Behind the Courthouse Door: The Legal Landscape of Transparency and Privacy

I. Introduction

Earlier this year, the Law Court highlighted the real-world importance of the job that this Task Force has been asked to do in the case of *In re Conservatorship of Emma*.[1] In that case, the Kennebec County Probate Court, faced with the issue of how much case-related financial information held by the court in electronic format should be available to the public online, asked the Law Court to answer exactly the kind of question the Task Force will confront:

> When a conservator files an inventory and account for the ward, a. should the image of the documents be available on line; b. should the summary numbers from the documents be available on line while the document images remain as publicly available only in the court (current practice in Kennebec); c. should neither the image of the document nor any summary numbers be available on line (current practice in fourteen counties); or d. should the Probate Court adopt a policy different from a, b, or c above?

Writing for the Law Court, Chief Justice Saufley explained why the question posed was important, and why the Court was unable to answer it:

> [T]he Probate Court has reported a significant and important question concerning the availability of court records and docket information in electronic format. Across the country, state and

[1] 2017 ME 1, 153 A.3d 102.

> local courts are reviewing and amending rules addressing the shift from paper to electronic filing and file storage. . . . The question submitted here concerns important public policy matters generated by the decisions of Maine's probate judges to modernize probate records by making certain court records and docket information available to the public in electronic format, rather than confining public access to paper files and docket records housed at particular courthouses.
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> Although the question is important, and addresses significant matters of interest to the public, it is truly a question of policy, with long-ranging and far-reaching implications. The issues raised by the question do not lend themselves to an adjudicatory response. Rather, they should be answered through rulemaking where the myriad questions regarding the treatment of digital records can be addressed together in an open forum. Unfortunately, no rulemaking or statutory amendments concerning privacy and transparency issues were proposed or enacted before the digitization of probate records, leaving many weighty questions, including those which the Kennebec County Probate Court has reported to us, unanswered.
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> [W]e decline to answer the Kennebec County Probate Court's question seeking an advisory opinion on matters that reach far beyond the controversy presented in the matter at hand. We cannot undertake de facto rulemaking—without public notice and a full opportunity for public comment—by responding to a reported question that seeks an advisory opinion . . . . Rulemaking or statutory action on such policy questions would have provided, and still may provide, the broader guidance that is sought in the Probate Court's question.

The Chief Justice's commentary demonstrates why the Task Force exists—to consider the important policy questions that will inevitably be raised when electronic filing becomes reality in all of Maine's courts, and to

recommend to the Supreme Judicial Court the nuts-and-bolts changes to court rules, administrative orders, and statutes that will allow our courts to make the electronic filing system work day-to-day. To assist the Task Force in doing that work, this memorandum, originally written by Laura O'Hanlon in 2005 in support of the Task Force on Electronic Court Record Access (TECRA), gives an overview of legal authorities concerning the issue of public access to court records in Maine.

II. Maine Law Governing Access to Records

A. Constitutions

The Maine Constitution guarantees citizens access to the courts for "redress for injuries" and to resolve criminal charges by a public jury trial,[2] but it does not contain any provision guaranteeing the general public complete access to court proceedings or court records. Although article I, section 4 provides for an unabridged freedom of the press,[3] there are no cases holding that a free press requires unfettered access to judicial proceedings or court records. The only provision in the Maine Constitution that directly discusses State records provides that "[t]he records of the State shall be kept

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[2] Me. Const. art. I, §§ 6, 19; *see Godbout v. WLB Holding, Inc.,* 2010 ME 46, ¶ 6, 997 A.2d 92.

[3] "[N]o laws shall be passed regulating or restraining the freedom of the press." Me. Const. art. I, § 4.

in the office of the [Secretary of State]."[4] That directive does not address issues of public access and does not apply to court records within the control of the Judicial Branch.

In the criminal context, the Court, referring to "the presumption that criminal proceedings are to be open to the public," recently affirmed that both the defendant and the public (including the media) have constitutional rights to public criminal trials—the defendant's right to a public trial being grounded in the Sixth Amendment, and the public's right to observe criminal trials arising from the First Amendment.[5] The Court explained that

> [t]he primary reasons for the right of the public and the press to observe criminal trials are twofold: first, the watchful eye of the public is understood to ensure a fair trial for the defendant; and second, the public's right to observe criminal trials is expected to enhance public confidence in the courts and criminal justice system.[6]

Transparency to the public is not absolute, however.[7] The Court discussed in *State v. Pullen* the aspects of a criminal trial that must be public—including jury selection, opening statements, the presentation of evidence,

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[4] Me. Const. art. V, pt. 2, § 2.

[5] *State v. Frisbee*, 2016 ME 83, ¶¶ 15-16, 22, 140 A.3d 1230; *see also MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 31, 82 A.3d 104; *In re Maine Today Media, Inc.*, 2013 ME 12, ¶¶ 3, 6, 59 A.3d 499.

[6] *Frisbee*, 2016 ME 83, ¶ 17, 140 A.3d 1230.

[7] *Id.* ¶ 21 ("The rights of the public and the defendant to an open trial are not absolute . . . and they may be overridden by other rights or interests.").

arguments of counsel, jury instructions, and the return of the verdict—but held that chambers conferences discussing points of law are not public proceedings.[8] In *State v. Frisbee*, the Court recognized that in some circumstances the defendant's "paramount" right to a fair trial may require the complete or partial closure of the courtroom, and it articulated the test to be applied before those steps can be taken.[9] As an example, before the Civil War began the Court noted that it was "obviously proper, and highly important, that the proceedings of a grand jury should be in secret."[10]

In the civil context, the United States Supreme Court said succinctly that, "A trial is a public event. What transpires in a court room is public property."[11] Justice Brennan observed that "[a]s a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation. Such abiding adherence to the principle of open trials reflects a profound judgment about the way in which law should be enforced and justice administered."[12]

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[8] 266 A.2d 222, 228 (Me. 1970), *overruled on other grounds by State v. Brewer,* 505 A.2d 774, 777-78 & n.5 (Me. 1985).

[9] 2016 ME 83, ¶¶ 19, 22-23, 140 A.3d 1230.

[10] *State v. Clough*, 49 Me. 573, 577 (1861).

[11] *Craig v. Harney*, 331 U.S. 367, 374 (1947).

[12] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 593 (1980) (Brennan, J., concurring) (alteration, citations, footnote, and quotation marks omitted).

B. Case Law

As it implicitly acknowledged in *Conservatorship of Emma*, the Law Court has not announced a general policy concerning public access to court records, which is a primary reason that this Task Force exists. Over the span of almost a century, the Court has set out relevant policy considerations in three decisions. First, in *State v. Ireland*,[13] the Court noted that "there must be and is an inherent power in the court to preserve and protect its own records." In *State v. DePalma*, the Court said that "[c]onvictions are matters of court record, permanent *and accessible*."[14] Finally, in *Halacy v. Steen,*[15] notwithstanding a general policy favoring accessibility, the Court adopted the federal courts' rationale for protecting presentence investigation reports from disclosure to third parties except upon "a compelling and particularized demonstration that such disclosure is required to meet the ends of justice."

In discussing the requirements of Maine's Freedom of Access Act,[16] the Court said recently that "FOAA was enacted in service of the public's interest in holding its government accountable by requiring that public actions be taken openly. To that end, FOAA sets out the general rule as to documents

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[13] 109 Me. 158, 159-60, 83 A. 453 (1912).

[14] 128 Me. 267, 268, 147 A. 191 (1929) (emphasis added).

[15] 670 A.2d 1371, 1374-76 (Me. 1996).

[16] 1 M.R.S. §§ 400-434 (2016).

that except as otherwise provided by statute, a person has the right to inspect and copy any public record . . . ."[17] In other cases, the Court noted that "FOAA should be liberally construed and applied to promote its underlying purpose of open government, and . . . exceptions to public disclosure must be strictly construed," as evidenced by the Legislature's enactment of "a very broad, all-encompassing definition of 'public records' subject only to specific exceptions . . . leav[ing] little room for qualification or restriction."[18]

Notwithstanding the FOAA's general rule, however, "Courts have the authority to prevent the general public from having access to records and watching proceedings that the Legislature has deemed confidential."[19] Accordingly, "protected information can be excised from a document to allow that document to be disclosed."[20] Furthermore, although it may be looked to for general policy guidance, the Law Court has indicated that FOAA does not apply to the Judicial Branch at all.[21]

The Court addressed the nature of investigatory records and the circumstances under which prosecutorial records must be disclosed pursuant

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[17] *Pinkham v. Dep't of Transp.*, 2016 ME 74, ¶ 9, 139 A.3d 904 (alteration, citation, and quotation marks omitted).

[18] *Id.* (alteration and quotation marks omitted).

[19] *Id.* ¶ 23 n.11.

[20] *Springfield Terminal Ry. Co. v. Dep't of Transp.,* 2000 ME 126, ¶ 11 n.4, 754 A.2d 353.

[21] *See Asselin v. Super. Ct.*, Mem-15-3 (Jan. 22, 2015).

to FOAA in *Blethen Me. Newspapers, Inc. v. State*, a case in which the Court affirmed the release of records held by the Maine Attorney General pertaining to allegations, some dating back decades, of sexual abuse by eighteen deceased Roman Catholic priests. Recognizing the significant privacy interest of people named in investigatory records, the Court said that

> [w]ith respect to the [Act], a possible invasion of privacy is warranted only if disclosure will advance its central purpose. Whether disclosure is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the [Act] to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested.[22]

The competing policy interests that the Task Force must consider are highlighted when comparing the *Blethen* majority opinion to the strong concurring and dissenting opinions filed by four justices in that case. The concurrence noted that "[a]ny analysis of the records request in this case must begin with the acknowledgment that criminal investigation records, such as the records at issue here, are not subsumed within the general sunshine laws, and, in contrast to most government records, are *not* available for public review unless certain conditions have been met," and the dissenting justices

[22] *Blethen Me. Newspapers, Inc. v. State*, 2005 ME 56, ¶ 28, 871 A.2d 523 (alterations, ellipsis, and quotation marks omitted). The current Intelligence and Investigative Record Information Act continues to protect from disclosure records that would "[c]onstitute an unwarranted invasion of personal privacy." 16 M.R.S. § 804(3) (2016).

warned of the negative impact on personal privacy and the ability of law enforcement agencies to conduct criminal investigations that may result from overly permissive access to investigative records.[23]

Demonstrating that the policy issue debated in *Blethen* is still ongoing, in a 2013 case the Court began its analysis of the State's denial, pursuant to the Criminal History Record Information Act (CHRIA),[24] of a FOAA request for 9-1-1 transcripts by noting that "[t]his case highlights the conflict that exists between the public interest in open access to governmental records, on the one hand, and the public interest in protecting the integrity of criminal investigations on the other."[25] The Court recognized that there is inherent tension between FOAA, which has a "basic purpose . . . to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," and CHRIA, which "demonstrates the Legislature's intent to shield law enforcement from the obligation to disclose materials that might compromise its public safety mission."[26]

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[23] *Blethen Me. Newspapers, Inc.*, 2005 ME 56, ¶ 42 (Saufley, C.J., concurring), ¶¶ 51-76 (Clifford, Rudman, and Alexander, JJ., dissenting), 871 A.2d 523.

[24] 16 M.R.S. §§ 701-710 (2016).

[25] *MaineToday Media, Inc.*, 2013 ME 100, ¶ 5, 82 A.3d 104 (ellipsis and quotation marks omitted).

[26] *Id.* ¶¶ 8, 16 (quotation marks omitted).

Similar to CHRIA, the Intelligence and Investigative Record Information Act (IIRIA) bars the dissemination of certain investigative information in twelve specific circumstances, including when "there is a reasonable possibility that public release or inspection of the record would . . . "[i]nterfere with law enforcement proceedings relating to crimes," or would "[c]onstitute an unwarranted invasion of personal privacy."[27] The IIRIA, enacted in 2013, has been discussed in one reported decision, but not in a way that resolves the policy issue of disclosure versus protecting sensitive law enforcement investigation records.[28]

C. Maine Statutes

There are numerous statutory provisions governing the confidentiality and release of state records and information. The Task Force will have access to a comprehensive "master list"[29] of those statutes, as well as a "short list,"[30] derived from the master list, of information that is commonly made confidential. This overview memorandum does not attempt to summarize those extensive resources.

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[27] 16 M.R.S. § 804(1), (3) (2016).

[28] *See Bowler v. State*, 2014 ME 157, 108 A.3d 1257.

[29] Maine Judicial Branch, Master Spreadsheet (Laura O'Hanlon et al. eds. 2017).

[30] Maine Judicial Branch, Categorization of Statutory Information (Jack Baldacci et. al. eds. 2017).

The master list was created by combining the charts provided to TECRA with the Office of Policy and Legal Analysis's list of statutes governing confidentiality and the list contained within Legislative Document 1455, a proposed "Act to Codify Public Records Exceptions" that was considered and ultimately rejected by the 122nd Legislature.[31] The short list was created through an analysis of the master list with a focus solely on the types or categories of information protected by Maine law.

III. Control Over Court Records

A. SJC's Inherent Authority

In deciding whether court records are publicly accessible, Maine's courts are bound by federal and state constitutional mandates. Within constitutional constraints, the Supreme Judicial Court has inherent authority over the operation of the state's courts. Illustrating that power, when considering Husson University's petition to allow its prospective law school graduates to sit for the Maine bar exam, the Court noted that it alone had "inherent authority and exclusive jurisdiction" over the admission of attorneys, notwithstanding the Legislature's enactment of a statutory

[31] L.D. 1455 (122nd Leg. 2005).

requirement that candidates graduate from an ABA-accredited law school.[32] More particularly, more than one hundred years ago the Court said that "there must be and is an inherent power in the court to preserve and protect its own records."[33]

The Legislature has also recognized the Court's inherent authority to manage the judicial branch. In Title 4, the Legislature acknowledged that "[t]he Supreme Judicial Court has general administrative and supervisory authority over the judicial branch and shall make and promulgate rules, regulations and orders governing the administration of the judicial branch."[34] Relevant here, as part of that general power, "The Supreme Judicial Court . . . has control of all records and documents in the custody of its clerks."[35]

There is potential tension, however, between the Court's inherent authority over the judicial branch and its records on the one hand, and particular statutes on the other. For example, CHRIA, discussed earlier, "governs the dissemination of criminal history record information" that is "collected by a criminal justice agency," and the Act explicitly includes "federal courts, Maine courts, [and] courts in any other state" within the definition of a

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[32] *In re Husson Univ. Sch. of Law*, 989 A.2d 754, 756 (Me. 2010) (discussing 4 M.R.S. § 803(2)(A) (2016)); *see In re Husson Coll. Sch. of Law*, 2008 Me. LEXIS 93, *6 n.3 (June 3, 2008).

[33] *State v. Ireland*, 109 Me. 158, 159-60, 83 A. 453 (1912).

[34] 4 M.R.S. § 1 (2016).

[35] 4 M.R.S. § 7 (2016).

"criminal justice agency" to be bound by CHRIA's provisions.[36] As another example, FOAA declares the general rule that "[t]he Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection . . . ."[37] The Court has strongly suggested, however, in a case where a person was denied access to court records following a FOAA request, that it would hold that FOAA does not apply to the judicial branch.[38]

The judicial and legislative branches may, of course, cooperate to insure appropriate access to properly-protected documents.[39] Unless an irreconcilable conflict exists, it is likely that the Court would look to statutory provisions as a guide in determining whether documents are accessible or confidential.

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[36] 16 M.R.S. §§ 702, 703(3), (4) (2016).

[37] 1 M.R.S. § 401 (2016).

[38] *Asselin*, Mem-15-3 (Jan. 22, 2015).

[39] *See, e.g.*, *New Bedford Standard-Times Publ'g Co. v. Clerk of Third Dist. Ct.,* 387 N.E.2d 110, 113-15 (Mass. 1979). A concurring opinion in the *New Bedford* case noted that the court had often "defer[red] to the Legislature in that sometimes overlapping and undefinable area of power that exists between the two branches of government." *Id.* at 117 (Abrams, J., concurring). Justice Abrams explained that "[i]n the absence of court rules, the Legislature has enacted legislation in aid of the judicial branch, but the fact that the Legislature has acted does not deprive the judicial branch of its power of decision in the area of judicial administration." *Id.*

B. Maine Rules of Court

1. Civil Rules

The Maine Rules of Civil Procedure contain exceptions to a general spirit of openness with respect to court filings, usually placing the burden on parties to raise issues of confidentiality. For example,

- Rule 26(c), governing discovery, allows the entry of a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" through various mechanisms, including limiting who can be present during discovery, sealing depositions or documents, and otherwise limiting disclosure of sensitive information.[40]

- Rule 79(b) provides for motions to impound or seal documents, and states that requests to see or copy protected documents must be made by motion, notwithstanding Rule 79(c), which allows parties "at all times [to] have copies" of materials in the clerk's file.

- Rule 80M provides that, "Medical malpractice screening panel proceedings shall be confidential."

- Rule 102 of the family division rules requires the clerk to seal identifying information if a party alleges under oath that disclosure could place the party or a child in jeopardy, "and [the clerk] shall not disclose the information to any other party or to the general public" absent a court order following a hearing.

- Rule 108(d)(3) of the family division rules shields from public inspection financial statements and child support affidavits

[40] *See Pinkham*, 2016 ME 74, ¶ 23 n.10, 139 A.3d 904 (discussing the "well-established structure . . . to limit the public availability of confidential information" provided by Rule 26).

filed by the parties, but does not limit access by the parties themselves.

- Rule 133(c) of the business and consumer docket rules allows parties to "submit to the court a proposed order governing the production and use of confidential documents and information in the pending action," and permits the court to enter a confidentiality order.

2. Criminal Rules

The Maine Rules of Unified Criminal Procedure likewise limit public access to certain proceedings and documents:

- Rule 6 is based on the principle that due to the nature of grand jury proceedings, they are presumptively secret. Rule 6(d) strictly limits persons who can be present when the grand jury hears evidence, and provides that—like a petit jury—only grand jurors may be present during deliberations. Rule 6(e) imposes a "[g]eneral rule of secrecy" on participants in a grand jury proceeding and the documents and recordings they generate absent a court order.

- Rule 24(f) directs that if jurors take notes during a trial, "[u]pon the completion of jury deliberations, the notes shall be immediately collected and, without inspection, physically destroyed."

- Rule 32(c) states that a presentence report "may not be disclosed to anyone, including the court" until the defendant has been found guilty. Even then, the Law Court has held that "the PSI is a confidential document that should not be disclosed to a third party in the absence of a compelling and particularized demonstration that such disclosure is required

to meet the ends of justice."[41]

- Rule 41(f)(2)(A) requires that a search warrant and its supporting affidavits be impounded until the return of the warrant is filed. Thereafter, the court "may for good cause order the clerk to impound some or all of the warrant materials until a specified date or event" pursuant to Rule 41(h).

C. Judicial Branch Administrative Orders[42]

The Supreme Judicial Court and the Superior Court have issued administrative and standing orders affecting public access to court records:

- AO JB-05-20[43] is a comprehensive order "govern[ing] the release of public information and the protection of confidential and other sensitive information within the Judicial Branch." It establishes a policy to provide "meaningful" public access to court files, while protecting "confidential," "sensitive," and personnel information from inappropriate disclosure. The order provides that "[i]nformation and records relating to cases . . . are generally public and access will be provided," including access to trial exhibits, unless the request is for confidential information, in which case a request may be made by motion to the court.

- AO JB-05-15[44] allows cameras or audio recording equipment to be used in courtrooms at the discretion of the presiding judge or justice, except in certain types of civil cases where the parties' agreement is also required, and during specified

[41] *Halacy v. Steen*, 670 A.2d 1371, 1375 (Me. 1996).

[42] Judicial Branch Administrative Orders are available on the Court's website at http://www.courts.maine.gov/rules_adminorders/adminorders/index.shtml.

[43] Public Information and Confidentiality, Me. Admin. Order JB-05-20 (as amended by A. 1-15) (effective Jan. 14, 2015).

[44] Cameras and Audio Recording in the Courtroom, Me. Admin Order JB-05-15 (as amended by A. 9-11) (effective Sept. 19, 2011).

portions of criminal trials. The order bars coverage of handicapped or disabled persons and crime victims if they wish, and bars in all instances coverage of the jury during its service, as well as bench/bar conferences.

- AO JB-09-2[45] requires that social security numbers and qualified domestic relations orders be kept in a separate, sealed envelope in the case file "and shall not be disclosed or provided to any . . . person" absent a court order, unless a specified exception applies.

  Relevant to the Task Force, the Order explicitly notes that "the Judicial Branch has neither the staff nor the resources to redact Social Security Numbers from all files, [and therefore] it has developed a protocol to segregate that information in incoming court files." Although the need to safeguard SSNs will not change with the advent of the e-filing system, the current paper-based protocol will.

- AO JB-15-1[46] states that pursuant to statute, courthouse "security surveillance video footage is deemed confidential and shall be provided only in very limited circumstances, primarily those involving public safety." That restriction applies to video taken inside and outside of courthouses.

- By standing order of the Superior and District Courts,[47] in any criminal case or protection from abuse case where there is an allegation that certain private images (generally involving nudity and/or sexual acts) are involved, those images, in whatever form, that are submitted as part of a filing or as an exhibit are placed under seal by the court clerk. They may then be viewed by the defendant or the defendant's attorney at the

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[45] Access to Social Security Numbers and Qualified Domestic Relations Orders, Me. Admin Order JB-09-2 (as amended by A. 9-11) (effective Sept. 19, 2011).

[46] Confidentiality of Courthouse Security System Footage, Me. Admin Order JB-15-1 (effective May 1, 2015).

[47] Standing Order Impounding Certain Private Images (effective 10/16/15).

courthouse.

- By standing order of the Superior Court,[48] an attorney or an unrepresented party may have access to juror information "for the limited purpose of preparing for and participating in voir dire in a case scheduled for jury trial," subject to several enumerated restrictions.

IV. Federal Law

As discussed above, the Law Court has had more to say via decision, rule, and administrative order concerning public access to Maine's courts and court records than was the case when TECRA considered the subject twelve years ago. What follows is a brief overview of federal sources of law on that subject. To begin with, the public has both constitutional and common-law rights to access court proceedings and court records, although those rights are not unlimited.

A. Case Law

In the criminal context, the United States Supreme Court has held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment,"[49] and the Court of Appeals for the First Circuit explained further that in criminal cases "there is general agreement among the courts that the public's right of access attaches to decisions of major importance to

[48] Standing Order for Limited Access to Juror Information (effective Aug. 19, 2014).

[49] *Richmond Newspapers, Inc.*, 448 U.S. at 580 (plurality opinion); *see Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 603 (1982).

the administration of justice,"[50] including access to trial testimony of minor sex offense victims; voir dire proceedings; pre-trial criminal hearings; bail hearings; and, in the ordinary case, juror names and addresses once the trial has ended.[51]

The right to access court proceedings is a restricted one, however; the Supreme Court said that "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute."[52] For example, the First Circuit stated that "[t]here is . . . clearly no public right of access to . . . jurors' deliberations," and a trial court may find in a given case that "exceptional circumstances" justify keeping juror information confidential.[53] Further, the Supreme Court recognized that "there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity" such that "the rights of the accused override the qualified First Amendment right of access,"[54] and the First Circuit noted that "even First Amendment rights must give way to a defendant's right to a fair trial.

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[50] *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11 (1st Cir. 1986) (quotation marks omitted).

[51] *In re Globe Newspaper Co.*, 920 F.2d 88, 94, 98 (1st Cir. 1990).

[52] *Globe Newspaper Co.*, 457 U.S. at 606; *see Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 9, 13 (1986) ("[E]ven when a right of access attaches, it is not absolute.") (also referring to a "qualified First Amendment right of access to criminal proceedings").

[53] *In re Globe Newspaper Co.*, 920 F.2d at 94, 97, 98.

[54] *Press-Enterprise Co.*, 478 U.S. at 9.

Similarly, First Amendment rights may have to bow to a court's needs to protect its essential processes . . . ."[55]

Nevertheless, although the public's right of access to criminal proceedings has limits, "the State's justification in denying access must be a weighty one. . . . [I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[56]

Concerning public access to documents and court records, the Supreme Court has recognized, without attempting to comprehensively define, a common-law "general right to inspect and copy . . . judicial records and documents"; again, however, "[i]t is uncontested . . . that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."[57] The Court referenced, without explicitly adopting, a general standard: "[T]he decision as to access [to documents] is one best left to the sound discretion of the trial court,

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[55] *In re Globe Newspaper Co.*, 920 F.2d at 97 n.10 (citation omitted).

[56] *Globe Newspaper Co.*, 457 U.S. at 606-07.

[57] *Nixon v. Warner Commc'ns*, 435 U.S. 589, 597-98 (1978); *see Anderson*, 805 F.2d at 13 ("There is a long-standing presumption in the common law that the public may inspect judicial records."); *In re Globe Newspaper Co.*, 920 F.2d at 96 (referring to the "historically based common law right to inspect and copy judicial records and documents").

a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[58] The First Circuit interpreted that standard to mean that the common-law presumption of public access "is more easily overcome than the constitutional right of access," for example, it does not apply to discovery materials, as those documents are not among "materials on which a court relies in determining the litigants' substantial rights."[59]

In the civil context, the First Circuit noted that, although it was not among them, "several courts have recognized a public right of access to civil as well as criminal trials,"[60] a right that "is still in the process of being defined."[61] The Supreme Court has not decided the issue of public access to court documents in civil cases,[62] and other courts have observed that the question of whether there is a constitutional right of public access in civil cases has not been answered.[63] In any event, to the extent that it exists the right to access civil proceedings and court records is not absolute—as noted above, the First

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[58] *Nixon*, 435 U.S. at 599.

[59] *Anderson*, 805 F.2d at 13.

[60] *Id.* at 11 (collecting cases).

[61] *Id.* at 10.

[62] *See United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997).

[63] *See, e.g.*, *Wilson v. Am. Motors Corp.,* 759 F.2d 1568, 1570 (11th Cir. 1985).

Circuit held, for example, that "there is no right of public access to documents considered in civil discovery motions."[64]

An important consideration when discussing the collection and dissemination of data by the court system is whether there is, as part of a constitutionally-protected right to privacy, an "individual interest in avoiding disclosure of personal matters."[65] If so, then courts presumably would not be allowed to collect or disseminate information within the scope of that right, at least absent compelling circumstances or stringent safeguards. In a caution applicable to this Task Force, forty years ago the Supreme Court noted:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. . . . [I]n some circumstances that duty arguably has its roots in the Constitution . . . .[66]

The Supreme Court in three cases has assumed the existence of a constitutional privacy right to prevent disclosure of some personal

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[64] *Anderson*, 805 F.2d at 11.

[65] *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

[66] *Id.* at 605 (footnote omitted).

information without explicitly holding that such a right exists.[67] All the Court has said thus far about the scope of the potential right is that the information at issue in those cases would not fall within it. Thus, with proper safeguards, it is constitutional to establish "a centralized computer file [containing] the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market"; collect and inspect presidential papers; and require prospective government employees to disclose recent involvement with illegal drugs, including treatment and counseling, on a background check form.[68]

B. Statutes

Federal statutes will generally not have a significant impact on a state court's release or protection of its own records. Two comprehensive statutes in this area of federal law, the Freedom of Information Act (FOIA)[69] and the Privacy Act,[70] are not applicable even to the federal courts.[71]

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[67] *Id.* at 598-99, 605-06; *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457-58 (1977); *NASA v. Nelson*, 562 U.S. 134, 138 (2011) ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.").

[68] *Whalen*, 429 U.S. at 591; *Nelson*, 562 U.S. at 134, 145.

[69] 5 U.S.C.S. § 552 (LEXIS through Pub. L. No. 115-22).

[70] 5 U.S.C.S. § 552a (LEXIS through Pub. L. No. 115-22).

[71] *United States v. Frank*, 864 F.2d 992, 1013 (3rd Cir. 1988).

C. Federal Rules of Court and Policy

The federal court system has a published "Privacy Policy for Electronic Case Files."[72] The policy first references federal court rules[73] requiring that "personal identifier information" be redacted from filings by the party, or nonparty, making the filing. That information includes:

- Social Security numbers (except the last four digits)
- names of minor children (except initials)
- financial account numbers (except the last four digits)
- dates of birth (except the year)
- home addresses (in criminal cases) (except the city/state)

The policy then lists, "[d]ocuments in criminal cases files for which public access should not be provided," either at the courthouse in the public case file or via remote electronic access, including:

- unexecuted summonses or warrants of any kind
- pretrial bail or presentence reports
- juvenile records
- documents identifying jurors or potential jurors
- financial affidavits filed in seeking appointed counsel
- ex parte requests for investigative or expert services
- sealed documents

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[72] http://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files (last visited Apr. 19, 2017).

[73] *See* Fed. R. Civ. P. 5.2(a); Fed. R. Crim. P. 49.1(a); Fed. R. Bankr. P. 9037(a); Fed. R. App. P. 25(a)(5). The civil, criminal, and bankruptcy procedure rules each have several enumerated exceptions to the redaction requirement. (*See* Attachment 1.)

Finally, the policy discusses "[t]he redaction of electronic transcripts of court proceedings," stating that if an electronic transcript is prepared, courts making documents available remotely must also make the electronic transcript available remotely, but first, attorneys (including standby counsel) or self-represented litigants are

> responsible for reviewing it for the personal data identifiers required by the federal rules to be redacted, and providing the court reporter or transcriber with a statement of the redactions to be made to comply with the rules. Unless otherwise ordered by the court, the attorney must review the following portions of the transcript:
>
> 1. opening and closing statements made on the party's behalf;
> 2. statements of the party;
> 3. the testimony of any witnesses called by the party;
> 4. sentencing proceedings; and
> 5. any other portion of the transcript as ordered by the court.

Once the transcript is delivered, the attorneys have seven calendar days to file a notice of their intent to direct a redaction of personal data identifiers; if no notice is given, "the court will assume redaction of personal data identifiers from the transcript is not necessary." If notice is given, parties have twenty-one calendar days from delivery of the transcript to submit a statement to the transcriber "indicating where the personal data identifiers to be redacted appear in the transcript"; the transcriber then has thirty-one days

from delivery of the transcript to perform the redactions and file a redacted version of the transcript with the court.

The federal approach thus places the primary burden for privacy protection concerning electronically-available documents squarely on the parties, not on court personnel. It is the parties who, in the ordinary case, must redact "personal identifier information" from documents before they are submitted to the clerk for filing, and it is the parties who must review transcripts and identify information to be redacted before the transcripts are made available remotely.

V. Conclusion

The transparency to the public of court proceedings and documents in the age of the internet is an evolving area of the law. As this memorandum has discussed, some principles are well established and fundamental—for example, public access to criminal trials and most documents and proceedings associated with a criminal trial—and some are less well established or are yet to be determined—for example, the extent of public access to civil trials and associated documents, and an individual's constitutional right to privacy concerning personal information. Many gray areas lie between the few absolutes.

The Task Force will have sources of Maine law to provide guidance, including state statutes, rules of court, and Judicial Branch administrative orders affecting transparency and privacy. There are also models from other jurisdictions that have already instituted electronic filing to be considered, chiefly the federal courts as well as other states, including Florida. The wisdom gleaned from those sources, combined with values deemed important to Maine citizens and the policy choices resulting from that process, will allow the Task Force to fulfill its important responsibilities spelled out in its charter.

Attachment: Selected Federal Rules of Procedure

USCS Bankruptcy R 9037

Current through changes received March 14, 2017.

USCS Court Rules > Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms > Part IX. General Provisions

Rule 9037. Privacy Protection for Filings Made with the Court

(a) Redacted filings. Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the redaction requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding unless filed with a proof of claim;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by subdivision (c) of this rule; and

(6) a filing that is subject to § 110 of the Code [11 USCS § 110].

(c) Filings made under seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.

(d) Protective orders. For cause, the court may by order in a case under the Code:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(e) Option for additional unredacted filing under seal. An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) Option for filing a reference list. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(g) Waiver of protection of identifiers. An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

History

(Added April 30, 2007, eff. Dec. 1, 2007.)

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form, but the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social-security number. It may also be necessary to protect information not covered by the redaction requirement—such as driver's license numbers and alien registration numbers—in a particular case. In such cases, protection may be sought under subdivision (c) or (d). Moreover, the rule does not affect the protection available under other rules, such as Rules 16 and 26(c) of the Federal Rules of Civil Procedure, or under other sources of protective authority.

Any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should therefore notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

An individual debtor's full social-security number or taxpayer-identification number is included on the notice of the § 341 meeting of creditors sent to creditors. Of course, that is not filed with the court, see Rule 1007(f) (the debtor "submits" this information), and the copy of the notice that is filed with the court does not include the full social-security number or taxpayer-identification number. Thus, since the full social-security number or taxpayer-identification number is not filed with the court, it is not available to a person searching that record.

The clerk is not required to review documents filed with the court for compliance with this rule. As subdivision (a) recognizes, the responsibility to redact filings rests with counsel, parties, and others who make filings with the court.

Subdivision (d) recognizes the court's inherent authority to issue a protective order to prevent remote access to private or sensitive information and to require redaction of material in addition to that which would be redacted under subdivision (a) of the rule. These orders may be issued whenever necessary either by the court on its own motion, or on motion of a party in interest.

Subdivision (e) allows an entity that makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (f) allows the option to file a reference list of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (g) allows an entity to waive the protections of the rule as to that entity's own personal information by filing it in unredacted form. An entity may elect to waive the protection if, for example, it is determined that the costs of redaction outweigh the benefits to privacy. As to financial account numbers, the instructions to Schedules E and F of Official Form 6 note that the debtor may elect to include the complete account number on those schedules rather than limit the number to the final four digits. Including the complete number would operate as a waiver by the debtor under subdivision (g) as to the full information that the debtor set out on those schedules. The waiver operates only to the extent of the information that the entity filed without redaction. If an entity files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 9037 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

Changes Made After Publication. Rule 9037 is intended to parallel as closely as possible Civil Rule 5.2 and Criminal Rule 49.1. The Advisory Committees have worked together to maintain as much consistency as possible in the three versions of the rule. The rule has been revised to implement the several style revisions suggested by the Style Subcommittee of the Standing Committee. Subdivision (b) was reorganized and renumbered. Subdivisions (b)(1) and (b)(3) were added in response to suggestions by the Department of Justice. Subdivision (b)(4), formerly subdivision (b)(2), was amended in response to the suggestion of the Committee on Court Administration and Case Management so that the subdivision now refers to court records that become a part of the record in the pending matter. The term "entity" has been substituted for "person" in subdivision (c) and for "party" in subdivisions (e) and (f) to conform the rule to the definitions provided in the Bankruptcy Code.

INTERPRETIVE NOTES AND DECISIONS

1.Generally

2.Social Security number

1. Generally

Claimant's attorney was required to show cause why she should not be sanctioned for improper dissemination of personal and confidential debtor information under Fed. R. Bankr. P. 9037 and for negligent practice of law because her firm filed numerous similar motions to redact information and her filings did not comply with local court rules. In re Greco (Bankr. S.D. Fla. 2009), 405 BR 393.

There is nothing contained in either Fed. R. Bankr. P. 9037 itself or advisory committee's notes that indicates award of sanctions or damages would be appropriate remedy; further, creditor had already provided form of relief specified by Rule 9037 by having debtor's personal information redacted from its proof of claim, and, accordingly, any Rule 9037 violation that occurred in this case was remedied when creditor accomplished redaction of debtor's personal information from proof of claim; regarding 11 USCS § 105, there was no allegation of flagrant violation or failure to remedy within reasonable time of learning of violation. Carter v. Flagler Hosp., Inc. (In re Carter) (Bankr. M.D. Fla. 2009), 411 BR 730.

USCS Fed Rules App Proc R 25

Current through changes received March 14, 2017.

USCS Court Rules > Federal Rules of Appellate Procedure > VII. General Provisions

Rule 25. Filing and Service

(a) Filing.

(1) *Filing with the Clerk.* A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) *Filing: Method and Timeliness.*

(A) *In general.* Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) *A brief or appendix.* A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(C) *Inmate Filing.* If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C). A paper filed by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(i) it is accompanied by:

• a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

• evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

(ii) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)(C)(i).

(D) *Electronic filing.* A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

(3) *Filing a Motion with a Judge.* If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) *Clerk's Refusal of Documents.* The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) *Privacy Protection.* An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is

governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 days; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

History

(Amended July 1, 1986; Dec. 1, 1991; Dec. 1, 1993; Dec. 1, 1994; Dec. 1, 1996; Dec. 1, 1998; Dec. 1, 2002; Dec. 1, 2006; Dec. 1, 2007; Dec. 1, 2009; April 28, 2016, eff. Dec. 1, 2016.)

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee.

Notes of Advisory Committee on 1991 amendments.

Notes of Advisory Committee on 1993 amendments.

Notes of Advisory Committee on 1994 amendments.

Notes of Advisory Committee on 1996 amendments.

Notes of Advisory Committee on 1998 amendments.

Notes of Advisory Committee on 2002 amendments.

Notes of Advisory Committee on 2006 amendments.

Notes of Advisory Committee on 2007 amendments.

Notes of Advisory Committee on 2009 amendments.

Notes of Advisory Committee on 2016 amendments.

Other provisions:

Notes of Advisory Committee.

The rule that filing is not timely unless the papers filed are received within the time allowed is the familiar one. *Ward v. Atlantic Coast Line RR Co.,* 265 F.2d 75 (5th Cir. 1959), rev'd on other grounds, 362 U.S. 396, 4 L. Ed. 2d 820 (1960); *Kahler-Ellis Co. v. Ohio Turnpike Commission,* 225 F.2d 922 (6th Cir. 1955). An exception is made in the case of briefs and appendices in order to afford the parties the maximum time for their preparation. By the terms of the exception, air mail delivery must be used whenever it is the most expeditious manner of delivery.

A majority of the circuits now require service of all papers filed with the clerk. The usual provision in present rules is for service on "adverse" parties. In view of the extreme simplicity of service by mail, there seems to be no reason why a party who files a paper should not be required to serve all parties to the proceeding in the court of appeals, whether or not they may be deemed adverse. The common requirement of proof of service is retained, but the rule permits it to be made by simple certification, which may be endorsed on the copy which is filed.

Notes of Advisory Committee on 1991 amendments.

Note to Subdivision (a). The amendment permits, but does not require, courts of appeals to adopt local rules that allow filing of papers by electronic means. However, courts of appeals cannot adopt such local rules until the Judicial Conference of the United States authorizes filing by facsimile or other electronic means.

Notes of Advisory Committee on 1993 amendments.

The amendment accompanies new subdivision (c) of Rule 4 and extends the holding in *Houston v. Lack,* 487 U.S. 266 (1988), to all papers filed in the courts of appeals by persons confined in institutions.

Notes of Advisory Committee on 1994 amendments.

Note Subdivision (a). Several circuits have local rules that authorize the office of the clerk to refuse to accept for filing papers that are not in the form required by these rules or by local rules. This is not a suitable role for the office of the clerk and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this rule. This provision is similar to Fed. R. Civ. P. 5(e) and Fed. R. Bankr. P. 5005.

The Committee wishes to make it clear that the provision prohibiting a clerk from refusing a document does not mean that a clerk's office may no longer screen documents to determine whether they comply with the rules. A court may delegate to the clerk authority to inform a party about any noncompliance with the rules and, if the party is willing to correct the document, to determine a date by which the corrected document must be resubmitted. If a party refuses to take the steps recommended by the clerk or if in the clerk's judgment the party fails to correct the noncompliance, the clerk must refer the matter to the court for a ruling.

Note Subdivision (d). Two changes have been made in this subdivision. Subdivision (d) provides that a paper presented for filing must contain proof of service.

The last sentence of subdivision (d) has been deleted as unnecessary. That sentence stated that a clerk could permit papers to be filed without acknowledgment or proof of service but must require that it be filed promptly thereafter. In light of the change made in subdivision (a) which states that a clerk may not refuse to accept for filing a document because it is not in the proper form, there is no further need for a provision stating that a clerk may accept a paper lacking a proof of service. The clerk must accept such a paper. That portion of the deleted sentence stating that the clerk must require that proof of service be filed promptly after the filing of the document if the proof is not filed concurrently with the document is also unnecessary.

The second amendment requires that the certificate of service must state the addresses to which the papers were mailed or at which they were delivered. The Federal Circuit has a similar local rule, Fed. Cir. R. 25.

Note to Subdivision (e). Subdivision (e) is a new subdivision. It makes it clear that whenever these rules require a party to file or furnish a number of copies a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

A party must consult local rules to determine whether the court requires a different number than that specified in these national rules. The Committee believes it would be helpful if each circuit either: 1) included a chart at the beginning of its local rules showing the number of copies of each document required to be filed with the court along with citation to the controlling rule; or 2) made available such a chart to each party upon commencement of an appeal; or both. If a party fails to file the required number of copies, the failure does not create a jurisdictional defect Rule 3(a) states: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate . . . .".

Notes of Advisory Committee on 1996 amendments.

Note to Subdivision (a). The amendment deletes the language requiring a party to use "the most expeditious form of delivery by mail, except special delivery" in order to file a brief using the mailbox rule. That language was adopted before the Postal Service offered Express Mail and other expedited delivery services. The amendment makes it clear that it is sufficient to use First-Class Mail. Other equally or more expeditious classes of mail service, such as

Express Mail, also may be used. In addition, the amendment permits the use of commercial carriers. The use of private, overnight courier services has become commonplace in law practice. Expedited services offered by commercial carriers often provide faster delivery than First-Class Mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. In order to make use of the mailbox rule when using a commercial carrier, the amendment requires that the filer employ a carrier who undertakes to deliver the document in no more than three calendar days. The three-calendar-day period coordinates with the three-day extension provided by Rule 26(c).

Note to Subdivision (c). The amendment permits service by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner—meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of overnight service too costly. A factor that bears upon the reasonableness of serving parties expeditiously is the immediacy of the relief requested.

Note to Subdivision (d). The amendment adds a requirement that when a brief or appendix is filed by mail or commercial carrier, the certificate of service state the date and manner by which the document was mailed or dispatched to the clerk. Including that information in the certificate of service avoids the necessity for a separate certificate concerning the date and manner of filing.

Notes of Advisory Committee on 1998 amendments.

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; a substantive amendment is made, however, in subdivision (a).

Note to Subdivision (a). The substantive amendment in this subdivision is in subparagraph (a)(2)(C) and is a companion to an amendment in Rule 4(c). Currently Rule 25(a)(2)(C) provides that if an inmate confined in an institution files a document by depositing it in the institution's internal mail system, the document is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subparagraph.

Notes of Advisory Committee on 2002 amendments.

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be filed by electronic means. Rule 25 has been amended in several respects to permit papers also to be served electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

Note to Subdivision (c)(1)(D). New subdivision (c)(1)(D) has been added to permit service to be made electronically, such as by e-mail or fax. No party may be served electronically, either by the clerk or by another party, unless the party has consented in writing to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have given written consent to electronic service.

Parties also have the flexibility to define the terms of their consent; a party's consent to electronic service does not have to be "all-or-nothing." For example, a party may consent to service by facsimile transmission, but not by electronic mail; or a party may consent to electronic service only if "courtesy" copies of all transmissions are mailed within 24 hours; or a party may consent to electronic service of only documents that were created with Corel WordPerfect.

Note to Subdivision (c)(2). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances may someday make it possible for a court to forward an electronically filed paper to all parties automatically or semi-automatically. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. New subdivision (c)(2) has been added so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Note to Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is notified — by the sender's e-mail program or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

Note to Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served electronically, the proof of service of that paper must include the electronic address or facsimile number to which the paper was transmitted.

Notes of Advisory Committee on 2006 amendments.

Note to Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under Rule 25(a)(2)(D), a local rule that requires electronic filing must include reasonable exceptions, but Rule 25(a)(2)(D) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 25(a)(2)(D).

A local rule may require that both electronic and "hard" copies of a paper be filed. Nothing in the last sentence of Rule 25(a)(2)(D) is meant to imply otherwise.

Notes of Advisory Committee on 2007 amendments.

Note to Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are already filed in paper form. *See*Fed. R. Bankr. P. 9037; Fed. R. Civ. P. 5.2; and Fed. R. Crim. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases—such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ—will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case—that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

Notes of Advisory Committee on 2009 amendments.

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term "calendar days." Rule 26(a) now takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "3 calendar days" in subdivisions (a)(2)(B)(ii) and (c)(1)(C) is amended to read simply "3 days."

Notes of Advisory Committee on 2016 amendments.

Rule 25(a)(2)(C) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a paper is timely if it is accompanied by a declaration or notarized statement stating the date the paper was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a paper is timely without a declaration or notarized statement if other evidence accompanying the paper shows that the paper was deposited on or before the due date and that postage was prepaid. If the paper is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit"—rather than simply "permits"—to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

INTERPRETIVE NOTES AND DECISIONS

1.Relationship to other rules and laws

2.Timeliness of filing

3.—Received by clerk

USCS Fed Rules Civ Proc R 5.2

Current through changes received March 14, 2017.

USCS Court Rules > Federal Rules of Civil Procedure > Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Rule 5.2. Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

History

(As added April 30, 2007, eff. Dec. 1, 2007.)

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on 2007 amendments. The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement—such as driver's license numbers and alien registration numbers—in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case for good cause require more extensive redaction than otherwise required by the Rule. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

Changes Made After Publication and Comment. The changes made after publication were made in conjunction with the E-Government Act Subcommittee and the other Advisory Committees.

Subdivision (a) was amended to incorporate a suggestion from the Federal Magistrate Judges Association that the rule text state that the responsibility to redact filings rests on the filer, not the court clerk.

As published, subdivision (b)(6) exempted from redaction all filings in habeas corpus proceedings under 28 U.S.C. § [§]2241, 2254, or 2255. The exemption is revised to apply only to pro se filings. A petitioner represented by counsel, and respondents represented by counsel, must redact under Rule 5.2(a).

Subdivision (e) was published with a standard for protective orders, referring to a need to protect private or sensitive information not otherwise protected by Rule 5.2(a). This standard has been replaced by a general reference to "good cause."

INTERPRETIVE NOTES AND DECISIONS

1.Generally

2.Minor children

USCS Fed Rules Crim Proc R 49.1

Current through changes received March 14, 2017.

USCS Court Rules > Federal Rules of Criminal Procedure > Title IX. General Provisions

Rule 49.1. Privacy Protection for Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) Immigration Cases. A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

History

(As added April 30, 2007, eff. Dec. 1, 2007.)

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement—such as driver's license numbers and alien registration numbers—in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (e) provides that the court can order in a particular case more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to nonparties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (g) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 49.1 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:

- unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and.
- sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

Research References & Practice Aids

Research References and Practice Aids

Federal Procedure: