

ACCESS TO ELECTRONIC COURT RECORDS

An Outline of Issues and Legal Analysis

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**OUTLINE AND LEGAL ANALYSIS OF ISSUES INVOLVED
IN PUBLIC ACCESS TO ELECTRONIC COURT RECORDS**

I. INTRODUCTION.

Recently, both the federal courts and the court systems of many states have begun to consider the adoption of, or have actually begun to implement, rules regarding public access to court records maintained in electronic form. For example, the California Judicial Council has recently promulgated proposed rules that would govern public access through electronic means to trial court records maintained in electronic form, and has invited public comments on those proposed rules. The federal Judicial Conference recently invited comments on less formalized proposals regarding access to electronic court records. Many states are in the process of considering or adopting such rules.

These proposals raise profound questions regarding public access to the judicial process. They also implicate substantial privacy concerns. Therefore, it is vital that there be the most extensive possible public knowledge and understanding of these proposals and their implications. Such understanding is necessary to ensure that the public participates in the formation of rules regarding access to electronic records in a meaningful manner.

The following discussion focuses on federal and California law, but the issues and legal principles discussed are common to all proposals regarding access to electronic court records.

II. SUMMARY OF KEY ISSUES RAISED BY PUBLIC ACCESS TO ELECTRONIC COURT RECORDS.

A. Key Issues Raised by Public Access to Electronic Court Records.

The approaches proposed by various courts differ quite significantly. However, similar concerns are addressed by virtually all of the proposals, and each of the proposals implicates the fundamental right of public access to judicial proceedings and records. The California Court Technology Advisory Committee (CATC) discussion of the rules being proposed in California summarizes the central concern expressed by most of the bodies considering such rules:

The proposed rules on public access to trial court records in electronic form attempt to balance the common law right of public access to trial court records against the constitutional right of privacy afforded by article I, section 1 of the California Constitution. The rules recognize the fundamental difference between paper records that may be examined and copied only at the courthouse and records maintained in electronic form that may be accessed and copied remotely. It is the conclusion of the Court Technology Advisory Committee (CTAC) that unrestricted Internet access to case files

would compromise privacy and, in some cases, could increase the risk of personal harm to litigants and others whose private information appears in case files.

Thus, the approach taken by the CATC, and reflected in the proposed California rules, proceeds from two fundamental concerns: that there is a fundamental difference between permitting public access to court records located at courthouses and permitting remote electronic access to court records; and that there is a fundamental right to privacy that applies to information contained in court records, which must be weighed against the right of public access. This and other concerns common to virtually all of the proposals present certain key issues:

- (1) Should rules governing access to court records maintained in electronic form provide for remote electronic access to court records?
- (2) Does remote electronic access to court records create risks of the impairment of privacy interests, identify theft, personal harm, or other dangers that are greater than those posed by public access to hardcopy court records?
- (3) Should certain types of information that routinely appear in hardcopy court records that are currently subject to public access be sealed or redacted because of the risk of impairment to privacy interests raised by providing remote electronic access to court records?
- (4) Should rules regulating access to electronic court records ensure that restrictions on public access to such records are not imposed in a manner that would reduce the level of public access that currently exists?

B. Key Principles Regarding Access to Electronic Court Records.

It is important to explicitly address the fundamental premises upon which such access should be based. I submit that the following principles are necessary assumptions of any rules governing access to electronic court records:

- (1) The public and the press have a fundamental and constitutional right of access to court records in both civil and criminal proceedings.
- (2) Public access to court records serves many important interests, and should be encouraged and facilitated to the extent reasonably possible. Thus, remote electronic access to court records should be provided to the broadest extent possible consistent with the preservation of legitimate privacy interests.
- (3) The protection of personal privacy is also an important value, and the public right of access to court records is not absolute. Certain private, personal information contained in court records need not be made public in order to promote the interests served by access to court records.
- (4) As courts move to electronic filing, rules governing access to electronic court records will eventually become the rules governing access to all court records,

and should not impose any restrictions on local electronic (i.e. courthouse) access to court records that are inconsistent with the current law regarding public access to court records.

- (5) Rules governing access to electronic records should anticipate the need to keep certain information confidential, and should require that electronic record-keeping systems employed by the courts are designed to provide for the segregation of confidential information.
- (6) Rules governing access to electronic court records should be sufficiently straightforward that they can be effectively implemented.

These principles provide the necessary framework for any consideration of rules regarding public access to court records maintained in electronic form, and should be used to assess any proposed rules governing access to electronic court records.

III. THE VITAL POLICIES SERVED BY PUBLIC ACCESS TO COURT RECORDS MUST BE CONSIDERED IN ADOPTING RULES REGARDING ELECTRONIC ACCESS TO COURT RECORDS.

A. Protection of Personal Privacy Is an Important Interest, but the Vital Public Interests Served by Public Access to Court Records Must also Be Served by Rules Regulating Access to Electronic Court Records.

Many of the discussions of the policy and legal foundations for the various proposed rules address in some detail the privacy concerns raised by electronic access to court records, but include little or no discussion of the public interests served by access to court records. This approach is often reflected in the proposed rules themselves.

The protection of personal privacy is unquestionably a legitimate concern, and one which must be addressed in the adoption of any policy regarding access to electronic court records. The courts have recognized that an individual's right to privacy may, in a particular case, justify denying public access to particular information disclosed in a court proceeding or document. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511-12 (1984) ("*Press-Enterprise I*"); *Copley Press, Inc. v. Superior Court*, 228 Cal. App. 3d 77, 85-86 (1991). However, rules that properly balance this interest against the public's right of access to court records cannot be premised on an analysis that essentially ignores the vital public interests that public access to court records serves.

Public access to court records, whether exercised directly by individual members of the public or through the agency of media reporting of court proceedings, serves several fundamental values. First, public access to court records permits the public to monitor the operations of the judicial system, and helps ensure the fairness and honesty of judicial proceedings. Second, public access to court records plays an indispensable role in protecting public health and welfare. Third, court records provide information essential to media reporting on matters of public interest and concern.

Each of these interests merits careful consideration, and will be discussed in turn below. Before turning to that discussion, however, the more fundamental premise—from which all the other interests served by public access proceed—should not be overlooked. We have a tendency to take for granted the blessings of a civil democratic society, and to forget that those blessings are to a very large extent the result of having fashioned an equitable and generally effective method for the resolution of disputes. In the United States, nearly all disputes that cannot be resolved by the parties themselves, and for which legislative solutions are either inappropriate or unobtainable, are submitted to the courts. This includes many matters that may arise in a distinct and limited context, but which raise matters of intense public concern and ultimately generate profound social change. (The prosecution of Richard Allen Davis, convicted of the murder of Polly Klaas, is an example.) It also includes matters of the most sweeping and profound political moment. (For example, the judicial proceedings pertaining to the most recent presidential election.) In many parts of the world, for thousands of years and continuing into the present, disputes such as these have been resolved through violence and bloodshed. That such disputes are resolved in the United States through deliberate and peaceful judicial proceedings, and that the outcomes of those proceedings are almost universally accepted by the public, is a testament to the public’s trust and faith in the judicial process.

However, although “people in an open society do not demand infallibility from their institutions . . . it is difficult for them to accept what they are prohibited from observing.” *Press-Enterprise I*, 464 U.S. at 509; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Secrecy is inimical to trust, and the moral authority of the courts, upon which their power is largely if not exclusively based, is dependent upon retaining the public’s trust. The issues that are played out in the courts—even in apparently mundane cases—as well as the manner in which those issues are addressed and resolved by the courts are of profound and legitimate public concern. Thus, the public interests served by access to court records must be carefully considered and preserved by any rules regulating public access to court records.

B. Public Access to Court Records Permits the Public to Monitor the Operations of the Judicial System, and Helps Ensure the Fairness and Honesty of Judicial Proceedings.

Recognition of the positive role played by public access to court records and proceedings in ensuring the integrity of the judicial process is universal. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *NBC Subsidiary, Inc. v. Superior Court*, 20 Cal. 4th 1178, 1201-1202 (1999). “[I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.” *Globe Newspaper Co.*, 457 U.S. at 606.

In particular, the courts have recognized that public access allows the public to monitor the conduct of judicial proceedings, and thereby provides an effective restraint on the possible abuse of judicial power. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592, 596 (1980) (Brennan, J., concurring); *NBC Subsidiary, Inc.*, 20 Cal. 4th at 1201-1202; *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). The courts have also emphasized that public access helps promote accurate fact finding, through publicity that results in the identification of witnesses and by serving as a check on perjured testimony. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 596-97 (Brennan, J., concurring);

NBC Subsidiary, Inc., 20 Cal. 4th at 1202; *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d at 897.

Public access to judicial proceedings is not an indulgence or a privilege, but rather an indispensable element of the judicial process itself. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 597 (Brennan, J., concurring); *NBC Subsidiary, Inc.*, 20 Cal. 4th at 1202. As the California Supreme Court has emphasized, “public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding.” *NBC Subsidiary*, 20 Cal. 4th at 1219. Any constraints imposed on access to judicial proceedings or records, therefore, must be designed not merely to protect the “public or private interests” of litigants or others involved in such proceedings, but must ensure that these fundamental goals of fairness and accuracy—which can only be served by public access—are also protected and promoted.

C. Public Access to Court Records Plays an Indispensable Role in Protecting Public Health and Welfare.

The CATC’s discussion of California’s proposed rules raises the spectre of “unrestricted Internet access to case files” and posits that such access “could increase the risk of personal harm to litigants and others whose private information appears in case files.” In this regard it is similar to many other proposals. However, these discussions tend to disregard the harm that more efficient dissemination of court records may prevent.

Absent from many of the proposals is any mention of the many cases in which court records contain information that bears directly on public health and welfare, including, for example: information regarding the health risks of food and drug products; information about defective tires, toys, tools, automobiles, aircraft, and other products; information regarding stock manipulation, insurance scams, Ponzi schemes, and other frauds, often perpetrated on a massive scale; information regarding illegal arms deals, election fraud, and bribery, perjury, and other forms of corruption on the part of government officials; information regarding antitrust violations and market manipulation affecting the price or availability of staple or ubiquitous products; the illegal dumping or disposal of toxic waste; and many other matters that may affect hundreds, thousands, or even millions of people who are not direct participants in the litigation. The success of the tobacco industry in avoiding, for decades, disclosure of the extent of its knowledge of the hazards of tobacco products was largely the result of its success in keeping information disclosed in the course of litigation from becoming public.

Public access to such information not only permits affected members of the public to seek judicial remedies themselves, but may also result in public debate and ultimately legislative or other forms of social or political reform. Thus, while providing public access may sometimes implicate the privacy interests of individual participants in litigation, it will also frequently help protect the health and welfare of substantial numbers of people who are not participants. In short, public access to trial court records is much more likely to promote public safety than to impair it.

D. Court Records Provide Information Essential to Media Reporting On Matters of Public Interest and Concern.

Coverage of court proceedings is a staple of media reporting throughout the United States. This is true for a very simple reason: what happens in judicial proceedings affects the communities that the media serve. That community may be a small town with a crime problem, or it may be the community of chief executive officers reading about recent securities class actions or antitrust prosecutions, or anything in between. Regardless of social station or location, everyone is in some way affected by what happens in the courts.

Examples of news coverage derived from court records are so ubiquitous as to defy enumeration or even categorization. However, many excellent examples are included in comments submitted by the Newspaper Association of America and others in response to the federal Judicial Conference's request for comments on its proposals regarding Privacy and Public Access to Electronic Case Files. Additional examples are included in the comments of the Reporters Committee for Freedom of the Press and others also submitted in response to the federal Judicial Conference proposals. These examples demonstrate not only routine reporting based on information obtained from the records of individual cases, but reporting on matters of considerable public significance that could be accomplished only by reviewing records from many cases. Obviously, reporting of this type could be considerably enhanced by electronic access to court records—and indeed, for newspapers and other media with limited resources could make possible reporting that otherwise would simply be impossible.

In summary, these vital public interests, which can only be served through public access to court records and which would be preserved and enhanced by providing electronic access to court records, must be recognized and served by any rules regulating access to trial court records maintained in electronic form. Failure to recognize and protect these interests would be a failure to recognize and protect the interests that underlie the very existence of the right of public access, and the interests that the courts exist, at least in part, in order to preserve.

IV. THE FIRST AMENDMENT AND CALIFORNIA LAW ESTABLISH THE FUNDAMENTAL IMPORTANCE OF PUBLIC ACCESS TO COURT RECORDS, AND PROVIDE THAT PUBLIC ACCESS MAY BE DENIED ONLY FOR COMPELLING REASONS.

Over several decades, and indeed in California over more than a century, the courts and legislatures have worked out doctrines, rules, and procedures governing public access to court records that balance the interests served by public access against the interests of litigants and other participants in legal proceedings in maintaining secrecy. Obviously, any rules regulating access to trial court records maintained in electronic form must be consistent with the requirements of this existing body of law. As or more importantly, the adoption of any new rules governing access to court records should be informed by the careful and deliberate work of those who have considered, debated, and resolved the issues presented by the proposed rules.

A. The United States Supreme Court and the Federal Courts Have Consistently Recognized the Profound Public Interest in Access to Judicial Proceedings and Records.

The United States Supreme Court consistently has held that the First Amendment guarantees the press and the public the right to attend criminal trials and pre-trial proceedings. *Richmond Newspapers, Inc.*, 448 U.S. 555; *Globe Newspaper Co.*, 457 U.S. 596; *Press-Enterprise I*, 464 U.S. 501; *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam). Although the issue has not been expressly addressed by the United States Supreme Court, this First Amendment guarantee clearly applies to criminal judicial records as well as proceedings. *See, e.g., Press-Enterprise II*, 478 U.S. 1 (First Amendment right of access applied to transcripts of voir dire proceedings); *Associated Press v. United States District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983).

In addition, while the United States Supreme Court has not specifically held that the First Amendment right of access applies to civil cases, most of the federal circuits have squarely faced this issue and have recognized that the First Amendment right of access applies to civil proceedings. *See, e.g., Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984), *cert. denied*, *Cable News Network, Inc. v. U.S. District Court*, 472 U.S. 1017 (1985); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm’n*, 710 F.2d 1165, 1179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1983).¹ Many of these cases have specifically applied the First Amendment right of access to requests for documents pertaining to civil proceedings. *See, e.g., Rushford*, 846 F.2d at 253 (“We believe that the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case.”); *Brown & Williamson Tobacco Corp.*, 710 F.2d 1165 (administrative record and other documents filed in connection with pretrial motions); *In re Continental Illinois Securities Litigation*, 732 F.2d at 1308-1309 (report of special litigation committee formed to evaluate shareholder derivative claims, filed in connection with motion to terminate claims); *Publicker Industries, Inc.*, 733 F.2d at 1074 (closure of hearing on motion for preliminary injunction and sealing of hearing transcript violated First Amendment).

In short, the vast body of federal case law, decided over the course of three decades, has recognized that there is a constitutional—and not merely a common law—right of public access

¹ *See also Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 180 (4th Cir. 1988); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653, 659 (3d Cir. 1991); *United States v. A.D.*, 28 F.3d 1353, 1356-57 (3d Cir. 1994). Only one circuit has taken a contrary view. *See In re Reporters Comm. for Freedom of Press*, 773 F.2d 1325 (D.C. Cir. 1985). That opinion has not been followed elsewhere, and has been rightly criticized. *See, e.g., Republic of the Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 59 (D.N.J.), *aff’d*, 949 F.2d 653 (3d Cir. 1991).

to court records of both civil and criminal judicial proceedings. Applying this constitutional right of access, the courts have established stringent requirements that must be met before the public may be denied access to judicial records: the sealing of documents must be "*strictly and inescapably necessary*" to protect a compelling interest such as a criminal defendant's right to a fair trial. *Associated Press*, 705 F.2d at 1145, quoting *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982) (emphasis added). Thus, the party seeking nondisclosure must establish that there exists:

- (1) "a substantial probability" of "irreparable damage" to a compelling government interest if the documents are unsealed;
- (2) a "substantial probability" that alternatives to nondisclosure cannot adequately protect the government interest; and
- (3) a "substantial probability" that nondisclosure will be "effective in protecting against the perceived harm."

Brooklier, 685 F.2d at 1167 (9th Cir. 1982); *Phoenix Newspapers, Inc. v. United States District Court*, 156 F.3d 940, 949 (9th Cir. 1998); *Associated Press*, 705 F.2d at 1146.

Even federal common law, however, creates a strong presumption of public access to court records. The United States Supreme Court has expressly recognized that there is a common law right to "inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978). The Court indicated that this right includes a "presumption—however gauged—in favor of public access to judicial records." *Id.* at 602. Thus, "[t]he existence of this [common law] right, which antedates the Constitution and which is applicable in both criminal and civil cases, is now 'beyond dispute.'" *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (citation omitted). See also *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677-78 (3d Cir. 1988). The Ninth Circuit has recognized and applied the common law right in both civil and criminal cases. *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995); *EEOC v. Erection Co., Inc.*, 900 F.2d 168 (9th Cir. 1990); *Valley Broadcasting Co. v. United States District Court*, 798 F.2d 1289 (9th Cir. 1986).² In the most recent of these cases, the Ninth Circuit explained the application of the common law right to documents filed in a civil case as follows:

² The other federal courts of appeals have also uniformly recognized the common law right of access to records of judicial proceedings. See, e.g., *F.T.C. v. Standard Financial Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied*, *Citytrust v. Joy*, 460 U.S. 1051 (1983) and, *cert. denied*, *Baldwin v. Joy*, 460 U.S. 1051 (1983); *Republic of the Philippines*, 949 F.2d at 657, 659-60; *Stone*, 855 F.2d at 180 (recognizing both First Amendment and common law rights of access); *Brown & Williamson*, 710 F.2d at 1177 (holding that both First Amendment and common law limit discretion to seal court documents); *Smith v. United States District Court*, 956 F.2d 647, 649-50 (7th Cir. 1991); *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985); *Johnson v. Greater Southeast Community Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991).

The Ninth Circuit has adopted the Seventh Circuit's approach for determining whether the common law right of access should be overridden, requiring courts to start with a strong presumption in favor of access. This presumption of access may be overcome only "on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture." . . . After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling

Hagestad, 49 F.3d at 1434 (citations omitted). In short, no matter what body of federal law is applied, court records may be withheld from the public only for compelling reasons.

Moreover, the United States Supreme Court and lower federal courts have emphasized that the determination of whether court proceedings or records can be sealed must be made on a case-by-case basis. See, e.g., *El Vocero de Puerto Rico*, 508 U.S. at 151; *Globe Newspaper Co.*, 457 U.S. at 607-608; *United States v. Schlette*, 842 F.2d 1547, 1583 (9th Cir. 1988). Therefore, as a general rule categorical sealing of particular types of information is not permissible. Rather, denial of public access must be based on a particularized showing that release of the information at issue would impair an overriding interest. See, e.g., *Federal Trade Comm'n v. Standard Financial Management Corp.*, 830 F.2d 404, 412 (1st Cir. 1987); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 166 (3d Cir. 1993).

These decisions proceed from the recognition of the profound importance of public access: Openness enhances both the basic fairness of judicial proceedings and the appearance of fairness so essential to public confidence in the judicial system. *Press-Enterprise II*, 478 U.S. at 13. Undue restrictions on access to trial court records maintained in electronic form, and in particular broad categorical prohibitions on access, undermine these fundamental goals.

B. California Law also Recognizes the Fundamental Importance of Public Access to Court Records.

The California courts have also recognized a constitutional right of access to records of judicial proceedings. The California Supreme Court has expressly held that "in light of the high court case law and its progeny . . . the First Amendment provides a right of access to ordinary civil trials and proceedings, that constitutional standards governing closure of trial proceedings apply in the civil setting, and that [Code of Civil Procedure] section 124 must, accordingly, be interpreted in a manner compatible with those standards." *NBC Subsidiary*, 20 Cal. 4th at 1212. Similarly, the California Courts of Appeal have recognized that "[a]lthough there is no specific statutory requirement for access to court documents, both the federal . . . and the state . . . Constitutions provide broad access rights to judicial records in criminal and civil cases." *Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367, 373 (1998); *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992). Court records subject to the constitutional right of access may not be sealed unless a court expressly finds that "(i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving

the overriding interest.” *NBC Subsidiary*, 20 Cal. 4th at 1217-18. *See also* California Rules of Court 243.1 *et seq.*

Moreover, California common law has long mandated a general rule of public access to court records. “The law favors maximum public access to judicial proceedings and court records. Judicial records are historically and presumptively open to the public and there is an important right of access which should not be closed except for compelling countervailing reasons.” *Pantos v. City and County of San Francisco*, 151 Cal. App. 3d 258, 262-63 (1984) (citations omitted). *Accord Alarcon v. Murphy*, 201 Cal. App. 3d 1, 5-6 (1988). Thus, “[t]he burden rests on the party seeking to deny public access to court records to establish compelling reasons why and to what extent the records should be made private.” *Copley Press*, 63 Cal. App. 4th at 374; *Mary R. v. B & R Corp.*, 149 Cal. App. 3d 308, 317 (1983).

Therefore, under California law as under federal law, there must be compelling reasons to restrict public access to court records. Moreover, the California Supreme Court, like the federal courts, has underscored the vital interests served by public access: “[P]ublic access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding.” *NBC Subsidiary*, 20 Cal. 4th at 1219. California law too, then, compels the conclusion that undue restrictions on public access to electronic court records would impair the achievement of these fundamental goals.

C. Neither Federal Law nor California Law Support the Imposition of Restrictions on Electronic Access to Court Records that Do Not Apply to Court Records Generally.

Many discussions of proposed rules regarding access to electronic court records rely heavily on the United States Supreme Court’s decision in *United States Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). Several fundamental distinctions demonstrate the inapplicability of the *Reporters Committee* decision to the analysis of whether restrictions can or should be imposed on electronic access to court records.

First, the *Reporters Committee* decision did not address access to court records, but rather a request for access under the Freedom of Information Act (“FOIA”) to a comprehensive database of individual criminal history information compiled by the FBI based on its own data and information provided by local law enforcement agencies throughout the United States. *Reporters Committee*, 489 U.S. at 751-52.³ This is important because the standard for determining whether public access to such information can be denied under the FOIA is far less demanding than the standard for denying access to court records. All that the government was required to show was that disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” *Id.*, at 756, quoting 5 U.S.C. § 552(b)(7)(C).

³ The Freedom of Information Act does not apply to court records. *See* 5 U.S.C. § 552(f).

Second, in considering whether the effect on the privacy rights of those listed in the database was unwarranted, the Supreme Court held that only a single interest in disclosure was to be considered: “whether disclosure . . . is warranted must turn on the nature of the requested document and its relationship to ‘the basic purpose of the Freedom of Information Act “to open agency action to the light of public scrutiny.”” *Id.*, at 772. The Supreme Court held that the disclosure of individual rap sheets of this kind did not cast any light on the conduct of the Department of Justice. *Id.*, at 773. As discussed above, public access to court records serves several important interests, only one of which is opening the conduct of the courts to public scrutiny. Disclosure of information contained in court records, including information regarding an individual’s legal history, may serve vital public interests other than public scrutiny of the courts. An excellent example is provided in the comments submitted to the federal Judicial Conference by the Reporters Committee for Freedom of the Press itself:

A case from Baltimore, Md., exemplified how people try to hide their background when they cross state lines. Developer Neil Fisher was going to receive land to build a Ritz-Carlton hotel. The Baltimore Sun investigated his background and obtained court records showing that he had a horrendous record in other states. Fisher had filed multiple bankruptcies, had been sued numerous times and refused to pay a fraud judgment that had been entered against him. Eventually, Ritz-Carlton decided to go forward with a building project, but without Fisher. The community may never have known about his record if they hadn’t been able to check the court records. In a case where access to information is time sensitive, more immediate access becomes even more necessary.

Moreover, information regarding individual criminal histories may be of vital interest to the public in assessing the conduct of the courts and prosecutors. For example, such information may cast light on the decisions of prosecutors to invoke “three strikes” laws, and on the sentences imposed on criminal defendants by the courts. The Richard Allen Davis case is an example of the public interest in, and the potential social impact of, disclosure of criminal histories.

Third, the *Reporters Committee* decision addressed a nationwide compilation of criminal history information. Nothing of such a sweeping scope will or could be provided by any California court. On the contrary, the courts will provide—at most—information about defendants involved in proceedings in the county in which the court is located. No statewide, much less nationwide, compilation will be created.

Fourth, the “practical obscurity” upon which the *Reporters Committee* decision is premised is largely an illusion. Individual legal histories can presently be obtained through private information providers. The scope of the information that can be obtained is limited only by the pocketbook of the person or entity seeking the information, and even then the limitations are not great. Thus, the primary effect of restricting electronic access to court records is simply to ensure that only those with adequate means will be able to obtain the information, and that people and organizations with limited means will be denied the same access. In this regard, another comment submitted to the federal Judicial Conference by Warren Matson, Pastor of the First Love Assembly of God in Milwaukee, Wisconsin, is instructive:

I just want to express my interest in seeing greater availability to full disclosure of public records. As a pastor employing volunteers working with children, my ability to access this material will enhance our ability to do thorough and competent background checks. Thanks for taking my view into consideration.⁴

Finally, the courts have consistently recognized that the dissemination of information contained in court records does not give rise to any actionable invasion of privacy. *See, e.g., Cox Broadcasting v. Cohn*, 420 U.S. 469, 491 (1975); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103-104 (1979). Moreover, it cannot be denied that public access to legal histories serves important public functions. Thus, for example, individual families, non-profit and commercial day care facilities, and public service organizations (such as Girl Scouts and Boy Scouts) have a legitimate need for information regarding the legal histories of those they hire to work with children. Indeed, given the potential for workplace fraud and even violence, employers generally have valid interests in ascertaining the legal histories of potential employees. In addition, Legislatures throughout the United States have recognized the legitimate need for public access to information regarding registered sex offenders living in the community, and have enacted Megan's Laws to ensure that the public can get access to such information. *See, e.g., California Penal Code § 290.4.*

Thus, the case generally relied upon as the basis for imposing substantial restrictions on electronic access to court records not currently imposed on public access to hardcopy court records does not support the imposition of broad categorical restrictions on access to public court records. Moreover, these discussions often fail to identify and assess the interests in public disclosure even of compiled or indexed information regarding individual legal histories. These flaws result in correlative flaws in the approach taken in the proposed rules.

V. SOME STATES THAT HAVE CONSIDERED PROVIDING ELECTRONIC ACCESS TO COURT RECORDS HAVE PROPOSED BROAD PUBLIC ACCESS RIGHTS.

Numerous states are actively considering the adoption of rules governing electronic access to court records. Two states that have initiatives that are in advanced stages of development are New Jersey and Arizona. The approaches they have taken are worthy of note. In its report on electronic access to court records, the New Jersey Public Access Subcommittee of the Judiciary Information Systems Policy Committee concluded as follows:

[T]he Subcommittee devoted a substantial amount of time grappling with the privacy implications of releasing computer readable court records, and considering whether those implications should limit or restrict access to electronic court records. Ultimately, however, the Subcommittee concluded that drawing artificial distinctions between paper

⁴ Additional, persuasive explanations of the inapplicability of the *Reporters Committee* analysis to the issue of public access are presented in the Comments of Investigative Reporters and Editors, Inc., to the federal Judicial Conference. A copy of those comments is submitted herewith.

and electronic records for the sake of privacy expectations which are not realistic in today's information society is not an appropriate policy response. In light of the public's well-established right to inspect and copy court records, and the Judiciary's strong tradition of open access, the Subcommittee recommends that court information which is non-confidential and available to the public in paper form remain non-confidential and available to the public when maintained in electronic form

Report of the New Jersey Public Access Subcommittee of the Judiciary Information Systems Policy Committee, November 1996.

In Arizona, the Report and Recommendations of the Ad Hoc Committee to Study Public Access to Electronic Court Records ("Arizona Report") were issued in March of this year. In making recommendations regarding access to electronic court records, that report first recognizes that access to court records at the courthouse should be unaffected by the medium in which records are stored. Arizona Report, p. 9. It then recommends, in essence, that access to virtually all non-confidential court records be provided electronically, so long as four categories of "sensitive data" are removed from the records, i.e. Social Security numbers, financial account numbers, credit card numbers, and debit card numbers. Arizona Report, pp. 10-12.

The reports and recommendations of these states support the conclusion that electronic access to court records can and should be provided in a manner consistent with the fundamental right of public access to court records, and that narrowly tailored exclusion of certain types of information, rather than broad categorical limitations, is sufficient to protect legitimate privacy interests.

VI. CERTAIN ASPECTS OF MANY OF THE PROPOSED RULES REQUIRE CAREFUL SCRUTINY TO ENSURE THAT THEY SERVE THE PUBLIC INTEREST AND CONFORM TO THE LAW.

A. Limitations on Access to Court Registers or Indexes of Cases.

Some rules would deny access to registers or indexes of lawsuits maintained by the courts. For example, California's Proposed Rule 2071(b) limits the application of the proposed rules by expressly excluding "a court's register of actions . . . court indexes, or court calendar records." There is no sound foundation for this exclusion.

First, such registers or indexes typically do not contain detailed information such as that that may exist in actual court records of individual proceedings. Rather, they typically consist of information regarding the identities of the parties and attorneys, the nature of the case, the case number, docket information (such as the titles and filing dates of particular documents). This is precisely the type of information that has been readily available from the federal courts for many years, through the Public Access to Court Electronic Records (PACER) system. There is no suggestion that the disclosure of this type of information by the federal courts has caused any significant impairment of privacy rights. On the contrary, comments by those familiar with the PACER system submitted to the federal Judicial Conference were generally very favorable, and reflect the fact that the PACER system has become a widely used tool by lawyers and litigants.

Thus, it does not appear that disclosure of indexes or registers of this kind would pose privacy concerns of the same significance as the disclosure of records of individual cases.

Second, it is well established that court dockets are public records subject to a presumptive right of public access. *See, e.g., In re Search Warrant (Thomas Gunn)*, 855 F.2d 569, 575 (8th Cir. 1988) (“The case dockets maintained by the clerk of the district court are public records.”); *United States v. Criden*, 675 F.2d 550, 559 (3d Cir. 1982) (same); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (“maintenance of a public docket and a sealed docket is inconsistent with affording the various interests of the public and the press meaningful access to criminal proceedings”). Indeed, dockets are typically required to be disclosed even if the documents to which the docket refers are properly sealed. *See, e.g., Valenti*, 987 F.2d at 715; *Webster Groves School Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990). Logically, then, compilations of docket information are also subject to the right of public access.

Even if the disclosure of such compilations is deemed to constitute an impermissible invasion of personal privacy, however, the remedy is not to eliminate all public access to such indexes, but rather to provide for the creation and maintenance of electronic databases designed to segregate any truly private or confidential information into non-public fields, and permit public disclosure of the rest of the information in the database. There is no reason why such a process cannot be automated, so that segregation does not require the expenditure of substantial court resources.

B. Limitations to Access on a “Case-by-Case” Basis.

Some proposals indicate that electronic access to court records will be provided only on a “case-by-case” basis. California’s Proposed Rule 2073(b) provides that trial courts are required to provide access to electronic court records—locally or remotely—“only when the record is identified by the number of the case, the caption of the case, or the name of the party, and only on a case-by-case basis.” This restriction is unwarranted, and would severely restrict the right of public access, including ordinary and routine newsgathering by the media.

First and foremost, such rules may impose restrictions on access to trial court records maintained in electronic form that are not currently imposed on access to trial court records maintained in other forms. To the extent they do, they clearly contravene the constitutional and common law rights of access to court records. Those rights are in no way conditioned upon being able to specify the name or number of a particular case or party. Indeed, such restrictions are inimical to the purposes served by the right of public access. The press and the public have a legitimate interest in every judicial proceeding, and they can and do seek access to cases about which they have no preexisting interest or knowledge. The proposed rule would prohibit the public and the press from obtaining any information about proceedings of which they were not already aware. This would impose a sweeping and totally unjustified restriction on the right of public access.

Furthermore, such restrictions would prevent routine newsgathering techniques that the press have used for time immemorial to provide important information to the public about specific judicial proceedings and about the operations of the courts in general. For example,

reporters and others involved in the dissemination of information regarding judicial proceedings routinely seek and obtain access to all new cases filed in the courts each day. Such rules could prohibit this practice, because the reporter would not be able to provide a case name, number, or party, and because such a request would arguably not constitute the grant of access on a “case-by-case basis.” Similarly, reporters have often used the court files to locate multiple judicial proceedings involving a particular judge, in order to assess patterns in the judge’s rulings or treatment of particular parties or kinds of litigants. Such examinations may reveal, for example, whether a judge tends to rule more favorably in cases in which parties are represented by attorneys with whom the judge has social relationships. Again, such rules would make such an investigation impossible, both because it permits access only on a “case-by-case basis,” and because it does not permit the public to request cases by the judge to whom the case was assigned.

C. Categorical Limitations on Electronic Access.

Another potentially problematic aspect of some proposals is the establishment of broad prohibitions on remote public access to certain categories of records. California’s Proposed rule 2074(b) provides for local electronic access but bars remote electronic access to several categories of records, including: (1) records of all proceedings under the Family Code; (2) records of all juvenile proceedings; (3) records of all guardianship and conservatorship proceedings; (4) records of all mental health proceedings; and (5) records of all criminal proceedings.

There are many troubling aspects to this approach. In general, there are probably certain categories of records or of information contained in records of such actions that would properly be sealed. Indeed, many states—including California—have states making selected types of records or information in such proceedings confidential. However, most states have not seen fit to categorically deny all access to records of such proceedings, and for the most part the wholesale denial of public access could not legally be imposed.

Most troubling, however, is the provision of Proposed Rule 2074(b) that would bar remote access to all criminal proceedings. To the extent that this prohibition is based on concerns about public access to criminal history information, those concerns are addressed in some detail above. We believe that the public benefits to be derived from removing barriers to access to information about criminal proceedings clearly outweigh any competing privacy concerns. The courts have consistently recognized that crimes and those who commit them are legitimate subjects of public interest, and therefore that the subjects of criminal proceedings have substantially reduced privacy interests. *See, e.g., Kapellas v. Kofman*, 1 Cal. 3d 20, 38 (1969) (“Newspapers have traditionally reported arrests or other incidents involving suspected criminal activity, and courts have universally concluded that such events are newsworthy matters of which the public has the right to be informed.”); *Briscoe v. Reader’s Digest Assn., Inc.*, 4 Cal. 3d 529, 536-37 (1971) (“while the suspect or offender obviously does not consent to public exposure, his right to privacy must give way to the overriding social interest”). Furthermore, broad public access to information about public proceedings is necessary to promote the “‘community therapeutic value’ of openness.” *Press-Enterprise II*, 478 U.S. at 13. “Criminal acts, especially certain violent crimes, provoke public concern, outrage, and hostility. ‘When the

public is aware that the law is being enforced and the criminal justice system is functioning, and outlet it provided for these understandable reactions and emotions.” *Id.*

Ultimately, there is no substantial justification for distinguishing between the information available through local electronic access at the courthouse and through remote electronic access. There is little if any empirical or even anecdotal evidence that the threats of personal harm and emotional injury that are asserted as the basis for this distinction are more than speculative. Those who are motivated to use information from court records to the disadvantage of others will most typically be parties to the litigation or others closely with direct relationships to persons or entities involved in litigation, who will either have or be able to readily obtain access to court records in hardcopy form. Providing remote access, in other words, is unlikely to significantly increase the threat to personal privacy or safety posed by public access to court records. Moreover, it would be inappropriate to provide public access to court records even in hardcopy form if there was a substantial probability that disclosure would result in an unwarranted invasion of an individual’s privacy or safety, and if no such probability exists, there is no sound justification for denying electronic access.

Thus, rather than denying electronic access to entire categories of cases, a more focused and responsible approach is to impose a requirement that records that are subject to statutory requirements of confidentiality or that have been specifically ordered to remain sealed not be subject to electronic access of any kind. (Arizona appears to have adopted an approach similar to this, identifying certain types of information that are to be redacted or segregated and kept confidential, but otherwise permitting public access.) Moreover, courts should provide that the parties have the obligation to identify on the cover or container of any document or exhibit that is subject to such a confidentiality requirement the express notation of that requirement, and that the courts are not responsible for public disclosure of documents or evidence not so identified. At a minimum, any restrictions on remote electronic access to criminal case records should be eliminated, and replaced with a provision restricting electronic access only to those documents or evidentiary exhibits properly sealed pursuant to statute or court order.

D. Resource-Based Limitations.

Some proposals appear to restrict public access to electronic court records based on the limitations on the courts’ resources. These provisions should be carefully examined to ensure that they require, at a minimum, that to the extent that records are available only in electronic form, the courts must ensure that the public’s right of access is accommodated.

E. Limitation of Access Based on Overriding Public Interest.

Many proposal also provide that access to electronic court records may be denied based on the determination that there is an interest in secrecy that outweighs the public right of access. Such provisions should be carefully reviewed to ensure that they are consistent with the very high burden imposed on proponents of secrecy under the First Amendment and common law rights of access.

F. Access Vendors.

Proposed rules regarding access to electronic court records should always be reviewed to ensure that they require that the right of public access be maintained even if the process of providing access to public records is subcontracted to an outside vendor.

G. Fees.

Many proposals have specific provisions governing fees for access. Obviously, the courts should not be permitted to impose substantial fees for access to electronic records, particularly if access is sought only through terminals located at court facilities. Fees can quickly become a prohibitive barrier to the exercise of a right of access that should belong to every citizen, however impecunious. Moreover, it may also deter or prevent the long-term or wide-ranging review of courts records necessary to much important news reporting.

VII. CONCLUSION.

Court records already serve as an invaluable source of information for reporting on matters of vital public interest and concern. Providing electronic access to court records will considerably enhance the ability of the media to serve the public. It will also remove existing barriers to public access the limit the effectiveness of public access and thereby impair the interest that public access promotes. In general, then, the courts should resist the temptation to engage in broad categorical restrictions on electronic access to court records, and instead should rely on the existing process of careful, case-by-case consideration of the propriety of sealing court records. In addition, given the importance of the interests at stake, precision in the language of the proposed rules is critical, and the courts should ensure that ambiguities that might result in unwarranted—and probably unintended—restrictions on access are eliminated.