COMMENTS ON AMENDMENTS TO PROPOSED RULES AND RULES OF PRACTICE GOVERNING ELECTRONIC FILING OF COURT DOCUMENTS

November 2014

These comments are submitted on behalf of ACCESS/RI, the American Civil Liberties Union of Rhode Island, Common Cause Rhode Island, the New England First Amendment Coalition, and the Rhode Island Press Association. They are a follow-up to those we submitted last month.

First, we appreciate the Court's decision to extend the deadline for offering comments on these important rules, and to review and update the rules on an ongoing basis.

However, despite the changes made in the latest version of Provisional Article X and the accompanying Rules of Practice on October 31st, most of the key concerns we expressed in our detailed October 16th testimony remain.

We will not reiterate those concerns here, but do wish to address one of the major changes made to the rules. It involves the elimination of the term "confidential document," and the inclusion of a new term in its place, "non-public document." It is possible that these revisions were designed, in part, to respond to the comments we offered on that former definition. Unfortunately, we don't believe that the changes, which also include a tweaking of the definition of "personal identifying information," resolve the ambiguities we had pointed out in the original definitions. Like the previous terms, the new ones are somewhat circular and, therefore, not terribly helpful to attorneys trying

to determine what information and documents should be withheld, or to the public's interest in the greatest access possible to court documents.

"Personal identifying information," or "PII," is now explicitly defined to refer to information that "can be redacted within the document." However, a "non-public document" is now defined as a document that "contains a significant amount of personal identifying information." As a result, the new definition allows an entire document to remain confidential merely because it contains a "significant amount" of information that is, by definition, redactable. That is problematic enough, but our concerns for public access are heightened by the lack of any guidance to attorneys as to what constitutes a "significant amount" of PII.

This new definition contains another ambiguity. A "non-public document" is further defined as a document that "contains information that is designated as non-public [by] state or federal law, court rule, court order or case law *resulting in the document being designated as non-public in its entirety*." (emphasis added) It is unclear where this designation of a document being non-public in its entirety is supposed to come from, or exactly how the presence of non-public information in a document *results* in it being kept fully secret. The Rules already declare certain documents and filings as completely exempt from disclosure. *See* Section 4(a) and (b). This definition appears to create another amorphous category of records that are to be kept confidential merely because *some* of the information it contains may be confidential.

Finally, the broader concerns our organizations share about the new system should not be lost in the details of the court rules we have commented on. Besides the

issue of what information or documents will or will not now be deemed "non-public," there are many more fundamental questions of accessibility involved.

As we stated in our initial submission, a major goal of an electronic court record system should be to make records more easily accessible to the public. At least as it has been initially implemented, however, this system does just the opposite. The public, including members of the media, has no remote access to any court documents whatsoever, and the rules provide only that such access "may" be available someday. And even if that day arrives, the public will still have no remote electronic access whatsoever to any filed court exhibits, despite their key importance in many lawsuits.

In short, despite the technological capabilities available – and to be expected – in making court files electronic, members of the public and the media will still have to physically go to the courthouse to view records, will still have to physically ask for hard copies to be made of any documents they wish to review in more depth, and will now encounter more documents off-limits as "confidential" than has been true in the past.

Once again, we appreciate the opportunity to submit this testimony, and hope that, in light of the importance of the transparency issues we have raised in both sets of our comments, additional revisions will be made to protect the public's right to know, and more expedited consideration will be given to promoting remote access to records by the public. Thank you.

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