STATE OF MAINE

SUPREME JUDICIAL COURT

For responsible adults ignorance is not bliss yet that is what the Task Force on Transparency and Privacy in Court Records (TFT) is recommending in its Report. Simply put, the recommendation of the Report is that what happens in our judicial system should be obscured from the public. I think the Report is wrong in its assessment of the facts on the ground and in its recommendations.

I am a lawyer in private practice. I was admitted in 1969. I practice at all levels of state and federal courts. I do only civil work. I represent both plaintiffs and defendants; both entities and individuals of both considerable and limited means; occasional government entities and their opponents. The first 8 years of my career were at Pine Tree Legal Assistance.

I still do a modest amount of pro bono work and regularly represent Pine Tree eligible clients who are involved in the Forcible Entry and Detainer proceedings governed by 14 M.R.S.A. §§ 6001 *et seq.* and Maine Rules of Civil Procedure 80D. I have probably defended between 100 and 300 evictions in my career.

I also do compliance and defense work for debt collectors and have some familiarity with both the state and federal fair debt collection acts and related statutes and regulations as well as, because much collection work is generated by unpaid medical bills, with the privacy provisions of HIPAA, 45 C.F.R. §§ 160-164 and the Maine Medical Privacy Act, 22 M.R.S.A. 1711-C.

I am familiar with the use of both federal court electronic systems: Pacer and ECF. I believe that our system in Maine should emulate each. In other words, our system should be as transparent as the federal system which I briefly explain below.

Court records are records of the workings of one of the three equal branches of government. Government action is taken, for the most part, either in public or where it is in private, a record of the event is available soon after the fact to the public.[1] The Freedom of Information Act makes most of what happens in the executive branch available to the public. The Legislative website, http://legislature.maine.gov/, makes most of what happens in the Legislature available to the public, often as it is happening. What happens in court, with very limited exception, happens in public. What happened in court today with very limited exception was available to the public as it happened; the paper record of what happened in court last week is available to the public. That has been the presumptive case for well over two hundred years. *Nixon v. Warner Commc'n's, Inc.,* 435 U.S. 589, 597-598 (1978). Nonetheless that availability required a physical trip to the courthouse.[2]

Court records in our state courts are about to become electronic rather than paper documents. The questions confronting this Court about that change are no doubt numerous and complex. Many are technical; many relate to the inner workings of the court system and many relate to the criminal process. All the answers to those questions, and no doubt to many others, are beyond my ken.

One question about which I do know something is whether the business of the judicial system should be conducted in a way that places barriers in front of a member of the public seeking to learn something about a particular case or a particular party or a particular institution. There should be no such barriers unless they serve to protect a compelling privacy interest.

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[1] This Court, when sitting as the Law Court, deliberates in private but its decisions are public. The Governor deliberates in private when considering whether to sign or veto a bill but the decision is public and if it is a veto, there is often a public veto message.

[2] The practice of this Court, when sitting as the Law Court, of video streaming arguments is a welcome development.

One such area is that of medical privacy. Such is protected by HIPAA and the Maine Medical Privacy Act, *supra*. There are comparable protections, perhaps even stronger, for adoption and juvenile proceedings. The Legislature, and this Court when enacting rules, can protect those interests[3]

Let me provide some specific examples of where the Task Force is wrong focusing on areas of the law about which I know something. It has been suggested that the identity of defendants in forcible entry or foreclosure proceedings should be less available to the public that other defendants. The basis for this suggestion is that since those defendants are usually poor and without power this Court should help to hide their identity. Likewise, it should help to hide the identity of the presumably more wealthy and powerful who are seeking to evict those defendants or take their houses from them.

The wealthy and powerful can often afford what the poor and less powerful cannot afford: individuals to search public records in person. Why, when I do pro bono work, should I have to go to the courthouse to learn whether the landlord adverse to my client has been the subject of counterclaims for breach of warranty?[4] Does that serve the interests of justice and accountability? Why should lawyers such who represent homeowners in foreclosure actions be required to drive to the courthouse to learn whether the mortgagees who is adverse to their homeowner client has been found to violate the substantive and procedural rules in place for protecting homeowners? For that matter, why should my adversary not have the same ease of access to information about the tenant I am representing? If evictions and foreclosures were

[3] See Maine Rules of Evidence 502 *et seq*.
[4] One can imagine the line of people waiting to use the one (most likely) terminal in the already crowded courthouse to access our state version of PACER as recommended by the TFT.

conducted in federal court, all that information could be found by relying on PACER and its search capabilities.

My debt collector clients are the targets of thousands of lawsuits throughout the United States every year. Many are brought by a handful of lawyers. Often, the same plaintiff litigates numerous cases.[5] Many cases are brought in federal court. When I am hired after a client receives a demand, I can and do go on PACER and learn about the lawyer and maybe even the client of the lawyer who made the demand.[6]

Some on the Task Force were no doubt thinking of privacy. As noted above, the Legislature often takes action to protect privacy and those decisions can be incorporated into the litigation process by counsel.[7] But to argue, as some have, that there is a meaningful (for our purposes) difference between paper files and electronic files, ignores two basic facts of modern life. First, that difference is quantitative, not qualitative; the same information appears in each version. Second, for better or worse, that horse left the barn when the internet became an important part of our daily life.

Finally, to talk about privacy in this era of Equifax and Anthem and Facebook and Instagram and Twitter is somewhat misguided. Multiple trillion of bytes of our "private" data has been stolen from our own computers or from Equifax or Anthem by hackers, both individual, corporate and governmental. And multiple billions of more bytes of that private data has been

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[5] There are numerous websites operated by lawyers who regularly represent consumers. A Google search for "debt collector harassment" generates numerous links to those sites.

[6] The name Spickler may ring a bell. I recently defended a case he initially brought in state court which ended up in federal court. It would have been helpful in the extreme to have had the ability to do a "Spickler" search on the state court version of PACER rather than relying on "reputation" evidence and the like. Of course, PACER let me learn of the seven prior federal court cases in which Mr. Spickler had been involved.

[7] If a *pro se*, ignorant of the laws relating to medical privacy, asserts that his or her adversary has been diagnosed with such a such a disease, a clerk or opposing counsel or even the opposing *pro se* can take the necessary action to require redaction or sealing of a document. There might be a built in delay between efiling and the posting of the filed document on the system.

voluntarily exposed to the public eye by all the citizens who display their lives on social media so that their ex-spouses, ex-lovers, ex-employees, ex-employers and the like it can review it and retransmit it. With all due respect to the well intentioned authors of the Report, they are mistaken and this Court should reject their recommendations out of hand.

We should have a system that is fully transparent except in two instances. First, where the Legislature has told us that information should be private. Second, where a judge, after carefully considering the requests of one or more of the parties and considering the strong presumption favoring openness, chooses to conceal specific information from the public eye.

Ignorance may be bliss, at least for a while, in a young person's life. Not so much as a goal of public policy. The recommendations of the Task Force should be rejected. What happens in the courts of this State should be available to all the pubic with carefully crafted and very limited exception.

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