrive in a free society where access to factual information is unhindered. Every newspaper in America would prefer to start with the unspun, unvarnished truth, and write articles based on that beginning point. As you well know, however, that is seldom the case. Reporters start with second or third-hand sources and work their way back, hoping to get as close to the facts as they reasonably can. New York, in its commendable protection of journalistic rights and legislative support for freedom of information and open meetings, has a lengthy history of choosing openness and maintaining the public's right to know.

David Tomlin described this tradition forcefully in his testimony to the Associated Press in your New York City hearing, and such universals bear repeating. We believe in the presumption of openness for all court records. We believe that anyone seeking to thwart or overcome this presumption must be held to rigorous standards. If that standard is met, we believe restrictions on access should be narrowly targeted to the interests that require that specific protection, and we

believe that the appropriate way that these principles are observed is on a case-by-case basis. Rules in the public's broader interest should be enacted to open or maintain public access to court records, and in this electronic age openness should be the default key. The person who wants to close records has to make the case that keeping them open is damaging.

Since long experience of newspaper reporters and editors and their attorneys has shown that a law as written is not always a law as practiced, this commission would be well advised to lean toward maintaining and giving the public the freest possible access. We would not urge this commission to allow public access to information that could be shown on a case-by-case basis to damage people. Embarrassment, even justified humiliation, however, should not come under the umbrella of damage.

What is of public use is not just the contents of the sensational trial, but also the routine, day-to-day facts that can make reporting more accurate, thereby better serving society. Correct determination of suspect's prior criminal records, for instance, ensures fairness. After-hours access

to lawsuits provides information for a complete story rather than one based on what a plaintiff's lawyer might leak at 5 p.m. on a Friday, not that that's ever happened. And citizens can get information to make decisions about grievances they want to pursue against a corporation or individual such as in class action suits. Open records means better journalism and an enhanced level of public knowledge.

Among the other lessons that the leaps of technology have taught us is that trying to hold back new realities technology creates is misguided at best. Just as the typewriter made way for the personal computer, paper files will make way for databases of court information on the Internet. Your charge should not be interpreted as a search for ways to stifle or restrict the inevitable flow of such information, but how to make best use of it in a free society and to the benefit of the most people.

Even though the perception is that the media look under every rock and into everyone's life, the actual abilities of the media, as you know, are far more limited. Even in a profession that deals with

hundreds and hundreds of people, stories, and events daily, journalists barely affect even a tiny percentage of lives in any one region. But when crucial information about one case or life or person is needed, it is likely crucial and should be available in the quickest, clearest, easiest fashion possible.

Finally, since I earlier discussed the difference between the way a law is written and how it is often interpreted, let me also reassure you with an example of how journalists police themselves in real, everyday situations. At my newspapers and many others -- at my newspaper and many others, we print bankruptcies and real estate transactions; we also report marriages, births, deaths, and weddings. We offer news of job promotions, public honors, and arrests. While most of these are routine and barely cause a ripple, we do get calls each year from people who may be negatively affected by release of this information. When we do, we consider them on a case-by-case basis and often withhold publication if we believe damaging them is real.

For instance, a sheriff's deputy or detective may call and say he or she recently bought a house

and for their protection would not want to have their address published in the real estate listings. We usually agree and omit the information. We thereby demonstrate in a way few know a level of responsibility and common sense most would not ascribe to us.

To sum up our view, the editors of The Buffalo News would like to see continued and enhanced free and open access to court records. Sensible limits on some information that, if released, could cause harm, makes sense. But we would urge this commission to emphasize and hold dear the public's right to know, maintaining and insuring swift, easy, and free access to court records.

Thank you, and I'll be happy to answer any question.

MR. ABRAMS: Could you talk a little more about the distinction you've drawn between information which, quote, damages people, unquote, and information which merely embarrasses them? What do you mean by damages people?

MR. BELL: I think that if we have reason to believe that someone's -- someone could be physically hurt, their reputation could be

incorrectly affected by the release of certain information, then we would go an extra mile or maybe exclude that information from publication. If we feel that someone is simply uncomfortable, would rather not have the information known to the people who live on the street with them, who would be simply embarrassed, we probably would not withhold the information.

MR. GRIFFIN: You make reference to Tomlin's advocacy of narrow restrictions and the appropriate ways on a case-by-case basis. And you talk about the paper -- your paper exercising discretion sometimes when a particular person, you made reference to the sheriff, or maybe somebody doesn't want someone to know they paid a mill five for a charitable house for such and such an organization. I can understand how a paper or a separate private organization will exercise discretion. But I have a real problem in a case-by-case solution overall for these privacy issues because it's all going to depend upon the individual criteria that are somewhat subjectively applied by whoever is the applier. So I personally think we have to find some standard criteria that will deal with the privacy

issue. It's a big problem to select what area.

We also have the problem, I think, as to how far we can go, whether this is a legislative issue. I mean, we talk about Social Security numbers, we talk about bank accounts, but there's a wide variety, such as we heard from the Surrogate, medical information that finds its way in all sorts of different papers and different context.

So in any event, that's my reaction and a question as well on a case by case. Do you have any response to that sort of --

MR. BELL: I'm glad I'm here and you're there. It's going to take a great deal of -- of wisdom to work that out. And if you can find the standard or set of standards that applies state-wide in an equitable way, I think that would be extraordinary.

I think what I've been listening to, some of the earlier testimony, what I've seen is an awful lot of local standards and gatekeepers to the information who are concerned that revenues may be affected or they may get yelled at by the public or things like that. To me, and to the paper, it makes a lot more sense to open things as much as possible in, as I say, the reality that very little of that

information actually comes out, very little of that information actually gets published or even checked. I think we should, you know, in a sense, err on the side of openness.

HON. V. GRAFFEO: Some of the guidelines that we've looked at suggest that only the last four digits of a Social Security number be used or only the year of birth, not the month and date. Would those kinds of limitations seriously impede your investigatory reporters --

MR. BELL: I don't think so.

HON. V. GRAFFEO: -- or would they still be able to conduct some kind of a tracing?

MR. BELL: Yeah, there's very little that we can do with Social Security numbers. Date of birth is important for the -- for the reasons that Lucy alluded to. But I don't see that, you know -- when you're trying to make distinctions between individuals, that -- that all that information has to be there. That some information, if it's sufficient to make sure we're not talking about the wrong person, that would -- that would be fine.

And the other thing is, just a quick follow up to that, we're talking here in most cases about a

starting point. If we were doing a story about someone and we only saw their date of birth and, you know, the last four digits of their Social Security number, that's just the very beginning of our involvement with that person. We would call them for comment, we would look into their background, we would do far more than simply rely on, well, we have the right person based on those four digits.

MR. CAMPBELL: You raised a very interesting point because you mentioned if the sheriff called you and wanted you to redact the information from the local newspaper, that is something that the newspaper might do and that it is their responsibility to. What about if the county clerk's office did the same thing, used their discretion, redacted that information and not put it on the Internet?

MR. BELL: Dave Swarts made the point for a while he was doing that, and it was shown to him to be incorrect by us. You know, whether -- it is our responsibility under the First Amendment to have that information. We try to be sensible about applying that information. If he decided to withhold it, there's no -- there's no particular

limit that he would face in deciding what criteria applied to withholding that information. And if -- to follow his line of argument, if he only got eight of 15 people that he needs to hire to -- to do the function, maybe he throws out half of the data, and then we run into all sorts of problems.

MR. CAMPBELL: You mentioned the fact about harm. Now another newspaper down the street which might be -- competing newspaper that might be irresponsible, might publish that information on the sheriff. That would result in harm.

MR. BELL: It could. Don't forget, there are 860 sheriff deputies in Erie County. We get a few calls, half a dozen to a dozen a year from people asking -- or police officers. Most people do not feel that that's a problem. And when we -- when they do call, they usually explain that there are, you know, specific circumstances that makes them different than the usual deputy. But, that's true. Certainly there would be, you know, openings for possible abuse.

MR. CAMPBELL: Okay.

MR. ABRAMS: Do you know of any cases in which law enforcement officials have been physically

harmd as a result of the publication in any newspaper of such information?

MR. BELL: No, I don't.

MR. GLEASON: Have you ever had any requests for information, Mr. Bell, about trade secrets, keeping that confidential? Anybody said, please, though you have it, don't publish that because it might harm a commercial interest?

MR. BELL: I'm not familiar -- I was business editor for three years; I'm not familiar with any major situations like that. I'm not saying that they haven't happened on the reporter level; but we've never had, you know, an issue come to a top editor level where we had to decide do we reveal this commercial trade secret or not.

MR. GLEASON: If you did, how would you generally feel you would respond to that?

MR. BELL: Well, I think that it would depend on the context of the story. If it were a story about, you know, someone received a patent and that patent is being challenged by the individual that says they invented what was patented, I think it would be relevant to put whatever the product is and describe it into the paper. If it's a dispute

between two commercial parties over, you know, valuable information, I think we'd probably have to put that in the paper. If it's just a random, you know, I've heard people making reference to an exhibit or something in a court document, I don't think that, you know, we would have a reporter going through court documents looking for commercial trade secrets that we could expose.

MR. ABRAMS: Thank you very much. We appreciate your attending.

MR. BELL: Thank you.

MR. ABRAMS: Mr. Altreuter?

MR. ALTREUTER: Good afternoon. I'm not here for anyone. I made the mistake this morning of reading the submissions that have been put before you already, so I'm a little intimidated. I'm just here speaking as a practitioner in a small firm with some background in privacy law and some background with Internet issues, and I just ask a few brief remarks that I have in that context be considered by this commission in making its recommendations.

One thing that I think is important to bear in mind is a computer law concept or computer code concept, is the scalability. I think the problem

that this commission is wrestling with is whether or not existing concepts and privacy law scale adequately. In other words, whether or not making these kinds of records available on the Internet changes the nature of the privacy concerns that we have. And I would submit to you that I think that there are adequate guidelines already in place for most of these kinds of records.

Our existing notions of privacy are somewhat in conflict, I think. There is a perception that there are a lot more things that are private than actually are, and I think there's a perception that things that are supposedly private are somehow legally protected. In fact, that's really not the case. These things are available in court, you can go and get them. The Buffalo News can go and get them. The only thing that really changes by putting court records on the Internet is the scale of the issue. And at some level, changing the scale of the question actually makes a lot of the stuff more confidential than it might otherwise be.

The sheer volume of information that's out there makes accessing these sorts of things more difficult than it might otherwise be. I think

weighed against that is something that I encounter on a daily basis in my practice, which is the assurance that we can give our clients that the court system is open and fair. That's a presumption that's enshrined in law, it's something that we all operate with on a daily basis. And I think that that presumption, when weighed against the relative rights of privacy that we have as individuals, has to take precedence. I think that actually making court records available -- more widely available and putting them out on the Internet works to increase and improve the public perception of the fairness of the process that we're all engaged in.

What it comes down to me, though, I believe privacy is important; that perception of what constitutes the right of privacy is different from the rights we have, and the right of access to the courts is so deeply rooted in the fundamental operation of our judicial system that that's really the thing that should be taken into -- into the deepest consideration.

We have a great opportunity here. I understand that people think that personal information is very sensitive. It is very sensitive, it is very

personal. But there's an opportunity here to make the courts more responsive to the constituencies that we're dealing with.

Someone used the expression: The lawyer is the gatekeeper for confidentiality. I think that's very true. When as a lawyer we are dealing with a client's trust, we are in the position of -- of making decisions with our client about what it is -- what is or is not appropriate to disclose. And when a matter is of such a sensitive nature that it's appropriate for the court's consideration but not for general dissemination to the public, there are mechanisms that exist.

Every lawsuit is a unique entity, and there's no reason in the world -- I'm sure all lawyers have had occasion to make an application to the court for a protective order. It's a fair process, it's a simple process, and it has never happened to me that it's been a process that's been abused, although I suppose it is something that could be subject to abuse. On the other hand, you know, we're a clubby little group, lawyers and judges, and I think sometimes in the full exercise of good faith, not the complete exercise of good judgment, sometimes we

err on the side of confidentiality and undermine somewhat the open -- the open aspect that our courts have, which is really the thing that guarantees their fairness.

My recommendation to this commission is that in shaping your recommendations overall, you work to keep the process as open as possible. And that's everything I have to say about it.

MR. ABRAMS: Mr. Altreuter, do you think, looking back on your own clients and looking ahead to and around you at the world as you see it, do you think there would be many clients who are already concerned about the degree to which their entry into a judicial proceeding opens them to public scrutiny, who would be greatly more concerned if made aware of the fact that it's not just public scrutiny as we've known it, but public Internet-like scrutiny?

MR. ALTREUTER: I think that when a client comes to you and says, you know, I want you to commence a lawsuit, it's an appropriate thing for you as a lawyer -- for us as lawyers, to do, to counsel our client and advise them that that means that they are entering into a public forum. And I think that, depending on the nature of the -- of the

dispute, depending on the nature of the lawsuit, we all do that in counseling our clients. Some things are not particularly matters of public interest, but you know the disclosure of health records in the smallest fender bender accident is something that you always do. You're going to have to have the client sign an authorization. And signing an authorization for medical records, you're telling them now this is going to be out there.

So I do think that there is a sense in which we already counsel clients as a profession about the nature of what kind of information that is considered really confidential, and I think that that's an appropriate thing to do.

Throwing it out there on the Internet, I think that that's one of the issues that goes to in what form it takes, in what form the documents on the Internet take, you know. If you're talking about pure data, database entry things that would find their way on a Google search, that might be a touchy issue. And I think that that's something that goes to the way the public -- or electronic filing is being done now. But if you're talking about pdf-type documents, scans of documents that are

available, that's not something that's going to be Google. That's going to be something that is -- there's an extra step that's involved in mining that kind of data because it's not just text that's going to be subject to a Boolean-type search. If you can find that the court record exists and then you view the pdf, that, to me, is the electronic equivalent, the 21st century equivalent of putting those documents in the hands of the court clerk.

MS. BRYSON: I'm a little confused about your last analogy, because certainly for the federal system that is currently in use for federal filing of court papers, you are required by the rules to use pdf. But pdf documents can be created in two forms. One, of course, is the traditional imaging form, where you're scanning a document in and it really is not in a searchable entity other than if you happen to sit there and flip through the pages on the screen instead of flipping through in a print format. But the way in which all papers, except for exhibits that do not lend themselves to it, is, in fact, in the pdf text-searchable format.

And I believe that what the court in New York is considering is requiring, in effect, and I use

the analogy of a Word document, where literally if you have the latest version of Word, one of the options you have across the top is to convert it into a pdf document. That pdf document is, in fact, at that moment searchable just as if it was, you know -- certainly the Google search would be available.

So are you saying that your recommendation is that they not be pdf in a text-based format and your preference is to have them scanned in an image format, that that's more secure or appropriate or constitutional? Or are you saying that that's simply an expectation? I'm a little confused about your --

MR. ALTREUTER: I think the middle one. But -- what I'm saying is yes, I believe -- I believe actually court filings it should be in the pdf image format. I think that's more appropriate. I think that's more appropriate for a couple of reasons. One, I really don't think it's a good idea to do electronic filing word processing format. I'm uncomfortable with the idea that the thing I'm submitting to the court is in some way subject to being altered. I also think that --

MS. BRYSON: Go ahead.

MR. ALTREUTER: -- you know, in the New York State -- my experience in New York State electronic filing has been that you're submitting things in processing formats, and I am not fond of that. I don't think that that's a good system. I have not had experience with the federal system.

MS. BRYSON: Just to correct -- that's why I made a face, and my apologies, I should have been more professional about that. But the bottom line is that the pdf format is not alterable. It is text searchable, but you could not go in with a word processing format and change something that has been filed electronically. It is -- that's one of the reasons that they chose to have pdf as the format of record for the federal system and for the state system, is so that it could be filed in a searchable format but not, in fact, alterable.

MR. ALTREUTER: Text searchable is fine with me. You're talking about exhibits, confidential documents, like medical records, which are obviously a source of concern, these would be scanned as image files. These are the things that clients would be concerned about having out there on the Internet as

a -- as a searchable document. Briefs, paper submitted in support of motions, complaints, answers, pleadings, discovery documents -- or discovery responses and documents to the extent that that does not encompass the actual exhibits. I think that having those as graphics files, if they're not searchable, really does address a lot of the confidential concerns the client might legitimately have. Your hospital records is not something that people, I think, would feel particularly comfortable about having out there on the worldwide web. To be honest, it's, you know, in here, in the clerk's office, and every bit as obtainable. I think having it as a nontext-searchable type of document adds an extra step of inconvenience that's the equivalent of having the clerk's office.

MR. ABRAMS: Okay. Thank you very much. We appreciate your testimony.

MR. ALTREUTER: Thank you.

MR. ABRAMS: Mr. Creahan?

MR. CREAMAN: Hello. My name's Emmett Creahan; I'm the Director of Mental Hygiene Legal Services for the Fourth Department Legal Division, and my

involvement with this issue goes back to November of 2001. When investigating the disclosure of some information for a patient at the Rochester Psychiatric Center, we started looking through databases and discovered a lot of information regarding our clients on the Internet. And we submitted a statement to OCA Counsel's Office that was also seconded by the director of the Second Department, Sidney Hirschfield. We focused primarily on publication of certain records I went through, and some of the other statutory bases for maintaining a distinction between release and publication of records generally. I don't know if you have that statement or not.

I know that Judge Pfau issued an order in December of 2001 touching, again, on confidentiality of these records to all the judges in the area, and in the state generally. And subsequent to that, I've gone back on the Internet again and found in connection with the use of certain search terms that are common to my area such as involuntary retention, involuntary treatment, you get lists of cases involving clients who are mentally ill who would not like their names put on the Internet, I'll tell you

that much.

There are certain statutory and rule-based restrictions I think you're well aware of, they were touched on in our statement back in 2001. And I've consulted with the other directors across the state, and we have -- are E-mailing a follow-up statement to the commission, hopefully it's coming in today, and reviewing our original position on the matter and touching on certain additional points and reviewing these generally. So if you want me to touch on any particular area, you know you can ask me to do that here today.

MR. ABRAMS: I would ask you when you do make your additional submission, that you also submit the 2001 statement.

MR. CREAHAN: Yes.

MR. ABRAMS: Thank you.

MR. CREAHAN: If you want me to go into the actions since the original statement, Judge Pfau's order that was issued to the judges talked very specifically about Mental Hygiene Law retention hearings. And despite that memorandum, those are still on the Internet. If you search under specific facility name, you can get a docket in the OCA

future court appearance database, and you can pop up patients' names in connection with retention hearings.

If you search the same database on the future decisions component, you can type in text-based searches using the phrases that I referred to, and get a list of cases involving the patients, patients are mentally retarded, mentally ill, being subjected to Kendra's law petitions, which are the involuntary outpatient care and treatment provisions under 960 of the Mental Hygiene Law. You also have cases involving involuntary care and treatment which we believe are covered under Mental Hygiene Law Article 33, which is the general confidentiality provisions in the Mental Hygiene Law, and we do not believe they should be on the Internet.

We tried to analyze what we saw as the cause of some of these releases, and we feel that some of them are the use or nonuse of the RJI as a coding mechanism. The RJI coding mechanism has, as you know, a list of boxes on it. And I've been informed that they're used in county clerks' offices oftentimes. And they're instructed to, when the box for Mental Hygiene Law matters are checked or other

are checked, I think they use that as a coding mechanism, so then delete makes them nonspecific in some fashion. And if you go through some of the records that I've indicated, you'll see for one county all the names are gone, and then in another county all the names are there.

So I think it does come down to a county by county county clerk as clerk of the court phenomenon, and you'll -- I think it does correspond greatly to the advancement that a particular county clerk has demonstrated in adapting to the Internet and getting the records on-line, and that's where I think you'll see that it's progressing quite quickly in an area where you may not want it to go.

Using the RJI, the Mental Hygiene Law hearings and other proceedings that are exempt from RJI filing requirements, is also particularly troublesome. Under Court Rule 202 and I think it's 202.6, there's a whole class of proceedings that are exempt from RJI filing requirements. So you don't even have that coding mechanism, if that's what's been used, to make these distinctions for placement on the Internet. You can go over to the Internet Cafe which is on Washington Street, and I've done

it, and I've typed in the name of a facility, and I've gotten all this retention hearings at facilities all over the state with patients' names on them. So it's not something I did at my desk at my office. It wasn't a mistake. It's very common, and I think it's accessible to the public regularly.

So if you have any questions about my statement, I can go through any particular proceeding that you want covered by the Mental Hygiene Law and see how --

MR. GRIFFIN: Emmett, I'm obviously not familiar with the field, and so I'm not understanding whether the problems that you've described are because certain information is not already protected as confidential as opposed to the procedures to keep it confidential are not being followed out -- followed up or complied with.

MR. CREAHAN: Right.

MR. GRIFFIN: Is it mainly the latter that exists and, of course, it illustrates the Internet problems. Unless you have pretty tight procedures and they're followed, this is going to be getting out?

MR. CREAHAN: Yeah. You know, it's hard to

tell because in the type of matter being handled, a judge could or could not be making individual decisions with regard to privacy. So it's not that easy for me to tell that. I know that when you look at Judge Pfau's order that was issued, she was pretty careful to say, well, clearly retention hearings are covered and they shouldn't be going on the Internet. And those are still on the Internet. So that's one problem.

There's a whole line of case types that you'd have to treat differently and analyze differently. Section 330 of the Mental Hygiene Law, which is not guilty by virtue of mental defect, essentially. If you go through 330, you reach a certain point where those matters are supposed to be treated as civil matters under Article 9, which is the civil statute for retention in New York State. Yet those proceedings, subsequent commitment proceedings, recommitment hearings involving very public defendants at times, one being Albert F., the famous cannibal down in New York City, has had several of his hearings put on the Internet. There's other -- other cases involving 730, the fitness not to proceed. We have a case called Hirschfield versus

Stone which is brought by the Director of the Second Department, and that's supposed to be confidential, and you find 730 cases on the Internet. So you can go through each one of them.

MR. ABRAMS: I also don't follow something, also not my field. The Albert F. case was put on the Internet?

MR. CREAHAN: Yes.

MR. ABRAMS: Is that case available, without regard to the Internet, generally, in the sense that anybody can get it?

MR. CREAHAN: Yes, under the name of Albert F. that case has been published.

HON. V. GRAFFEO: I think what we're trying to ask is what is the extent of protection that's provided by state or federal law? Is it just the identity of your client, or is it that none of those papers are available to the public in the county clerk's office under that index number? Say it's a retention hearing.

MR. CREAHAN: Right.

HON. V. GRAFFEO: If someone were to walk in the county clerk's office and have the index number for that retention hearing, can they not look at a

hearing?

MR. CREAHAN: They can't. It's supposed to be sealed.

HON. V. GRAFFEO: So it's a complete sealing?

MR. CREAHAN: Yes. On a retention.

MR. ABRAMS: Are you saying it was error, legal error for these opinions to be published?

MR. CREAHAN: On the -- I don't even though -- okay. She was talking about retention hearings. I think your question originally dealt with 330s.

MR. ABRAMS: Yes.

MR. CREAHAN: 330s, if the person's name is anonymous, we maintain that once you hit that provision in 330, it's supposed to be confidential, yet they are publishing recommitment and rehearing cases, and we don't think that's proper.

MR. ABRAMS: But that's not an Internet problem, right? You've got a problem with --

MR. CREAHAN: I was not aware that they were being made available in the county clerk's office either, and I don't know if they are.

MR. ABRAMS: Well, it doesn't begin on the Internet, does it?

MR. CREAHAN: For example, in Erie County, what

they do is when they reach that proceeding, they do seal the file. When they reach the proceeding that the person's now under the retention provisions of 330 of the Mental Hygiene Law, Criminal Procedures Law, they seal the file. In other counties, I don't know if that's happening or not. But I do know that some of those cases are on the Internet.

MR. ABRAMS: And some of those cases are publicly -- published, right?

MR. CREAHAN: Correct.

MR. ABRAMS: Not just on the Internet?

MR. CREAHAN: Right.

MR. ABRAMS: They're published by the judicial system?

MR. CREAHAN: Albert F. I think is a published decision. So that's --

MR. ABRAMS: Are you saying there's an additional problem when a published decision is put on the Internet?

MR. CREAHAN: That's what I -- if you want to distinguish between my stance on that thing being confidential and also having ramifications for the Internet, you can examine my statement, and I'll submit that. Sidney Hirschfield, Director of the

Second Department, restricted solely his comments to publication on the Internet, and I'll submit his statement as well.

MR. ABRAMS: Thank you.

MR. CREAHAN: And you know there are other sections under the Mental Hygiene Law that you can go through, which involuntary care and treatment.

MS. BRYSON: I just want to make sure I understand your statement. Who are you saying is publishing this on the Internet? Are you saying that the parties are doing this? That the press is doing this? That it's being done in a -- just let me finish the question because the court reporter will not be able to take down both of us at the same time.

MR. CREAHAN: I'm sorry.

MS. BRYSON: Who is doing the publishing? And are you saying that that publication itself is violative of Judge Pfau's order, or are you saying that it's violating the spirit of the order and the notion that these things should be public as -- should be private as opposed to whether they're required to be sealed?

MR. CREAHAN: I don't know who's putting them

on. OCA database. OCA web page, down in the left-hand margin, future court appearance database. When you go into that page --

MS. BRYSON: So the E-court's page, is that what you're referring to?

MR. CREAHAN: No, it's actually a future court appearance database. If I type in the name of a particular attorney, for example, and I've typed in Mental Hygiene Legal Service, I get a list of cases in which Mental Hygiene Legal Services serves as counsel for every county in New York State. If I go in under defendant, and I go and take one of the names I know already has been released, and by finding an opinion or whatever, I can type that in as a defendant and pop up that case. If I go in further, there's a future -- there's a decisions area where you can text search decisions, particular cases, using certain phrases.

MS. BRYSON: And are you saying that that violates either the spirit or the letter of Judge Pfau's order?

MR. CREAHAN: I think with regard to the retention cases, I think it does.

MS. BRYSON: Thank you.

MR. CREAHAN: And with regard to the others, there's going to be some -- it's hard to tell because you don't know if in those individual cases additional privacy concerns were meant to be addressed. I can't tell you.

MR. ABRAMS: Thank you very much for your testimony. Mr. Hamilton?

MR. HAMILTON: Good afternoon. My name's Grant Hamilton. I'm the publisher of four community newspapers in Erie and Wyoming Counties, and I'm the past president of the New York Press Association.

While it's predictable that a newspaper person would support better access to public documents -- and I do -- let me first tell you why I might argue the opposite position. Many of us have had the experience of paying an auto mechanic \$70 an hour to make a simple repair. When we grumble about the bill, he or she may remind us that the rate is \$10 an hour to turn the screw and \$60 to know where to put the screwdriver.

A good court reporter, who knows the ropes and knows the folks, knows where to put the screwdriver. By hiring that court reporter, a newspaper can and, in essence, does sell to the public what is free to

the public. Now, obviously a good court reporter does more than obtain records. But by protecting that inside track to information, he has something the average person wants, information they feel they cannot access. And of course newspapers are not the only people that can do this. Law offices, business journals, private detectives, and Internet services all have the opportunity to sell public record information to the public.

If I may, let me offer one other reason a reporter might not favor good access to judicial records. It gives the public an opportunity to more easily check the accuracy and the fairness of the reporter's work.

So in some respects, this isn't a media issue or technical issue. It could be considered a consumer issue. Internet access to records empowers the consumers of the legal and judicial system and the readers of newspapers. I'm certain others have discussed the potentially significant productivity improvements that electronic filing and dissemination of records could bring to the legal system and the benefits that could be seen by the educational community. So let me briefly discuss

some ways electronic access to judicial records would benefit the approximately 40,000 readers of my small newspapers.

Many community newspapers, because of the economics of community newspaper publishing, have small reporting staffs. Our newspapers cover communities in three counties, a couple of dozen municipal governments including the local courts, and several school districts. Frankly, it is very hard for us to adequately cover judicial proceedings. This leaves us in an uncomfortable position of either not covering these stories or covering them in a manner that may offer the who, what, when, and where of the story, but not the why and the how. Thus the ability of our newspaper to help our readers understand the system is diminished.

In many of our communities, the only -- only the sensational cases are covered by the large daily newspapers with their greater resources. There are many areas where electronic -- electronically available information would assist in our job and in informing the public. Details of Article 78 proceedings come to mind. In our community such

proceedings are not uncommon and they often relate to land use and zoning matters, which are of general public concern. As you know, oral arguments are often limited in such proceedings. So the ability to easily access written complaints and answers and briefs and to read cases cited would certainly make our reporting more accurate and thorough.

Electronic access to records, especially with adequate search functions -- and I heard some of the testimony on search, and I'd be happy to discuss that with you -- but this would also provide us with the opportunity to more quickly and accurately research trends and the disposition of cases in our courts. How does one town court deal with DWI cases as compared to another, for example? Now, I don't believe that a statistical analysis of decisions is the story itself, but it may help determine if there is a story to be pursued.

There's a hazard in journalism that if a reporter invests a huge amount of time and research, it must become a story even if it's not a story. There's a hazard that a reporter researching a story based on a certain premise will find enough information to support the premise and miss the

information that would refute it. The ability to quickly and accurately do research at all hours of the day is important in obtaining complete information and to avoid the "time is story" temptation. Equally important, electronic access would enable editors to check facts and verify stories. Also, especially in small towns, there's often a perception that there are people who may receive special treatment in the judicial system. It's not easy to prove or disprove such allegations; thus the rumor mill can, without justification, undermine the confidence in the system. The ability to quickly research such allegations could help allay those rumors or, in rare cases, prove the malfeasance of the local justice.

The ability to do story research that involves public records is an important function of news gathering. Enabling that to be done more efficiently extends our capability, improves our accuracy, and gives our reader an opportunity to check our credibility. I believe that it serves our readers and our society.

Fortunately, this discussion, as I understand it, is not about making records public. That issue

is largely in resolve legislatively and judicially. There's plenty of guidance as to what records are not public, leaving us with the presumption of access to most records. There is a concern that there may be legitimately private information contained in records that could be abused if available easily to the public. It's a reasonable concern. And while the same abuse is possible with the hard copy records in the courthouse, I certainly support the concept that information such as an individual's Social Security number and credit card and bank account numbers should be given special consideration. The key is not to restrict all information, but rather to design the system with the minimal necessary controls and to strengthen and enforce penalties for those who abuse it.

When New York State replaced the winding state highways with the Thruway to improve transportation, there certainly was the possibility that there would be those who would travel at an unsafe speed and put others at risk. We didn't abandon the concept of the Thruway or restrict its use to a chosen few. We set reasonable speed limits and enforced them. In general, there should be no different rules for

Internet access to court records than exists for paper records at the courthouse.

I'd like to also briefly provide a testimonial to the usefulness of the Internet. As you know, New York State laws are available on-line. Prior to that time, in order to read the law, I had to go to our local police station and borrow a McKinney's book, and that was available from nine to five, five days a week. And not being an attorney, I wasn't always sure in what section of the code to look. Now I can read the law 24 hours a day, 7 days a week, and I can more quickly move from chapter to chapter and find what I need.

In addition to my newspapers, I also publish a stock market newsletter. At one time obtaining public information about public companies was time-consuming and costly. Those who could afford to have a physical presence at the Securities Exchange Commission could obtain the information. That information -- which, by the way, includes names, addresses, and financial information about individuals -- is now available to me in real time through the SEC's Edgar system. If you haven't visited the site, it has become quite user friendly

and you might want to look at it as a model.

I recognize there is cost to the taxpayer to create digital records. I believe that cost will be more than offset by productivity savings. More importantly, however, is the premise that information is the lifeblood of democracy. While those of us who have better access to information may wish to protect that franchise, making information available to more citizens can only strengthen the democracy.

I thank you for your attention, and I hope we have some questions. And my -- I have copies of my testimony, and it's also on-line at the East Aurora Advertiser web site.

MR. ABRAMS: Thank you very much.

HON. V. GRAFFEO: Can I just ask you the same question that I asked one of the other -- that I asked Mr. Bell. If the Social Security number was reduced to four digits or, you know, there was some limiting of some of the personal information, would that severely hamper the type of searches that you engage in?

MR. HAMILTON: No. We rarely have Social Security numbers to work with. Certainly addresses

to verify similar names, birth dates can be important, again.

HON. V. GRAFFEO: But addresses and birth dates you would put in a different category --

MR. HAMILTON: Yes, yes.

HON. V. GRAFFEO: -- of usefulness?

MR. HAMILTON: Certainly. We need to accurately identify people; and one way to do that is to have their age and their -- and their address.

MR. ABRAMS: Do you need the precise date?

MR. HAMILTON: It would -- it's certainly helpful in getting the right person identified. It's probably not vital, but I think it -- there's the hazard -- the more information you withhold, the greater the hazard that someone is misidentified. So unless there's a very good reason not to provide the exact birth date, I would suggest that that should be part of the record that we can obtain.

MR. CAMPBELL: How about -- how about a year of birth as opposed to the exact date of birth?

MR. HAMILTON: Again, that certainly, you know, if that's -- if that's what we can have, that will help us. But I don't -- I'm not sure what the objection to the entire birth date is, so I'm a

little bit at a disadvantage in answering that. Of course I always err on the side of give me all the information I can get.

MR. CAMPBELL: One issue you brought up was the fact that we can impose penalties on people who abuse the Internet. How would you enforce that penalty for someone in Germany who decided to access the New York information, repackage it, and sold it to different mediums back into the United States?

MR. HAMILTON: I'm not certain that the packaging and resale is, in itself, bad. I mean, it's not necessary for people to pay for information that's free. But I'm thinking more in terms of someone who goes and researches all the DWI convictions, they're public information, you can find out that John Jones was convicted last week and can call him up and say for \$500 I won't call your employer. And that's extortion, and that's illegal, and that's -- that's the kind of abuse that I'm looking at. Repackaging information, it may be in bad taste, but I'm not so sure --

MR. CAMPBELL: When I say repackage, I also meant like identify theft. If you took the information, created an identity overseas, brought

it back to the U.S.

MR. HAMILTON: Identity theft is a problem, no question about it. I'm not so certain that already publicly available records would -- would enhance the ability to steal identity. I think we give away more identity information every time you go to a restaurant and hand over our American Express. We don't know where that goes. People are very nervous about putting information on the Internet because they're afraid it will be stolen, but that card goes off to a back room all the time.

MR. GRIFFIN: Using your analogy to the highway and having speed limits and, of course, stop signs and caution lights, would you have any suggestions for the privacy highway as to what sort of traffic control and the appropriate instance we might consider?

MR. HAMILTON: I think the control that's probably -- and I apologize to the previous speaker if I misunderstood what he was talking about, but I think the control lies in the clerk's office, the court office where items that are not supposed to be public are made public accidentally or on purpose by someone. It's -- I don't believe the -- and I knew

that analogy would get me in trouble, but I don't think it's necessarily on the -- on the user side. I think it's on the information keeper side guided by existing law.

MR. ABRAMS: Thank you very much. We appreciate your attendance.

HON. V. GRAFFEO: Thank you for your patience in waiting the afternoon.

MR. ABRAMS: And we are adjourned today.

* * *

C E R T I F I C A T I O N

Date: _____

I certify that the foregoing 126 pages are a correct transcription of the proceedings recorded by me in this matter.

LYNN S. DULAK, RPR, CRR,
Official Court Reporter.

Privacy Considerations and Public Access to Court Records

Testimony of William C. Altreuter, Altreuter Habermehl

Presented before the New York Commission on

Public Access to Court Records

June 12, 2003

When evaluating which court records should be available on the Internet, and how they should be accessed, we need to consider the issue of privacy, and in considering this question this Commission should assess what social expectations are, and what the realities are with respect to individuals' right to privacy.

Privacy in the United States is a paradox. People nearly universally believe it to be a fundamental right, yet we value it so lightly that we make our shopping habits available to the world for the equivalent of 50¢ off on a carton of orange juice. The "right to be let alone," as Warren and Brandeis¹ famously expressed it, may be inexorably intertwined with the right to enjoy life, but for the most part this is not a right that courts have been willing to recognize as existing in the common law. Indeed, it is somewhat remarkable that "The Right to Privacy," which has been called the most influential law review article ever written has had so little impact on any actual jurisprudence. Often cited, rarely followed, "The Right to Privacy is more an expression of wishful thinking than an articulation of any sort of binding legal principle.

New York was among the first to turn away litigants seeking a private right of action based in a common law right of privacy,² and little has changed since then. For example, last year, the Second Department held that banks may sell their customers' names, addresses, telephone numbers, account and loan numbers and other financial data to third parties without concern about the supposedly private nature of this information because the intrusion into the privacy of the individuals who sought to bring a class action seeking damages arising out of this activity was found to amount to no more than unwanted junk mail and telephone solicitations. The court held that this did not constitute an actual injury, stating: "Class members were merely offered products and services which they were free to decline."³

New York State drivers licenses bear a bar code containing information on name, age, license number, date of birth and expiration date. Bars and liquor stores routinely scan these bar codes, and there is nothing to prevent such vendor from preserving this data along with details about what and when the individual purchased.⁴

Lawyers practicing in this State have the choice of standing in lines that can stretch to the base of the steps at 60 Center Street, or obtaining a security card that makes

¹Warren and Brandeis, "The Right to Privacy" 4 Harvard L. Rev. 193 (1890).

²*Roberson v. Rochester Folding Box Co.*, 177 NY 538 (1902).

³*Smith v. Chase Manhattan Bank USA* __ A.D.2d __ (2nd Dept. 2002).

⁴<http://schram.net/articles/barcode.html>

our names and dates of birth information available to anyone with a computer and modem, or access to the public library.

The tax assessor's information on your house, and even a photograph of it, may be on the Internet. It is public information, and it is posted in a number of places. In New York City, deed records contain the purchaser's social security number. Presently this information is protected merely by virtue of the fact that it is mildly inconvenient to go to where it is kept, but it is certainly not private. Federal bankruptcy records contain a wealth of personal information, essentially all of which is available on the Internet.

Life in the 21st Century may resemble life in 19th Century Boston as respects our expectations of anonymity, but as interesting as that may be sociologically, it does not mean much when held up to reality. Samuel Warren is said to have been motivated to explore the concept of the right to privacy out of pique over the newspaper coverage of his cousin's wedding⁵; today we are concerned about identity theft. In the end, the answer is always going to be the same and privacy experts generally acknowledge this: Nothing is private. Get used to it.

Balanced against this is the absolute right to open access to the courts. Open access to court proceedings is generally recognized as being important to preserving the integrity of the legal process, and in the public interest.⁶ At the same time, the public's right to inspect and copy court records is neither absolute nor unrestricted.⁷ Confidentiality agreements and sealed settlements are not favored by the law in New York,⁸ but provision is made for protecting the disclosure of information under certain circumstances. CPLR § 3103 provides that the court may, on its own motion, or upon application of any party, make a protective order "denying, limiting, conditioning or regulating the use of any disclosure device," and specifically directs that such protective orders, "shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person...." Moreover, the statute further provides that, in the event any disclosure is improperly or irregularly obtained, prejudicing a substantial right of a party, the court may order the information suppressed.⁹

⁵Turkington, Richard C., and Allen, Anita, *Privacy Law*, (West, 1999), 23. This may be a jurisprudential creation myth on a par with Abner Doubleday's invention of baseball, but both stories have some value: one has given us an attractive museum in Cooperstown; and the other has given us a number of attractive turns of phrase.

⁶NY Judiciary Law § 4.

⁷*Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), see, also, *Aetna Casualty and Surety Company v. Certain Underwriters at Lloyd's, London*, 176 Misc.2d 598 (NY County, 1998)

⁸Uniform Rules for the New York State Trial Courts, 22 NYCRR § 216.1

⁹CPLR § 3103(c). In *Lipin v. Bender*⁹⁹84 NY 2d 562 (1994). the Court of Appeals went even further, holding that dismissal of plaintiff's action was appropriate in a situation where plaintiff's counsel, upon coming across a pile of defendant's papers in the court room, picked them up, took them back to her office, copied them, then set up a settlement

In determining whether "good cause" has been established for sealing records, a court must balance the public interest in disclosure in a particular case against the benefits to be derived by the parties from confidentiality.¹⁰ Courts may consider a number of factors in making this determination, and are generally quite willing to evaluate whether court records may be a source of business information which could harm a litigant's competitive standing,¹¹ or whether public access to court records may be detrimental to the best interests of an infant or an infant's family.¹² In addition, specific statutory protections of privacy include records maintained pursuant to the Mental Hygiene Law,¹³ educational records, medical and records pertaining to HIV status. These examples are not by no means exhaustive, and, indeed, the categories of information and records that are statutorily protected as "private" are so extensive that many practitioners-- and I include myself among them-- often only learn of the confidential nature of a particular record when it is subpoenaed for trial and a motion to quash appears instead of the sought after materials..

Over the history of American law the courts have balanced privacy rights and the public's right to access court records. This assessment is done by the courts on a case by case basis, when authorized by statute and regulation, and by the legislature, when it enacts specific statutes. Some may point to the ability to disseminate information over the Internet as a justification for changing our past and current practice. However, there is no threat here. The information that people want to get is out there and can be obtained one way or another. Given our long held predilection for making information accessible (sunlight is the best disinfectant), there does not appear to be any justification for suddenly making data unavailable merely because it is now more accessible. When life centered around small towns, records were readily available to one's "entire world" simply by going to the local Clerk's Office. Now that our lives and influences have expanded beyond the once cozy boundaries of daily life, the scope of possible dissemination has increased. This is not new. The circle has simply expanded. Just as the belief is pervasive that there are greater privacy rights provided for under the law than there actually are, so to is the concern about the harm which might result if personal information becomes more accessible. There is no privacy. Get used to it.

The phrase "more accessible" may be misleading and it too should be evaluated with a skeptical eye. Notwithstanding the fact that an Internet search can reveal a great deal about an individual, anyone who has ever conducted an on-line search will agree that search queries can retrieve mountains of irrelevant data. Screening the results can

conference in an attempt to exploit the improperly obtained information contained in the documents.

¹⁰*In re Estate of Hofmann*, 729 NYS2d 821 (NY Sur, 2001).

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¹¹*Crain Communications v. Hughes*, 521 NYS2d 244 (1st Dept. 1987)

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¹²*See, e.g. Matter of Twentieth Century Fox Film Corp.*, 601 NYS2d 267 (1st Dept. 1993).

¹³Mental Hygiene Law § 33.13

become no less inconvenient than combing the Records Room of the courthouse. After all, too much information is almost worse than too little, if having too much means that time, effort, and energy must be spent sifting through mountains of data.

This is not to suggest that privacy is not something that is desirable, or that it is unattainable, but if there is going to be a fundamental change in the law of privacy, we should not try to make this happen by way of regulations which might diminish transparency and access to court records. This is approaching the problem the wrong way, and amounts to closing the barn door long after the horse has gotten away.

If identity theft is the concern, there are certainly other ways to address this, even in the current political climate. If the concern is merely that some things are more private than others, then it seems clear that the mechanisms necessary to protect recognized privacy concerns already exist, and work well. Although it is widely believed that the Internet somehow changed everything, in fact, that belief is already somewhat passé: it now appears that the Internet has changed very little. The experience of e-commerce has shown that we do not require new commercial codes to deal with cyberspace; new rules to deal with access to court records are likewise not necessary. Our legal system uses the public nature of its proceedings as a guarantee of fairness, and its default presumption is, and should be towards transparency. Once a dispute has reached the point that the court system has been called upon to resolve it, the assumption is that the dispute is public information, if only to insure that the system operates fairly. We should work to preserve this, and I hope and recommend that this Commission draft its findings accordingly.

William C. Altreuter is a member of the law firm Altreuter Habermehl (www.althab.com). He concentrates his practice on the litigation of complex liability cases, Internet, e-commerce and privacy issues, Hospitality law; Intellectual Property, and Alternative Dispute Resolution. He is an adjunct lecturer at the University at Buffalo School of Law, and is member of the Civil Practice Laws and Rules Committee for the New York State Bar Association. In addition, he is the editor of *Outside Counsel*, (www.outsidethelaw.com), a weblog which addresses issues related to the practice of law, including privacy topics. His publications include *Use of Surveillance Evidence Poses Risk of Ethical Dilemmas and Possible Juror Backlash* (NYS Bar Journal July/August 2002); *Legal Issues in Electric Commerce*, US Reporter AIJA 2000; *Product Liability Defenses*, New York Chapter, DRI, 1992; *International Products Liability Litigation*, Co-editor and US Reporter AIJA 1997; *Summary Proceedings*, US

Reporter, Kluwer Law International 1999; *Webvertising*, Kluwer Law International, 1999; *Contractual Indemnification in New York Labor Law*, New York State Bar Journal (July/Aug 1995); *Strategies for Successful Tort Claims Defense*, Pennsylvania State University 1993. He is a graduate of the State University of New York College at Geneseo and the University at Buffalo School of Law.

*Comments of Stephen W. Bell
Managing Editor, The Buffalo News
Buffalo, New York*

*Before the New York State Commission
On Public Access to Court Records*

June 12, 2003

The significance of the issue of how open New York's courts should be is borne out by Chief Judge Judith Kaye's creation of this commission, and by the distinguished members of the panel and your reputations in this field. Thank you for the opportunity to be heard.

The history of technology seems replete with examples of how the advances preceded clear societal systems, rules and customs for dealing comfortably with the innovations. The Buffalo News feels strongly that because technology will improve public access to court records, this commission should in no way restrict that access under the guise of slowing down or blunting the technology's promise.

In other words, as current real restrictions disappear – such as locating a case file in a dusty storeroom, finding a clerk to retrieve it, having a pocket full of quarters to copy the needed documents – we would urge the commission not to introduce speed bumps to the free flow of information to the public.

Newspapers – and especially their reporters – thrive in a free society where access to factual information is unhindered. Every newspaper in America would prefer to start with the unspun, unvarnished truth and write articles based on that beginning point.

As you know well, however, that is seldom the case. Reporters start with second- or third-hand sources and work their way back, hoping to get as close to the facts as they reasonably can.

New York, in its commendable protection of journalistic rights and legislative support for Freedom of Information and open meetings, has a

lengthy history of choosing openness and maintaining the public's right to know.

David Tomlin described this tradition forcefully in his testimony for The Associated Press in your New York City hearing and such universals bear repeating:

- We believe in the presumption of openness for all court records.
- We believe that anyone seeking to thwart or overcome this presumption must be held to rigorous standards.
- If that standard is met, we believe restrictions on access should be narrowly targeted to the interests that require that specific protection.
- And, we believe that “the appropriate way that these principles are observed is on a case-by-case basis.”

Rules in the public's broader interest should be enacted to open or maintain public access to court records, and, in this electronic age, openness should be the “default key.” The person who wants to close records has to make the case that keeping them open is damaging.

Since long experience of newspaper reporters and editors – and their attorneys – has shown that a law as written is not always a law as practiced, this commission would be well advised to lean toward maintaining and giving the public the freest possible access.

We would not urge this commission to allow public access to information that could be shown on a case-by-case basis to damage people. Embarrassment, even justified humiliation, however, should not come under the umbrella of damage.

What is of use is not just the contents of a sensational trial, but also the routine, day-to-day facts that can make reporting more accurate, thereby better serving society. Correct determination of suspects' prior criminal records, for instance, ensures fairness; after-hours access to lawsuits provides information for a complete story, rather than one based on what a plaintiff's lawyer might leak at 5 p.m. on a Friday, not that that's ever happened; and

citizens can get information to make decisions about grievances they may want to pursue against a corporation or individual, such as in class action suits.

Open records means better journalism and an enhanced level of public knowledge.

Among the other lessons that the leaps of technology have taught us is that trying to “hold back” new realities technology creates is misguided at best. Just as the typewriter inevitably made way for the personal computer, paper files will make way for databases of court information on the Internet. Your charge should not be interpreted as a search for ways to stifle or restrict the inevitable flow of such information, but how to make best use of it in a free society and to the benefit of the most people.

Even though the perception is that the media look under every rock and into everyone’s life, the actual abilities of the media, as you know, are more limited. Even in a profession that deals with hundreds and hundreds of people, stories and events daily, journalists barely affect even a tiny percentage of lives in any one region. But when crucial information about one life, or case, or person, is needed, it is likely crucial and should be available in the quickest, clearest, easiest fashion possible.

Finally, since earlier I discussed the difference between the way a law is written and how it is often interpreted, let me also reassure you with an example of how journalists police themselves, in real, everyday situations.

At my newspaper and many others, we print bankruptcies and real estate transactions; we also report marriages, births, deaths and weddings; we offer news of job promotions, public honors and arrests. While most of these are routine and cause barely a ripple, we do get calls each year from people who may be negatively affected by release of this information. When we do, we consider them on a case-by-case basis and often withhold publication if we believe damaging them is real.

For instance, a sheriff’s deputy may call and say he or she recently bought a house and for their protection would not want to have their address published in the real estate listings. We usually agree and omit the information. We thereby demonstrate in ways that few know a level of responsibility and common sense most would not ascribe to us.

To sum up our view, the editors of The Buffalo News would like to see continued and enhanced free and open access to court records. Sensible limits on some information that if released could cause harm makes sense. But we would urge this commission to emphasize and hold dear the public's right to know, maintaining and ensuring swift, easy and free access to court records.

The Buffalo News is an independent daily newspaper, serving eight counties of Western New York, where it is the dominant information source, both in print and via buffalo.com. A division of Berkshire Hathaway, The News has the highest penetration rate in its primary circulation area of any top 50 newspaper in the country.

Testimony of Grant Hamilton,
Publisher of Neighbor-to-Neighbor Newspapers
Before The Commission on Public Access to Court Records
June 12, 2003, Buffalo, NY

Good afternoon. My Name is Grant Hamilton and I am the publisher of four community newspaper in Erie and Wyoming Counties and a past president of the New York Press Association.

While it is predictable that a newspaper person would support better access to public documents -- and I do -- let me first tell you why I might argue an opposite position.

Many of us have had the experience of paying an auto mechanic \$70 an hour for a seemingly simple repair. When we grumble about the bill, the mechanic reminds us that the rate is \$10 an hour to turn the screw and \$60 an hour to know where to put the screwdriver.

A good court reporter, who knows the ropes and knows the folks, knows where to put the screwdriver. By hiring that court reporter a newspaper can, in essence, sell to the public what is free to the public. Now obviously a good reporter does more than obtain records...but by protecting that inside track to information, he has something the average person wants...information they cannot access...or at least they think they cannot. And, of course, newspapers are not alone in this. Law offices, business journals, private detectives and Internet services all have the opportunity to sell public record information to the public.

If I may, let me offer one other reason a reporter might not favor good public access to judicial records. It gives the public an opportunity to more easily check the accuracy and fairness of a reporter's work.

So, in some respects, this isn't a media issue or a technology issue -- it could be considered a consumer issue. Internet access to records empowers the consumers of the legal and judicial system and the readers of newspapers.

I am certain others have discussed the potentially significant productivity improvements electronic filing and dissemination of records could bring to the legal system, and the benefits that could be seen by the educational community.

So let me briefly discuss some ways electronic access to judicial records would benefit the approximately 40,000 readers of my small newspapers. Many community newspapers, because of the economics of community publishing, have small reporting staffs. Our newspapers cover communities in three counties, a couple of dozen municipal governments, including their local courts, and several school districts. Frankly, it is very hard for us to adequately cover judicial proceedings. This leaves us in the uncomfortable position of either not covering these stories or covering them in a manner that may offer the "who what, when and where of the story" but not the "why and how." Thus the ability of our newspaper to help our readers understand the judicial system is diminished. In many of our communities only the "sensational" cases are covered by large daily newspapers with their greater resources.

There are many areas where the electronically available information would assist in our job of informing the public. Details of Article 78 proceedings come to mind. In our communities such proceedings are not uncommon, and they often relate to land use and zoning matters that are of general public concern. As you know, oral arguments are often limited in such proceedings. The ability to easily access written complaints, answers and briefs, and to read cases cited would certainly make our reporting more accurate and thorough.

Electronic access to records, especially with adequate search functions, also would provide us with the opportunity to more quickly and accurately research trends in the disposition of cases in our courts. How does one town court deal with its DWI cases as compared to another, for example? Now, I don't believe a statistical analysis of decisions is the story itself, but it may help determine if there is a story to be pursued.

There is a hazard in journalism, that if a reporter invests a huge amount of time in research it must become a story, even if it isn't a story. There is a hazard that a reporter researching a story based on certain premise will find enough information to support the premise and miss the information that would refute it. The ability to quickly and accurately do research -- at all hours of the day -- is important in obtaining complete information and to avoid the time-is-story temptation.

Equally important, electronic access would enable editors to check facts and verify stories.

Also, especially in small towns, there is often a perception that there are people who may receive special treatment in the judicial system. It is not easy to prove or disprove such allegations, thus rumor mill can, without justification, undermine confidence in the system. The ability to quickly research such allegations could help allay those rumors, or in rare cases, prove the malfeasance of a local justice.

The ability to do story research that involves public records is an important function of newsgathering. Enabling that to be done more efficiently extends our capability, improves our accuracy, and gives our readers an opportunity to check our credibility. I believe that serves our readers and our society.

Fortunately this discussion, as I understand it, is not about making records public. That issue has been largely resolved legislatively and judicially. There is plenty of guidance as to what records are not public, leaving us with the presumption of access to most records.

There is concern that there may be legitimately private information contained in records that could be abused if easily available to the public. It's a reasonable concern and, while the same abuse is possible with hard copy records in the courthouse, I certainly support the concept that information such as an individual's social security number and credit card and bank account numbers should be given special consideration.

The key is not to restrict all information, but rather to design a system with the minimal necessary controls and to strengthen and enforce penalties for those who abuse it. When New York State replaced the winding state highways with the Thruway to improve transportation, there certainly was the possibility that there would be those who would travel at an unsafe speed and put others at risk. We didn't abandon the concept of the Thruway or restrict its use to a chosen few. We set reasonable speed limits and enforced them.

In general there should be no different rules for Internet access to court records than exist for paper records at the courthouse.

I'd like also to just briefly, provide a testimonial to the usefulness of the Internet. As you know New York State laws are available on-line. Prior to that time, in order to read a law I had to go to our local police station and borrow a McKinney's book -- that was only available to me from 9 to 5 on business days. And, not being an attorney, I wasn't always sure in what section of the code to look. Now I can read the law 24 hours a day, seven days a week and I can more quickly move from chapter to chapter to find what I need.

In addition to my newspapers, I also publish a stock market newsletter. At one time obtaining public information about public companies was time consuming and costly. Those who could afford to have a physical presence at the Securities Exchange Commission could obtain the information. That information (which, by the way, includes names, addresses and financial information about individuals) is now available to me in real time through the SEC's Edgar system. If you haven't visited the site, it has become quite "user friendly" to the general public. (<http://www.sec.gov/edgar.shtml>)

I recognize that there is a cost to the taxpayer to create digital records. I believe that cost will be more than offset by the productivity savings it will create in the legal system.

More importantly, however, is the premise that information is the lifeblood of democracy. While those of us who have better access to information may wish to protect that franchise, making information available more citizens can only strengthen the democracy.

Thank you for your attention. I have provided copies of my testimony and it is also available on-line at the East Aurora Advertiser website. (www.eastaurorany.com, the Advertiser section on the left navigation bar under "testimony".)

I would welcome your questions.