To: New York Commission on Public Access to Court Records

From: Media Law Committee of the New York State Bar Association

Date: May 30, 2003

I am Edward Klaris[1] and I want to thank the Commission for permitting me to make a presentation on behalf of the Media Law Committee of the New York State Bar Association.[2] The Media Law Committee is comprised of attorneys who specialize in issues relating to the First Amendment and privacy.[3] We represent news organizations and reporters and firmly believe online access to court records will allow for more quality journalism and improve the public's knowledge of the court system and court proceedings without compromising New York's protection of privacy interests.

Currently, searching court records is something of an ordeal; many people work or live miles away from courthouses, making it near impossible to visit the courthouses when they are open. Simply tracking down the correct courthouse in New York City can be overwhelming for reporters and members of the public trying to find information about a particular case. Electronic access to court records would allow for efficient searches of important information about attorney and medical malpractice, dead-beat parents, corporations charged with fraud, products claimed to be defective and other information that is currently very difficult to find. Moreover, not only the mainstream New York press would be able to search through court records. Out-of-state newspapers, broadcasters and websites; public interest organizations; and many others could make use of these records, causing more direct oversight of the courts and contributing to discussions of public issues.

An online database would give private citizens and non-experts access to the same material available to lawyers and government officials. As the Supreme Court noted in the Richmond Newspapers case, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[4] Making court records available on electronic networks would permit greater understanding of judicial decision-making, provide everyone in society meaningful access to important cases in the system and continue to improve the

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[2] This statement does not represent the position of the New York State Bar Assoc House of Delegates.

[3] The Media Law Committee is chaired by Slade Metcalf. The members include: Andrew Ian Bart, Richard A. Bernstein, Robin Bierstedt, Thomas M. Blair, Jennifer A. Borg, Zachary W. Carter, Jan F. Constantine, David T. Fannon, Alice L. Fradin, George Freeman, Kevin W. Goering, Michael J. Grygiel, David V. Heller, David J. Kerstein, Edward J. Klaris, Stefanie S Kraus, Richard A. Kurnit, Joel L. Kurtzberg, Matthew A. Leish, David E. McCraw, Elizabeth A. McNamara, Robert E. Moses, Eileen Napolitano, Lesley Oelsner, Nicholas E. Poser, Robert L. Raskopf, Muriel H. Reis, Madeleine Schachter, Elise S. Solomon, Katherine Aurore Surprenant, Susan E. Weiner, Jack M Weiss, Richard N. Winfield, David B. Wolf, David A. Schulz. Members serve on the committee in the their individual capacities, not as agents for their employers; views expressed herein or otherwise are not on behalf of members' respective employers, nor do the views necessarily reflect those of the employers.

[4] Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555, 572 (1980).

tradition of openness that is part of the culture and law of the New York court system. These benefits are best achieved with full-text searching and easy access to all cases rather than having to input the name of the case to conduct a search.

In the context of electronic access to court records, the doctrine of "practical obscurity"[5] and concerns over privacy are misleading and do not apply. The current system of open court records works quite well and it would be a mistake to impose a new system of court secrecy in which categorical and preemptive determinations limit access. These decisions are best made on a case-by-case basis, upon a motion by the party seeking to either seal the records entirely or to curtail their availability.

The Commission is by now well aware that the U.S. Supreme Court made clear in Nixon v. Warner Communications, Inc.,[6] that the public enjoys a common law right of access to judicial records. The "presumption of openness" can be reversed only by showing an "overriding interest based on findings that closure is essential to preserve higher values."[7]

New York Rule of Court 216.1 requires judges to consider not only the parties but also the "interests of the public" and provide a written finding of "good cause" before sealing court records. The rule undergirds New York's strong public policy in favor of open court records. New York courts over the past decade have consistently relied on Rule 216.1 to deny requests to seal court records even where all parties were in favor of sealing the case. For example, in a case decided in 2001 involving the proprieties of an estate accounting and personal finances, the First Department upheld a Surrogate Court judge's denial of a joint motion for protective order to seal the settlement agreement. In that case, named In re Hofmann, the court in denying the motion noted that, even where all parties agree to seal the records, "[c]onfidentiality is clearly the exception, not the rule, and the court is always required to make an independent determination of good cause." [8]

Would the Appellate Division's analysis in In re Hofmann or other cases change if court records were available electronically? We do not think so. For decades New York courts and the legislature have rebuffed privacy advocates' attempts to create generalized privacy torts such as one for publication of private facts. On the other hand,

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[5] Many people who fear electronic access point to the 1989 Supreme Court Reporters Committee case where the concept of "practical obscurity" was first articulated.[5] But that case has been misconstrued in the context of access to court records and ought to be disregarded by the Commission. The Reporters Committee case concerned a FOIA request for records of the executive branch, not an access motion for court records. Specifically, Reporters Committee involved FBI "rap sheets", which are multi-state summaries of an individual's criminal history and include "descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations."[5] Rap sheets are not documents filed in a courthouse. Rather, the FBI gathers this information from law enforcement agencies at all levels of the federal and state governments.[5] Here the public would simply have electronic access to "the source records themselves"—the same court files that are accessible today through physical inspection. Electronic access will make the inspection of public records easier. But making inspection of a public court file easier does not invade the privacy of any litigant.

[6] 435 U.S. 539 (1978),

[7] Press Enterprise Co. v. Superior Court., 464 U.S. 501, 510 (1984).

[8] In re Will of Renate Hofmann, 287 A.D.2d 119, 733 N.Y.S.2d 168 (1st Dept. 2001).

where the benefits of confidentiality in court records clearly outweigh the presumed benefit of transparency, New York already has several rules and statutes to cover this. For example, state statutes currently permit courts to seal records in family law, matrimonial and juvenile cases. The New York Public Health Law and the New York Mental Hygiene Law are the principal statutory sources of New York law that require health information to be held in confidence. Additional health-related statutes cover specific situations (e.g. HIV and AIDS patients[9], disclosure of health records in litigation[10], and the collection of statistical information by various governmental agencies). These rules would continue to apply in the electronic environment.

Congress has also passed a number of federal laws that protect certain kinds of information: HIPPA protects health information[11]; Gramm-Leach-Bliley protects financial information[12]; FERPA protects educational information[13]; COPPA protects information about children[14]; the Driver's Privacy Protection Act protects drivers' license applications and information[15]; and there are more.

With all these privacy-related laws, the chances that highly confidential information will be filed with the court in litigation have been significantly reduced. Even where such information may be turned over in discovery, only a tiny percentage of discovery information and materials are actually filed with the court, and, of course, the First Amendment does not require that non-parties be given access to discovery material that has not been filed in the clerk's office.

Perhaps the greatest fear of electronic access to court records is that information may be used in identity theft -- where a person's social security number, credit card and bank account information are appropriated and used illegally. While identity theft is a serious concern, blocking access to certain electronic court records is not the answer. Strict enforcement of the existing criminal laws and the proper implementation of state and federal privacy legislation will deter such behavior. In addition, there is no evidence that court records would ever be a good place for would-be criminals to obtain social security, credit card and bank information, while there is ample evidence that such information can be obtained elsewhere on the Internet and through criminal rings that collect the data from co-conspirators at banks and retailers. Speculative and remote fears about deviant behavior should not cloud this Commission's recommendations. This Commission should support electronic access to court records and endorse the current rule of law and good public policy in New York, which already properly balances privacy in court records with the First Amendment.

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[9] N.Y. Public Health Law § 2134.

[10] In a court proceeding in New York, specific providers (physicians, dentists, podiatrists, chiropractors, nurses, professional corporations, medical corporations and other "person[s] authorized to practice medicine") are not permitted to disclose information which ws acquired in attending the patient and which was necessary to enable him to act in the capacity. CPLR § 4504 (rule of evidence).

[11] Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, § 264, 110 Stat. 1936, 2033-34 (1996); 45 C.F.R. pts. 160 & 162.

[12] 16 C.F.R. § 313.

[13] Federal Education Rights and Privacy Act, 20 U.S.C. § 1232g and its implementing regs., 34 C.F.R. part 99.

[14] Children's Online Privacy Protection Act f 1998, 15 U.S.C. §§ 6501-6505.

[15] 18 U.S.C. §§ 2721-2725 & Pub. Law No. 109-69, §§ 350 (c), (d) and (e), 113 Stat. 986, 1025 (1999).

In conclusion, we suggest that this Commission recommend that New York court records be made available electronically, utilizing the same rules of openness followed by the current New York court system. Doing this will increase the efficiency of the judiciary and, correspondingly, make the records system available to all citizens so that they may monitor the integrity and efficacy of the courts. We do not request that New York expand the types of records available to the public. Rather, we simply would like New York to provide broader and more efficient access to records that are already public.