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Mathew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street
Portland, Maine 04101

Re: Comments regarding the TAP Report

Dear Matt:

This letter sets out my comments regarding the September 2017 Report to the Supreme Judicial Court by the Maine Judicial Branch Task Force on Transparency and Privacy in Court Records (the “TAP Report”). In preparation for the submission of these comments, I have read the TAP Report, including the attachments and all of the materials on Judicial Branch website collecting the materials reviewed by the Task Force.

My law practice for the last ten years has been focused upon providing pro bono representation to low income Maine homeowners facing foreclosure actions against their homes. The cases on which I have worked have primarily been filed in the Maine state courts, but more recently, I have dealt with substantial numbers of cases being filed in the U.S. District Court. In addition to this pro bono representation of foreclosure defendants, I have served as the “Volunteer Program Coordinator” for the Maine Attorneys Saving Homes (MASH) program run by the Pine Tree Legal Assistance and the Maine Volunteer Lawyers project. With MASH, one of my major responsibilities has been to review homeowner case files and refer them out to members of the private bar for pro bono representation. Rather than being limiting, I believe the relatively narrow focus of my

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work gives me a unique perspective on a number of the issues raised by the TAP Report.

I start with a presumption that court records should be open to the maximum extent possible, but with a recognition that a balancing may be required, in limited situations, between the presumption of public access and privacy concerns. I also start with a view, discussed further below, that widely open access to electronic court files would provide substantial opportunities for improvements in access to justice in Maine's courts.

Presently, we have in the Maine court system what the TAP Report and commentators have chosen to call "practical obscurity," the substantial preservation of which authors of the report apparently view as being desirable. As always, reality often depends upon one's vantage point. I respectfully suggest that what we now have in the Maine court system, especially in comparison to the federal PACER system, is what we should more appropriately call "practical obstruction of open access." The TAP Report proposes to decrease that obstruction only slightly by making docket sheets openly available, by allowing litigants and their counsel to have full access to electronic files, but by continuing to obstruct open public access to those files by continuing to require non-litigants to view actual filings by physically traveling to courthouses. The authors of the TAP Report apparently do not see officers of the court (i.e. Maine licensed attorneys) as sufficiently trustworthy so as to allow them to have open online access to all court files.

In my opinion, to the extent that open public access to court records is to be limited or obstructed, such limitations should be based upon sound and articulated reasons, should be implemented only after careful analysis of the harms which may be caused by such limitations, and should be as narrowly drawn as possible. It is my

opinion that the authors of the TAP Report did not identify the true benefits which could result from open online access to electronic court files, and then failed to conduct any substantial analysis of the loss of benefits which will be caused by their proposed limits on access to electronic court files. Thus, the task force failed to weigh or balance the loss of these benefits against the benefits which it claimed would result from preservation of practical obstruction of open access.

Rather than focusing upon scholarly legal research on this issue, which is being addressed by other commentators, I focus upon the specific respects in which the recommendations of the Task Force will cause harm.

1. There should be open access to all dispositive court orders. The TAP Report recommends making “court-created information” open to the public online, with specific exceptions. The phrase “court-created information” is apparently limited to docket sheets and notices of hearings. Dispositive orders of Maine trial courts should have maximum open access possible because:

- a. Orders and decisions finally disposing of cases are the essence of what courts do—the end products of the Maine justice system, and the public should be allowed to have open access to and be fully informed regarding that end product;
- b. Open online access to decisions and orders should encourage judges to be careful to make carefully reasoned rulings which will inform the public about how the Maine judicial process works and which can withstand possible questions

about fairness or bias;

c. Making dispositive orders and decisions openly available to all lawyers without their being required to physically travel to courthouses will enhance justice by allowing lawyers to be more easily informed of rulings in cases similar to those which they are handling, and concomitantly to provide more accurate and better informed legal advice to their clients.

2. There should be open access to all orders relating to pre-trial discovery disputes. In the work upon which I have been focusing, there are rampant abuses of the pre-trial discovery process. There is no good reason for not allowing court orders resolving discovery dispute to be openly accessible. Open access to discovery orders will allow the miscreants to become more widely known and may lead to judicial willingness to deal more appropriately with repeat offenders.

3. Maine lawyers should have open online access to all electronic case files. Maine lawyers are told that they are officers of the court. They are expected to, and do indeed, give back to the Maine judicial system by substantial contributions of pro bono legal work. As such, they should be given open online access to all electronic case files. Especially their pro bono legal work should not be impaired or made more burdensome by unwarranted limitations on access to court records. If necessary, rules can be established for the permissible uses of such access and disciplinary measures can be imposed for abuses. The TAP Report does not appear to give any consideration to such

an approach. Maine lawyers should be given full and open online access to electronic case files because:

a. Often clients (especially low-income clients) approach Maine lawyers (often lawyers in legal services organizations or pro bono lawyers), for representation when litigation is underway. Such lawyers may be unwilling to undertake such representation without first reviewing the relevant court files. Those lawyers should not be forced to travel to a court house to gain such access. The time and expense of such an effort alone might dissuade a lawyer from considering representation. That is the case now with paper files.

b. Often representation of a client in a given case may involve the need to review other case files. For example, I often encounter foreclosure or related cases where there have been previous actions which must be reviewed. Presently, I must incur the expense and time expenditure, and suffer the delays, resulting from my having to send of multiple letters to court clerks to first obtain docket sheets and to then obtain actual pleadings. The TAP Report would give me access to the docket sheets but would still force me to go to court houses to get the pleadings and to pay substantial sums for those pleadings.

c. Often my representation of a client in one case will involve issues which have been previously litigated in other cases involving other parties. My ability to examine the court files in those other case often helps me to provide better client

representation and better court filings. The more easily accessible those files are, the more likely it will be that a lawyer will access them and thereby improve his client representation and the quality of his court filings.

d. As the MASH Volunteer Program Coordinator responsible for trying to persuade private attorneys to take on pro bono representation of foreclosure defendants, I find the task to be challenging. This is a complex area of the law. When I try to refer such a file, I have learned that I can be most successful if I can first have a complete court file and use it to recommend a potential case strategy to the potential pro bono lawyer. I am able to do only occasionally, and only then for cases in the Cumberland County courthouse, which I can physically visit to obtain the records myself (usually at my own expense). I cannot do that for cases outside of this courthouse. The recommendations of the TAP Report will continue this handicap by continuing to force me to view files at the courthouse, and by continuing to burden me or Pine Tree or the VLP with the high costs of obtaining records from the courts. This will be a continuing detriment to our efforts to obtain pro bono representation for low income clients.

4. Practical obstruction of open access to electronic court files aids litigants who abuse the Maine justice system. At the trial court level in the case of *Federal National Mortgage Association v. Bradbury*, 2011 ME 120, 32 A.3d 1014, I presented to the trial court the deposition of Jeffrey Stephan of GMAC Mortgage who admitted to signing thousands of fraudulent summary judgment affidavits in cases across the country.

Had Maine had the PACER system for state court filings at that time, I would have been able to present to the trial court, and the Law Court would have had an appellate record containing, hundreds of Stephan's fraudulent affidavits from Maine cases. The outcome on the issue of the contempt of GMAC Mortgage might well have been decided differently. While the limited access system proposed by the TAP Report would have made docket sheets from the GMAC cases in Maine accessible to me and thus enabled me to find cases containing those fraudulent affidavits, it still would have been unduly expensive and difficult for me to actually obtain copies of those affidavits by forcing me to go to a court house and to obtain the cooperation of clerks to print them out for me.¹ The TAP Report does not articulate any adequate reason which litigants such as GMAC Mortgage should be able to benefit from the practical obstruction of open access to court records which the TAP Report recommends.

It would be absurd to impose practical obstruction of open access to foreclosure cases where Maine statutes mandate the identification of the defendants in the pleadings, recording in registries of deeds of clerks' certificates of foreclosure complaints, and the

¹ This issue of the cooperation of clerks is not a theoretical issue. Maine court clerks have been uniformly helpful and responsive, but starting a couple of years ago, the Judicial Branch imposed restrictions upon their ability to be helpful. The clerks reported that they had been forbidden to respond on the telephone to lawyers' requests for information from court files where those lawyers had not yet entered appearances in those cases. The clerks were forced to tell Maine lawyers, often representing pro bono clients, that those lawyers could obtain the information that they needed only by physically going to courthouses to look at those files.

I do not know whether the Judicial Branch abandoned this troubling (to us as attorneys and officers of the court) policy or whether clerks have chosen to ignore it, because most of them do now readily respond to telephonic requests for information or for copies of documents. I fear that implementation of the TAP Report recommendation will lead to re-implementation of this unfortunate policy so that we will again have clerks telling lawyers that, with records now being accessible on court computer terminals, if the lawyers want any information from a file where they are not counsel of record, they will have to travel to a court house to use court computers to obtain that information.

recording of foreclosure judgments.

Mortgagees are not the only abusive litigants in the Maine judicial system. Similar issues exist with respect to debt buyer and debt collector case, and may will exist with other classes off litigants. The TAP Report neither recognizes nor discusses this problem in any respect. Nor does the report consider whether some classes of cases should be given full open access where others, such as protection from abuse cases, may deserve.

5. The TAP Report does not address requests for bulk distribution of court records or access to compiled information from court records. The TAP Report purposely does not address these topics, but they are vital and must be addressed. These topics are discussed in Sections 4.30 and 40.40 of the CCJ/COSCA Guidelines. In my work in the Maine Legislature in speaking to bills affecting Maine homeowners facing foreclosure, I have regularly seen a need to be able to present information about how Maine courts are handling various foreclosure issues, but that information has not been available to me. I have also seen far too often false or misleading information being presented to the Judiciary Committee, and have been unable to counter it with information in the Maine judicial system which exists but which is not accessible.

Thoughtful analysis is needed on how to handle these important access issues.

6. The TAP Report does not address the costs of access to the new electronic case system. On the PACER system, downloaded documents cost 10¢ per page, except that there are no charges for downloading court orders. There are challenges to this fee

structure as being excessive, and pending litigation asserts that the failure to provide free access to the federal filings inhibits the development of systems to improve that system.²

It is vital that the Court come to a clear policy position on what, if any, charges should be made for access to Maine's new electronic filing system. It is my position that the court should consider having a no-charge for access policy, for the reasons outlined in the article: Schultze, *The Price of Ignorance: The Constitutional Cost of Fees for Access to Electronic Public Court Records*, Georgetown Law Journal, Vol. 106, No. 4, 2018 available at <https://ssrn.com/abstract=3026779>

7. Conclusions. There are substantial benefits which can be realized from an open access system. These benefits include increased efficiencies for lawyers having open online access to electronic files, costs savings to courts in reducing staff time in responding to lawyer and litigant inquiries and document requests, and, of paramount importance, greater public access to and awareness of the functioning of the Maine judicial system. The recommendations of the TAP Report will obstruct the full achievement of those benefits. Maine lawyers should not be treated as untrustworthy parties who must be denied the benefits of open access. Abusive litigants, whether plaintiff's or defendants should not be allowed to continue operate in obscurity once an electronic file system is established. Judicial orders and decisions should be given complete open access.

The authors of the Task Force report have committed a major effort to the production of that report. The range of materials which it has reviewed is substantial and

² See *National Veterans Legal Services Program v. United States*, Civil Action No. 16-745, US DC, District of Columbia.

impressive. Nevertheless, I respectfully suggest that the Task Force has not achieved a balanced and full evaluation of all of the factors which must be considered in achieving a fair balance between needed public access to court records and limited needs for preservation of privacy in narrowly limited areas.

Very truly yours,

A handwritten signature in blue ink that reads "Thomas A. Cox". The signature is written in a cursive style with a large initial 'T' and a long, sweeping underline.

Thomas A. Cox