

COMMISSION ON PUBLIC ACCESS TO
COURT RECORDS

PUBLIC HEARING

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DONNA EVANS

OFFICIAL COURT REPORTERS

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1 MR. ABRAMS: Good afternoon. I am Floyd
2 Abrams. I have the honor to share the New York
3 Commission on Public Access to court records.

4 With me today -- and those who will be with
5 me today -- are a number of members of this Commission
6 including Stephanie Abrutyn, Elizabeth Bryson, Hugh
7 Campbell, William Farley, Thomas Gleason, Norman
8 Goodman, distinguished Clerk of New York County,
9 Richard Griffin, Pamela Jones Harbour, Maria Imperial,
10 Victor Kovner, Joseph Lelyveld, Charles Sims, and Gary
11 Spivey.

12 Chief Judge Judith Kaye empaneled this
13 Commission last year to advise the New York State Court
14 System on a difficult and vexing issue that arises out
15 of the technological advances of recent years.
16 Judicial records are, as a general proposition, public.
17 Indeed, as a general matter of federal and state
18 constitutional law, they must be public. What Justice
19 William O. Douglas said 56 years ago remains true
20 today, that a trial is a public event. What transpires
21 in the courtroom is a public event. And the same is
22 true of most but not all court records.

23 The new advances in technology, the Internet
24 in particular, now make it easier to disseminate public
25 information far easier than ever before. But the

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1 glories, the benefits of the Internet, the ease of
2 availability of information, the 24/7 availability of
3 information, the unconstrained nature of who may
4 receive the information also may raise potential
5 problems. Can there be too much availability of public
6 records? Should Internet access in particular lead us
7 to take a second look to take care about what finds its
8 way into public judicial records in the first place?

9 Announcing the formation of this Commission,
10 Judge Kaye put our tasks this way. She said: "In
11 keeping with society's increasing reliance on
12 technology, the court system will begin to make case
13 files available electronically within the next few
14 years. But while providing greater access to this
15 information, we must also be diligent to protect the
16 litigants' right to privacy. We recognize that court
17 records can contain sensitive information such as
18 social security and home telephone numbers, tax
19 returns, medical reports and even signatures. I have
20 charged this Commission with the hard task of examining
21 any potential pitfalls, weighing the demands of both
22 open access and individual confidentiality and making
23 recommendations as to the manner in which we should
24 proceed."

25 Judge Kaye's formulation makes it clear that

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1 the important questions that this panel has been asked
2 to address are not easily answered. The purpose of
3 today's hearing, of the hearing that preceded today in
4 Albany a few weeks ago, and the hearing which will take
5 place in Buffalo a few weeks from today will be to
6 receive and consider the views of interested
7 individuals and organizations from around the state;
8 and given the prominence of New York State, from around
9 the country. A transcript of all three hearings will
10 be made available on the Commission's website.

11 The notice for these hearings set forth
12 several questions that go to the heart of this
13 Commission's mandate:

14 1) In light of the recognized public interest
15 that is served by having court case records available
16 for public information, are there any privacy concerns
17 that should limit public access to those records on the
18 Internet?

19 2) Should any information that is currently
20 deemed public be subject to greater restrictions if
21 made available for public access on the Internet by the
22 Unified Court System? For example, are there
23 particular privacy concerns that outweigh open access
24 considerations regarding the disclosure on the Internet
25 of an individual's social security identification

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1 number, credit card information, bank or investment
2 account numbers, or other personal identifying
3 information?

4 3) If such personal identifying information
5 should not be made available on the Internet, how
6 should that information be eliminated from electronic
7 Internet availability?

8 4) If there are any limitations or
9 restrictions to be placed on the dissemination of court
10 records on the Internet, what role should be played by
11 the courts, by attorneys, and by others?

12 5) Should the public be charged a fee to
13 access court case records on the Internet?

14 6) What information should a member of the
15 public need in order to search case records on the
16 Internet? Should a search require the name of a
17 litigant or litigants, or should searches be available
18 by topical inquiry or statutory reference?

19 We are looking forward to hearing from our
20 speakers and witnesses today. We have asked each of
21 you to speak to us for a time period of between five to
22 a maximum of ten minutes; or, if you wish, no minutes
23 at all in circumstances in which they have given us
24 copies of their testimony already. We will then
25 address questions directly to them.

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1 I conclude by saying that there are examples
2 of records that are not publicly available under New
3 York State law without a court order making them so;
4 and they are, therefore, not within the ken of this
5 Commission. If material is not public already, we are
6 not here to sit to decide that they should be made
7 public. One may, of course, argue about those things,
8 but it is just not what this Commission is doing.

9 Those records include records in matrimonial
10 matters, child custody proceedings, pre-sentencing
11 reports and memoranda in criminal cases, documents
12 containing HIV-related information or the identity of
13 victims of sexual offenses and other documents that are
14 filed under seal under New York law. As I have said,
15 our mandate is not to revisit the law and policies that
16 provide for confidential treatment of those materials.

17 We will now turn to our witnesses. I would
18 ask each witness whether or not the person has provided
19 us with a copy of his or her testimony to first when
20 they speak identify themselves and their organization,
21 if they speak for an organization. And we ask first
22 Elisa Velazques to speak.

23 MS. VELAZQUES: Thank you.

24 I am Elisa Velazques, and I am legislative
25 counsel for the New York State Trial Lawyers

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1 Association.

2 Good afternoon, and thank you, members of the
3 Commission, for the invitation to come and address you
4 on the very important issue of making information
5 contained in court records more accessible to the
6 public through the use of enhanced technology or the
7 Internet. The New York State Trial Lawyers Association
8 applauds the efforts of this Commission to listen to
9 all the different voices and concerns regarding the
10 challenges that you face.

11 Technology changes every day, and advances
12 that have been made in recent years have completely
13 transformed the dynamics between government agencies
14 and the public they serve. The Internet has made the
15 workings of government far more accessible to the
16 public and has liberalized information-sharing so
17 individuals can more fully participate in government
18 and their community.

19 As mentioned by the Chair, historically,
20 judicial proceedings have always been open and subject
21 to public scrutiny. Judicial proceedings contained in
22 court records are legally a matter of public record, so
23 enhancing access to records by making them available
24 electronically can certainly provide a convenient way
25 for individuals to monitor the court system and ensure

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1 the fairness in the quality of its operations. In
2 addition, greater reliance on technological advances
3 and on the Internet can help courts manage the increase
4 in their case loads and streamline their process for
5 filing motions and pleadings and papers and the like.

6 However, the personally identifiable and
7 often sensitive information contained within judicial
8 proceedings, while legally a matter of public record,
9 has always been practically obscure and somewhat of a
10 challenge for an individual to obtain. In order to get
11 this information, a member of the public would have to
12 know the name or index number or some kind of
13 identifying information about the case, and must then
14 physically go to the courthouse where the case is
15 filed, find the file room, fill out a petition or fill
16 out a form to petition the file, wait in line to turn
17 in the form, wait for a clerk to locate the file, wait
18 for yet another clerk, you know, to bring the file
19 over, find a place to review the file, and then finally
20 find a working copy machine to make copies of whatever
21 it is that they want. As arcane and cumbersome of a
22 process as this might seem, it does actually act as an
23 institutional safeguard because it requires a
24 highly-motivated individual to complete this process
25 which actually reduces the universe of individuals who

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1 have access to the information.

2 But with the advent of the Internet, this
3 information is now -- is now available through a
4 keystroke to anybody who has access to a computer, and
5 it is clear that such unfettered access to personal or
6 confidential information was not foreseen and it could
7 have serious and unintended consequences.

8 Also, it is questionable as to whether
9 unrestricted access to personal and often sensitive
10 information contained in the court file is in the
11 public interest or is sound public policy. Protecting
12 the integrity of the confidentiality of this personal
13 information or making the court system as accessible to
14 the public as possible is the challenge that you face
15 on this Commission.

16 The ability of information contained within
17 judicial proceedings on the information highway varies
18 from state to state and from court to court. Some
19 states or jurisdictions utilize statewide searchable
20 databases. Some require the user to have a case number
21 or name in order to search an existing database. Some
22 states provide access to criminal and civil records
23 restricting user access to records that contain
24 sensitive personal information. Some states offer free
25 comprehensive access to court records while others

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1 charge a fee for online access. Within the same state
2 one judicial district or jurisdiction may make judicial
3 proceedings available online while yet others might
4 not. Some examples are:

5 California has adopted statewide rules that
6 allow for widespread electronic access to civil trial
7 records while limiting electronic access to criminal
8 records and various cases that contain personally
9 identifiable information.

10 Colorado has a website that allows you to
11 search open and closed cases, but sealed cases as well
12 as probate mental health and juvenile records are not
13 available to the public on the site.

14 Hawaii has an online access system that
15 allows users to search for case information by case
16 number or case name, and sealed records are
17 confidential information and are not available online.

18 There are states that don't make their court
19 records as a whole available online; Idaho and Maine.
20 They offer information about index numbers,
21 administrative orders, and they offer court opinions.

22 In New Jersey Supreme, Appellate and Tax
23 Court opinions are available online and there is a
24 searchable electronic civil motions calendar. However,
25 in New Jersey, the judiciary has decided not to expand

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1 access to court records due to budgetary constraints
2 and the concern that making court records available
3 online would violate privacy rights guaranteed by the
4 Constitution and other statutes.

5 The struggle to help states balance
6 competing -- the competing right to privacy and right
7 to access interest has resulted in several national
8 groups including the State Justice Institute, the
9 National Center for State Courts, and the Justice
10 Management Institute to come together and develop
11 guidelines for public access to state court records.
12 These guidelines are for comprehensive framework that
13 can be referenced and used by this Commission along
14 with similar commissions in other states examining this
15 issue.

16 In developing either a statewide policy and
17 standards for public access to court records via the
18 Internet, the fundamental objectives of these
19 guidelines -- and I am not sure if the Commission is
20 familiar with them -- is to maximize public access to
21 court records without compromising an individual's
22 right to privacy or creating a risk of injury to
23 individuals or businesses. The guidelines provide for
24 access in a manner that maximizes the availability of
25 court records, promotes government accountability,

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1 supports the role of the judiciary as the arbiter of
2 disputes, and contributes to public safety, but it is
3 in a way that also minimizes a risk of injury to a
4 individual or business and that protects individual
5 privacy rights and interests and protects proprietary
6 business information.

7 They make recommendations for the definition
8 of key terms. They lay out general access rules and
9 exceptions. They discuss, question, prohibit public
10 access information in court records or obtain access to
11 restricted information. And they discuss the
12 obligation of vendors providing information technology
13 support to a Court to maintain court records --

14 MR. ABRAMS: Your time is about up.

15 MS. VELAZQUES: I will go quickly.

16 These are the issues that are kicked around.
17 And as plaintiffs attorneys and advocates for
18 individuals who have been harmed --

19 MR. ABRAMS: I will let you speak a little
20 slower. I will not cut you off.

21 MS. VELAZQUES: Okay. Thank you.

22 There is a great interest in having
23 information contained in court records readily
24 accessible online. It can save money and time. It can
25 help to defray research costs and online access to

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1 records. It also enhances an attorney's ability to get
2 valuable and difficult enough to obtain information
3 about a particular government agency or large corporate
4 defendant. However, as advocates for our clients,
5 plaintiffs' attorneys also see the great danger in
6 having personal, sensitive or confidential information
7 available at a keystroke.

8 For example, a Bill of Particulars routinely
9 contains highly personal and identifiable information
10 regarding the plaintiff's injuries, medical history,
11 work history, financial status. While a Bill of
12 Particulars is filed with the Court and with the court
13 clerk and is part of the public court record, it is a
14 completely different issue if this highly sensitive
15 pleading can be accessed by anybody with a computer.
16 For obvious reasons of safety and security, neither
17 individual nor business clients nor their attorneys
18 would want this information readily accessible for
19 public consumption.

20 In addition, the electronic availability or
21 the extent of the electronic availability of certain
22 information contained within court records is also
23 dependent on other statutory requirements that affect
24 civil practice.

25 For example, the Department of Health and

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1 Human Services has just implemented the standards for
2 privacy of individually identifiable health
3 information. And it is called the privacy rule. And
4 it is required by HIPPA, or the Health Insurance
5 Privacy, Portability and Accountability Act. This
6 privacy rule went into effect April 1 of this year, and
7 it protects all individually identifiable health
8 information held or transmitted by a covered entity or
9 its business associates in any form or media,
10 electronic, paper or oral.

11 As a result of the privacy rule,
12 authorizations that attorneys have routinely used and
13 subpoenas that they have used -- have had to use to
14 obtain medical records and access the information
15 contained within those medical records have had to be
16 changed and modified in order to comply with the new
17 requirements. Certainly the information contained in
18 those medical records becomes part of pleadings in a
19 civil case; and having such information readily
20 accessible via some online searchable database seems to
21 conflict directly with the new federal mandates under
22 HIPPA. So, again, we raise these as issues that the
23 Commission would have to look at when devising policy.

24 Quickly, in closing, we want this
25 Commission to establish a sound policy that allows

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1 proper access to public data without, in effect,
2 advertising personal information.

3 Thank you very much.

4 MR. ABRAMS: We are now going to ask you some
5 questions.

6 Let me start out by saying that I want to be
7 as clear as I can about precisely what sort of
8 information is the type that your organization believes
9 ought not to be made available on a wider public basis
10 that Internet dissemination would allow. You mentioned
11 personal, sensitive, and confidential information. You
12 cited a Bill of Particulars by way of illustration.

13 What is the problem with putting on the
14 Internet as opposed to putting in a court document --
15 which is available to anybody that is interested -- the
16 work history or the personal history of somebody making
17 a personal injury claim?

18 MS. VELAZQUES: There could be several things
19 wrong with that.

20 When a Bill of Particulars is presented,
21 there is information in there, like you said, about a
22 person's social security number, how many children they
23 have, where they live. And let's just say that in the
24 case of a medical malpractice, maybe, the plaintiff in
25 a case like that is suing the doctor, and they have

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1 some kind of medical condition that would be considered
2 confidential, like you said, either HIV or maybe some
3 kind of other condition that they wouldn't want out
4 there. This is information that the Court needs to
5 make determinations of fact and law, but then there is,
6 I think, more information that is contained in
7 pleadings that does not go directly to that function,
8 which if made accessible would be an invasion of
9 privacy.

10 MR. ABRAMS: But this is all information
11 which the newspaper can obtain.

12 MS. VELAZQUES: There are various pleadings
13 that are filed that have to be filed as a matter of
14 course with the court and that are available in the
15 court file, but, again, it is a different story to have
16 to go down, physically go down to a courthouse and
17 requisition a file and look through the file and be
18 motivated in that sense than to have that information
19 available in your bedroom which is just a couple of
20 steps that you have to stumble from your bed to the
21 computer. And that's something in terms of the
22 interests of, I think, plaintiffs that needs to be
23 taken into consideration.

24 Part of your goal is to make judicial
25 proceedings more open to the public. You want to open

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1 the doors to the courthouse. If people think that
2 their business is going to be out there on the
3 Internet, they might not be so inclined to seek redress
4 in the courts, and you don't want to have that kind
5 of -- you don't want to put people in that kind of
6 situation.

7 MR. ABRAMS: Any questions on my left?

8 MR. SIMS: Yes.

9 With respect to your discussion about HIPPA,
10 was it your contention that requirements of HIPPA apply
11 even at the point at which a patient has asked the
12 doctor to give stuff to her lawyer or the other side's
13 lawyer in the hands of the lawyer?

14 In other words, does HIPPA, in your view, and
15 then I will ask you for authority to support it, affect
16 what a lawyer can file in court?

17 MS. VELAZQUES: The HIPPA regs have just --
18 the new privacy rule has just gone into effect April 3.
19 I am by no means an expert on the new regs. I know
20 working at the Trial Lawyers Association that we have
21 been getting inundated by calls from our members who
22 practice and who have been providing either healthcare
23 providers or hospitals with authorizations to get
24 medical records.

25 MR. SIMS: That's a different matter.

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1 I would ask that if there is anything, either
2 the statute or the regulations or any cases that affect
3 filing, would you supply it to the Commission?

4 MS. VELAZQUES: Absolutely. I can supply --
5 I mean, on the Health and Human Services website there
6 is a very good succinct summary of the rule, what the
7 requirements are. And there is also, you know, the
8 actual part of the federal regs that are in there, but
9 I definitely think there is going to be some conflict
10 in what the Commission is trying to accomplish and some
11 other federal standards that have been implemented.

12 MR. SIMS: But HIPPA affects what the
13 hospital can give out voluntarily. I am not sure it
14 says what a lawyer can do once he subpoenaed that
15 information. And do you think it affects the lawyer's
16 obligations or his abilities after he gets something
17 pursuant to subpoena? And if there is something,
18 please supply it to the Commission.

19 MS. VELAZQUES: Okay.

20 MR. FARLEY: I want to follow up a little
21 more with what you think the harm is. We considered
22 certain types of information like bank account numbers,
23 PIN numbers, things like that. That might facilitate a
24 fraud or something of that sort. The kinds of things
25 you were talking about, certain medical conditions or

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1 something of that sort, don't seem to lend themselves
2 to those kinds of harms. You were suggesting, perhaps,
3 that these are things that might be embarrassing to the
4 individual or uncomfortable for the individual. And I
5 just want to press that point a little bit because we
6 have had a submission from some other people who will
7 be talking to us today who say that fear of shame or
8 embarrassment should not be enough to prevent the
9 release of information even over the Internet.

10 I would like you to address that, if you
11 would.

12 MS. VELAZQUES: I think we would agree that
13 fear of embarrassment should not trump the need to make
14 information, public information more accessible to the
15 public; however, the information very often that is
16 contained within these pleadings could work harm in
17 other ways, I think.

18 You know, if you have -- let's say you have,
19 for example, a case where there is a no-fault case or
20 there is a no-fault insurance carrier, it has a lot of
21 resources and they can maybe go online and start
22 searching information about people that they might have
23 claims against them. They want to find that
24 information and use that information in some way, shape
25 or form to either benefit them, hurt the client or do

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1 something with the case.

2 I think, again, that in the area where you
3 where you are in active litigation, and, you know, you
4 are trying to resolve an issue, you have to also take
5 into consideration that there are entities out there
6 and there are people out there who would go on to the
7 sites and use this information in ways that might not
8 be intended by what this Commission wants the
9 information out there for. And my position is not to
10 say that it shouldn't be done, but my position is that
11 the Commission understand that there are these
12 different types of scenarios that can play themselves
13 out and I'm sure you would want to address those types
14 of issues because it would impact a lot of people that
15 bring cases in court.

16 MS. BRYSON: Ms. Velazques, representing the
17 trial lawyers, obviously your interest is, in part, on
18 the practicalities, I assume, of what the implications
19 are depending on what our recommendation is and what
20 the courts decide to do.

21 There have been proposals to the Commission
22 that what should happen is that lawyers themselves
23 should be obligated, that there should be a set of
24 rules that should be issued to lawyers saying, Thou
25 shalt not file the following types of information in

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1 your routine pleadings unless you take certain steps,
2 etcetera.

3 For example, lawyers might be required not to
4 include social security numbers in their primary
5 pleading but, perhaps, to put it in an envelope and
6 seal it if it was a necessary piece of information.

7 You know, if you have a dispute with a credit
8 card company about whether this was your bill, you
9 might also have the lawyer obligated not to provide the
10 credit card numbers and so on.

11 Does the trial lawyers organization have a
12 position with respect to whether this is a feasible and
13 an acceptable course for protecting the very clients
14 that you are talking about?

15 MS. VELAZQUES: I am sure it is feasible.
16 And, I guess, you know, we would have to see what the
17 final -- you know, what the final rules or the final
18 breakdown of rules would be. But if there is a way to
19 do it and there is a way to protect that information,
20 and if there is accountability built into that and if
21 there is an education process so that lawyers are very
22 clear about what they are supposed to be doing, also
23 information providers that will be managing the
24 information; if they are all very clear about what
25 should be out there and not out there and that there is

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1 some accountability built into that rule system if
2 there is a breakdown, you know, I think that would be
3 something that would be okay with us.

4 MS. BRYSON: Do you have any experts within
5 your organization with respect to the technological
6 aspects of this?

7 One of the challenges that we have seen in
8 some of the other testimony and in some of the other
9 materials that we have examined is, for example, an
10 attachment to a pleading might be photocopies of a
11 record that are really -- that really you have to sit
12 there with page by page and look and see whether there
13 was something confidential on it and redact it; perhaps
14 it is a photograph of a rape victim or something.

15 Do you have any expertise with respect to
16 that or does your organization have access to that?

17 MS. VELAZQUES: I am sure we do. I mean,
18 there are members that are more up on this and involved
19 in this more than I am personally; but I am sure that
20 whatever expertise we have and wherever we think we can
21 give references to the Commission, we would be more
22 than happy to do so.

23 MS. BRYSON: Thank you.

24 MR. GOODMAN: Carrying on the practical
25 aspects of this, and as was just mentioned, something

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1 about redaction; do you feel that if you have
2 information, if you do file, if we do go to Internet
3 access and you have information that is carried in the
4 pleadings or the Bill of Particulars or in any of the
5 papers that are filed, who would be there if the
6 attorneys -- if the attorneys didn't do it, who would
7 be there to redact it, and could this be done within
8 the court? Do you have any feelings about that?

9 MS. VELAZQUES: Well, I don't think that
10 there is anybody now -- I don't think there is a system
11 in place now that the courts have to do that kind of
12 work. I mean, I think it would take a commitment on
13 the part of OCA, you know, to put those resources there
14 to do that. Is it possible to do? I am sure it is.
15 But I think it would be -- there is cost to consider,
16 you know, and there is restructuring to consider. And
17 if it is deemed that it can be done and this Commission
18 feels it can be done, and, you know, either legislation
19 or rules are enacted or rules are adopted and the
20 resources are allocated to do it correctly, I think
21 that we would be fine with that; but I think all of
22 those things need to fall into place.

23 I mean, like you said, practically speaking
24 that infrastructure is not there. You are going to
25 have to -- if that's the route the Commission goes, you

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1 are going to have to create that infrastructure, which
2 is another challenge in and of itself.

3 MR. KOVNER: Am I correct in understanding
4 that it is the position of the trial lawyers that
5 notwithstanding the public interest and the interest of
6 litigants' access, remote access to information about
7 corporations and government agencies and others, that
8 those valuable interests are outweighed by the privacy
9 interests of the individual claimants that you were
10 concerned about?

11 MS. VELAZQUES: Okay. Just to be clear, you
12 are asking me if the privacy interests for our
13 individual clients outweigh these other concerns? No,
14 that's not our position at all.

15 Our position is that there is a balance. And
16 that's what this Commission is here to do, to balance
17 the presumption that court records are a matter of
18 public record. They should be readily accessible and
19 we should rely on enhanced technology to do this, but
20 there are competing privacy interests.

21 In particular, as a plaintiffs' bar we look
22 at interests that are particular to our clients and
23 that might be issues to our clients, and we raise them
24 for you to consider as you're molding your policy, as
25 you are developing policy.

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1 It is not our position at all that one
2 outweighs the other. We want to make sure the
3 balancing starts and reaches it's logical conclusion
4 and that the policy, whatever the policy is and whether
5 you decide to implement something statewide, whether
6 legislatively, or whether it is done -- you know,
7 whether individual courts decide to do it with the
8 guidance of this Commission; we don't have a position
9 either way on that, I think. It is just about making
10 sure that a balancing is done and that all of those
11 factors are considered, which was why I raised the
12 guidelines.

13 MR. ABRAMS: Plaintiffs are sometimes
14 benefitted by having more information available, more
15 cheaply.

16 MS. VELAZQUES: Absolutely. Absolutely.
17 And, you know, we have members who are solo
18 practitioners and that would really welcome having more
19 access to trial court proceedings and the like. But
20 there is also the competing interest that a client has
21 in keeping certain information confidential.

22 MR. ABRAMS: Thank you very much.
23 Ms. Velazques. Thank you for coming.

24

25 (Continued on next page)

1 MR. ABRAMS: The next organization that is
2 represented here today are the people who own the
3 building we're in. The Association of the Bar of the
4 City of New York.

5 We asked for their comments on the questions
6 that I posed earlier. And the Bar Association has
7 provided us with five members of a sub committee who
8 looked into this and have already submitted to us a
9 statement on behalf of a sub committee of the Bar
10 Association and a separate statement by three members
11 of the sub-committee.

12 The Association itself has advised us that
13 they have yet to take a position as an Association on
14 the issues we are addressing. The individuals who are
15 here will respond to questions. They've advised us
16 that, rather than even summarize their submissions,
17 that they would rather spend their time responding to
18 questions from us.

19 I'd ask whoever answers the questions to come
20 to the podium and identify herself or himself.

21 I'd like to begin with page four of the
22 submission of the sub-committee which, at the bottom,
23 has the following paragraph, which I'll read into the
24 record: "Thus while Internet access to court records
25 is still relatively new and while this sub-committee

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1 cannot state with certainty that it has reviewed all of
2 the systems available to date, the capability of
3 carrying out full text Internet searches of court
4 records does not appear to exist anywhere in the world
5 today. However, if a given body of court records (for
6 example those in New York State) were to be open to
7 unrestricted Internet access, then it would
8 automatically become technologically feasible for
9 commercial vendors to copy and manipulate such records,
10 thereby providing such full text search capability,
11 regardless of whether or not the court system itself
12 chose to provide such a capability as part of its Web
13 site. Alternatively, large litigants or law firms
14 could set up proprietary systems allowing full text
15 searches, which would not be available to other lawyers
16 or litigants or to the public at large. This fact
17 raises consideration of a quality of access to public
18 records that the commission may wish to address."

19 I wanted to ask whoever wishes to answer one
20 or two questions with respect to that, first: Are the
21 considerations of equality that are referred to here
22 anything more or different than the already existing
23 considerations of equality that might be raised because
24 large litigants or law firms have the capacity already,
25 without regard to the Internet, to have more man power,

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1 more time spent, more money devoted to a particular
2 litigation?

3 Could you identify yourself?

4 MR. SCAROLA: Rick Scarola. I'm one of the
5 sub-committee members who spent a considerable amount
6 of time on the issue that you've identified.

7 I think, to answer the first question you
8 posed, it is an issue that's different in character
9 from the general proposition that those with more
10 resources may have more access. And that's so for the
11 following reason -- let me take a step back and
12 explain, as best as I can, as nontechnical person, what
13 our committee ascertained in the process of our own
14 investigation.

15 It appears -- and I can't swear to this as a
16 technical matter, but we did have on our sub-committee
17 a number of information technology personnel from some
18 of the large law firms in New York City who were able
19 to assist us with this. It appears that it would be
20 probably a project that would cost in the few millions
21 of dollars but certainly not the tens of millions of
22 dollars to do something as follows:

23 Write a computer program that in effect
24 crawls through all of what is publicly available on any
25 system, such as the Pacer System, or other state by

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1 state system where court records are publicly
2 available; then captures an image, even though those
3 documents may be in a so-called PDF format or otherwise
4 non-alterable. Still, the image could be captured, all
5 done by a computer program, operating on a document by
6 document basis, in effect, copy those images to ones
7 own substantial computer database and then, with
8 relatively available modest manipulation, make that
9 database searchable in a way that it wouldn't be
10 searchable to the public at large by approaching the
11 Court system records so that, as a practical matter --
12 In other words, whether it were to be done by a public
13 vendor such as a Lexis or Nexus, or by a private party,
14 someone for a cost of a few million dollars could take
15 whatever isn't posted on the Internet, capture a copy
16 of it and have something that is searchable; in the
17 same way as lawyers think of Lexis Nexus and Weslaw as
18 being searchable.

19 That's a relatively modest cost, in light of
20 the expense of significant litigation today, but it's a
21 cost outside the reach of many. Certainly, many law
22 firms. And certainly, it's outside the reach of most
23 private litigants. It's within the reach of large
24 litigants. It's within the reach of large companies.
25 And that's why I say it is different in character.

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1 It will allow a kind of access to those with
2 resources that would be tremendously powerful, if one
3 had a private, searchable database of that sort. And
4 it would be simply unavailable in the same form, if it
5 were in fact private --

6 MR. ABRAMS: I think I'm missing one
7 element.

8 I understand, I think, everything you've
9 said. How is that different in kind from the
10 advantages that money and person power and the like
11 have always given large law firms, large clients over
12 smaller entities and smaller clients? What's new?

13 MR. SCAROLA: It's a matter of degree. But
14 I think what's new is this: If a large company or a
15 large law firm were to do it, it would have it and it
16 would simply be out of the reach of anyone elsewhere as
17 today by comparison. If one has enough resources, one
18 can by hand turn enough pages, search enough files and
19 perhaps find what one is looking for. And, as a matter
20 of degree, one might throw a thousand paralegals at
21 such a project but for a relatively modest cost. It
22 would be absolutely available to some and absolutely
23 unavailable to those who couldn't achieve that cost.

24 In that sense, I think it is different.
25 Whereas, today, you certainly do have advantages by

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1 having more resources. There isn't such an absolute
2 black and white difference in availability.

3 MR. SIMS: I suppose one possibility is for
4 a relatively modest layout, it would be done by some
5 company, Lexis or whoever, and just charged out the way
6 the creation of the case data base was charged out
7 beginning 25 years ago. So at that point it's not an
8 equal.

9 I guess the next point is, none of us sitting
10 here knows which way it would go. It would always be
11 open, I suppose, to a private company to do it. But
12 more importantly, have you done any research or drawn
13 any conclusions with respect to whether, as a legal
14 matter, it would be possible -- consistent with the
15 first amendment -- to make records available but to bar
16 the use of computer programs such as you hypothesized?

17 MR. SCAROLA: We have talked about the
18 possibility as a remedy. We haven't researched the
19 reliability. I'm certainly not --

20 MR. SIMS: No view as to whether it would
21 even be constitutional to even try to do that?

22 MS. ABRUTYN: I have a question about
23 something on page seven of the submission.

24 This is the portion where you discuss types
25 of personally identifying information that deserve

1 consideration, including: Custody cases, juvenile
2 cases, matrimonial cases, mental health proceedings and
3 probate cases.

4 And then the next paragraph of the submission
5 goes on to say: "In noting that such cases may raise
6 issues that are worthy of consideration, the
7 sub-committee is not prejudging or advocating that
8 Internet access should be blocked in any or all such
9 cases. In general, the sub-committee believes that
10 restrictions on Internet access should be the minimum
11 necessary to prevent significant harm to privacy,
12 financial or physical security."

13 I would like whomever is prepared to address
14 whether or not you're advocating that those lines ought
15 to be drawn in advance by this Commission or that the
16 issues you raise could be addressed on a case by case
17 basis by the individual judge in any one proceeding.

18 MS. KENNEY: My name is Alfreida Kenny. I'm
19 sure other members of our sub-committee will want to
20 comment on your question.

21 Number one, I'd like to point out we put that
22 part of this in for your information, to let you know
23 how others have -- in other jurisdictions, what they
24 have done. We're not advocating that in this
25 jurisdiction that any types of cases be excluded.

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1 And I'm going to speak personally now. And
2 my personal opinion is you start with everything that's
3 available in the courthouse is available on line. And
4 then you begin to move back. And you move back by
5 looking at security issues, not issues dealing with
6 embarrassment or it's a private fact. Issues dealing
7 with security.

8 So, if you look at these types of cases, in
9 my opinion, it would be inappropriate for this State to
10 say that certain types of cases that are presently --
11 where your records are presently available in a
12 courthouse would now be unavailable because of easy
13 access. I don't think that the fact that we now have
14 easy access should be the determining thing that says
15 what I get access to or what the public will have
16 access to.

17 So, we would not suggest that juvenile cases
18 or certain types of cases necessarily would be excluded
19 but would suggest that you look at the security issues.

20 I certainly would not suggest that it be done
21 on a case by case basis and certainly not by a judge by
22 judge basis. I think that would be dangerous, create
23 havoc in the court system and people would not know
24 what to do from case to case.

25 And so one of the things I think is

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1 important -- or two things I think are important are, I
2 think, standards and uniformity.

3 When thinking about standards and uniformity,
4 I think it's also important to consider what the
5 backlash will be too. And I'm talking about sealing of
6 court records.

7 What may happen, because of the access to the
8 public, you may have more motions to seal court
9 records.

10 Now, we have standards with respect to what
11 is required to seal court records. But because people
12 don't like private information out in the public, I
13 believe you will have more motions for sealing court
14 records.

15 So you have to consider what the backlash is
16 too. And to the extent this Commission would have any
17 jurisdiction saying let's continue to enforce the rules
18 as they are now with sealing of court records and the
19 fact that something is private or embarrassing should
20 not be the subject of a seal.

21 Have I responded to your question?

22 MS. ABRUTYN: I think so.

23 MR. KAHN: Let me just add to that.

24 MR. ABRAMS: Give your name.

25 MR. KAHN: Steven Kahn, a member of the ad

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1 hoc committee.

2 What Alfreida said is correct. Our committee
3 did not intend to suggest that classes of cases should
4 be excluded or included at that level. I think all we
5 were trying to point out there was that it's relatively
6 simple to exclude or to facilitate the exclusion from
7 Internet data of cases. Particular kinds of docketing
8 systems could be used. We spent time figuring out how
9 to implement some degree of Internet access.

10 In helping you understand our submission, I
11 should say that we took our mandate to be extremely
12 broad. That is, we took the Commission and Judge
13 Kaye's statements to mean that the New York State
14 courts are considering the broadest form of Internet
15 access to records. In other words, not just to what
16 I'll call summary case information; the docket numbers,
17 judges names, litigant's names and docket sheets.

18 There is a fair amount of that available on
19 line now. But we took the issue to be much broader
20 than that, to cover full text searching capability of
21 pleadings, briefs, transcripts, opinions, all of which
22 can be prepared in electronic form.

23 But in addition, I think Rick alluded to this
24 earlier, through the use of scanning of paper documents
25 and then optical character recognition processing, to

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1 include exhibits and attachments to transcripts, to
2 testimony of all kinds. In other words, the full
3 content of a case being potentially made available on
4 the Internet and full text searchable, perhaps through
5 the intervention of a third party, if the court systems
6 didn't themselves give that capability.

7 So that was the mandate we took to be ours
8 and that's what we tried to give some guidance to this
9 commission about.

10 MR. ABRAMS: I'm still not clear though as
11 to where you come out on what we should do and what we
12 should conclude, based on your testimony.

13 The passage from page seven my colleague read
14 to you sounded -- read to me as if you were more
15 inclined to a case by case analysis of this rather than
16 the establishment of categories of material that ought,
17 per se, not to be made available for the Internet.

18 MR. KAHN: That's exactly right. That is
19 our view.

20 There is, in any kind of categorization, a
21 danger of being over inclusive on the one hand, under
22 inclusive on the other. The more granular the
23 decisions about excluding or protecting information can
24 be, I think the closer we'll get to whatever the right
25 balance is between the clear public interest, which we

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1 took as a given to maximize public access to the extent
2 consistent with these potentially countervailing
3 interests.

4 It did seem to us, as has already been said,
5 that the technology is available today to make court
6 records -- all of them -- full scope of what I said,
7 available in searchable format from anywhere in the
8 world with a click or two of a mouse.

9 And it seems to, I think, all of us --
10 although I don't want to speak for the people making
11 the additional submission -- that this is a
12 qualitatively different kind of court access than has
13 existed to date, including the ability to search docket
14 names.

15 Therefore, as we saw it, it was really your
16 job, although we were trying to help in assessing what
17 kind of legal framework should be put into place, to
18 decide what to exclude and what not to exclude. And
19 that the existing framework that the New York State
20 courts already have would not necessarily be
21 appropriate in this new -- in our view -- qualitatively
22 different world of information availability.

23 I should also say, while I have the podium,
24 and Alfreida mentioned this, there is a question of
25 uniformity or not at this point. And speaking for

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1 myself and at least some members of our committee, I
2 think this is a perfect example of where federalism has
3 a very useful role to play.

4 I don't agree with these other submissions
5 that there should be a uniform standard, at least off
6 the bat. There's so much unknown. We could find no
7 example of full text, case wide Internet access out
8 there today. It seems to us that this is a perfect
9 case for one court to try one thing and another court
10 to try another thing and build up a body of knowledge
11 before uniformity --

12 MR. ABRAMS: I understand that as a
13 federalism principle. Are you saying within the State
14 one court should try one thing and one try another?

15 MR. KAHN: That's something your Commission
16 ought to consider. There are so many unknowns here. I
17 think you would all agree trying a small scale
18 experiment like the one in Ohio we alluded to in our
19 papers, that wasn't full texted but try a number of
20 smaller examples might be a path worth taking.

21 MR. GRIFFIN: Mr. Kahn, I'm assuming that
22 you're a member of the majority of the group and I want
23 to ask you a question by citing something from the
24 minority or the three person report, which I will then
25 ask later to address.

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1 On page four of the second report that we
2 have from the three persons, there is a statement made:
3 "Safeguards for information on the Internet should only
4 be imposed where required, to protect financial
5 security and safety, not to avoid embarrassment or
6 shame."

7 I have a couple part question.

8 Number one: Whether you would agree to that
9 limitation. I'm assuming you would not but I'd like to
10 hear what your view is. And whether, under the
11 category of embarrassments, the disclosure of medical
12 information for example, as was discussed by the first
13 speaker today, would be an example of something that we
14 have to deal with that doesn't come under the category
15 of financial security and safety.

16 MR. KAHN: I don't mean to duck your
17 question but we try not to go beyond what we thought
18 was our mandate.

19 I think the answer -- certainly the answer I
20 would get was that financial and physical security was
21 one category of information as to which at least the
22 majority of the committee felt strongly. But there was
23 another category. It was not what the submission
24 you're pointing me to cause embarrassment. I notice
25 that word appeared a number of times.

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1 In our view, privacy was a legitimate area
2 for concern. I don't equate necessarily embarrassment
3 with privacy. I'm far from an expert in that area but
4 I think there's a difference.

5 The majority felt privacy was the other area
6 for concern.

7 MR. GLEASON: Do you have a point with
8 respect to a point in time when something is filed,
9 when the constitutional protections attach or the right
10 to public access attach? Is this something that occurs
11 simply the instant that it hits the courthouse step or
12 County Clerk's office or is there -- would you object
13 to some period of time for evaluation, if somebody
14 perhaps had an objection to something becoming public?

15 MR. KAHN: In fact, our report, in getting
16 down to the mechanics of how this might be done,
17 suggested a period of time before posting on the
18 Internet.

19 I'm not speaking now to posting in court
20 records, as is done in the current world, but we felt
21 because the -- because as I think we all agree, the
22 masking, however it's done, is likely to be imperfect,
23 that there should be an opportunity for the other side
24 to check whether the proper masking was done.

25 And, therefore, in answer to one of the later

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1 questions, I'm not sure if it was four or five that we
2 suggested that there be a delay before Internet posting
3 to accounts for possible oversights.

4 MR. ABRAMS: I have a question from one of
5 the drafts-persons of the other or dissenting,
6 different view report. And it relates to material on
7 page four of your report, which states: "We urge that
8 concerns about privacy for electronic records are best
9 dealt with in the same manner as courts in the State
10 currently manage them in connection with paper
11 records."

12 The argument is then set forth that in a
13 given case, there might be particular consideration
14 given to particular privacy interests, vis-a-vis public
15 dissemination interest.

16 The paragraph concludes: "The courts are
17 experienced in balancing the interests appropriately on
18 a case by case basis and there is no reason that they
19 cannot continue to do so with electronic records."

20 Do I understand that correctly? You
21 recommend to us that we should not have categories of
22 material that should be treated differently across the
23 board -- the identification of social security numbers,
24 bank record information -- but that the entirety of
25 this issue ought to be dealt with on a case by case

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1 basis in which a judge engages in balancing of the
2 particular interest as set forth in that case?

3 MS. BARON: Sandra Baron.

4 I think my answer to you on that is yes, that
5 isn't the position that this is best dealt with on a
6 case by case basis.

7 MR. ABRAMS: One of the witnesses we had on
8 behalf of a press group in Albany stated that there was
9 never any newsworthiness and never any -- this is my
10 language -- never any social advantage in
11 disseminating, say, the identification of a social
12 security number. Do you disagree with that?

13 MS. BARON: I think I would disagree.

14 I recognize, by the way -- I don't want you
15 to think I don't -- the concerns that legitimately
16 exist for identity theft. I want to put a pin in that
17 because I think there are other ways of dealing with
18 that.

19 But social security numbers are used today by
20 journalists and, probably, people better than me to
21 talk about how journalists operate to distinguish
22 between individuals in the court system.

23 It's my understanding that one could imagine
24 many John Jones' in New York City. But to the extent
25 cases involve a specific John Jones, then, if not all,

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1 at least a portion of the social security number may be
2 the mechanism by which you distinguish between one John
3 Jones and another.

4 It is not always an incident where it is not
5 useful information for news gathering and other
6 purposes.

7 MS. BRYSON: It would be helpful -- again,
8 I'm not sure who should respond to this, respond to the
9 earlier question about the burden on attorneys and the
10 ability of attorneys, on a practical basis, to comply
11 with any specific rules in this area.

12 I'm familiar with the federal filing systems
13 that have been -- as is the commission -- have been
14 created and -- but the access to those systems, as was
15 pointed out in the Association's submission, are
16 significantly different than the access that is
17 contemplated by a fully open system.

18 So, I'd appreciate it if the appropriate
19 people from the Association could comment on the
20 practical implications of trying to come up with rules
21 in this area.

22 MS. BARON: I'll speak from my own personal
23 knowledge, based on this, and then be glad to turn it
24 back.

25 I think, in our submission, we make it clear

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1 we're not technologically savvy. What I do understand
2 is systems, as they are today, word processing systems,
3 can be used to help tag information that the court
4 system can then read as information it should not put
5 on a Web site.

6 That works for those documents that are being
7 created on word processing systems. It does not answer
8 your question, which I think is a legitimate one, about
9 attachments and exhibits.

10 As we wrote in our paper, we believe that
11 this should be the role of lawyers not the role of
12 court personnel and should be dealt with, at least
13 initially, through certification, which would require
14 counsel to take responsibility for it.

15 It may sound too facile -- I hope you don't
16 take it that way -- that I believe that as technology
17 begins to march forward, so will the ability to tag
18 information that needs to be redacted.

19 It's hard to imagine that five, ten years ago
20 we would be standing here talking about this. And,
21 therefore, I believe --

22 MS. BRYSON: Doesn't your case by case
23 methodology for handling this engender a tremendous
24 additional amount of mechanical and, maybe, pro forma
25 motions that are going to have to be made, while in

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1 this case it should be this way, this way, this way?

2 It seems like the mechanics of it become very
3 cumbersome in a case by case analysis.

4 MS. BARON: Let me take that as two issues.

5 One is: Will there be additional motions?

6 Of course there will, in the beginning at
7 least, until people settle down and see the rules are
8 being generally applied, we hope, by the judiciary, in
9 a consistent manner and a manner consistent with the
10 last ten, 20, 30 years of rulings of what is to be
11 allowed in a public -- in the public record and what
12 isn't.

13 In terms of will it put more burden on
14 lawyers to tag information? Yes. Yes.

15 We found that in a document creating a brief,
16 for example, one motion, the tagging was as simple as a
17 search and replace, which existed in our Word software.
18 That doesn't strike me as a particularly difficult
19 burden or one that's likely to cause any major
20 disruption to ordinary counsel.

21 MS. BRYSON: Someone else from the team
22 wanted to respond to the same question.

23 Thank you.

24 MS. NEUNER: Lynn Neuner from Simpson
25 Thatcher Bartlet, as a member of the committee.

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1 Allow me to respond first to your question.

2 At page ten of the submission by the
3 sub-committee, we attempt to deal with the practical
4 realities of this situation.

5 In the first instance, I think the consensus
6 of the sub-committee is that it would be untenable to
7 expect court personnel to be the lead identifiers of
8 information, that perhaps the Commission may achieve a
9 consensus should be protected, such as social security
10 numbers.

11 We envision a system in which it is incumbent
12 upon the moving attorney to file a certificate of
13 compliance with what may be a promulgative court rule
14 that sensitive information, however that is come to be
15 defined by the courts, has been appropriately redacted
16 from the submission. I think that we also expect there
17 could be a period of some delay -- for example, two or
18 three days -- in which that certificate and the
19 pleading was provided to opposing parties and they had
20 the opportunity to provide an immediate objection.

21 There does, however, raise -- there is raised
22 the question of protection of parties who neither
23 litigant has an interest in protecting. And for this,
24 the sub-committee does not have a firm answer. There
25 may need to be a level of court personnel review.

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1 Similarly, there could be, however, a
2 countervailing check on the moving party in the form of
3 sanctions for failure to undertake a diligent search of
4 ones' file documents for protected information.

5 While we were on the subject of practical
6 realities, we do think it is useful for the commission
7 to consider what may be unintended consequences of
8 allowing full Internet capability and full text
9 searching.

10 From our own diligence, looking at different
11 court systems, we found the situation in Ohio to be
12 very helpful in coming to grips with unintended
13 consequences.

14 As you all know, from the New York Times
15 article, many of the court documents became not full
16 text searchable but searchable with a much stronger
17 search engine than others have seen publicly available.

18 Unintended consequences were seen in the
19 following:

20 From traffic tickets, there became identity
21 theft. Because not only did every traffic ticket have
22 social security numbers, it had the height, age, weight
23 and physical characteristics of the individual.

24 From county appraisals and real estate
25 filings, there became the situation of every neighbors'

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1 floor plan being available on line. Not only for
2 interesting perusement of what your neighbor's indoor
3 house looks like but also the potential for burglars to
4 become very effective in targeting the inner workings
5 of the homes they are looking at.

6 MR. ABRAMS: Were there any burglaries?

7 MS. NEUNER: We don't have direct
8 information of that but this is one point we needed to
9 make. There may be harms never known because it does
10 not come out that the source of the information was in
11 fact the court records.

12 One point that is potential is for the
13 commission to consider a pilot program in one court of
14 the State, to allow a first look at what may happen in
15 terms of actual consequences; to work through, for
16 example, in a pilot jurisdiction. Education of the
17 local bar, so that they can learn compliance with these
18 new forms of rules that are being adopted.

19 And in fact, you do see, in the Ohio
20 legislature, proposals now by the former County Clerk,
21 James Sissel, recommending attorney education programs.
22 But also, you'll see recommendation of a far greater
23 use of motions for seal. Now, that may be something
24 the commission would not like to see as a kind of
25 unintended consequence of its recommendations. But our

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1 suggestion is really that the Ohio example may be the
2 best forerunner to look at for practical realities and
3 implications.

4 MR. SIMS: I have a question for Sandra
5 Baron.

6 Your answer to Floyd, with respect to social
7 security numbers. My question is: Was that your view
8 of wise policy or would it be your view that the line
9 of first amendment cases dealing with publication of
10 truthful information would bar any effort by us or the
11 legislature to, say, social security numbers
12 presumptively must be tagged, subject to later court
13 ruling? I hear your question. I think that an
14 argument could easily -- easily, an argument could be
15 made that, in fact, any kind of blanket redaction of
16 information or denial of disclosure does have
17 constitutional consequences.

18 In fact, going back to Judge Sissel, who is
19 the Cincinnati -- was clerk in Cincinnati. He pointed
20 out some cases to us which, I'm embarrassed to say,
21 I've not followed up on, in which courts of this nation
22 have indicated that social security numbers are not
23 private information and the publication of it should
24 not be deemed to be private information.

25 So I think the answer to your question is

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1 yes.

2 MR. GRIFFIN: I'd like to follow up the
3 counterpart of the question asked to Mr. Kahn. And
4 that is that in your report you said that the
5 safeguards should only be imposed to protect financial
6 security and safety, assuming whatever safeguards there
7 are. And I wonder if you'd mentioned what the reasons
8 are not to deal with other areas of privacy?

9 MS. BARON: I think we came to the
10 conclusion that categorical -- that dealing with
11 information on a categorical basis was likely to be
12 unconstitutional and more importantly was probably bad
13 policy. That it has proven to be probably the better
14 way of handling information to do it on a case by case
15 basis. That that allows for the judgment of time, it
16 allows for the judgment in context.

17 If I can back off from the medical question
18 that may be implicit in that to the fact that the
19 bankruptcy courts, as I understand it, have had --
20 Alfreida can talk to that better than I can. She
21 talked to the bankruptcy clerk on behalf of our
22 Committee.

23 The bankruptcy clerks have put all of the
24 information coming into the court on line and in the
25 public record for a very long time. Now, one could

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1 argue the reason why one shouldn't have categorical
2 determinations about information that's private or not
3 is because one can understand in the bankruptcy context
4 why it might matter less, number one, in protecting
5 bank accounts and might matter more to those who are
6 potential creditors or those who wish to deal with
7 potential fraud or other issues in the bankruptcy area
8 to have that information available.

9 It was that kind of experience and that kind
10 of information that we got within the Committee that
11 led us to conclude that dealing in categories was
12 probably not a wise way to go.

13 MR. CAMPBELL: I had a question to the
14 general panel.

15 Should the public be charged a fee to access
16 court records on the Internet? You seem to go both
17 ways.

18 MR. ABRAMS: Do you have a three to two vote
19 on that?

20 MR. KAHN: Our position on that was fees
21 should be minimal.

22 We do recognize no matter how the
23 implementation comes about, the Court system is going
24 to bear some costs. We were looking at practical
25 realities and realized that the court system's not

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1 going to be able to bear much cost.

2 With that said, for all the reasons, I think
3 our entire committee we feel the cost should be
4 minimal, the cost to the public should be minimal. And
5 if there's no fee, should there be a logging system to
6 get access to the court records.

7 MR. KAHN: I don't believe there's sentiment
8 for a logging system. In dealing with commercial
9 enterprises, LexisWeslaw, Westlaw, Google, which should
10 be mentioned, the court system might impose some fees
11 or some limitations in connection with the full text
12 searching capability being implemented.

13 MR. ABRAMS: Thank you to the Association
14 for the abundance of riches.

15 Kenneth Dreifach.

16 MR. DREIFACH: My name is Kenneth Dreifach.
17 I am the Chief of the Attorney General's Internet
18 Bureau, Office of the New York Attorney General.

19 I have earlier today submitted testimony,
20 which I will abbreviate. Some of the points have
21 already been made very well and others are summarized
22 in my testimony.

23 By the way, on behalf of the Attorney
24 General, I'd like to thank the Commission members for
25 this opportunity to address this issue of public and

Donna Evans, Official Court Reporter

1 crucial concern.

2 The Attorney General recognizes at the outset
3 that for very good, well documented reasons, court
4 records are and should be presumed to be public.

5 I have been asked to address issues of
6 privacy and security. That might arise out of place in
7 court documents on line with unfettered access. And in
8 doing so, I would address two separate, distinct but
9 overlapping concerns: One of security, often involving
10 financial security. The other, more general privacy
11 issues that arise when sensitive or personal or medical
12 information is made available en masse.

13 As to the security issues, as others have
14 already testified, identity theft can and probably will
15 arise from the greater accessibility of information,
16 such as social security numbers, bank account
17 information, credit card information and the like.

18 No doubt, the incidence of identity theft is
19 on the rise. It rises every year. About half a
20 million cases were reported in 2002 and this number
21 surely will increase this year.

22 All members of society, rich or poor are
23 susceptible to this crime. In addition, victims may
24 find that they will not or cannot be made whole after
25 being victimized in this way.

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1 MR. DREIFACH: (Continuing) And I should say
2 that I am going to briefly address the identity theft
3 issue before getting to the other issue that I sense
4 some of the panel members have particular concerns
5 about regarding sensitive, personal and medical
6 information.

7 The exposure of social security numbers,
8 credit cards and banking information places consumers
9 at particularly great risk of identity theft.

10 For instance, with a social security number
11 an identity thief can usually obtain a birth
12 certificate. And with these in hand, the thief can
13 obtain or convincingly counterfeit your passport,
14 utility bill or a replacement driver's license. The
15 thief may also even access your financial assets which
16 often use your social security number as a de facto
17 password and identifier. What then follows is usually
18 limited only by the thief's energy and creativity. The
19 thief may transfer your funds, open new bank accounts,
20 telephone accounts, Internet service accounts, obtain
21 car loans, lines of credit. A savvy identity thief
22 might even, as many have done, contact your local post
23 office or phone carrier and divert your mail or unlist
24 your telephone number so that, for instance, his
25 creditors cannot contact you.

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1 A word about the social security numbers,
2 which probably of everything places consumers in the
3 greatest jeopardy.

4 They are right now available for purchase
5 online from some online vendors. However, this
6 practice has been very widely criticized, and there is
7 a very vigorous effort in Congress to ban or severely
8 restrict these sales. The tide is with those who are
9 seeking to restrict these types of personal identifying
10 numbers.

11 Mr. Sims, you had posed a question about the
12 laws surrounding such transfer, and I just wanted to
13 point out that the New Hampshire Supreme Court in the
14 case involving the information broker Docusearch
15 recently held that Docusearch had violated a common law
16 duty when it sold a stalker the social security number
17 and workplace address of his target, Amy Boyer, whom he
18 then fatally shot at her workplace. And here i a quick
19 quote from that Supreme Court. The Court reasoned
20 that, "A person's interest in maintaining the privacy
21 of his or her social security number has been
22 recognized by numerous federal and state statutes. As
23 a result of the entities to which this information is
24 disclosed and their employees are bound by legal and,
25 perhaps, contractual constraints to hold social

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1 security numbers in confidence to ensure that they
2 remain private."

3 In short, to facilitate the ready
4 accessibility of such information seems to be swimming
5 upstream against a tide of legislators, courts and
6 advocates who are awakening to the importance of
7 protecting this information.

8 I would like to say now a couple of words
9 about the somewhat more general privacy aspects as
10 distinct from the security aspects.

11 Other sensitive information beyond simple
12 personal identifiers such as social security or banking
13 numerical information and related information may merit
14 some type of protection. And, of course, I am not here
15 to presume to strike the precise balance or suggest the
16 precise procedures that should apply. That having been
17 said, for many people the disclosure of personal,
18 medical, familial information can be undesirable,
19 disruptive and potentially harmful and may even in the
20 end chill many citizens from trusting and participating
21 in the justice system.

22 For instance, class action lawsuits against
23 pharmaceutical or asbestos companies may, for a number
24 of reasons, contain the names and addresses of
25 claimants suffering from a variety of ailments ranging

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1 from cancer to depression. Often these may be hidden
2 ailments. These claimants may have very good reasons
3 beyond what you call embarrassment or shame -- because
4 there is no embarrassment or shame to having a
5 debilitating or physical ailment -- to avoid
6 universally exposing their chronic conditions.

7 In the hands of an employer, the information
8 may provide a basis for discrimination; in the hands of
9 an insurer, it may provide a basis to deny coverage;
10 and in the hands of a financial institution, a basis to
11 deny a loan.

12 Again, as with social security information,
13 this type of personal information may be available
14 today in various forms to those willing to pay for it.
15 That said, if such information becomes more cheaply and
16 readily available and accessible -- in other words,
17 orders of magnitude more accessible than it is right
18 now -- information brokers can and will aggregate it
19 and find a cheap market for the data. Large employers
20 will purchase the data to run searches on their
21 employees, including regarding their medical
22 conditions, as will banks and insurers. And so the
23 lives of those with difficult, often hidden, conditions
24 may find fair treatment even more elusive than they
25 find it now.

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1 Another example, victims of predatory lending
2 schemes or other consumer scams. If they file claim
3 forms, if they are listed in reports by claims
4 administrators, if they are otherwise contained in
5 court records, sometimes within large accumulated lists
6 en masse, these lists may fall into the hands of
7 unscrupulous marketers and scammers and essentially
8 provide these marketers with potential victim lists to
9 mine. This, again, can have a chilling effect against
10 people participating in and trusting the legal system.

11 In the testimony that I have submitted I
12 further address the six questions that you have posed,
13 but I sense that there may be some questions. So given
14 the time constraints, I would be more than happy to
15 answer any questions you may have.

16 MR. ABRAMS: Thank you very much.

17 MR. SIMS: I have two questions.

18 First, you mentioned what you call a rising
19 tide of opposition, or the tide is in favor of those
20 who are against the disclosure of social security
21 numbers and such. But when I looked through your
22 testimony and listened to it, I see one case from New
23 Hampshire and a lot of statements by officials and
24 legislators who would like to pass a legislation rule
25 but haven't.

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1 Does the tide you talk about really consist
2 of anything other than one decision and a lot of talk?

3 MR. DREIFACH: Absolutely. There have been a
4 number of bills proposed in Congress.

5 MR. SIMS: But they have not been enacted?

6 MR. DREIFACH: They have not, no. They have
7 not been enacted.

8 The policy issues and the policy debates
9 include an awakening awareness of the fact that
10 identity thieves are finding it. And there is, I
11 think, very little disagreement about this, that it is
12 much easier and much cheaper to run their scams. And
13 it is placing burdens on the financial markets, on the
14 financial institutions, on insurers, and on consumers.
15 And the 500,000 cases of identity theft will rise. It
16 will rise to a million, it will rise to two million,
17 and it will affect ultimately -- potentially everyone
18 in this room. And I think that's the basis behind
19 these enactments.

20 Sometimes legislators are slow to act, and
21 sometimes legislators when they are addressing new
22 issues want to get the balance exactly correct. I
23 don't read in their failure to enact it any sort of
24 widespread acknowledgment that this is not a problem.
25 I think it is a problem, and, obviously, that's

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1 something that all of you have to grapple with.

2 MR. SIMS: The other question is, I guess,
3 that at two points in your testimony you refer to the
4 possibility of rules we might suggest the Legislature
5 might implement purporting to bar wholesale extraction
6 or spidering or other kinds -- or full text searching;
7 and the question is whether you or anybody in your
8 office has done any legal research that would suggest
9 that a rule barring certain kinds of use of court
10 files, barring private companies from installing full
11 text searching, for example, would be constitutional?

12 MR. DREIFACH: I don't have a particular
13 position on the constitutionality, but I would provide
14 an analogy to other public goods.

15 I do know that certain databases that exist
16 now that are run by the government such as job and
17 resume databases do provide certain terms and
18 conditions. In other words, they ask that if you are
19 going to use the database that you use it for the
20 purpose provided; that you submit your resume and you
21 see other people's resumes as an employer; that you
22 not, if you are a recruiter or headhunter, pull out the
23 data using these types of spidering programs because
24 that is not the purpose that public money and effort
25 went in to setting up these types of databases. That's

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1 one analogy.

2 And I think something underlying that analogy
3 is the fact that if everyone had the right to run these
4 types of spidering programs to their heart's content
5 over government resources, well, we know that the sites
6 would crash. And this has come up, for instance, in
7 some private litigation involving eBay and Verio and
8 Register dot com. And the courts there recognized that
9 fact, that it is fair to place certain limits on even
10 generally opened and generally accessible websites.
11 And I do think the analogy to the Botanic Gardens is a
12 good one. Any public resource has particular purposes,
13 and although we are not used to thinking of information
14 as something that should be restricted, I think it is
15 reasonable to at least consider the possibility of
16 imposing certain user conditions to somehow regulate
17 the potentially unfettered and harmful extraction of
18 data.

19 MR. ABRAMS: Is it the Attorney General's
20 view that court records that contain bank account
21 numbers, social security numbers and confidential
22 medical personal or family information should be made
23 public or not, without regard to the Internet?

24 MR. DREIFACH: Well, obviously there is a
25 balance. I don't want to duck the question.

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1 Ultimately it probably will be most prudent
2 to have some sort of process whereby these items can be
3 redacted. There may be exceptions to that. And it has
4 to be weighed against the public necessity to have
5 those identifying numbers, but there is a very
6 significant concern about identity theft. These
7 numbers can be and will be used for mischievous and
8 illegal purposes.

9 MR. ABRAMS: I want to make sure we are on
10 the same wavelength. I meant the last phrase in my
11 question very deliberately, that is to say: Without
12 regard to the Internet.

13 Addressing now the question of whether this
14 material ought to be public in the first place, is it
15 the Attorney General's position that court records
16 which contain social security numbers, bank account
17 numbers, confidential medical, personal and family
18 information should ever be made public in the first
19 place?

20 MR. DREIFACH: I'm sorry. I had missed that.

21 We do draw a distinction between the types of
22 efforts that people have to go through right now and
23 the type of expense that people have to go through
24 right now to get this information with the far more
25 minimal efforts that they would have to go through on

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1 the Internet. And the reason we draw that distinction
2 is simply because there comes a point, practically
3 speaking, where if the information is accessible enough
4 and cheap enough it will have a direct effect on
5 increasing crime. Right now it is simply, as a
6 practical matter, not cheap enough or accessible enough
7 that there is a burgeoning problem arising.

8 MR. ABRAMS: So I understand the answer to my
9 question is yes, the Attorney General believes that
10 court records that contain bank account numbers, social
11 security numbers and confidential medical, personal and
12 family information should remain public?

13 MR. DREIFACH: Yes. We have confined our
14 testimony to the placement of all of this information
15 online. We have not advocated any change in the way
16 the current offline system in the courthouse records is
17 set up.

18 MR. GLEASON: In New York State, as you know,
19 we have pretty wide rules on ability of information and
20 the pre-trial discovery process, and there is some
21 usually hazy line before that actually gets into court
22 records, part of a motion or something the Court might
23 consider.

24 Would the Attorney General take a position on
25 the types of lines that ought to be imposed on

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1 attorneys, perhaps, before they put stuff into court
2 records and whether there should be any general
3 restriction on privacy matters coming from pre-trial
4 discovery and how relevant they might be in the
5 litigation context of a particular case?

6 MR. DREIFACH: We have thought about that.
7 And ultimately it may be less cumbersome to consider
8 rules where certain information is not placed into the
9 court files but either submitted in another way or made
10 available for in camera usage, or, perhaps, there might
11 be two sets of papers, one for filing in the courthouse
12 for courthouse usage or anyone who feels the necessity
13 to access it and another set that may be redacted that
14 is placed online.

15 There are a number of ways to go, I think,
16 and we don't have a particular suggestion as to which
17 of those would be the best balance.

18 MR. SPIVEY: If we concede that information
19 made available electronically can be abused, why isn't
20 it sufficient to address that abuse through criminal
21 prosecution, through civil litigation rather than
22 suppressing the information in the first instance?

23 MR. DREIFACH: It is appropriate and we do
24 address it, but there are not enough prosecutors out
25 there to prosecute a million cases of identity theft.

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1 It is a labor intensive type of case to prosecute, and
2 there are other types of crime that sometimes take
3 precedence, such as violent crime.

4 I would have the same answer as to, you know,
5 if you pose the question: Why not permit people who
6 have been or who suspected they have been discriminated
7 against because of a health condition, why not just let
8 them seek redress under the ADA? The fact is it is
9 difficult to do that. It is costly and it is time
10 intensive. No one wants to go through that. No one
11 wants to go through being an identity theft victim even
12 if a prosecutor may somehow be able to catch the
13 perpetrator, albeit not necessarily make restitution to
14 you. And it is just not quite a proportionate response
15 to say: Well, you know, maybe you will get some
16 satisfaction from jailing the perpetrator.

17 MR. CAMPBELL: Considering the nature of the
18 Internet, would it be problematic from a jurisdictional
19 standpoint to prosecute some of these people, for
20 example, someone in Germany who accesses the Internet?

21 MR. DREIFACH: This is one of the reasons I
22 say it is extremely labor intensive. It is also very
23 difficult to get jurisdiction, and it is more difficult
24 to get enforcement power.

25 We get complaints, as I am sure the district

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1 attorneys offices do, from people who, for instance, in
2 a recent case, traced the source of the person that had
3 stolen her identity to Australia and then it turned out
4 they weren't there. They had a web hosting company out
5 of Germany but rented a post office in New York.

6 It is very labor intensive and it involves,
7 very often, people overseas.

8 MS. ABRUTYN: Obviously the Court records
9 containing this information aren't yet on the Internet.
10 Also, obviously the identity theft has been talked
11 about as a problem in a lot of different places. We
12 have seen in other contexts that a lot of the
13 information you are concerned about is already out
14 there on the Internet in one form or another.

15 My question is: Can you cite us some
16 examples or specific cases from your experience where
17 the identity theft occurred because the thief got the
18 information from the Internet, what information it was
19 that the person got from the Internet, and whether you
20 have any reason to know one way or the other whether
21 that information would have otherwise been available if
22 it wasn't on the Internet?

23 MR. DREIFACH: Well, of the hundreds of
24 thousands of cases of identity theft that have
25 occurred, the thieves absolutely got their information

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1 somewhere. I will give you one example.

2 We have seen a surge in phony e-mails by scam
3 artists who somehow learn where people bank and then
4 send them e-mails posing as their bank asking them for
5 security purposes to re-enter their account number and
6 pin number. They take them through a link in the
7 e-mail to a perfect copy of the bank's website that
8 resembles the website and even has a similar URL.

9 A large number of people have fallen for this
10 scam, both account holders at large banks and people
11 who have accounts through financial intermediaries and
12 aggregators.

13 The most publicized case of identity thieves
14 doing actual harm, or I should say people who access
15 information brokers doing real harm, is the Docusearch
16 case where someone obtained this woman's social
17 security number and workplace address and then stalked
18 and killed her.

19 Now, to some extent people are -- if people
20 are willing to work hard enough they will find you and
21 they will do what they are going to do, but there is no
22 question that the more accessible this information
23 becomes, the more the incidence of identity theft is.

24 MS. ABRUTYN: Should I take it from that that
25 you don't have a specific case that you can tell me

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1 about where you have learned through your
2 investigation, your prosecution, that the information
3 that the thief obtained they actually obtained from the
4 Internet? I am looking for specifics.

5 MR. DREIFACH: We have the e-mail cases in
6 our files which we don't -- the cases are under
7 investigation. We don't make that public under the
8 Freedom of Information Law.

9 The Docusearch case is a publicly-available
10 case. And I will cite you to a website. Go to
11 Dunhills dot com, D-u-n-h-i-l-l-s, Marketing Company,
12 one of many that offers vast mailing lists, telephone
13 and e-mail lists of, quote, consumers with ailments,
14 literally ranging from acne and asthma to ulcerative
15 colitis and everything in between.

16 That particular company ties access to
17 hundreds of thousands of people who have everything
18 from Crohn's Disease to hidden heart ailments, people
19 in cancer recovery, people who have been on depression
20 drugs, you know, and dozens and dozens more.

21 The problem is that these lists are
22 expensive. They are between \$1.00 to \$2.00 per
23 individual profile; and they are generally not sold
24 right now per person, they are sold in bulk.

25 There are investigative services that, for

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1 instance, your employer can certainly hire, and for
2 thousands of dollars can find out a great deal about
3 what diseases you may have. They can even track you.
4 That's publicly accessible. Someone follows you for a
5 couple of weeks to your doctors appointments, and they
6 can learn a great deal about you, but they have to be
7 willing to spend thousands of dollars for that and your
8 employer may not find it economically feasible to do
9 that. If it were \$50 instead of thousands of dollars
10 to get that sort of information resource, your employer
11 might do that.

12 MR. ABRAMS: Thank you very much for your
13 testimony. We appreciate it. We have one witness who
14 has to leave a little early to catch a plane. I
15 received a request that he be moved up a bit. That's
16 David Bralow.

17 MR. BRALOW: Mr. Chairman and members of the
18 Commission, I am David Bralow, senior counsel for
19 Tribune Publishing, here today on behalf of Newsday. I
20 have provided written comments and I will summarize
21 them at this point.

22 Besides Newsday, the Tribune Company
23 publishes 11 publications including the Chicago Tribune
24 and the Los Angeles Times. It also operates 26
25 television stations, including WPIX here in New York

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1 and WEWB in Albany.

2 I think that it is clear that everyone agrees
3 to the principle that -- everyone agrees that any
4 debate about access to judicial records on the Internet
5 is informed by the same presumption as the access to
6 records. Discrimination between a byte and paper, the
7 imposition of restrictions on one but not the other
8 requires a demonstration that access to the electronic
9 record causes a qualitatively different effect than
10 access to the paper record. And that difference
11 itself, not simply the nature of the information but
12 the difference between those two forms of access must
13 jeopardize some the compelling State interest.

14 It strikes me that we spent some time today
15 talking or thinking about something that I labeled the
16 practical obscurity concept. The idea that if you
17 increase the transactional costs of getting a public
18 record or judicial record you somehow change the nature
19 of the information itself. And it strikes me that that
20 practical obscurity doctrine is really threatening that
21 presumption of access at its very basis.

22 If access to judicial records is presumed to
23 be in the best interest of the community -- and that's
24 not doubted throughout these proceedings -- how can
25 permitting more convenient or more accurate access to

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1 those same records create a compelling threat?

2 Furthermore, I think if you remove the
3 barriers of access to judicial records, what you are
4 doing is renewing a core First Amendment constitutional
5 value of direct and public observance of the judicial
6 system. By providing records electronically, we can
7 restore that direct citizen's contact. But let me get
8 more pragmatic.

9 Newsday believes that the press's ability to
10 fulfill its mission improves with electronic access to
11 judicial records. Such access increases timeliness and
12 accuracy and offers reporters tools to look at trends
13 that they wouldn't necessarily have the ability to do
14 without that kind of access.

15 For daily news coverage, the present way of
16 storing and retrieving judicial records creates news
17 barriers that burden both the newspaper and
18 disadvantages its readers. Reporters cannot get
19 information when the court file is in a judge's
20 chambers, for instance, or in the possession of
21 attorneys. If access were permitted online, a
22 newspaper could rely on the court file rather than the
23 exigencies of extrajudicial statements that occur every
24 day.

25 Reporters often have logistical problems. In

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1 Suffolk County there are state courts in five
2 locations, some 30 miles apart, and the court clerks'
3 offices are in two locations. Court personnel often
4 can't even say where the files are, and oftentimes they
5 don't even know what courthouse they are in. Our
6 reporters have driven back and forth trying to find
7 particular files. And that is as true for individual
8 citizens as it is for reporters.

9 Reporters are often affected by zealous
10 clerks and attorneys. Clerks, prosecutors, attorneys
11 remove documents from files, even criminal cases,
12 simply because they believe without the benefit of
13 court order or legislative authority that it is in the
14 public interest to remove those. An electronic records
15 retrieval system will compel trial participants to seek
16 appropriate sealing orders rather than exfoliating the
17 file.

18 Also, access to online records creates a
19 certain amount of uniformity. In a recent examination
20 by Newsday of Surrogate Court files here in New York to
21 document fees attorneys received in trust and estate
22 cases, a Newsday reporter found in some cases that the
23 petition for fees and the judge's order establishing
24 those fees were missing.

25 If we have a system where these documents are

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1 put online, there will be, by necessity, additional
2 uniformity of files. But besides enhancing the
3 accuracy and timeliness of these records, our ability
4 to serve the community would improve with in-depth
5 analysis that would come from full text searching.
6 That type of functionality permits the public to locate
7 records applicable to a particular subject.

8 For instance, Newsday published a series
9 about Catholic priests allowed to continue ministries
10 despite accused sexual abuse. Another series focussed
11 on inmates beaten by correctional officers and the
12 medical care of inmates at county jails. The reporters
13 that did that work all will testify that that kind of
14 work creates a significant dedication to man hours and
15 a commitment to just troll through judicial files in
16 such a way to create and to discover the trends. With
17 online access, we can get to that greater depth and
18 have greater insight.

19 Let's talk about privacy and identity theft
20 for a second. First, privacy must be defined with
21 specificity before it can be meaningfully addressed.
22 It is an elastic concept, you heard that here. It is
23 distorted to unrealistic expectations of anonymity,
24 including common information found on streets and in
25 phone books.

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1 Before the existence of any so-called private
2 fact can meaningfully restrict access to a judicial
3 record, we have always had the standard that that
4 private fact should be examined in the relationship to
5 the harm caused by permitting it to reside in an open
6 court file. It doesn't change that that file would now
7 be available electronically. This is just the way --
8 it is an old-fashioned way of saying that a judge is in
9 the best position to protect whatever rights exist in
10 any specific court file. There has always been
11 adequate measures for litigants and third-parties to
12 request sealing of information based on
13 well-established, albeit difficult to establish or to
14 meet, standards.

15 Let's assume a lawsuit is filed in Nassau
16 County against a chemical company that involves
17 personal injury claims. The court file will, by
18 necessity, contain medical information. A motion to
19 seal that medical information would balance the harm to
20 that particular individual against the need for the
21 information or the subject. Furthermore, medical
22 information that might be considered private in one
23 context is no longer private if that medical
24 information becomes an integral part of the judicial
25 decision-making process. Without a demonstration of a

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1 specific compelling reason for the sealing, there would
2 be no ground for the sealing itself. To seal
3 automatically would simply ignore the dictates of Craig
4 versus Harney, that what transpires in a courtroom is
5 public property.

6 If there is some change in status that arises
7 from greater access, that harm must be established or
8 evaluated in the same precise and nonspeculative way
9 for both Internet access and paper records.

10 That leads me to a concept of identity theft.
11 As a practical matter, I am not aware of significant
12 problems that have arisen for identity theft out of
13 judicial records and out of the use of judicial
14 records. Indeed, many causes of identity theft are
15 relatively low tech and don't involve court files or
16 the Internet.

17 Jodie Bernstein, the director of the Bureau
18 of Consumer Protection for the FTC, testified that
19 among the common causes of identity theft is simply
20 rummaging through the trash for bank statements and
21 stealing a purse or wallet is another.

22 As I was sitting here listening to the
23 testimony I pulled out my wallet, my Blue Cross/Blue
24 Shield card and my drug prescription card, all of which
25 have my social security number on them. In fact, the

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1 Supreme Court case that most recently addressed
2 identity theft dealt with the factual scenario that a
3 death occurred when a secretary in a doctor's office
4 copied a patient's social security number from a
5 woman's initial referral form.

6 The idea that social security numbers create
7 a significant and palpable risk may be true, but until
8 we think about the concept of limiting the
9 ubiquitousness of the social security number as an
10 individual and identifier, removing them from the court
11 file is not going to be effective.

12 MR. ABRAMS: Your time is about up, sir.

13 MR. BRALOW: Okay. I would like to answer
14 some questions. That would be fine.

15 MR. ABRAMS: Okay.

16 MR. LELYVELD: The point about ubiquitousness
17 is well taken, but would you agree with the argument
18 made earlier that it might be unconstitutional to
19 remove social security numbers from court filings, that
20 reporters have a constitutional right?

21 MR. BRALOW: I think certainly there can be
22 an argument that blanket prescriptions of information
23 in a court file fails to meet that standard that we are
24 familiar with. I think also there are times that the
25 legislature can, upon sufficient factual findings, make

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1 certain determinations with respect to information. I
2 do believe, however, endorse what was said before, that
3 my reporters routinely use social security numbers to
4 make sure they are not reporting about the wrong
5 person. When there is a case of 16 John Smiths, that
6 identifier becomes a germane and important piece of
7 information.

8 I also think we tend to burden information
9 because of conduct. And the conduct isn't simply the
10 conduct of the bad guy, the conduct is that we have as
11 a nation chosen to use this form as the discrete
12 identifier of people; that the fair credit reporting
13 act has chosen to make this identifier or the credit
14 card companies have chosen this identifier as the sole
15 means of checking who the individual is.

16 MR. GLEASON: I have asked a couple of
17 questions of some witnesses regarding the tension that
18 you have between the wide open discovery that you
19 sometimes get in civil actions and the openness of
20 court records, and so I have this question for you
21 because I think you said there should be no difference
22 at all between an electronic record and a paper record.
23 The difference arises out of a fact scenario such as
24 the following: For example, consider a case where
25 there might be trade information that is very

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1 sensitive. In one instance it is filed in the
2 courthouse, it is served on all the other parties, and
3 they realize the Heinz Ketchup recipe is in the court
4 filings. So the parties make motions, get a protective
5 order, and the court file is adjusted so that it's
6 sealed.

7 Now, compare that situation with an Internet
8 situation where the motion papers containing the
9 sensitive information are filed and immediately
10 available to the world. You can have a court
11 protective order after that, but we all agree that the
12 toothpaste is out of the tube and the remedy might well
13 be too late.

14 Don't you see that as a possible reason for
15 treating electronic records as, in some sense,
16 qualitatively different than paper records?

17 MR. BRALOW: I think most litigants deal with
18 trade secret circumstances by creating protective
19 orders prior to the time that the material hits the
20 court file. So in the majority of cases in which you
21 have proprietary information, the possibility that that
22 proprietary information would hit a court file has
23 already been discussed and there have already been
24 procedures put in line. I think you are talking about
25 a third-party or someone that is not a party to the

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1 matter.

2 MR. GLEASON: Proprietary information is one
3 category of sensitive information. Let's talk now
4 about somebody's medical history that might be the
5 subject of some dispute in depositions but ultimately
6 is not really very relevant at all to what the judge is
7 going to act on in the case. And yet because of some
8 dispute over discovery, we find one day that motion
9 papers are filed that include some rather sensitive
10 personal information about somebody that really doesn't
11 have anything at all to do with what is ultimately
12 going to be litigated. It would just be another
13 category of information that might be generically
14 sensitive.

15 I don't know that I would agree that you can
16 always say that parties are going to put up the
17 firewall before the information hits the court file in
18 a successful way. That's the thing that troubles me.
19 And an electronic file has vastly more opportunities
20 for immediate and permanent dissemination than a paper
21 file.

22 MR. BRALOW: I would take a hard line and say
23 that it would be the attorneys that have to practice
24 before the bar that have an obligation to refrain from
25 putting scandalous or impertinent information into a

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1 court file, material that isn't otherwise relevant to
2 the actions before the Court. And once the file or the
3 pleadings hit the court file, then it really becomes
4 part and parcel or up to the judge on a case-by-case
5 determination.

6 MR. GLEASON: Do you view the temporal point
7 in time when constitutional protection attaches as
8 being simply the act of it hitting the file or is the
9 time when protection attaches when the material becomes
10 potentially part of the judicial process?

11 MR. BRALOW: I would view either the
12 Constitution or the Common Law Rights, depending on
13 what place you are at, to hit or attach at the time
14 that the material hits the court file.

15 MR. GLEASON: As soon as it hits, it is then
16 public?

17 MR. BRALOW: Yes.

18 MR. ABRAMS: Thank you very much. We
19 appreciate your testimony. Have a good flight.

20

21 (Continued on next page)

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25

1 MR. ABRAMS: Ms. Watson.

2 MS. WATSON: Charlotte Watson, Executive
3 Director for the New York State Office for the
4 Prevention of Domestic Violence.

5 Chairman Abrams, esteemed Commissioners, I
6 want to thank you for the opportunity to address you
7 this afternoon on the most important and challenging
8 issue of public access to court records. The New York
9 State Office for the Prevention of Domestic Violence is
10 an executive level state agency, created by the
11 governor and legislature to improve the response of the
12 State and local communities to domestic violence.

13 Great strides have been made in the past 30
14 years in response to domestic violence, along with the
15 vastly increased use of the civil and criminal justice
16 system. The lion's share of change in the criminal
17 justice system's response in the State of New York has
18 occurred over the past ten years under the incomparable
19 and synergistic leadership of Governor George Pataki
20 and Chief Judge Judith Kaye.

21 MR. ABRAMS: Do you speak for the State of
22 New York in saying that?

23 MS. WATSON: Yes.

24 MR. ABRAMS: Thank you.

25 MS. WATSON: At the same, time the use of

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1 computers and access to the Internet has exploded.
2 What we innocently put on the "Web" a few years ago is
3 now being used in ways we never considered, including
4 invasive crimes such as identity theft. We've heard
5 horror stories of how stalking victims were tracked and
6 harmed through information posted and available to all
7 for good or bad intent. We've all seen those annoying
8 pop-up adds on our computers, advertising the ability
9 to find literally, anyone. As a domestic violence
10 advocate with more than 27 years in the field, and one
11 concerned about privacy in general, those ads, and the
12 open, easy access to so much personal information in
13 what we term the "information age" are truly
14 frightening.

15 Nowhere is this more of a concern than when
16 considering the safety and security of victims of
17 domestic violence, sexual assault and stalking. We
18 know that domestic violence is pervasive, on-going,
19 life-changing reality for millions of women and
20 children in this country, and stalking is an integral
21 part of the dynamic of domestic violence.

22 Domestic violence victims know all too well
23 their abusers will use any means to control and terrify
24 them and keep them from escaping. It is not unusual
25 for a batterer to monitor the odometer on a victim's

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1 car, record the victim's phone calls, or use hidden
2 cameras. Imagine what it would be like to have a
3 Global Positioning Satellite unit attached to your car
4 and monitored constantly by someone in authority over
5 you. This is the daily reality of many victims of
6 domestic violence with the state of technology today.
7 What will tomorrow hold?

8 It's extremely difficulty and often dangerous
9 for battered women to escape their abusers. Many find
10 it necessary to flee the area entirely in hope of
11 finding safety. Those who are able to get away live
12 with the extreme fear of being found by their abuser.
13 A losing battle for approximately 1,100 U.S. women each
14 year who were murdered by their intimate partners after
15 fleeing, as well as, countless others who are
16 re-assaulted.

17 There have been many attempts to help victims
18 find safety. Recent changes in law make it a federal
19 crime for an abuser to stalk and abuse a victim across
20 state lines. There are processes by which victims can
21 change their names and social security numbers,
22 sacrificing their identities just to be safe.
23 Unfortunately, at the same time we are recognizing the
24 needs of domestic violence victims, the trend toward
25 "open government" and access to information has become

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1 an easy, affordable and valuable weapon for abusers.

2 As advocates for victims of crime, however,
3 we do recognize the need to find ways to increase the
4 accountability of systems, including the courts, in
5 their responses and decisions. It's vital that these
6 interests are balanced against victim safety and the
7 privacy of users of our court process. In the effort
8 to increase accountabilities, the court must be mindful
9 of even the appearance of culpability, should granting
10 easy access to information result in harm to a victim.
11 It should never be the case that potential consumers of
12 the courts must weigh the need for safety through court
13 intervention against the need for privacy and anonymity
14 which may also impact safety.

15 In light of these concerns, I will outline a
16 number of recommendations regarding open access to
17 court information. In addition for our own experience
18 in responding to domestic violence, we received
19 assistance from the National Network to End Domestic
20 Violence in researching this important issue. The
21 following critical issues must be addressed before
22 moving ahead with this process.

23 The negative implications include, as has
24 been mentioned:.

25 A chilling effect on victims who are

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1 considering using the court for legal relief.

2 While we applaud the fact that family court
3 and matrimonial records will not be subject to open
4 access, I must emphasize that under current law,
5 criminal court is the only court in which many victims
6 may seek relief. Consider, for example, a victim who's
7 being abused or stalked by a boyfriend. To obtain an
8 order of protection, that victim will have to disclose
9 significant personal information and potentially
10 embarrassing details about the abuse in criminal court.
11 Under the Conference of Chief Justices and the
12 Conference of State Court Administrators Guidelines,
13 this information would readily be accessible by the
14 public and the offender. It's not a leap to say the
15 victims will be reluctant to pursue an order of
16 protection under these circumstances. Is it fair to
17 ask a victim to sacrifice her privacy for the safety
18 she's entitled to under the law?

19 Imagine the heyday the pornography and smut
20 industry will have with such easy access to crime scene
21 photos of horribly violent rapes and homicides.
22 Imagine the websurfer who accidentally opens a porn
23 site or the errant adolescent going to sneak a peak
24 only to discover the crime scene photo of his naked
25 mother lying in a pool of blood. At what point would

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1 the balance tip from accountability at this point to
2 culpability? At what price? Who and how would these
3 decisions be made as to where to draw the line?

4 There are safety risks for crime victims and
5 witnesses. As I noted earlier, abusers often track and
6 monitor their victims as a means of maintaining
7 control. These behaviors typically increase when a
8 victim leaves the abuser. Whenever a victim becomes
9 involved with the court system, whether voluntarily, as
10 a result of mandatory arrest or pro-prosecution
11 policies or for some other reason, precious information
12 about her location, status, current name, phone numbers
13 and other circumstances is disclosed. Such disclosure
14 is a major concern for my agency and victim advocates
15 across the state. We know that abusers will access
16 this information and use it every way possible to
17 stalk, threaten, assault or kill the victim and maybe
18 her children.

19 This can be a problem even when the victim is
20 using the court system for something unrelated to
21 domestic violence. For example, if these involved in a
22 motor vehicle accident resulting in legal action and
23 the information, including simply the location of
24 the Court is posted on the Internet, her address would
25 be posted making it all too easy for her abuser to find

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1 her. Perhaps she relocates to escape the abuser and
2 later becomes the beneficiary of a probated estate. As
3 a result, identifying information could be posted
4 creating similar safety risks. Ironically, if the
5 victim is seeking a legal name change, even this
6 information could be posted on the Web, making her
7 efforts at anonymity fruitless.

8 It's important to note she may not be a
9 victim at the time of her interaction with the court on
10 the myriad of non-domestic violence related actions
11 that could bring her to court. After one date with a
12 stalker, she would be vulnerable to his gaining
13 valuable information about her that could lead to her
14 demise.

15 There's an increased opportunity for identity
16 theft. Destroying the victim's credit and reputation
17 is a tactic already used by batterers. Open public
18 court records will only increase the opportunity for
19 accessing and misusing personal information.

20 We're concerned about the secondary uses of
21 the information. Information stored by the courts will
22 most certainly be used for purposes that move far from
23 the original public policy intent of governmental
24 accountability. It will be gleaned and sifted and
25 compiled along with other information to create

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1 entirely new databases that can be misused and
2 misinterpreted. Once the information is gathered for
3 another database, it can never be taken back or
4 corrected. In domestic violence cases, false or
5 misleading information could be deliberately planted by
6 the batterer in spurious legal filings that include
7 slanderous material against the victim which are then
8 posted on the Web for all to see and use.

9 Internet access could undermine the victim in
10 custody proceedings. Seeking custody is one of the
11 most powerful tactics used by abusers to access control
12 their victims. Abusers will use every means available
13 to discredit the victim and prolong a custody battle.
14 The proposed guidelines actually aid abusers in this
15 process. Open public access to court information
16 provides abusers with cheap and easy access to all
17 records of any criminal proceeding, regardless of
18 whether such information was relied upon we the court.
19 This poses serious ramifications for victims who
20 ultimately leave their abusers and seek custody.
21 Economic survival or the abusers threats or false
22 promises often compel victims to minimize or deny the
23 events or later recant earlier statements of abuse that
24 form the basis of a criminal prosecution. The fact
25 that such records from a criminal proceeding and many

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1 civil proceedings will be within easy grasp of an
2 abuser in a subsequent custody proceeding essentially
3 re-victimizes the victim, rewards the abuser's use of
4 coercive tactics and facilitates the abuser's use of
5 custody as a weapon of control.

6 Finally, there's a dangerous reliance on
7 individual discretion. In many instances, courts will
8 possess far more personal information about a victim
9 than might be held by a State agency subject to FOIL.
10 The proposed guidelines heavily rely on human
11 discretion and information management in an effort to
12 protect personal privacy which will undoubtedly result
13 in human error. Unlike many other types of crimes, in
14 domestic violence cases, one simple failure to redact
15 an address or social security number could have,
16 literally, fatal consequences. Even the most competent
17 offices may find themselves outmatched by an abuser
18 determined to discover the whereabouts of his victim.

19 Under the proposed guidelines, victims of
20 domestic violence will likely be hunted down, harassed,
21 stalked, assaulted or even killed with greater
22 frequency. Government exposure to legal liability will
23 increase. It's deeply troubling for us advocates to
24 contemplate a system so completely depends on
25 individual discretion and competence at the risk of

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1 harm to victims and their children.

2 We whole heartedly agree that as much
3 information as possible should be available to the
4 public regarding governmental actions for systems
5 accountability to be achieved. However, this should
6 not mean full and open, cheap and easy access to
7 everything that happens within the walls of the
8 courthouse. We must hold this system accountable in
9 the same way that we hold the healthcare system
10 accountable without violating the patient's right to
11 privacy.

12 MR. ABRAMS: Miss Watson, your time is up
13 and we do have your statement. And I don't want to
14 lose the chance for people to ask you questions.

15 MS. WATSON: May I make one more point?

16 MR. ABRAMS: Briefly.

17 MS. WATSON: If indeed the objective is
18 governmental accountability, we have to agree on what
19 the objective is. Yet we concur with the
20 recommendation of the Privacy Rights Clearing House
21 that case information be gathered but posted only in
22 the aggregate, making personal identifiers unnecessary.

23 So we can know that in a given courthouse,
24 the Family Court judges, who have certain number of
25 orders of protections before them each month, which --

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1 you know what percentage are granted. Maybe you have
2 five judges, four of them grant 75 to 85 percent of the
3 orders of protection petitions that are before them;
4 maybe one judge routinely grants only 30 percent.

5 That would help you to identify, in terms of
6 the court's accountability or an issue that needs to be
7 looked into. Aggregate information might be helpful
8 without having to identify all the personal information
9 and put victims at great risk.

10 MR. ABRAMS: It seems to me that a good part
11 of what you're saying would apply to public access,
12 regardless of whether there's an Internet or not.

13 When you say that "open public access -- on
14 page five -- to court information provides abusers with
15 cheap and easy access to all records of any criminal
16 proceeding, regardless of whether such information was
17 relied upon by the court." The fact is that now,
18 without an Internet -- before we had an Internet, there
19 was open public access to court information, regardless
20 of whether the information was relied upon by the
21 court.

22 Does your office favor limiting access to the
23 information itself, regardless of whether it's going on
24 the Internet?

25 MS. WATSON: Our concern is the same one

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1 expressed many times today; that's the cheap, easy
2 affordable part of it.

3 You can actually be sitting in your bedroom,
4 walk over to your computer and find the information.
5 It's very different from having to go down to the
6 courthouse and go through the records and find the
7 information, being able to sit in California, sit on
8 your computer, pull up your victim, your target's
9 information on a court record in New York.

10 MR. ABRAMS: Is there any benefit to having
11 such information public? If your position is the only
12 purpose of access is accountability and that making
13 information like this available doesn't really relate
14 to accountability, unless you're aggregated or take
15 some other steps, why make it available at all?

16 MS. WATSON: I think, if you're talking
17 about a local community and you make the information
18 available in the community interested enough and
19 willing enough to pursue that information, it could
20 help them understand what's happening in their system
21 and help the system improve.

22 In individual cases, you have the right to
23 get as much information as you possibly can, if you're
24 litigating a case.

25 But I think the idea of public now really --

1 "public" being defined as the entire world. A
2 gentleman before was talking about public access,
3 meaning information available to the citizens. We're
4 talking about every person in the world having access
5 to this information.

6 At the time the constitution was crafted, we
7 didn't even have California. You know? So the idea of
8 getting information from -- at that point in time from
9 a place as distant as California would have meant days
10 and days of travel to come and review a paper in a file
11 somewhere. Now we're talking all the way from Hong
12 Kong, Russia, all parts of the world in a matter of
13 seconds having access to the information.

14 MR. ABRAMS: Do you think newspapers should
15 be banned from publishing the information or
16 broadcasters barred from broadcasting it?

17 MS. WATSON: I think we always have to think
18 first about what is the potential harm that's possible
19 and I think that we would -- at least I would hope we
20 would all agree if there's a clear avenue of harm, we
21 would want to avoid that.

22 I'm not saying that newspapers shouldn't
23 publish information or really describe what's happening
24 to our clients and our families. But we already have
25 an agreement. By and large we don't publish the names

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1 of rape victims. The problem there is that if she
2 happens to be murdered, that confidentiality
3 requirement is gone.

4 What if she's raped and severely beaten and
5 in a plea agreement or through the course of the trial,
6 if rapist is not convicted of rape, he's only convicted
7 of assault, she is no longer a rape victim then her
8 name can be published. It can be very damaging to the
9 person.

10 We always have to weigh what's the public
11 interest against the harm to the society and to that
12 individual.

13 MR. FARLEY: I was wondering -- you may have
14 addressed this to some extent. Could you identify the
15 kinds of information that you think would be most
16 damaging to have publicly available for victims of
17 domestic violence? And I'd also like you to give me
18 your thoughts on the extent to which that same kind of
19 information but about the potential or possible abusers
20 might be of some value to their victims. For example,
21 I would think that it would be of interest to them to
22 know that the abuser lives in Oregon instead of New
23 York or something like that. So if you could address
24 that as well.

25 MS. WATSON: I don't think where the abuser

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1 lives is particularly that important to the victim.

2 It doesn't mean -- he might live in Oregon,
3 she might live in New York. If he decides to come
4 after her he can find his way to New York.

5 So what's more important to protect is her
6 information. Where does she live? What's her phone
7 number? And also other information that can be offered
8 up to a court that may or may not be true that
9 disparages her in some way, that then can be used in
10 another proceeding, like a custody proceeding, an
11 attempt to cause her to lose her job.

12 Abusers attack their victims on many
13 different levels. In many ways, information they can
14 have to use against her in other venues is a tool for
15 them.

16 MR. SIMS: If I understand your testimony,
17 the protection you want is not limited to any category
18 of domestic violence case, it involves every court
19 case, including every criminal case, because every case
20 may have something that could eventually harm a
21 potential victim. Is that the point you're making?

22 MS. WATSON: The point I'm making is, any
23 time you have an individual appear before the Court and
24 have to give their name and address, you now can be
25 placing them potentially at some risk. Of course, most

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1 people won't be be harmed but we can't preselect where
2 the high risk is.

3 MR. SIMS: Would you be willing to trade
4 away the protection to the potential victims that
5 comes -- somebody sort of made this point but I think
6 not in quite this way -- from having access to cases in
7 that state and other states about potential attackers?
8 In other words, part of your assumption seems to be
9 every alleged victim is a victim and every alleged
10 attacker is an attacker. That may be true. Then a
11 woman could find out someone dating her has been
12 accused in seven other states through seven other cases
13 for the same thing. Wouldn't that be information she'd
14 want to know?

15 MS. WATSON: Not necessarily. You can never
16 broadly generalize and cover everything. There are
17 certainly exceptions to this rule. I don't know how
18 many of you had relationships that weren't the best;
19 weren't necessarily abusive, violent or threatening but
20 you've had a few of your friends, other friends tell
21 you this person is not really the best one you want to
22 let into your life. You think, I know better. I have
23 the relationship with this person. Our heart rules our
24 mind, sometimes and we go forward.

25 Having access to that information to her, I

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1 don't think most folks will go on line to see whether
2 or not this person has ever been a danger to someone
3 else. If they did, they might make up reasons, excuses
4 for why that would be. And the heart may win out.

5 MR. SIMS: There are also cases in which
6 people have been convicted of various kinds of abuse.
7 I think of teachers, students, for example. Then it's
8 turned out, through reporters researching open court
9 records, the convictions are unfair, based on improper
10 convictions and the availability of court files has led
11 to the exoneration of people improperly convicted.

12 Is that a benefit you'd be willing to trade
13 away from this sort of super protection you're seeking?

14 MS. WATSON: I'm never willing to trade away
15 the safety of the victim. If there is a way to get at
16 some of this other information without jeopardizing
17 that person's safety, that would be my preference.

18 MR. KOVNER: Miss Watson, in some courts in
19 New York State you want to access records today, you
20 have to go to the courthouse and you have to fill in a
21 form and say who you are in order to get it. We've
22 heard some testimony from people that say if, to the
23 extent it should be remotely accessible, that you
24 shouldn't have to log on or provide any identifying
25 information to access court records that are otherwise

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1 public. Would it be material, as far as you're
2 concerned, if to the extent this Commission were to
3 propose that there would be remote access available,
4 that that -- to condition remote access on logging on
5 and providing some identifying information so that it
6 would be ascertainable as to who had obtained
7 particular records at particular times?

8 MS. WATSON: It's an interesting question
9 because you can create any identity you want on the
10 Internet. I could log on as Mickey Mouse. I can
11 create a pass word. Usually, they are asking you to
12 create your own identity when you log on. I don't know
13 that you necessarily are going to have the information
14 about who is logging on.

15 Honestly, I don't have a strong opinion about
16 it one way or the other. But I don't know that it
17 provides any sort of security that we might hope that
18 it would be a deterrent to anyone.

19 MR. KOVNER: Doesn't even a fabricated entry
20 contain within it information that provides some
21 identifying information to authorities who would wish
22 to pursue the person or persons who had access to that
23 information?

24 MS. WATSON: Honestly, that's a very
25 technical question and I don't understand the

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1 technology well enough to answer it. I'm sure some
2 prosecutors who are prosecuting some of these Internet
3 based crimes, child pornography, those sorts of things,
4 might be able to say that.

5 Would that level of scrutiny be applied to
6 all the folks who are accessing information, how would
7 we ever provide enough resources to do that?

8 Again, would it be an after the fact now that
9 a crime's been committed, an individual's been harmed?
10 Would we be going back to prove the case against the
11 perpetrator of that if in fact we didn't prevent it
12 when maybe we could have?

13 MS. ABRUTYN: There's been some discussion
14 earlier about potentially handling these kinds of
15 issues on a case by case basis. And what struck me
16 about the issues that you raise, the concern over the
17 victims, is that in those instances the person involved
18 in the proceeding -- the victim who is at risk -- would
19 always know that they had been the victim of a stalker
20 or domestic violence or whatnot. And do you think that
21 the concerns you've raised could be addressed by having
22 that person put those facts before the judge in any
23 specific case and presumably, I think, if one were to
24 go before a judge, that there's a likelihood that a
25 request would be granted, if their safety and security

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1 was actually at risk as opposed to some sort of blanket
2 prohibition that would keep all records off? As you
3 said before, maybe 80 or 90 percent of the people
4 wouldn't be at risk but to handle the 10 percent that
5 would by having them make an application to have their
6 case treated differently or specially. And if that
7 would not address the concerns, why not?

8 MS. WATSON: I don't think it would address
9 the concerns because, first of all, any time you do
10 things on a case by case basis and you're involving
11 individual judgment, you're going to end up -- I don't
12 know how many judges we have in our system -- you have
13 the potential of that many different ways to view a
14 particular case and to make a decision. You don't have
15 consistency in that regard.

16 And I might know that I was a stalking
17 victim, I might know that I was raped or I might know
18 I'd been battered. When I show up to court on my
19 traffic ticket or my father's estate or whatever, but
20 what if I don't know that? What if that hasn't been
21 my experience? I've been lucky, haven't had any real
22 bad problems and I go through this process. The first
23 question is state your name and address for the record,
24 please. I do that. It's on the record. Then two or
25 three years down the road, I'm mugged or I'm assaulted

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1 or I meet someone for a date and by the end of that
2 date, I know that there's a serious problem here, I
3 don't want to see this person again. He doesn't want
4 to give up. So he goes on the Internet and boom,
5 there's the information. There's my address. I didn't
6 give my address. In a matter of seconds, he can have
7 access to it. We don't know prospectively who the
8 victims are going to be. We don't know how many
9 victims there are in the United States in terms of
10 violence against women. We know there are estimates,
11 at least one out of every four women will be physically
12 assaulted by an intimate partner in their lifetime.
13 That's a lot.

14 There are similar numbers on women who will
15 be raped. It's a fairly significant part of our
16 population we're talking about putting information on
17 the Internet. For what purpose? I'm not certain.
18 This particular information, for what?

19 MS. BRYSON: I want to make sure we
20 understand the scope of what you're recommending.

21 On the one hand, it sounds like we basically
22 should recommend that there not be any personal
23 information of any kind, demographic or potentially
24 embarrassing or personal information, medical
25 information, et cetera, should basically be barred from

1 those court records that are going to be filed
2 electronically.

3 On the other hand, it seems there are certain
4 specific pieces of information that trouble you more,
5 such as name, address and perhaps certain identifying
6 numbers. Can you be a little clearer about exactly
7 what you're recommending we do?

8 MS. WATSON: I'm recommending that you not
9 use personal identifying information, that you not put
10 that on the Internet. I'm recommending if the goal of
11 this -- I understand this to be the goal, from the
12 Conference of Chief Judges mono policy guidelines.
13 From what I understood Judge Kaye to say when she
14 announced this initiative, the goal is accountability
15 of the court system.

16 If that's the goal of it, then why does it
17 matter what my name and address is? What matters is
18 what did I petition the court for? And what result did
19 I get out of it.

20 And not only me in my individual case. Are
21 we looking for a pattern where we might have problems
22 that we need to resolve? A place where maybe someone's
23 not as accountable as they might need to be? We can
24 come in and bring a fix to that problem.

25 MS. BRYSON: Do you mean literally not to

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1 put names on the Court papers?

2 MS. WATSON: No. On the court papers, of
3 course. I'm saying -- in a way, you could say that the
4 Internet is much more akin to a publishing house,
5 newspaper, magazine than it is to a filing cabinet
6 because you're publishing information. If I come in to
7 the court, this is my whole court file. There's a lot
8 of stuff in here. My name, a lot of facts about me.
9 Maybe some untruth about me are all in this particular
10 file. And this is in the filing cabinet in the
11 courthouse. You come in and if you want, you can read
12 everything in there. That's very different than if you
13 put this in the New York Times and everybody can pick
14 it up and read it tomorrow.

15 MR. ABRAMS: So what are you saying, that it
16 shouldn't go on the New York Times?

17 MS. WATSON: I'm saying if there is an
18 interest that serves the public that the Times
19 identifies, of course it would go in the New York
20 Times. But what I'm saying is would you take every
21 single piece of information that comes before the court
22 and publish it to the world? That's what we're doing.
23 We're publishing it to the world. We're not simply
24 putting it in the world's filing cabinet.

25 MR. ABRAMS: Thank you very much.

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1 MS. WATSON: Thank you very much.

2 MR. ABRAMS: I want to say, for the
3 witnesses who are waiting, we appreciate. This is
4 really very important testimony for us. We're hearing
5 a lot of views we haven't heard before. I apologize
6 for making you wait around but this material really
7 matters to us.

8 Next person is Hillary Sunghee Seo.

9 MS. SEO: How much time do I have?

10 MR. ABRAMS: You have five minutes. Maximum
11 of ten minutes. Five minutes we will smile more
12 broadly.

13 MS. SEO: A lot of my testimony does overlap
14 with Charlotte Watson's testimony.

15 I believe you have copies of my testimony?

16 MR. ABRAMS: Yes.

17 MS. SEO: I represent Sanctuary For
18 Families' Center For Battered Women's Legal Services.
19 It is the oldest and largest legal services
20 organization in New York State, dedicated to domestic
21 violence victims.

22 Last year, our staff and voluntary attorneys
23 provided direct legal representation and advocacy
24 services to 3,000 battered women. We also lead
25 community education and public advocacy efforts to help

Donna Evans, Official Court Reporter

1 promote healthy relationships free of violence.

2 We also believe, based on our experience
3 advocating for thousands of domestic violence victims,
4 that posting case files on the Internet, making
5 generally available to the public without significant
6 restrictions would really endanger our clients. And
7 I'd like to explain a little about why we're so
8 concerned.

9 Let me outline my basic reasons and, as I
10 have time, I'll try to elaborate on some of those
11 points.

12 First, we find in our work, batterers and
13 stalkers are extremely obsessed with monitoring and
14 controlling their victims. They terrorize victims over
15 many years, even after their victims have managed to
16 escape and often spend countless hours really trying to
17 track down these victims, using any means available to
18 them.

19 (Continued on following page.)

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Donna Evans, Official Court Reporter

Sunghee Seo

1 MS. SUNGHEE SEO: (Continuing) Second, we
2 find in our work that the batterers and stalkers of our
3 clients are often very savvy technologically; and we
4 have no doubt if sensitive material is made available
5 to them on the Internet, they would spare no effort to
6 harass, track down and endanger their victims using
7 that information.

8 Third, as referred to previously, while
9 records from Family Court and matrimonial proceedings
10 are not available to the public at this point, court
11 files from criminal and other cases, other civil cases
12 are publicly available. And one of the difficulties
13 that we had in, sort of, formulating recommendations is
14 that while there is a category of information that is
15 more sensitive and obviously harmful like name,
16 address, phone number and things like that, identifying
17 information, in a large number of cases I think it
18 would be difficult to predict beforehand how some of
19 the information in seemingly unrelated cases would be
20 used as a weapon in the hands of abusers; one scenario
21 being that you are not a victim of domestic violence
22 stalking at the time that you were involved with the
23 court system in a case and then you become a victim in
24 the future.

25 Then finally, a point that many people -- you

Sunghee Seo

1 know, once this information is out there, it would be
2 really difficult to undo the damage. Just to give you
3 an idea of the number of women we are talking about,
4 one in four women in the United States are victims of
5 some sort of violence. That translates to about
6 26 million women nationwide. And according to the
7 National Institute of Justice, about 8 percent of women
8 are stalked sometime over their lifetimes, and that
9 would translate to about 8.2 million women. So we
10 really are talking about large numbers of women. And
11 you have to take into account children because often
12 the stalkers and abusers also attack their families and
13 lawyers and other support community members. So this
14 really is a problem. I think it really affects all of
15 us.

16 I would like to give you just two stories of
17 women who have stories that are typical of the types of
18 clients that we encounter. The first one is J.S. --
19 and I give you these examples to give you an idea of
20 how resourceful and persistent and aggressive the
21 abusers that we see on a daily basis are. The first
22 woman was physically and emotionally abused by her
23 husband. Besides beating her regularly and forcing her
24 to have sex while he slapped and verbally abused her,
25 he isolated her by preventing her from working,

Sunghee Seo

1 forbidding her from leaving the house without his
2 permission, calling her multiple times a day from his
3 workplace keeping tabs on her, becoming angry if she
4 talked to her friends or family over the phone, and not
5 giving her any money so she would have to ask his
6 permission to buy such incidental things as toothpaste
7 or feminine hygiene products. When she fled the house,
8 he called every one of her relatives and friends until
9 he eventually tracked her down.

10 I give you this example as, sort of, a
11 typical example in terms of how these -- you know, the
12 lengths that these abusers will go to track down their
13 victims and to sort of illustrate why we really have no
14 doubt that if sensitive information is made available
15 on the Internet, these abusers will misuse them.

16 The second woman S.H. was a stalking victim.
17 She was stalked by someone she met briefly while
18 volunteering at a community organization in South
19 Korea. He followed her to her home and asked her out.
20 When she said no, he started stalking her outside her
21 home. He found out her work phone number and called
22 her incessantly at work. He also stalked her at a
23 workplace. After about a year S.H. moved to New York
24 to pursue graduate studies. To her dismay, her stalker
25 found out the name of her school in the U.S. by

Sunghee Seo

1 contacting a fellow volunteer at the community
2 organization and took a plane and came to New York
3 after her. He showed up at her school in New York
4 causing her great fear. He also found out her phone
5 number, e-mail address and home address over the
6 Internet and began to harass her. After a while, S.H.
7 became so scared that she moved to a new location. But
8 she is still afraid her stalker may again succeed in
9 tracking her down.

10 About 10 percent of stalking victims
11 relocate, actually physically relocate to get away from
12 stalkers because they find that's really the only way
13 to make the stalkers go away.

14 Another point that I would like to
15 highlight -- though I elaborate on each of the points
16 in my written testimony -- is again this point that it
17 would be difficult to predict beforehand exactly where
18 some of the sensitive material that would ultimately
19 harm victims would be in the case files. So, for
20 example, if a woman is battered and relocates, she is
21 stalked and she relocates and she gets a new job in a
22 new location and then she is terminated after she
23 complains to her supervisor about sexual harassment and
24 decides to seek redress in the court, her employment
25 files which contain the name and address of her

Sunghee Seo

1 employer would, you know, if these files are made
2 available on the Internet, would become available. Her
3 batterer/stalker who is intent on finding her may
4 spend, you know, one night out of every two or three
5 days looking for her on the Internet. If he comes
6 across this case by just putting in the search code of
7 her name, he would find out who she is working for now,
8 and it would be much easier to track her down.

9 In a similar case, we have seen people where
10 not only does he find out her address and try to track
11 her down and begin to threaten her that way, but he
12 will threaten to humiliate and embarrass her by posting
13 all the details from her sexual harassment case on the
14 Internet and by mass mailing the link to her friends,
15 family and colleagues.

16 This is, sort of, an Internet hypothetical,
17 but we have seen abusers who go to great lengths to
18 create elaborate websites where they gather information
19 about the purporting sex lives, and the abusers then
20 try to either mass mail to people he knows or to some
21 of her friends to embarrass her.

22 And again, sort of -- I am giving you these
23 examples to really underscore who these people are and
24 why we are so concerned.

25 MR. ABRAMS: Your time is up, ma'am, but I do

Sunghee Seo

1 want to save time for my colleagues to question you.

2 Could I ask you generally, what is your
3 recommendation to us, what would you like us to
4 recommend to the Judiciary about this subject?

5 MS. SUNGHEE SEO: Two points. The first
6 point is that we have had a hard time coming up with,
7 sort of, specific recommendations because one of the
8 points that we are making is that you are not really
9 going to provide adequate protection by just sealing,
10 you know, domestic violence cases or matrimonial
11 actions and things like that. As Charlotte Watson
12 mentioned, New York does have a statute that protects
13 the victims of sexual crimes, but that doesn't apply
14 unless the perpetrator is prosecuted under very
15 specific sex crimes under the Penal Law. So that's the
16 first point.

17 Having said that, I think there are
18 categories of information that would be more
19 predictably harmful and would be relatively easier to
20 isolate, like name, address, social security number,
21 you know, telephone number and the like. And in terms
22 of some of the suggestions before about redacting such
23 information and then giving a few days so that people
24 can check for clerical mistakes and things like that, I
25 think those steps would be -- I don't think it would be

Sunghee Seo

1 a complete remedy but it would be helpful.

2 I do want to note that many of our clients
3 are pro se. We help them, but they proceed on a pro se
4 basis.

5 There was a question from the panel before
6 about, you know, whether it would make sense in
7 individual cases for the woman victim, since she might
8 know at that point that she has, you know, been a
9 victim of domestic violence or stalking, that she could
10 potentially be in danger, and why don't we have her
11 make a petition before the Court on a case-by-case
12 basis?

13 My response to that is, you know, yes, an
14 opportunity to do that could be helpful in some cases,
15 but in a case, especially of a woman proceeding pro se,
16 I think in many circumstances she just wouldn't have
17 the resources or the foresight to really be able to
18 make such petitions and, frankly, persuade the judge
19 that what may seem on its face harmless material could
20 potentially harm her. Also, again, the point that if
21 you have never had these bad experiences at that point
22 but become a victim in the future, obviously it would
23 be really hard to predict what is going to be done with
24 some of this information by an abuser in the future.

25 MR. ABRAMS: You mentioned your prepared

Sunghee Seo

1 statement, and I want to let you know and everyone know
2 that all the prepared statements will be set forth in
3 the record of these proceedings. They will be on our
4 website together with a transcript of the testimony.
5 So people will be able to read the entirety of what you
6 prepared even though we are necessarily cutting you off
7 to some extent in terms of presenting it all.

8 Any questions?

9 MS. BRYSON: Once again, I just want to be
10 sure that we understand the scope of what is being
11 recommended.

12 Do you agree with the previous speaker that
13 we really should not have -- it is almost as if we
14 shouldn't have any electronic filing of court papers,
15 or are you prepared to say that there should be some
16 electronic filing but that there should be a
17 distinction between what is filed electronically and
18 what is filed in the courthouse? It seems that the
19 previous speaker was perfectly comfortable with that
20 information in the courthouse. But it seems to me if
21 they know where the person lives, they can go to the
22 New York County Court, do a search on the person's
23 name, and if they are that dogged and that determined,
24 they can hunt them down and locate the same information
25 on paper. But there seems to be a distinction then

Sunghee Seo

1 between that and putting it out electronically. What
2 is your group's view on those distinctions?

3 MS. SUNGHEE SEO: On the first point, the
4 first question, I realize that this is not a black and
5 white matter. We are talking about degrees of danger
6 and balancing it against other interests. And so -- I
7 mean, in a spectrum of possibilities it is going to be
8 better if court records, for example, are defined more
9 narrowly than was defined in the national guidelines.
10 If there is more restriction in some cases to who can
11 access these files electronically, whether there is a
12 fee, for example, all these things, I think, will
13 matter. The worst scenario being you make everything
14 available to everyone for free, you know, with a very
15 broad definition of "court records" so that it even
16 includes exhibits that are not entered into evidence.
17 I think that was one of the suggestions or
18 considerations within the national guidelines. So I
19 would urge the Commission to think about domestic
20 violence victims and stalking victims as you consider
21 balancing these interests. I realize that, again, you
22 know, it is not really a black and white matter, but as
23 you balance these interests, I think there are ways,
24 maybe by going to a multi-tiered system in terms of the
25 type of cases that would be available electronically

Sunghee Seo

1 and to whom, you know, that if you go -- if you sort of
2 divide up the cases between categories, the highest
3 protection being given to identifying information, I
4 think that would probably make it safer. Although I
5 think one of the points we are making is that it
6 really is difficult when we think about how this will
7 affect our clients, it will be difficult to predict --
8 you know, we can't say if you get rid of this, this and
9 this information our victims will be safe.

10 On the second question, we read the
11 guidelines that the Commission published and understand
12 that it is not your job right now to reconsider
13 existing policies, and so the testimony does not
14 include our information about what to do about the
15 public access rules on paper court filings.

16 MR. ABRAMS: Thank you very much.

17 Mr. Solomon, you are next.

18 MR. SOLOMON: Thank you. I am Richard
19 Solomon. I am a graduate from Georgetown Law School of
20 1985. I am a published author. I wrote a book called
21 Winning in the New York Small Claims Court, and I
22 regularly teach people on how to use the public courts
23 and public records to get information in their own
24 cases. And you would think that I would be very much
25 in favor of unfettered access, but the truth is I am

Solomon

1 not, probably because of my own experiences.

2 Even though I teach and talk about public
3 records, there is a big difference between taking your
4 ID, showing it to somebody at the clerk's office,
5 signing a little form, having your face there, and
6 telling the clerk, I want this file. It's just like
7 the difference with check fraud. If you have to go to
8 the bank and actually cash the check, you are on video
9 camera. Because when you go into the bank, you are
10 exposing your own problems.

11 One of the problems that we have in the
12 litigation system is that there is so much private
13 information -- and I couldn't help agreeing 100 percent
14 with the Attorney General's office.

15 I brought with me a Bill of Particulars from
16 one of my own medical malpractice cases from 1995. In
17 this case, just like in every other med mal case and
18 every other case, they ask your salary and your date of
19 birth. And over here they ask for a social security
20 number, and they ask for your resident address. It is
21 all right there. And I have reluctantly never filed
22 these kinds of papers in the courthouse because it is
23 not required. And I do that to protect my own clients.
24 Also, it is to protect me. I don't want to be
25 responsible for revealing the privacies and intimacies

Solomon

1 of my clients who come to the court system. And they
2 shouldn't have to pay for motions for protective
3 orders, which are expensive. Invariably there will be
4 a fight between the lawyers and clients about who is
5 getting paid for their privacy. After all, I brought a
6 lawsuit and now I have to file a protective order.
7 There goes a couple of thousand dollars because you
8 have to make motions and it has to go on the record.
9 There is an appearance and whatever. They don't want
10 to spend a couple of thousands on that. So all this
11 information is out there. And I agree with Ms. Watson,
12 I think, who talked about the difference between a
13 filing cabinet and everywhere.

14 One of the things we really need to think
15 about is 9/11. No one mentioned anything about
16 terrorism in New York. Since there are people out
17 there who are committed to jeopardizing the safety of
18 public officials and whatever, who is to say that when
19 officials or various people are the subject of
20 litigation, that somehow when an officer of government
21 has to give a personal piece of information that that
22 somehow is not going to be jeopardizing their own
23 personal safety or their family's safety or using
24 people to get to other people? It truly is different
25 to be able to go to a courthouse in person, hand in an

Solomon

1 ID and say, I want this specific file, to actually go
2 there. It is another thing for anyone around the
3 universe to anonymously and for relatively no money
4 access everything about you. The criminal justice
5 system will not be able to track those people down in
6 foreign jurisdictions. I agree with the Attorney
7 General's comments on that point.

8 The one thing that no one has talked about --
9 I will raise this hypothetically -- is do you even know
10 what it is like to be the victim of identity theft? In
11 1999 one of my oldest clients, a really nice man named
12 Mike, had his identity stolen. I was his lawyer and
13 figured I would help him out. The amount of damage it
14 did to him, a nice elderly man, was unbelievable. Do
15 you know what it took to fix his credit, to get to the
16 credit reporting agencies, to get the information
17 cleared up? Do you know the cost involved in that?
18 Now, I was his friend so I basically did it for
19 nothing. But if he had to pay for it, it would have
20 been enormous. It probably took 15 straight hours to
21 hunt down the right places, explain, show his real
22 identity to everybody and undo the mess. That was
23 1999. That was only one case and I figured okay. But
24 last year I had about fifteen cases. Not because I am
25 an expert in identity theft, but it is because it

Solomon

1 really is exploding. It is a very easy crime.

2 I wrote the article entitle, "Protecting
3 Yourself from Identity Theft." Even the Attorney
4 General in the State of Arkansas talks about this in
5 their website. All you need is a social security
6 number, date of birth, and maybe even a phone number,
7 and you can grab someone's identity. It is that
8 simple.

9 Now, of course, I went on Google on the
10 Internet and looked up "identity theft" and with a date
11 of birth found -- you can locate anyone's e-mail
12 address, find unlisted numbers. You can discover new
13 and old romantic interests, verify death, marriage
14 property, snoop for secrets your neighbors don't want
15 you to know, locate hidden assets, and check for
16 unclaimed monies in your own name.

17 Well, the problem is identity theft is
18 exploding. If you looked at the New York Post from
19 this week, you would have seen an article about
20 identity theft causing about \$35,000 worth of damages
21 when a loan was taken out. And the question is: Once
22 you let the toothpaste out of the tube, is it a
23 problem? You betcha.

24 Look at the list from the government's own
25 website on what you have to do to clear the problem.

Solomon

1 You have to contact all creditors involved, file police
2 reports. You have to contact fraud departments. You
3 have to make a victim statement to your own credit
4 report. You have to then regularly check your credit
5 report. And most likely, if you have credit, you have
6 to hire an attorney to clear it up because I have seen
7 the resistance in clearing this up because there are a
8 lot of problems out there. Debtors say their identity
9 was stolen just as a way of delaying bankruptcy.

10 Just in closing I have some quick points.
11 One is that the burden on attorneys shouldn't really be
12 made greater. We have enough problems with compliance
13 and CLE requirements. And to become the keepers of
14 whether information is going to subject our clients to
15 identity theft creates malpractice problems for us. If
16 anything, we are going to have to make motions pro
17 forma in every case to preclude things to protect
18 ourselves. That is going to cost money. And the
19 clients won't want to pay for it, and the court doesn't
20 want to see thousands of motions on identity theft.
21 They will be flabbergasted.

22 What probably really makes sense is to keep
23 the system as kind of what we have but enhanced
24 somewhat. What we have in the courthouse is fine. I
25 don't have any problem with that. What I do have a

Solomon

1 problem with is everything being on the Internet. If
2 we really need to have information out there, people
3 can hire people to go down. The gentleman from Newsday
4 was talking about how they have to send people down.
5 Well, they have runners do that. If you really want
6 the information, you can go get it. The real
7 difference between getting that information and getting
8 it from Germany, Switzerland, from Osama Bin Laden is
9 that somebody has to go in person through metal
10 detectors and hand an ID to someone.

11 One of the things I criticize the court
12 system for is when you fill out that white sheet at
13 60 Centre Street and hand it in, or the yellow one at
14 111 Centre Street, you just fill out your name and you
15 hand it to somebody. No one even checks to make sure
16 that's your name. If you really wanted to, you could
17 put down Bob Jones, Lake Success, New York. You don't
18 really put an address and they will hand you the file
19 anyway. If anything, there should be some check inside
20 the court building like showing a driver's license or
21 your secure pass. All attorneys now have the secure
22 pass. That was one of the post-9/11 things, a security
23 enhancement. That should be recommended. When people
24 access the public records inside the court building,
25 show some identity, some real identity, provable

Solomon

1 identity. So if the information taken out is misused,
2 you know exactly who it was. Otherwise it is a bunch
3 of scribble and they throw it in a big pile.

4 MR. ABRAMS: Mr. Solomon, your time is up.

5 Does anybody have any questions?

6 MR. KOVNER: I take it it is your position
7 that the present system could be tightened but it works
8 pretty well, and the court records ought not be
9 remotely accessible at all.

10 MR. SOLOMON: Well, it is not that court
11 records shouldn't be remotely accessible at all, but
12 what do you need is maybe the complaint, maybe an
13 answer and an opinion.

14 MR. KOVNER: But beyond the sort of
15 skeletal --

16 MR. SOLOMON: Why do Bills of Particular
17 really need to be on the Internet? Why should the
18 court system scan all the documents, the motion
19 practice? If I was in a motor vehicle accident, what
20 good does that serve the public, all my private
21 information about my back injury or whatever is in
22 there? If anything, the insurance companies will want
23 to look at it. And the telemarketers are going to send
24 me prescription pain medication. Don't we have enough
25 of that? Look at all the spam you get. Mortgage rates

Solomon

1 have never been lower, you get that every day. All the
2 things about personal things that they send, legal
3 marijuana. It is only going to be enhanced by the fact
4 that the telemarketers, insurance companies and
5 identity thieves are going to be out there harvesting
6 the information and reselling it.

7 MR. ABRAMS: Thank you very much.

8 Ed Klaris.

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10 (Continued on next page)

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2 MR. KLARIS: Good afternoon. I'm Edward
3 Klaris. I'm here on behalf of the New York State Bar
4 Association's Media Log Committee. Not, as stated in
5 your form, the New Yorker; although I work there.

6 I thank you for permitting me to make a
7 presentation on behalf of the Media Law Committee of
8 the New York Stat Bar Assoiation.

9 The Media Law Committee is comprised of
10 attorneys who specialize in issues relating to the
11 First Amendment and privacy. We represent news
12 organizations and reporters and we firmly believe that
13 online access to court records will allow for more
14 quality journalism and improve the public's knowledge
15 of the court system and court proceedings without
16 comprising New York's protection of privacy interests.

17 Currently, searching court records is
18 something of an ordeal; many people work during the
19 hours when records are available for examination and
20 many work or live miles away from the courthouses.
21 Tracking down the correct courthouse in New York City
22 can be overwhelming for reporters and members of the
23 public trying to find information about particular
24 cases.

25 Electronic access to court records would

1 allow for meaningful and efficient searches of
2 important information about attorney and medical
3 malpractice, deadbeat parents, corporations charged
4 with fraud, products claimed to be defective and other
5 information that is currently very difficult to find.

6 Moreover, there are many organizations beyond
7 the mainstream New York press that, with sufficient
8 access, could engage in more direct public oversight of
9 the courts and contribute significantly to discussions
10 of public issues.

11 Alternative news organizations, out of state
12 newspapers, broadcasters and Web sites, public interest
13 organizations, lawyers associations and many others
14 could make valuable use of these records.

15 An on-line database would give private
16 citizens the same access, as the Supreme Court noted in
17 the Richmond Newspapers case, "People in open society
18 do not demand infallibility from their institutions,
19 but it is difficult for them to accept if they are
20 prohibited from observing.

21 Making court records available on electronic
22 networks would increase the fairness of the court
23 record sytem facilitate greater scrutiny, meaningful
24 access to important cases in the system and continue to
25 enhance the tradition of openness that is part of the

1 culture and law of the New York court system.

2 These benefits are best achieved with
3 full-text searching and easy access to all cases rather
4 than having to input the name of the case to conduct a
5 search.

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

16 The Commission is by now well aware that the
17 U.S. Supreme Court made clear in *Nixon v. Warner*
18 *Communications*, that the public enjoys a common law
19 access to judicial records. The "presumption of
20 openness" can be reversed only by showing an
21 "overriding interest based on findings that closure
22 is essential to preserve higher values."

23 New York Rule of Court 216.1 requires judges
24 to consider not only the parties but also the "interest
25 of the public" and provide a written finding of "good

1 cause" before sealing court records. The rule
2 undergirds New Yorks' strong public policy in favor of
3 open court records.

4 New York courts over the past decade, have
5 consistently relied on 216.1 to deny requests to seal
6 court records even where all the parties were in favor
7 of sealing the case. For example, in a case decided in
8 2001 involving the proprieties of an estate accounting
9 and personal finances, the First Department upheld the
10 Surrogate Court judge's denial of a joint motion for
11 protective order to seal the settlement agreement.

12 In that case, named In re Hoffmann, the
13 court, in denying the motion, noted that even where all
14 parties agreed to seal the records, "Confidentiality is
15 clearly the exception not the rule and the court is
16 always required to make an independent determination of
17 good cause."

18 Would the Appellate Division's analysis in In
19 re Hoffmann or other cases change if court records were
20 available electronically? We do not think so.

21 For decades, New York courts and the
22 legislature have rebuffed privacy advocates' attempts
23 to create generalized privacy torts, such as one for
24 publication of private facts. On the other hand, where
25 the benefits of confidentiality in court records

1 clearly outweigh the presumed benefit of transparency,
2 New York already has several rules and statutes to
3 cover this.

4 For example, State statutes currently permit
5 courts to seal records in family law, matrimonial and
6 juvenile cases. The New York Public Health Law and New
7 York Mental Hygiene Law are the principal statutory
8 sources of New York law that require health information
9 to be held in confidence. Additional health-related
10 statutes cover specific situations, like HIV and AIDS
11 patients, disclosure of health records in litigation
12 and the collection of statistical information by
13 various governmental agencies. These rules would
14 continue to apply in the electronic environment.

15 Congress has also passed a number of federal
16 laws that protect certain kinds of information. HIPPA
17 protects health information. Gramm-Leach-Bliley
18 protects financial information. FERPA protects
19 education information. COPPA protects information
20 about children. The Driver's Privacy Protection Act
21 protects drivers' license applications and information.
22 And there are more.

23 With all these privacy-related laws, the
24 chances that highly confidential information would be
25 filed with the court in litigation have been

1 significantly reduced. Even where such information may
2 be turned over in discovery, only a tiny percentage of
3 discovery information and materials are actually filed
4 with the court. And, of course, the first amendment
5 does not require that non-parties be given access to
6 discovery material that has not been filed in the
7 clerk's office.

8 Perhaps the greatest fear of electronic
9 access to court records is that information may be used
10 in identity theft, where a person's social security
11 number, credit card and bank account information are
12 appropriated and used illegally. While identity theft
13 is a serious concern, blocking access to certain
14 electronic records is not the answer. Strict
15 enforcement of the existing criminal laws and the
16 proper implementation of state and federal privacy
17 legislation will deter such behavior.

18 In addition, there's no evidence that court
19 records would ever be a good place for would-be
20 criminals to obtain social security, credit card and
21 bank information, while there's ample evidence that
22 such information can be obtained elsewhere on the
23 Internet and through criminal rings that collect the
24 data from co-conspirators at banks and retailers.

25 Speculative and remote fears about deviant

1 behavior should not cloud this Commission's
2 recommendations. This Commission should support
3 electronic access to court records and endorse the
4 current rule of law and good public policy in New York,
5 which already properly balances privacy in court
6 records with the First Amendment.

7 In conclusion, we suggest that this
8 Commission recommend the continued implementation of
9 the New York court system and that New York court
10 records be made available electronically. Doing this
11 will increase the efficiency of the judiciary, while
12 also democratizing the system, giving citizens
13 journalists and other interested parties access to
14 information they need to monitor the fairness and
15 efficacy of the courts.

16 It's worth emphasizing that we do not request
17 New York expand the types of records available to the
18 public. Rather, we simply would like New York to
19 provide broader and more efficient access to records
20 that are already there.

21 MR. ABRAMS: Thank you.

22 I'm interested in your reaction to the
23 conclusions and the concerns expressed by the last two
24 witnesses who pointed out that while Family Court
25 proceedings are closed, criminal and civil cases, of

1 course, are not. They expressed concern, therefore,
2 about providing information that might make it easier
3 for stalkers or others to commit criminal acts on
4 individuals whose names were mentioned in court
5 records.

6 MR. KLARIS: The Media Law Committee, those
7 kinds of hypothetical concerns are unfounded because
8 there's really no evidence that anybody would use the
9 records for that purpose. And also, it seems there are
10 many other ways to get the information as well.

11 MR. LELYVELD: Your argument is the the cat
12 is out of the bag and therefore it's not a concern?
13 Why wouldn't they use it, if it were easily available?

14 MR. KLARIS: The testimony that was stated
15 before pretty much indicated that the reason people are
16 stalked or found by predators is that they called the
17 families and get the numbers through family and
18 friends. They used means of obtaining the information
19 typically that is also available publicly and not from
20 the public records.

21 Court cases involving people who might be
22 victimized are probably relatively rare. And there's
23 no systematic way of knowing that there's a certain
24 case that a person has been named in. It would be much
25 more logical for a potential predator to call the

1 family or call the friends who they know to find out
2 where this person is.

3 MR. LELYVELD: Would you apply the same
4 argument to the identity theft concerns that have been
5 mentioned?

6 MR. KLARIS: Yes. I think there are other
7 places that collect that kind of information in broad
8 ways where there's hundreds or thousands of credit card
9 accounts collected by retailers and banks where it's
10 much easier to get that information and use it in
11 identity fraud as opposed to piece together particular
12 cases where somebody's identity or information might be
13 stated some place in a record. That seems far less
14 efficient for criminals than actually going after broad
15 based databases, which are already available.

16 MR. CAMPBELL: In following up on his
17 question, in attempting to locate someone if, in fact,
18 the court system implemented a searchable database that
19 was discussed earlier, wouldn't it be easy just to plug
20 in the name, address or name of someone and locate it
21 very easily rather than having to go to a particular
22 county?

23 MR. KLARIS: I think that the on-line white
24 imagines are probably the easiest way to find somebody.

25 There are many other ways to get somebody's

1 information, including calling their area code and
2 555-1212, which will typically give someone's phone
3 numbers.

4 Where somebody's unlisted because they are
5 afraid of being stalked, which is, of course, a
6 legitimate concern, if somebody has that problem, I can
7 imagine if they are involved in litigation where that
8 kind of information might be in the public record,
9 their lawyer would work hard to get that information
10 sealed.

11 And there may well be good grounds to seal
12 it. But to do it in a preemptive way, this Commission,
13 to suggest that that kind of information should be
14 across the board exempted from filing in the public
15 court system seems, to the Media Law Committee, to be a
16 mistake.

17 MR. CAMPBELL: Do you feel that people will
18 now tend to move away from using the court system to
19 bring their grievances to be resolved in the Court
20 system because of this open access to court records?

21 MR. KLARIS: No, not at all. The Media Law
22 Committee thinks there should be no reason to change
23 the way litigation strategy is, other than perhaps in
24 the beginning there might be some more motions to seal
25 records that people are concerned their corporate

1 documents might be an open -- get more scrutiny in an
2 electronic environment. I don't see any evidence that
3 there would be a change in litigation strategies --

4 MR. CAMPBELL: I'm not saying a change in
5 litigation strategy. What I'm asking is if someone is
6 afraid of their medical records being posted on the
7 Internet, would they be a little less inclined to
8 commence an action and have their medical records and
9 bill of particulars and so forth and so on be posted on
10 the Internet?

11 MR. KLARIS: I have no idea.

12 MR. GLEASON: I'd like to ask you if you
13 could comment on the timing of when you think a record
14 should be absolutely open and whether that perhaps
15 could conflict with what you said about a sealing
16 motion because, presumably the sealing motion implies
17 that there's something out there that you want to keep
18 confidential. In an electronic filing system, you
19 might actually have something out there and publicly
20 available to the world before you even had an
21 opportunity to make a sealing motion.

22 MR. KLARIS: From my understanding of the
23 way the system works, when you're going to provide
24 something to your adversary in discovery that you
25 believe is confidential, you can move to have that

1 information sealed prior to the discovery.

2 MR. GLEASON: That's true. But there are
3 sometimes situations where the information would be
4 used in a court filing. It may not even have come from
5 discovery. It might have come indirectly through
6 discovery and the adversary, who has the interest in
7 confidentiality, might not immediately appreciate that
8 somebody else is going to put this thing in a court
9 document and file it.

10 Would you agree that there's a reasonable
11 expectation that somebody should at least have an
12 opportunity to argue for confidentiality before it's
13 on the Internet?

14 MR. KLARIS: No. The Media Law Committee
15 agrees with the Newsday statement earlier that once
16 records -- court documents hit the courthouse and are
17 publicly available in the clerk's office, they should
18 also be publicly available on-line and I think the way
19 the system currently works, there's no delay when you
20 file records in the courthouse.

21 MR. GLEASON: That's why we want to know if
22 the Internet is different because of the fact it's
23 practically obscure in the courthouse but when it's on
24 the Internet it's immediately available to the world.

25 Should we appreciate some difference because

1 of that?

2 MR. KLARIS: We think there should be no
3 difference. And you're talking about a miniscule
4 number of cases which, in fact, this Commission we
5 don't think should let the tail wag the dog, in terms
6 of the public benefits to media, public access to Court
7 filings and permit some hypothetical fears about a tiny
8 number of cases that might have some private
9 information where the parties haven't gotten a chance
10 to seal the information to wag the dog.

11 MR. GLEASON: Would you also take the
12 position that the critical event that gives
13 constitutional protection is your adversary filing it
14 as opposed to perhaps some later point in time when the
15 judge actually deals with the issue?

16 MR. KLARIS: We believe that at the time you
17 file the papers, they should be available publicly.

18 MR. GLEASON: In other words, your adversary
19 will control the timing of the attachment of the
20 world's right to know?

21 MR. KLARIS: Right.

22 MR. KOVNER: Mr. Klaris, would the Media Law
23 Committee object if we were to impose a recommendation
24 for remote access, a requirement that somebody log on
25 and provide identifying information, just as many

1 courts do, in terms of when you get a file from the New
2 York County courthouse?

3 MR. KLARIS: The Media Law Committee
4 believes that the rules that apply on-line should be in
5 tandem with those that are being instituted in the
6 courthouse.

7 MR. KOVNER: So if there's a requirement of
8 identification that some courts impose, there's no
9 reason why that shouldn't apply to on-line access.

10 MR. KLARIS: Correct.

11 MR. KOVNER: You would agree, would you not,
12 that the information that would be available on-line
13 would be far beyond that which is available today in
14 the courthouse?

15 MR. KLARIS: Because of full text searching,
16 the information would be more available. The benefits
17 to being able to search the record are so great,
18 because you can track down things like I mentioned in
19 my statement -- defective products, abusing spouses,
20 dead beat people in society, which is really important
21 information.

22 That greater access, on balance, is going to
23 far outweigh any kind of harm that may occur,
24 speculative and hypothetical harm that may occur.

25 MR. CAMPBELL: I want to raise one issue.

1 This is not a hypothetical.

2 Under the new HIPPA law, when the patient
3 fills out an authorization, they have to specifically
4 delineate what records are being released. They have
5 to indicate what purpose the records will be used for.

6 Following up on what Mr. Gleason said, if a
7 defendant makes a motion for summary judgment, let's
8 say, in a personal injury action, threshold motion,
9 they now have the right to attach all medical
10 documentation to that motion. Under the HIPPA
11 authorization, they are given authorization to receive
12 those documents for a limited purpose.

13 Now you're going beyond the scope of that
14 authorization because now you're publishing it on the
15 Internet. If it is made available at the time it hits
16 the clerk's office, as you suggested, how would you
17 balance that?

18 MR. KLARIS: I would balance it on a case by
19 case basis. So would the Media Law Committee, on whose
20 behalf I speak.

21 We believe that you can -- the plaintiff's
22 attorney, in a medical malpractice type case or case
23 involving private medical information, where the
24 information itself is put in issue by the plaintiff and
25 the question of their health and well-being, whatever

1 it may be, is in issue, if in fact there's a concern
2 about it being available publicly, the plaintiff's
3 attorney will have perhaps good grounds, depending on
4 the case, to move for a protective order.

5 MR. FARLEY: If I could ask you a question
6 that probably will sound like it's coming from left
7 field and that's about the copyright status of
8 materials that might be introduced into the court
9 record.

10 If an article from the New Yorker or a book
11 or something of that sort is included as an exhibit to
12 a court filing and it's just left in the court file,
13 that is a different copyright situation than if it is
14 then reproduced and disseminated on the Internet, which
15 might result in a publication or public display.

16 What thoughts would you give us about dealing
17 with items that may be copyrighted or otherwise be
18 protected and what the court should do with such
19 documents? Should they be disseminated on the
20 Internet? How would you over come the copyright
21 issues?

22 MR. KLARIS: I'll answer as an attorney and
23 from the New Yorker, not from the Committee.

24 That's a good question. The way we handle it
25 and most copyright holders is that you worry about the

1 infringer. You don't worry about the possibility that
2 your magazine might be scanned and is available,
3 because you can't stop the scanning.

4 We would always go after those who might be
5 using it improperly, not the court file that was
6 available whether electronically or in court.

7 If it goes from there to a Web site that is
8 distributing it widely for commercial gain, in our
9 opinion improperly, we would go after that Web site or
10 individual publisher.

11 MR. FARLEY: From the prospective of the
12 court system, the court system would be maintaining
13 this on some database and making it available. The
14 court system would be the entity disseminating the
15 copyrighted material. Are you saying that you would be
16 suing the court system?

17 MR. KLARIS: It's a good question. One
18 could analyze it in many ways. Each time somebody logs
19 on to the system, one could argue it's a copyright
20 infringement. I haven't thought through that scenario.
21 It's difficult to answer.

22 MR. ABRAMS: One possible result would be it
23 would be treated -- consistent with your testimony --
24 in the same way as each time someone went to the
25 courthouse to look at the book, or it was a magazine

1 article, to say there was no violation by the judicial
2 system in allowing viewing of the material. But if
3 someone went out and then published it or used it or
4 abused the copyright --

5 MR. KLARIS: The difference is, there's no
6 copy when you're looking at that. It's the copyright
7 you're talking about. So if someone goes to the
8 courthouse and makes a photocopy in front of the Court
9 Clerk, is the Court Clerk and courthouse somehow
10 contributing to the infringement because they make
11 available a copy machine? That seems far-fetched.

12 It's the same with the hypothetical with the
13 courthouse being responsible for the collection to see
14 on-line court records.

15 MR. ABRAMS: Thank you very much.

16 MR. KLARIS: Thank you.

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1 regulation aimed at electronic files in relatively
2 short order may amount to regulation of all court
3 files, as paper records may well disappear entirely in
4 our lifetime. Any tilting of the balance between
5 privacy interests and openness towards the privacy end
6 of the spectrum, even only with respect to electronic
7 records, may achieve the very opposite result of the
8 advantages to public access which the new technology
9 offers. Since it is possible that in the future the
10 only files that exist will be computerized, we should
11 be wary of creating new rules for that medium which
12 differ from those currently applied in the courthouses,
13 because ultimately the Internet may be the only game in
14 town.

15 Assuming, then, that we agree that the new
16 technologies and this new initiative should not result
17 in the diminution of openness in our courthouses, what
18 are the advantages of transition to electronic case
19 files? The practical importance of the change could
20 not be overstated, and in most cases it is entirely
21 uncontroversial. A paper copy of a document filed in
22 court, (1) requires a trip to the courthouse to inspect
23 or copy, once one figures out the correct courthouse to
24 visit; (2) is available for inspection and copying one
25 person at a time; (3) is available only during business

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1 hours; (4) may be archived in a dusty warehouse and
2 hard to find years after it is filed; (5) may be in use
3 at trials or in chambers and not available in the
4 clerk's office; (6) typically can be copied only by
5 very patient people with vast amounts of pocket change
6 on an antiquated photocopying machine; (7) must be
7 manually searched for relevant information by,
8 generally, uninformed agents for the parties actually
9 seeking the information; and then (8) only truly
10 retrievable if the party knows the exact caption or
11 case number of a specific litigation.

12 Clearly this is only for the very determined
13 and very resourceful. Electronic records solve all
14 these problems and we applaud the judiciary for its
15 efforts in this area.

16 The notice for these public hearings suggests
17 a limited number of areas in which restrictions on
18 electronic access are being considered where no
19 limitations currently exist with respect to paper
20 records. We view these suggestions as unwise,
21 unwarranted and constitutionally suspect.

22 First, there are adequate measures available
23 for litigants and others to request the sealing of such
24 information in the current procedures, although the
25 standard is, properly, a difficult one to meet. What

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1 seems quite problematic is to set up a scheme of
2 discriminatory access where the rules with respect to
3 hard records are different than those with respect to
4 electronic records.

5 Before discussing why we believe the same
6 rules ought to apply to both media -- that is, why any
7 system in which two standards don't mirror each other
8 is unwarranted -- my statement makes the points I will
9 skip right now. That there are an awful lot of
10 advantages to openness in our system such as those
11 cited in the Richmond Newspapers case. And I know the
12 Commission is well familiar with that, so I will pass
13 on that. But I think it is important to note that the
14 advantages of openness are all the greater if they
15 truly can be brought to the public rather than only to
16 those members of the public with the time, the
17 knowledge, the inclination and the money to actually go
18 to the clerk's office, a place where I, a New York
19 litigator of 27 years, still fear to tread.

20 But beyond the advantages of openness set
21 forth in Richmond Newspapers and the other Supreme
22 Court cases, I would make this point: That many times,
23 given the tension between privacy interest and access,
24 and indeed in the now 16-year battle in the state about
25 cameras in the courtroom, the participants in these

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1 struggles forget about what we have in common, and
2 that's an interest in the fair workings of the judicial
3 system. But I would submit it is more critical how the
4 public perceives the judicial system as working fairly.
5 That really ought to be paramount in any inquiry such
6 as this, particularly in today's environment where
7 lawyers, judges and the judicial system in general are
8 not thought of terribly highly by the public, not much
9 more than even lowly journalists. Whether it be O.J.,
10 bribe-taking state judges, the perception that LA Law
11 is the law, whether it be lack of understanding of the
12 adversary system and why the defendants are entitled to
13 due process, the judicial system is not held in high
14 esteem. And for the very reasons articulated by Chief
15 Justice Berger for a unanimous Supreme Court, more
16 openness is one way is to improve that very paramount
17 problem.

18 There has been testimony about privacy
19 interests, and we believe that much of the fears of
20 openness on the Internet is more speculation than
21 reality. And we underscore, especially from a
22 newspaper's point of view, the great advantages of
23 electronic access and full text searching capabilities.

24 First, it allows better reporting on the
25 judicial system. A paper like The Times reports on

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1 cases throughout the very large Empire State from
2 Dutchess County, home of the Tawana Brawley case, to
3 land issues in the Adirondacks. And timely and
4 accurate reporting, relying more on court records
5 rather than on the spin of lawyers and phone calls
6 would be greatly aided if a reporter in New York City
7 had access to a court file in Poughkeepsie.

8 Second, electronic access would improve
9 reporting in a variety of matters. As one who comes
10 from a building currently in turmoil, a problem created
11 in part by the lack of checking with respect to an
12 employee's background, it seems obvious that the
13 ability and the press and the public to have better
14 access to check upon the background of potential
15 employees is a good thing. Whether it is a newspaper
16 being able to get access to court records without a
17 candidate for the judiciary or any person running for
18 public office, for a newspaper or any employer to have
19 the ability to more easily check the true and sworn
20 background of potential employees in executive
21 positions, there is a myriad of advantages to get more
22 information more easily about such high-placed people
23 in sensitive jobs, or, for that matter about the past
24 history of those charged with crime. Moreover it is
25 not just about people. Newspapers could better report

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1 about companies deceiving the public, about products
2 claimed to be injurious and so on.

3 I note that the New York Times very recently
4 won a Pulitzer Prize for -- by Clifford Levy for his
5 reporting on abuses in private nursing homes. That
6 reporting was largely based on very, very painstaking
7 research into a whole number of court files and in a
8 wide variety of courts in the state. That reporting
9 would have been more quickly, more efficiently, and
10 more deeply had electronic searches on the owners of
11 those homes and the homes themselves been available.

12 Against these types of advantages it is hard
13 to see disadvantages of intrusiveness. First, one who
14 wants to get background about an individual can
15 probably do so without this new initiative. The
16 Internet already provides access to personal
17 information about people often well beyond what would
18 be filed and not redacted or sealed in court. And in a
19 very real sense, the cat is already out of the bag.

20 Second, the balance has already been struck
21 with privacy and openness in the standards which
22 currently exist for protective orders, seals and the
23 like.

24 Third, of course, is the case that in many of
25 the fora in which potentially private information

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1 exists, the law currently permits courts to seal such
2 records, such as in family law and juvenile cases. And
3 I also point out in another area often mentioned as one
4 area of concern is the bankruptcy courts. They are
5 federal and beyond the purview of this rule.

6 I close by saying we believe the balance that
7 exists now properly takes into account privacy
8 interests as well as the great public advantages to
9 openness, and that in embracing the new technologies we
10 should not alter that balance but should welcome the
11 added public access the Internet brings. To the extent
12 the Commission believes it should not exactly mirror
13 the current rules with respect to paper documents
14 generally, we think they should. We submit, consistent
15 with the Supreme Court cases, the burden must be on
16 those favoring more restrictive rules to show a
17 compelling reason based on real evidence and not mere
18 speculation on why a system that discriminates between
19 media should prevail. If the Commission believes such
20 a burden has been met, the exceptions should be
21 extremely narrowly tailored to include only a closed
22 specific set of so-called identity data -- social
23 security number, credit card, bank account and nothing
24 else -- and should be blocked from access not
25 automatically but only upon appropriate showing.

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1 I reiterate, we do not think that any such
2 discrimination is warranted, but if realistically the
3 only way to achieve the progress the Internet makes
4 available is by such a narrowly and clearly-defined
5 restriction after clear evidence has been shown that it
6 is substantially probable that real damage will occur,
7 we could understand why such a trade-off might be made.

8 MR. ABRAMS: Thank you.

9 I would like to ask you the same question I
10 asked Mr. Klaris about the testimony of the two
11 witnesses about stalking and the avoidance of domestic
12 violence in which they both testified that while Family
13 Court proceedings may be closed in New York, criminal
14 and civil proceedings in which potentially sensitive
15 information is revealed are not. And on that basis, at
16 least in part, they urge that we ought to avoid
17 recommending anything which would permit almost any
18 information which could be a benefit to a potential
19 stalker to go on the Internet with the assistance, at
20 least, of the Office of the Court Administration.

21 MR. FREEMAN: Let me start by answering that
22 with a short anecdote that Mr. Kovner's presence
23 reminds me about.

24 A month ago we were in a trial sponsored by
25 the Office of Court Administration. Judge Kaye was

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1 there and Judge Rosenblatt of the Court of Appeals was
2 there. And the hypothetical they created for that
3 particular occasion was one which really focused on
4 this exact problem and on the issue you are dealing
5 with. The hypothetical itself was of an old boyfriend
6 stalking an old girlfriend through records he somehow
7 obtained through the court process. In fact, the
8 information came out of records from Bankruptcy Court,
9 which isn't even within the purview of the state court
10 system. So even in the hypothetical created to make
11 the point, there was a problem here. They seemingly
12 weren't able to make the hypothetical with the real
13 facts open to us because since Family Courts are closed
14 they took a bankruptcy case that had the private
15 information that supposedly was the genesis of the
16 stalking, which isn't even in our state court.

17 So I do think that the harm is speculative,
18 and I have to agree with Mr. Klaris that so much of
19 this information is already available on websites and
20 on the Internet, that the thought that it somehow
21 becomes really beyond the breaking point because there
22 will be a website with court information, I just don't
23 think holds. Also I point out -- and I really am not
24 an expert in this, but my understanding is that we have
25 the same kind of rhythm, same kind of scenario with the

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1 Driver Protection Act. That was essentially passed
2 because of a fear of stalking and a supposed incidence
3 of one situation where stalking of an actress occurred;
4 although it is my understanding that occurred not
5 through the Internet but through a private
6 investigator.

7 So obviously the incidents which the
8 witnesses gave are terrible things. I do think,
9 though, that a number of cases where it is an old
10 boyfriend stalking an old girlfriend, where that old
11 girlfriend lives is easily obtainable by the old
12 boyfriend through many, many means. And I don't think
13 that it being available because maybe the old boyfriend
14 is involved in litigation and so maybe the address is
15 in the court record, I don't think that is the way we
16 are going to find where the people live. It is kind of
17 self-evident from much more easy methods.

18 MR. GLEASON: I would like to ask you the
19 same question I asked Klaris.

20 Would you also take the position that
21 constitutionally the instant your adversary files
22 something with the court it becomes a matter of public
23 record; and are you at all discomfited by the prospect
24 of having your adversary, who may have relatively wide
25 access through discovery or through other means, having

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1 the ability to place within the public domain whatever
2 they might wish to place there?

3 MR. FREEMAN: My understanding, and certainly
4 the procedure in New York, is that for the most part
5 discovery documents are not part of this inquiry
6 because we are only talking about those documents
7 gotten in discovery relevant to a motion being filed.

8 MR. GLEASON: Right.

9 MR. FREEMAN: Not discovery in general.
10 That's important.

11 MR. GLEASON: I am talking about through the
12 filing of a motion and attaching exhibits. Your
13 adversary would have the opportunity to place something
14 in a court record that might have a trade secret,
15 medical significance or other kinds of things like
16 that.

17 MR. FREEMAN: You know, the example given
18 earlier in the afternoon was, I think, of the Coca Cola
19 trademark recipe. If it was available in a court file
20 three days before someone made a motion to close it,
21 presumably that would be a problem in and of itself.

22 I guess I do agree with Mr. Klaris that we
23 think a mirrored approach is workable, and, you know,
24 if something dangerous is in the court file for three
25 days and Coca Cola is going to survive that, then they

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1 will survive it on the Internet too. I assume once it
2 is sealed in the court file, then it will be sealed on
3 the Internet in some manner that I can't logically deal
4 with.

5 So I guess the question that maybe I bagged
6 that you are really asking is: What happens? I am not
7 sure of the answer. What happens if something is filed
8 under seal, if the file is made under seal? If the
9 rules allow for that, then I assume the Internet filing
10 would be under seal as well in order to be consistent
11 with the analogy.

12 MR. GLEASON: My question is: Is there
13 constitutionally a big problem if, because of the
14 nature of the Internet and the immediate worldwide
15 availability of whatever is filed there, is it really a
16 constitutional problem if you have some period of time
17 after a filing that gives the adversary in the case the
18 opportunity to make an objection? Do you have a real
19 problem with that; and if so, what is the
20 constitutional basis for that? Because presumably a
21 judge hasn't even seen it yet.

22 MR. FREEMAN: I guess my answer is whether it
23 is constitutionally a major problem is hard to say. I
24 rely on the Commission for that answer who has more
25 experience than I do. But I do think it is hard for me

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1 to see the great harm if, in your scenario, that
2 information is available in the courthouse in any case
3 from the time of filing until the time a judge hears a
4 motion, etcetera. And let me just say that, you know,
5 if your question is that people can then attach
6 documents just to harm other people, the fact is they
7 can do that today on a website, they don't need the
8 court's website to do it. They can have their website.
9 For example, I just heard an instance, you know, this
10 morning, where a restraint has been issued because
11 someone put on their website the sexual proclivities of
12 his former girlfriend, and so the girlfriend came in
13 and got a restraint against that website.

14 So this is being done from time to time. You
15 don't need to do it through the court processes. You
16 can just put the stuff on your own website and the
17 effect would be the same.

18 MR. KOVNER: I think Mr. Gleason is
19 suggesting if there is something inadvertently
20 contained in someone's papers or attached to someone's
21 papers which will be noticed by the adversary party who
22 will see right away something that they should not
23 because, perhaps, the other party didn't think about
24 it, that it should have been under seal or confidential
25 and that an application should have been made for that.

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1 Within a short period of time, nobody is immediately
2 going to go to the courthouse anyway, unless they have
3 been alerted to do so; but shouldn't there be a short
4 period of time where the other side can either ask the
5 party to place it under seal by stipulation or ask the
6 Court, you know, that Exhibits X and Y in the filing
7 ought to be placed under seal so they don't go on to
8 the net?

9 MR. FREEMAN: My answer is only -- well, if
10 you are saying there is no great harm because it is
11 only going to be in the courthouse for a couple of days
12 with access to the public, why do we think somehow that
13 even if it is on the Internet everyone is going to hit
14 upon that?

15 MR. GLEASON: I will tell you why. I think
16 there will be people who will create search mechanisms
17 that basically download every single item of
18 information that comes out of the court system every
19 day; not looking at it, just cataloguing it. So as
20 soon as it hits the Internet every day, it gets copied
21 and made available, then it becomes public.

22 MR. FREEMAN: So you are saying if it is
23 later sealed but it is already on the website, it is
24 fair game and can't be put back in the tube. Yes, I
25 understand that problem. I mean, I also don't know or

Freeman

1 profess to know -- I assume that the filing will not be
2 simultaneous.

3 MR. GLEASON: Actually, now on New York's
4 electronic filing system, when it hits the web page it
5 is public. And presumably an electronic filing system
6 can operate the same way. If you want maximize the
7 openness for reporters and everything else, you could
8 have a system virtually having simultaneous publication
9 with the filing. And our question is: Do we need to
10 temper that because of possible harm?

11 MR. FREEMAN: I guess the question -- I don't
12 think that it would be necessary were it not for the
13 kind of secondary use that you just spoke of, of the
14 people who then won't obey the seal once a seal has
15 been enacted.

16 MR. GLEASON: It could be the New York Times
17 getting the Pentagon papers becoming public or
18 something like that.

19 MR. FREEMAN: Well, it would be good for us
20 to be able to do that.

21 MS. BRYSON: I follow up on Mr. Gleason's
22 point.

23 With all due respect, you are sort of talking
24 out of both sides of your mouth. The reality is on
25 Pages 2 and 3 you cite eight separate steps that

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1 somebody has got to go through to get the file if they
2 know it is there. And, in fact, if the Coca Cola
3 recipe is sitting in the courthouse, unless you are one
4 of the parties, you have to either know or you have to,
5 sort of, luck into it that day and have a lot of pocket
6 change and have the caption of the matter. So the
7 reality is that if you have the knowledge to go down
8 there that day, then it is accessible. But short of
9 that, there is a realistic period of time built into
10 the existing system which you like. There is an
11 existing period of time that you have where you look at
12 the papers that you just received from your adversary
13 and say, Oh, my God, he released attorney-client
14 privileged material that we all agreed was confidential
15 and we all agreed would not be filed and yet they have
16 attached it as an exhibit -- maybe out of accident or
17 maybe out of malice. Or, perhaps, it relates to the
18 privacy of a third-party who is not even a party.
19 There are lots of reasons why and certainly lots of
20 circumstances under which proceedings have resulted
21 from the inadvertent filing or the intentional bad act
22 of filing.

23 So I really want to challenge you on whether
24 or not if you like the system as it is in terms of
25 access, whether or not the system as it is already

Freeman

1 includes the contemplation of the ability to remediate
2 that without having it be all over the universe.

3 MR. FREEMAN: There are a lot of different
4 durations of the problems that could come up. I think
5 if it is malicious, as I say, it could be put on a
6 website. Forgetting about the court system website,
7 you could put it on any website. If it's Coca Cola, it
8 seems the Dr. Pepper people will know it is filed and
9 get a hold of the patents.

10 If it is inadvertent, sure, I don't deny that
11 in certain instances it would be a situation where if
12 no one is looking for it, the odds are that if it is in
13 the courthouse for a week it is not going to cause
14 great harm. But those are only odds. That's kind of
15 luck and fortuity. You are saying and speculating that
16 if that same week it is on the Internet, boy, that
17 millions of people will rush to get it, which I doubt
18 is true. But sure, in that sort of branch of the
19 hypothetical, it is possible, you know, that one way
20 something not particularly good will happen whereas the
21 other way, if we are lucky, no one will see it in the
22 courthouse and it will eventually be sealed.

23 MS. BRYSON: Mr. Freeman, at the end of your
24 statement you indicated -- and I want to be clear about
25 this on the record. I am quoting from your statement:

Freeman

1 "If the Commission believes that such a burden has been
2 met, the exception should be extremely narrowly
3 tailored to include only a close specific set of
4 so-called identity data -- social security number,
5 credit card numbers, bank account numbers and nothing
6 else -- and should be blocked from access not
7 automatically but only upon an appropriate showing."

8 What would you believe would constitute an
9 appropriate showing; and are you saying by this that we
10 should not recommend to the courts that they adopt a
11 rule that says the presumption is don't include a
12 social security number?

13 MR. FREEMAN: I'm sorry, the last part of the
14 question is what? The presumption is --

15 MS. BRYSON: It has been proposed to the
16 Commission by several speakers that we include a
17 recommendation to the courts that the rule be don't
18 include identifying information unless there is a
19 showing for a need for that identifying information.

20 It sounds to me like you are depositing the
21 opposite, which says to include all information unless
22 a showing is made not to. Am I correct in that
23 understanding?

24 MR. FREEMAN: Yes. I am putting the
25 burden on -- and I think that the usual access First

Freeman

1 Amendment analysis puts the burden on the person trying
2 to close the material rather than the other way around.

3 MS. BRYSON: But can't the Court determine --

4 MR. FREEMAN: Let me add one more thing to
5 clarify.

6 I do think that with respect to those three
7 distinct identity data situations, it is fair to say
8 that the burden on the person trying to close that, to
9 redact that, as it were, ought to be easier. It ought
10 to be a lighter burden than with any other type of
11 information where the current balances would take
12 place. I do understand that that type of information,
13 that the showing ought to be a lot easier with that
14 type of information.

15 MR. ABRAMS: Let me follow up, though.

16 When you said on Page 8: "To the extent the
17 Commission believes that the rules for openness of
18 electronic records should not exactly mirror the
19 current rules with respect to paper documents
20 generally," let's turn back to the rules about paper
21 documents generally.

22 Do you have a view as to the wisdom of the
23 judicial system urging or requiring counsel, when
24 counsel files paper documents or electronic documents,
25 not to include social security number or the equivalent

Freeman

1 type of information absent some sort of special
2 circumstance?

3 Some people have argued at our Albany hearing
4 that maybe a way to do this would be to keep the
5 standard the same for paper filing and electronic
6 filing and Internet posting with respect to this
7 subject, but that the way to do it would be, in effect,
8 to urge or require counsel, whatever the form of
9 filing, not to put in certain types of especially
10 sensitive data without some special permission.

11 MR. FREEMAN: Again, that has the jeopardy
12 that I was warning against at the beginning; that in
13 order to keep the mirror image of an electronic and
14 paper filing, we are going to create less openness
15 overall in the system. That's a risk I really don't
16 want to have happen, and that's a risk we ought not
17 undertake.

18 So despite my stress and my presentation, I
19 am for this -- for the mirror image concept. And with
20 respect to the very narrow identity data information, I
21 wouldn't object to some different standard with respect
22 to the electronic filing of that data. But I am
23 troubled about the fact that that then could be
24 automatic, and I wonder -- and as Ms. Bryson pointed
25 out, it is not perfectly formulated -- whether some

Freeman

1 showing still should be made before that should be
2 blocked, even in an electronic world.

3 MS. BRYSON: May I just ask you, did you
4 respond with respect to the address question? Does the
5 Times take a position with respect to whether address
6 information as is proposed by the domestic violence
7 advocates, that that is a type of demographic
8 information that should fall into that social security
9 number type --

10 MR. FREEMAN: No, it should not. I believe
11 that the examples of address and phone numbers are
12 inappropriate because they are so readily available. I
13 think that really is flipping presumptions around
14 entirely and flipping reality around. Addresses and
15 phone numbers are just not very hard to find, and the
16 notion that we should make exceptions to those, you
17 know, I don't think is worth it.

18 MR. ABRAMS: Thanks very much.

19

20 (Continued on next page)

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1 MR. ABRAMS: Robert Port.

2 MR. PORT: Hello, everyone. I would imagine
3 you're very tired at this point.

4 I've submitted a statement of six pages and I
5 won't waste your time by going back over all of that.
6 Just a few brief remarks and I'd be happy to answer any
7 questions.

8 I've been a newspaper reporter and editor for
9 more than 20 years. In the past ten years or more of
10 my career have specialized in a somewhat unusual area
11 of journalism and that is using large electronic
12 databases in investigative reporting.

13 For example, I have a copy of the entire New
14 York State criminal records database in my house at
15 home. I also have the entire civil system.

16 This data is available. It's not easily
17 available. And I only use it for my work as a daily
18 news reporter and restrict it to that. But I have it
19 and it's great.

20 I would like to make one main point to you
21 and that is this: I believe there's one and only one
22 policy that makes any sense for electronic access to
23 court records in New York or any other state for that
24 matter. Information that is public at the courthouse
25 should be available on the internet to everyone all the

1 time for no more cost than the cost, if anything, of
2 its publication. To do anything less than that is to
3 bar the common man from what will be the real clerk's
4 office of the future.

5 A couple of years ago -- short story -- I
6 visited Bankruptcy Court, here in Manhattan, for the
7 first time. I don't know if any one of you have had
8 occasion to stop at the clerk's office there. My
9 advice is don't waste your time.

10 I got on the subway all the way down to
11 Bowling Green. There is a room full of Court Clerks.
12 One young lady, filing her nails, chewing gum. Another
13 fellow reading a magazine. Someone watching TV. I was
14 all ready with the case I needed, eager to see the big
15 cart of files pulled out. And when I finally got their
16 attention, a young woman pointed to a tube across the
17 hall and said it's right over there.

18 Bankruptcy Court in Manhattan has had an all
19 digital filing system for longer, I believe, than any
20 other court in the United States, possibly. Certainly
21 one of the longest. And paper records essentially
22 don't exist.

23 I think this is an important point for you
24 because you really are not debating policies that
25 should apply to records on the internet, you are really

1 debating some very core questions: What are the basic
2 rights of access for citizens to court records period.

3 I believe that whatever results from what you
4 recommend is simply going to end up being the practice
5 of the courts in New York. To me that makes your job
6 very simple. Just keep the access the way it is right
7 now at the courthouse.

8 The internet really does only one thing, I
9 would say to you. It does it utterly democratically.
10 It makes transmission of information exponentially more
11 efficient. All else that it does that results from it
12 would or could have occurred otherwise.

13 For court records, all it does is save trips
14 to the courthouse. The court has the full power to
15 seal whatever it wants to seal where it has a right to
16 seal it and it can continue to do that with electronic
17 records.

18 A few points: I believe our notions, our
19 expectations of privacy really are foolhardy. Anyone
20 who seriously believes that social security numbers are
21 private is deluding himself or herself. They are not.

22 I could get any of your social security
23 numbers easily, legally, without any trouble at all.
24 Any journal list could and they often do.

25 The solution to identity theft that that

1 implies for us is very simple: Id cards that have
2 biometrics, a concept that's been endorsed by many
3 people, including a lot of prominent, liberal defense
4 attorneys like Alan Dershowitz. Simply ends the
5 problem of identity theft.

6 For every horror story -- and I've heard a
7 lot this afternoon and every one of them has been
8 purely hypothetical, I would argue to you that I could
9 conceive of a hundred public record success stories.

10 The ability of citizens to quickly get
11 answers to basic questions they need for know. A young
12 couple shopping for a co-op, able to review the
13 litigation on the co-op is on file, without having to
14 trust the seller's assertions. That sort of simple,
15 day-to-day access is tremendously valuable to our
16 economy and it increases our productivity.

17 When it comes to personal identifying
18 information, I would respectfully disagree with
19 Mr. Freeman's suggestion of censoring bank account
20 numbers and social security numbers and so forth,
21 mostly on the grounds that it's a waste of your time
22 because it has very little value. When it comes to
23 personal identifying information, the horse -- the
24 horses are so far, far out of the barn you will never
25 bring them back.

1 It isn't the judiciaries' job to do that, to
2 worry about that. That's a job for our legislature.
3 Privacy concerns.

4 There is a growing -- it was discussed
5 earlier, the hypothetical problem of the instantaneous
6 filing of pleadings of documents in a civil case, the
7 problems that can occur if information is inadvertently
8 released, that sort of screening of filings is already
9 occurring electronically.

10 A service company called Court Link was
11 recently acquired by ***Nexis Lexus; purchases from the
12 Unified Court System of New York, transmissions four
13 times a day of all docket entries in civil cases.

14 I've had conversations with them simply to
15 learn how their service works. A number of large
16 clients, some large corporations, pay them upwards of a
17 thousand or a few thousand dollars a week for
18 instantaneous electronic monitoring of these docket
19 entries.

20 Now, it's not the entire digital document.
21 They don't have the thing in their hands yet. But they
22 have only when they see something important to send a
23 runner to the courthouse and make a copy. That's not
24 that much quicker than would occur on the internet and
25 yet chicken little, the sky has not fallen on us for

1 these sorts of mistakes.

2 In short, what I would say to you is my
3 greatest fear as a citizen -- and it terrifies me as a
4 journalist -- is that you will take the occasion of
5 this construction of a new fax machine for court
6 records to begin enacting restrictions on my ability to
7 see public information that never existed before and
8 have no good reason to exist.

9 I'd be happy to answer questions.

10 MR. ABRAMS: Thank you, Mr. Port.

11 MR. GLEASON: My same question again.

12 I think you raised the issue of sealing of
13 court records. I think you take the position that --
14 correct me if I'm wrong -- that as soon as the
15 documents hit the courthouse, they are public and
16 available to the world. And in that instance, don't
17 you see a concern of the possible misuse of or
18 inadvertent use of sensitive medical, trade secret or
19 other information that would immediately be made
20 available in electronic form that would be impossible
21 to recall after it hits the Internet, if the systems
22 are identical in the sense that anything hitting the
23 courthouse is immediately available to the world.

24 MR. PORT: I don't see any concern at all
25 that doesn't already exist to essentially the same

1 degree in our current system of paper records. The
2 only concern -- the concern might be amplified a bit
3 because of the speed at which things occur. But I see
4 no reason --

5 MR. GLEASON: The possibility at least
6 exists, in a paper record situation, that if there is,
7 for example, some medical information that's sensitive
8 and irrelevant to a case, that you could seal the court
9 record and it not be widely and publicly disseminated;
10 whereas, if the court records are scanned every day, as
11 I would assume they would be, after that -- perhaps the
12 information could be copied and disseminated to
13 millions of people with a few clicks of the mouse.
14 Isn't that at least to some degree different in a
15 qualitative sense?

16 MR. PORT: I don't believe it is. It's a
17 fair question but I don't believe it is because I think
18 you have to ask yourself the question: What is the
19 potential harm?

20 MR. GLEASON: Well, if your adversary has it
21 and wants to use the information for purposes of
22 damaging your business in a commercial case, or if in a
23 case where you have people who have an acrimonious
24 break up of a business and they want to use things for
25 purposes of creating harm, there's a possibility that

1 before any judicial action is taken on it, before it
2 even becomes the subject of any judicial consideration,
3 it's immediately widely available to the public and it
4 is used in a tactical way by an unscrupulous adversary,
5 perhaps in a way that has nothing to do with the
6 ultimate disposition of the court case.

7 It's at least possible that would happen.
8 And that risk certainly is, in my view, greater in
9 electronic format, which we should at least consider.

10 I don't see them being quite exactly the same
11 as I think you do.

12 MR. PORT: I think the only difference has
13 to do with some degree of speed. I would say that an
14 adversary in a civil case, as you hypothesize, who
15 wants to embarrass the other side, should not waste
16 their time filing it in court and putting it on the
17 Internet, they should call me at the Daily News and
18 I'll put it in the newspaper.

19 MR. GLEASON: It might not be something
20 you'd put in the newspaper.

21 MR. PORT: It might not. It probably
22 wouldn't.

23 This the thing about the Internet you might
24 keep in mind. It's not some massive broadcasting
25 system, constantly sending E-mails into everyone's box

1 where they will twitter over every embarrassing detail.
2 It's just sitting there.

3 And I just think that most of these fears are
4 exaggerated. Most people won't care. And in an
5 intense emotional dispute and in litigation, those
6 sorts of tactics will always be available any number of
7 ways. And it is just not that hard for someone to set
8 up a Web site already and publish documents.

9 Someone mentioned earlier fears of 9/11, you
10 should be concerned about 9/11.

11 The federal litigation, the transcripts of
12 the various criminal trials starting in the first World
13 Trade Center bombing, through subsequent cases, the
14 embassy bombing case, were all widely published on the
15 Internet. The problem for us in New York was not
16 enough people read them. That was really the problem.
17 Not that they were there.

18 And I think that publishing documents in
19 civil litigation on the Internet is simply going to
20 speed up the whole business of getting to the bottom of
21 who was right and who was wrong and who was to blame
22 and should we care.

23 I see no reason to being particularly worried
24 about adversaries any more so because we have a faster
25 fax machine.

1 MS. ABRUTYN: A practical question,
2 following up on that same theme.

3 I want to understand a little bit how the
4 system works now. And let's assume that the -- an
5 adversary in a case, a defendant or plaintiff in a case
6 files a motion with a bunch of documents attached to it
7 and it's either they are trying to embarrass you so
8 they call you up and tell you they are going to file
9 the motion, or it's on a case that you're interested in
10 and you use this service or whatnot. How long between
11 when it's filed and when you or your runner or whatnot
12 can get down to the courthouse and read it? Is it
13 days? Hours? How long would it actually be sitting
14 there before somebody could get their hands on a copy
15 of it?

16 MR. PORT: In the current system? A few
17 hours. I think we're talking technologically the
18 difference between four hours at most a day and less
19 than an hour.

20 I think a very interesting example, I mention
21 in my written statement, is the Enron bankruptcy case,
22 which is all electronic. Reporters covering that case,
23 all the lawyers on it, have to file everything
24 electronically and read it that way.

25 It was on a Saturday that the committee,

1 appointed by the board of directors of Enron released
2 it's very explosive investigative report describing its
3 initial findings of what went wrong. We were very
4 lucky the New York Times reporter was watching the
5 Federal Court record system, Pacer, and monitoring new
6 records saw it. Maybe someone called him and alerted
7 him to it -- that may be more likely perhaps what
8 happened -- downloaded it, wrote a story and there was
9 the essence of the -- that whole report on Sunday
10 morning when a lot of readers are most ready to absorb
11 it. The healthy debate that followed got off to a
12 running start.

13 If in the current system, I guess we would
14 have had to wait until Monday and then Tuesday's paper
15 to learn that.

16 That's maybe the extreme. But if a reporter
17 is hot on a case, watching it day-to-day, the
18 difference between electronic filing and having the
19 document versus what it is now, runner, courier to the
20 courthouse, is less than four hours.

21 MR. ABRAMS: Thanks very much.

22 Ms. Mortise.

23 MS. MORTISE: Good afternoon. Thank you for
24 allowing me this opportunity to be heard.

25 I would like to spend five minutes to make a

1 comment and I would like to give my other five minutes
2 to another member of our group, Pro Se Alliance.

3 First of all, I'd like to say, to put a face
4 on this type of information, I've been in a Housing
5 Court, Civil Court of Manhattan for approximately five
6 to six years.

7 Although I've listened to your panel and you
8 seem to have a respect of the majesty of the law, in
9 the lower courts this is not true.

10 While all court officers, judges and some of
11 the petitioners' attorneys are not that bad, there is a
12 problem. And I believe this information that Judith
13 Kaye is seeking might hurt a segment of the population
14 that is not being considered. That population has a
15 racial component, an economic component and class
16 component. Poor people will be hurt by this.

17 My analogy is this: The jogger, the five
18 teenage boys did not do the awful crime committed to
19 that woman. Those boys were accused and persecuted for
20 13 years. If this was out on the Internet back on the
21 day it happened, 1988, the whole world would have hated
22 them. Fortunately, it was not on the Internet but it
23 did go out into the world and it was a lot of hate.

24 Now, in this year, 2003, they are exonerated
25 and we see there was some problem with the prosecution.

1 When you go into the Housing Court, it's the
2 same thing. Ninety-five percent of the litigants in
3 the Housing Court are unrepresented. These attorneys
4 will do anything to objectify a neighborhood to steal
5 property.

6 My property was stolen. I live on East 97th
7 near Gracie Mansion. These attorneys will -- if you
8 have children -- will get your records, they will make
9 a false complaint to Children's Services that you're a
10 bad mother. If you filed a bankruptcy petition, as you
11 spoke earlier, they will get those records, the whole
12 petition, put that into Housing Court; your money, your
13 dependants, your social security. Anything you've done
14 is put into the lower courts and exposed to be used and
15 abused to anybody that wants to use it. As a lay
16 person, I'm still down there.

17 As I said, I lost my property. This year, my
18 landlord and his attorneys regurgitated a case and kept
19 me in court for a very long time.

20 This year, one of the Housing Court judges
21 deemed I needed a guardian. I didn't know what that
22 was but when she said it, I was embarrassed. It was an
23 open court of 30, 40 people. Never in camera.

24 I never had any history of mental illness. I
25 thought she was helping me.

1 Unfortunately, a guardian takes over your
2 life. You're not able to defend yourself, speak for
3 yourself. Their guardian lived in another state, New
4 Jersey. I had one trial one Court appearance. My
5 equity -- my co-op of 175,000 is down the tube. I was
6 evicted with my shoes and T-shirt, because of this
7 guardian.

8 Court officers from the Housing Court that
9 knew me said, Oh, Miss Mortise, would I want to sign
10 in, make my appearance and let your guardian do it. I
11 couldn't even get an Order to Show Cause form in the
12 Housing Court because I was designated I needed a
13 guardian.

14 I've known people who have come to our
15 monthly meetings, since we don't have money for
16 attorneys, and we help each other who have left their
17 properties rather than be abused by a Housing Court's
18 discretion of saying you need a guardian ad litem.

19 You cannot get a job. Someone says you need
20 a guardian. You are stigmatized. It's like being a
21 junkie.

22 If you do have mental illness, that's one
23 thing. It should have been done in camera; should have
24 been done with a professional.

25 A judge -- certain judges may have their own

1 bias. This is what's wrong.

2 I believe if you're poor, a minority in the
3 lower courts, we do not have the sophistication of
4 papers to put in papers to protect ourselves. If this
5 is made public on the Internet, it can affect our
6 lives.

7 Who's to say that someone fighting a Housing
8 Court action that goes and is characterized --
9 mischaracterized as a bad person and these records are
10 filed on the Internet, maybe they don't have an
11 Internet to look at at home. It could ruin your life.

12 I hope whoever is looking, they are aware
13 there will be a segment of population that won't be
14 heard. The ones without lawyers and in the lower court
15 Housing Court.

16 One other thing. Due to what happened to me
17 this year as a pro se litigant, I should not have to be
18 able to do this but my dignity has suffered and I've
19 had to file a State claim against certain misconduct,
20 certain information that was done about me, that cast
21 me in such a bad light. So I now have a Court of
22 Claims action against the Civil Court of New York.

23 Thank you.

24 MR. EISENSTEIL: My name is Irwin
25 Eisensteil.

1 Although I'm a member of the same group, I
2 have a different position in certain areas.

3 Before I continue, realize, I am or was a
4 database administrator, managing extremely large
5 databases for the City of New York. I also have had an
6 interest in Court TV's brief. In fact, I think
7 Mr. Abrams helped in presenting that brief in a case in
8 Virginia.

9 Let me just cite from one thing. "The value
10 of openness lies in the fact that people are not
11 actually attending trials and have confidence a that
12 standards of fairness are being observed. The sure
13 knowledge that anyone is free to attend, gives
14 assurances that established procedures are being
15 followed and that deviations will become known."

16 Obviously, that was written for a Court TV
17 brief. However, I've heard misstatements made at this
18 forum that I'd like to address.

19 I really wasn't aware that this Commission
20 was on and I was called down, so I really didn't have a
21 prepared statement.

22 If someone wants to publish papers on a Web
23 site prior to filing them, as the ACLU did, and certain
24 First Amendment issues, I think in a Coppa case, they
25 can.

1 So, as far as putting stuff and waiting until
2 it hits the Court, obviously is a misnomer.

3 As far as spam and other information, you can
4 control some information within the country. There are
5 international issues and areas of law which you haven't
6 touched on.

7 Scott MacNeely, the head of Sun Micro Systems
8 said anything is available.

9 As for credit and as for identity theft, the
10 FTC has a Web site. However, put the burden where it
11 belongs, the people who are giving the credit should do
12 credit checks. They have the information available.
13 They are not doing it.

14 As to openness on court records, I think the
15 court record should cost less or, in fact, should cost
16 nothing, rather than restrict access to information to
17 a segment who can afford it, in most instances only
18 lawyers. You want everyone to have access to that
19 information. You don't want people to have to drag to
20 take a day off from work in order to get access to the
21 information. You can get access to all of the records.

22 As to the cost, you're going to have
23 reduction in costs because you're going to image
24 everything. You're not going to have to store it,
25 retrieve it. There are so many advantages of having

1 all records available.

2 Right now, you now, for example, the Federal
3 Court system is talking about having all unpublished
4 cases available on open and public sites. They expect
5 to do that, I believe, in two or three years.

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1 MR. EISENSTEIL: (Continuing) She started
2 this guy. I have so much to talk about it is really
3 too bad I wasn't aware, but if I went down the five
4 points, in light of recognized public interest: (1) If
5 you want to restrict certain information, you can.
6 That's the duty of the Court, to put restrictive orders
7 on individual attorneys. And, in fact, you have
8 sanctions available if attorneys don't act
9 appropriately. Perhaps look at your own profession and
10 ask how frequently you have sanctioned attorneys for
11 abuse. Very infrequently. I have seen lawyers lie so
12 frequently that public trust in the legal system, they
13 rate lower than used car salesmen.

14 A judge of the Fifth Circuit in front of the
15 Harvard Law School class raised the issue of law as a
16 business, it is no longer an honorable profession. I
17 think it was Helene Jones, or something similar to
18 that.

19 Cost should not, in fact, be an issue.
20 Access to the information can, in fact, be controlled
21 whether you want bank accounts or anything else. I
22 think what you do have when you open all records and in
23 fact, put more than just the filings online is you have
24 an entire picture rather than a restrictive picture.
25 You don't have the costs of putting in the 25 cent

1 piece for each page that you currently have to get at a
2 courthouse. All of those records are available to no
3 cost once they are online and available. I can afford
4 it but many people can't afford the \$5 or \$10 or \$15.

5 As far as keys to access, you can either use
6 an entire document key or, for that matter, if the
7 image of a document is online, you can convert that
8 image to a text database. It happens all the time.
9 There are so many tests, OCR types of programs that
10 will take an image and do that. You could go to Adobe
11 PDF files, for example, and convert them to a text base
12 and then a searchable --

13 MR. ABRAMS: Sorry, sir. Your time is up.

14 MR. EISENSTEIL: Okay. If issues are related
15 to cost or access, please address them to me. You
16 raised issues as to privacy issues and to other issues,
17 but, again, if cost is --

18 MR. ABRAMS: Let me add a final word, sir.
19 If you do want to make a written submission, we would
20 be glad to receive it.

21 MR. EISENSTEIL: Thank you.

22 If there are any comments or questions, I
23 will answer them.

24 MR. ABRAMS: No? All right. Thank you.

25 Our last witness for the day is Eliot

1 Deutsch.

2 MR. DEUTSCH: Yes. Good afternoon.

3 MR. ABRAMS: Thank you for waiting the day
4 out.

5 MR. DEUTSCH: Sure. I think I missed most of
6 the day. You had to have been here all day.

7 I am a single practitioner practicing
8 primarily criminal traffic law for 25 years. I have an
9 office in Nassau County and an office in Suffolk
10 County. And as far as runners are concerned -- I heard
11 that word used -- I am the runner, the doer. I am a
12 single practitioner. Everything that is done I do
13 myself.

14 In making a mental note of things taking
15 place between yesterday and today in my practice in
16 relation to this presentation, I came across several
17 items for which I would have found access over the
18 Internet extremely useful.

19 Today I got a phone call from a 68-year-old
20 gentleman in trouble and who has no copies of court
21 papers. He is not even sure what he is charged with
22 doing. I can't help him or even start to talk about
23 his case until I go to the court and get a copy of the
24 papers.

25 I also got a call from a Spanish-speaking

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1 person who can't read the papers that he has, and,
2 therefore, he does not know when his refusal hearing at
3 the Motor Vehicle Bureau is. For all I know, it could
4 have been this morning. But if he misses his refusal
5 hearing he is going to have his license revoked due to
6 non-attendance, and he'll lose his opportunity to be at
7 that hearing because he can't read the papers. If I
8 had Internet access, I could go immediately online and
9 see the papers and have an answer to that question.

10 The court system predates electricity. To
11 date, the failure of the court system to embrace
12 technology has led to enormous amounts of time and
13 money being wasted. Money and time is wasted in both
14 the public and private sectors with the current system.

15 The subject of public access to records goes
16 hand in hand with a future major revision in the way
17 the courts operate. With increased public access
18 through individual public access computers at the court
19 itself and over the Internet, information could not
20 only be obtained but in the future eventually
21 exchanged. Once the ability to exchange information is
22 established, more court business could actually be
23 conducted over the Internet, thus less people would be
24 needed to make our paper system and in-person system
25 work.

Deutsch

1 Currently the courts waste an enormous amount
2 of time on simple adjournments. The court staff: The
3 judge, the court reporter, the court clerk and three or
4 four court personnel are all in a courtroom all morning
5 but half the cases are adjourned.

6 For example, a person has a suspended license
7 charge and the license has to be cleared before the
8 case can be done, so there's an adjournment. With a
9 petit larceny, a shoplifting charge, a person might
10 have to take a course but maybe that person hasn't take
11 taken the course yet. So the case is called, we
12 approach the bench, talk to the judge, I tell the judge
13 that my client needs more time for the course. The
14 judge says, Okay, I will give you have a new date.
15 With a DWU various things have to be done. In Suffolk
16 County you have to do community service work. So when
17 the case is called you tell the judge and the judge
18 says, Okay, I will give you a new date to do the
19 community service.

20 All these things, these adjournments can be
21 done over the Internet, and then the courts could be
22 productive rather than spinning wheels.

23 An open system is a better, more honest
24 system. If records were more easily accessible, more
25 public analysis of these records could take place which

Deutsch

1 would result in more public scrutiny of the
2 prosecution's system and the eventual reduction and
3 possible elimination of inequities and questionable
4 behavior on the part of the prosecution system.

5 For example, a system which would allow all
6 arrests made by a particular police officer to be
7 accessed would allow the public to analyze these
8 arrests and see if certain patterns exist. Is there
9 racial profiling going on? Did the arrest take place
10 within the last fifteen minutes of the tour of duty of
11 this particular police officer so that, perhaps, he is
12 getting overtime for it? Are we seeing a particularly
13 high number of questionable arrests from a police
14 officer in the year before he is due to retire so that
15 this year he is putting in a lot of overtime by making
16 arrests during the last 15 minutes of his tour of duty
17 to boost his income this year so he in turn will get a
18 greater pension? I know it works somehow like that.

19 Privacy concerns. I heard a couple of the
20 other speakers, and I agree with what they say in the
21 sense that there are current ways in which privacy is
22 maintained in the current system. I think those
23 concerns should be brought over into an Internet access
24 system.

25 Mr. Gleason, you asked the same question a

Deutsch

1 couple of times about records that are sealed and what
2 happens if we first have a document on the Internet and
3 then it is later order to be sealed.

4 From a criminal point of view, the same thing
5 happens with criminal records all the time in the
6 current system. Look at how OJ's reputation was ruined
7 even though he was found not guilty. That could happen
8 to many types of criminal charges. A local paper might
9 report that someone was arrested for shoplifting and
10 the neighbors will see it. But then maybe eventually
11 that person will be exonerated. However, because it
12 was already in the newspaper, already made public, even
13 if later the record is sealed, the damage is already
14 done. So that happens already in the current system,
15 and I don't think there is a way to avoid that.

16 What is the role of the court? Any public
17 information that could be available through a clerk or
18 through the act of looking at a court file should be
19 available on public access computer terminals at the
20 court and over the Internet. I mention public access
21 computers at the court because lots of people don't
22 have access to computers. And we don't need the clerk
23 to just give out information. The clerk can do
24 something else.

25 Regarding fees, public access means public

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1 access. It does not mean access when we get around to
2 it or access if you fill out a form and come back in
3 two days or access if you pay me money. Just as a file
4 could be looked at for free, a file should be
5 accessible on public access computer terminals at court
6 and over the Internet for free. The public has already
7 paid for the compilation of information in the court
8 system. The government is the government of the
9 people. The information in the court system is not the
10 government's information, it belongs to the people.

11 Charging fees for access to public information is
12 nothing but a hat trick, and, in fact, it chills public
13 information access. If we say it is public but you
14 have to pay for it, it is not really public anymore.

15 If there would be fees -- if there had to be
16 fees, I would suggest that accessed information on the
17 outside of the file jacket be absolutely free; that
18 there be no fee whatsoever charged for that
19 information. If there were to be a fee for Internet
20 access, then I would suggest that there be a
21 subscription fee along the lines of a monthly or yearly
22 fee designed to cover the cost of providing such
23 access; not designed to make profit, but to cover the
24 actual cost of providing access. Remember, the
25 government is not a private company. It is not

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1 Microsoft. If public information is public, then it is
2 already paid for by the taxpayers.

3 Search methods. The ability to perform
4 text-based searches is, indeed, a valuable thing to
5 have. I can see the possibility of charging for a
6 text-based search because it would save an awful lot of
7 time. And so I would recognize that a text-based
8 search specifically would be worthy of charging some
9 type of fee for.

10 MR. ABRAMS: I am afraid, Mr. Deutsch, your
11 time is up.

12 MR. DEUTSCH: And there should be no fee for
13 searches based on name or docket number, only on
14 text-based searches.

15 MR. ABRAMS: Thank you very much.

16 MS. BRYSON: I have a quick question about
17 your suggestion about a subscription fee. Are you
18 saying that should be in lieu of a per search fee, or
19 could you please explain a little more about what you
20 mean?

21 MR. DEUTSCH: AOL access -- of course, it
22 wouldn't be the same type of thing, but 20 bucks a
23 month is AOL, or 22. So if you wanted access to the
24 court system you would pay X amount monthly or yearly
25 or maybe you would get a discount if you paid the year

Deutsch

1 in advance. But it would not be on a per search basis.

2 I think that is just too chilling and too extensive.

3 MS. BRYSON: Would you consider either
4 alternative, because the pro se litigant may not have
5 \$20 a month?

6 MR. DEUTSCH: That's where the computer at
7 the court, the public access computer at the court
8 comes in. It's for a litigant to walk up and use. So
9 that would come into play there and that would be free.

10 MR. ABRAMS: Thank very much. We appreciate
11 your testimony. Thank you all very much for attending.
12 We are adjourned until Buffalo.

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