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Op-ed

Uneasy Access: Court Records Online

Disclosure of all court documents would have a chilling effect

By Grayson Barber

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The New Jersey judiciary is moving to provide public access to the court system, making motion calendars freely available over the Internet and expanding the Judiciary Electronic Filing and Imaging System.

Attorneys can register and establish an account with the Superior Court to file all pleadings and documents for civil actions involving $10,000 or less. Electronic access already is available in federal court for initial bankruptcy petitions, notices to creditors and court orders. The federal Public Access to Court Electronic Records system, known as PACER, will contain dockets and case file documents.

The New Jersey judiciary had the foresight to create an Information Systems Policy Committee in 1994, which had the task of formulating comprehensive electronic access policy recommendations. A special subcommittee on public access, chaired by Appellate Division Judge Herman Michels, rendered a report in 1996.

Since that time, however, privacy concerns have become acute, as the Internet has become a commonplace means of transmitting health, financial and business records. Public access to electronic case files brings both benefits and risks to the public. Even strong advocates of open government, who support the right of public access to judicial records, have warned of heightened risks to personal privacy.

A Chilling Effect

The difficulty with putting court records online is that although it would preserve the principle that judicial proceedings should be conducted in public, there is a substantial risk that over-publication would have a chilling effect. The courts have always been concerned with openness, fairness, perception and confidence in governmental processes. At the same time, trust and confidence are interests shared by litigants and the bench. The judiciary should weigh and consider the salutary effects of confidentiality and chilling effects of disclosure.

Very few "facts" are proved to a conclusion in the American system. Only about 15 percent of lawsuits actually proceed to trial. This means that most of the "facts" recited in pleadings are not tested. If they are disseminated over the Internet, however, and especially if they are "newsworthy," there are no guarantees that any of the information on the Internet will be reliable. This will undermine the perception of fairness and trust in the legal system.

Part of the problem is the nature of the American adversarial system. Its primary objective is not so much to seek material truth as to resolve disputes in a way that will be acceptable to the parties and society. If the search for truth were supreme, privileges would not be recognized. Our procedures are intended to maintain the appearance of fairness, but they do not always succeed. Unfortunately, many Americans hold distorted and negative views of the system.

Disclosure of all court records on the Internet would have a chilling effect. It may not be possible to predict just how litigants, or prospective litigants, would react to the prospect of worldwide publication, but there have been two good examples in the past year of the chilling effect of disclosure. The first is the harm

done to public health and to the health-care services industry when patients fear that their medical records will be posted on the Internet. The second is the uproar over the 2000 U.S. Census.

The chilling effect has harmed public health and the health-care services industry by skewing health data. One out of every six Americans now engages in some form of privacy-protective behavior, according to a 1999 survey by the California Health Care Foundation. These behaviors include lying to doctors, asking doctors to lie to insurance companies, asking doctors to keep two sets of records, paying out-of-pocket for services (especially psychiatric services) that are covered by insurance and, in the worst cases, refusing to seek treatment at all, lest the patient's health data be misused. The most poignant and obvious example of harm is untreated HIV infection.

During the census uproar, some Americans encouraged others not to complete their census forms, lest the information they disclose to the government be redisclosed for unforeseen purposes. Without good census data, the political system is harmed and government cannot provide appropriate services.

When people lose control over information about themselves, they change their behavior in ways that may harm society. The judiciary has recognized this; there is ample precedent for limiting disclosure when a chilling effect looms over litigants. Subpoena power, for example, can easily be used to destroy privacy and confidentiality; hence, there are clearly defined restrictions and limitations on its use. Privileges are recognized where four conditions are met: 1) communications originate in confidence; 2) confidentiality is essential for the relationship; 3) the relationship is fostered in the community; and 4) injury from disclosure outweighs the benefit. These conditions apply to the Internet.

Accordingly, the judiciary should be cautious about publishing all court documents on the Internet. Electronic records have attributes that fundamentally change the premises for categorizing information as "public."

'Public' vs. 'Private'

Popular notions about what should be considered "public" and "private" are largely the product of analytical models that are outdated. For example, back in the days before direct marketing and the Internet, the fear of Big Brother was a fear of big government. Consumers did not worry that private companies would compile dossiers about their spending habits, not to mention other, less benevolent characteristics, like medical and family histories, and legal disputes.

Two analytical models have historically dominated the analysis of privacy rights as they relate to public access to governmental information. The first, public sector versus private sector, sets up government against private enterprise. The second, a balancing-of-interests approach, dominates the law of informational privacy. The public sector versus private sector dichotomy has lured many jurists and scholars toward a bright-line approach, in which disclosures made in the public sector for *any* purpose can be redisclosed for *every* purpose. This is no longer appropriate.

Traditionally, documents that make it through the courthouse door become part of the public record and open to scrutiny. But this tradition was never intended for the purpose of broadcasting details about the litigants. Government records are made available to the public to allow citizens to make political decisions, to instill confidence in the system, to make the government accountable and to facilitate business, personal and legal affairs.

Civil cases are filed because litigants have failed to reach a private compromise. This fact does not transform the litigants' pleadings, or evidence submitted with motion practice, into a commodity that is public for any and all purposes. Inaccuracies spawn statistics and perceptions that are incorrect. If the records that are considered public on paper are published on the Internet, there is a significant risk that the public will lose confidence in the court system.

The judiciary cannot control profiteers once they obtain information for secondary or tertiary subsequent publication, and obviously it will not be possible to impose complicated canons of restraint on the news media. There are injuries of expression for which "more speech" is not the remedy. The cure in this case is prevention. The judiciary should reconsider the definition of "public" for the purposes of publishing court records on the Internet.

Security and Marketing

Security is also an important aspect of electronic access to court files. Unhindered access to case files may result in a further increase in identity theft. People with criminal records may try to access case files to erase or alter their arrest history or conviction record. Marketers may take advantage of compiled records to target advertising at former litigants and witnesses. Personal information that is disclosed for the purposes of litigation could unfairly stigmatize a litigant in the pursuit of employment or educational opportunities.

For these reasons, the judiciary should carefully review the types of records to be considered public for purposes of disclosure on the Internet.