May 4, 2016

VIA HAND DELIVERY

Hon. Peter M. Lauriat, Chair
Public Access to Court Records Committee
Superior Court Administrative Office, 13th Floor
Three Pemberton Square
Boston, MA 02108

Re: Comments of Courthouse News Service, the New England Newspaper and Press Association, and the New England First Amendment Coalition Regarding Proposed Trial Court Rule XIV

Dear Justice Lauriat:

On behalf of Courthouse News Service, the New England Newspaper and Press Association, and the New England First Amendment Coalition ("the Press Coalition"), we are pleased to submit the following comments on the Proposed Uniform Rules on Public Access to Court Records (the "Proposed Rules"). The Proposed Rules reflect significant work and time commitment by the Trial Court Public Access to Court Records Committee (the "Committee"), and we offer the following comments in the spirit of clarifying and improving that work.

1. Superior Court Records Should be Publicly Accessible to Lawyers and Non-Lawyers Alike.

Proposed Rules 5(b) and 5(d) provide that electronic full text court documents will only be available on the "Attorney Portal," unless the Chief Justice of the Trial Court determines that "additional electronic court records or information may be made remotely accessible to the public." Currently, the Attorney Portal gives any registered attorney access to .pdf images of certain types of Superior Court decisions, even if the attorney has not appeared in the matter. This practice would seem to conflict with the notes to Rule 5(b), which state that attorneys "shall have no greater access to court records than the general public except for those cases in which they have entered an appearance."

We respectfully submit that the approach taken in the notes to Proposed Rule 5(b) is correct: attorneys, as a group, should not have greater electronic access to court records or information than members of the public and the press. This equality-of-access principle has been part of our law since the adoption of the Body of Liberties in 1641, which provided that "*Every* inhabitant of the Country shall have free libertie to search and veewe any Rooles, Records, or Regesters of any Court or office except the Councell." More recently, it has been reflected in court policies such as the "Guide to Public Access, Sealing & Expungement of District Court Records" (rev.

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Sept. 2013), published by the Administrative Office of the District Court, which states that the "presumptive right of public access extends to all members of the public, and cannot be restricted only to certain groups such as attorneys...." *Id.* at 4 (emphasis added), citing Trial Court Administrative Directive No. 2-93 ("Access to public records shall not be restricted to any class or group of persons.").

In a memorandum dated March 30, 2016, the Committee explained that upon implementation of the new rules, "Current attorney portal access would be reduced to cases in which the attorney has entered an appearance." While that change would remedy the current state of preferred attorney access, it would regrettably do so by reducing, rather than expanding, the universe of persons who can access to electronic records. Instead, electronic Superior Court records should be made fully accessible to the public on the public access portal. Such an approach would be consistent with the public policies favoring access to court records. This is in turn reflected in the growing recognition of a constitutional right of access not only to criminal court proceedings, but also to court records, including in civil cases. As the Second Circuit has noted, "all the other circuits that have considered the issue" have concluded "that the First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and their related proceedings and records." Accord *Courthouse News Service v. Planet,* 750 F.3d 776, 786 (9th Cir. 2014) ("the federal courts of appeal have widely agreed that [the First Amendment right of access] extends to civil proceedings and associated records and documents.").

In addition, while the notes to Proposed Rule 5(b) are clear that attorneys "shall have no greater access to court records than the general public except for those cases in which they have entered an appearance," Proposed Rule 5(b) rule itself is less clear. We respectfully suggest this ambiguity be eliminated by amending the second sentence of the proposed rule as follows: "The portable document format (PDF) version of certain publicly available court records, if so maintained by the court, may be made available on the Attorney Portal***, so long as those records are also made available on the Public Portal at the same or earlier time."***

2. Kiosk Access Should Be Statewide.

The Press Coalition is pleased that Proposed Rule 2(f) requires all publicly available docket information to be "viewable at a computer kiosk or terminal located in the courthouse," as is currently the practice in most courthouses. However, the Proposed Rules should go a step further and explicitly provide that each courthouse kiosk shall permit statewide searching and accessing of publicly-available docket information (and, to the extent available, full-text documents), in all court locations. A person located in Williamstown, for example, should be able to go to the courthouse in nearby Pittsfield to search Barnstable County Superior Court records, rather than having to drive three and a half hours to West Barnstable. Providing statewide kiosk access in this manner would lessen the inconvenience caused by keeping certain dockets and information off the public access internet portal. There should be no significant technical barrier to accomplishing such statewide access—numerous

other states provide statewide access from each court kiosk for some or all of their courts, including Rhode Island, New Hampshire, North Dakota, New Mexico, South Dakota, Minnesota and Utah.

3. Any "Time Place and Manner" Restrictions on Access in a Courthouse Must Protect the Timeliness of Access.

Clerks' offices clearly have an obligation to protect the integrity of court records and the right to ensure that their working environments are not unduly disrupted by persons seeking access. However, the notes to Proposed Rule 2(c), which permits clerks to "set reasonable limits on the time, location, volume, and manner of access," should be amended to remind clerk's offices that any such "time place and manner" restrictions may not impinge on the public's *contemporaneous* right of access to adjudicative court documents, and point out that even short delays in such access have been deemed unconstitutional. *See, e.g., Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one to two day delay" in access to court records "burdens the First Amendment"); *Company Doe v. Public Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) ("we take this opportunity to ... emphasize that the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies"); *Lugosch v. Pyramid Co.*, 435 F.3d 110, 126 (2d. Cir. 2006) ("Our public access cases and those in other circuits emphasize the importance of immediate access where a right of access is found."); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("[i]n light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous"); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (48 hour delays in access to court records constituted "a total restraint on the public's first amendment right of access even though the restraint is limited in time, and are unconstitutional unless the strict test for denying access has been satisfied."); *Courthouse News Serv. v. Jackson*, 2009 WL 2163609, *11 (S.D. Tex. July 20, 2009) (rejecting argument that '"slight delay" in availability of new civil complaints was "a reasonable time, place or manner restriction").

4. Handheld Devices Should be Permitted.

Proposed Rule 2(j) provides that clerks may, but need not, permit the use of handheld devices to image, photograph or scan court documents. The notes to Proposed Rule 2(j) further specify that, where permitted, such devices may not be used with a flash.

In this mobile, electronic age, handheld scanning devices should be permitted under all circumstances. This will have a number of salutary effects, including reducing the demand for photocopiers in clerks' offices, lessening the burden on court staff to make copies, and reducing the cost to the public of obtaining copies. Absent a security reason that would justify prohibiting smartphones from courthouses altogether, there would appear to be little reason for a clerk to prohibit the use of

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such devices to scan or photograph court records. In addition, some scanning applications on smartphones, such as Evernote, may work better with a flash in low-light areas. With appropriate instructions to records requesters, the rules should generally allow the use of handheld devices, including those with flash capabilities.

Thank you for this opportunity to submit comments to the Proposed Rules. We would be happy to discuss these matters with members of the Committee at any time.

Sincerely yours,

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