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**SUMMARY OF THE COMMENTS OF THE ARTS, ENTERTAINMENT AND  
SPORTS LAW SECTION OF THE DISTRICT OF COLUMBIA BAR IN  
RESPONSE TO A REQUEST FOR COMMENT ON PRIVACY AND PUBLIC  
ACCESS TO ELECTRONIC CASE FILES**

The Request solicits comments on plans to provide electronic access to case files through the Internet. The Request raises privacy concerns about some of the information contained in court filings. The Request considers various alternatives: one, the electronic files be the same as the courthouse files and privacy and other concerns continue to be handled on a case by case basis through sealing motions; two, the electronic files contain less information than the courthouse files with the information raising privacy concerns removed from the electronic version; or, three, more restricted access to the electronic files which would contain the same information as the courthouse files but with access to certain portions of the electronic file limited to, for example, court personnel, the parties and their counsel.

The Comments urge the Judicial Conference to follow the first alternative and continue the current case by case approach on sealing of sensitive information. The electronic files would contain the same information as the courthouse files. The information available would not depend on the method of storage, the means of access or the status of the individual seeking the information. This approach is consistent with the presumption of openness of court records and court proceedings recognized at common law and/or under the First Amendment. The interest of the judiciary is generally served when more information, not less, is available to the general public and, more particularly, reporters covering court proceedings. Information that raises legitimate privacy concerns can be adequately protected, as it is now, by sealing orders based on the specifics of the case.

**COMMENTS OF THE ARTS, ENTERTAINMENT AND SPORTS LAW SECTION OF  
THE DISTRICT OF COLUMBIA BAR IN RESPONSE TO A REQUEST FOR  
COMMENT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES\***

The Arts, Entertainment and Sports Law Section of the District of Columbia Bar respectfully submits these comments to urge the Judicial Conference to develop electronic access policies that maximize the ability of the public to obtain copies of judicial records over the Internet. The Comments were prepared by the Media Law Committee, which includes attorneys who routinely represent reporters and news organizations in newsgathering matters. We therefore have a keen understanding of the importance of keeping judicial files open and accessible and an appreciation for the enhanced possibilities for journalistic excellence that would accompany improved electronic dissemination of court records. The work that goes on in our nation's courts is of vital significance to all citizens, and it should receive more, not less, attention. The Judicial Conference should therefore press forward with policies to encourage the broadest possible distribution of court files and materials.

We realize that the Conference is only in the early stages of formulating policy in this area and thus does not yet have a particular proposal to put forward for comment. Of the various "scenarios" envisioned by the Conference in its Request for Comment, however, the Section endorses the continuation of the judiciary's present case-by-case approach to determining whether any portion of a judicial file should be sealed. Under this framework, court records are presumptively open, and any litigant or third-party may apply for a protective order in order to shield particular pleadings or other materials from public view. The ad-hoc balancing between First Amendment and common law rights of access with the legitimate privacy interests of litigants and third-parties is the most appropriate way to reconcile the presumption of openness with the case where privacy concerns require special solicitude.

The Media Law Committee is aware of the more detailed analysis submitted to the Conference by the Newspaper Association of America ("NAA"), The Washington Post, Gannett Satellite Information Network, Inc., Dow Jones & Company and other news organizations. We write separately to emphasize our commitment, as lawyers who often represent news organizations seeking access to court records, to maintaining transparency in the judicial system. We identify three key issues for the Judicial Conference to consider in devising its electronic access policy:

1. Legal Considerations

Included in the Request for Comment is a short description of the current state of access law prepared by the Office of Judges Programs. This recital of leading cases and authorities establishes that under the common law and/or the First Amendment a presumption exists in favor of access to judicial records. As the NAA letter explains, there is some conflict within

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\* The views expressed herein represent only those of the Arts, Entertainment and Sports Law Section of the District of Columbia Bar and not those of the D.C. Bar or its Board of Governors. The comments were prepared by Laura R. Handman of Davis Wright Tremaine LLP, Chair of the Media Law Committee, and Mark Bailen and Bruce Brown of Baker & Hostetler LLP.

the federal circuits as to the "nature and strength" of this presumption and what sort of showing is required to defeat it. Because the Judicial Conference is not at this time presenting a single, detailed policy option for comment, there are not any specific proscriptions to "test" under these common law and constitutional access principles. But we urge that any Judicial Conference policy that would have the effect of curtailing public access to court docket sheets and files on a wholesale basis would raise serious legal questions.

## 2. Public Policy Considerations

On the public policy front, one need do no more than point to Justice Burger's memorable phrase in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980) - "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing" - to highlight that the vitality of any democracy depends on the transparency of its public institutions. Open court records serve to educate the citizenry on the mechanics of our system of laws, thus creating a well-informed electorate and inspiring confidence in the impartial administration of justice. Because most members of the public are not able to routinely visit their local courthouses, the press's role is to function as the people's surrogate and monitor what transpires inside, from criminal trials to civil suits to bankruptcy proceedings. Access to court files is essential in order to provide the public an informed means of evaluating the basis for judicial action. The free press is the institution that transmits information from courtroom to family room. Limiting access to otherwise public files based on the mode of storage, the means of access or the status of the individual seeking it, would be impractical and without sound policy basis.

## 3. Journalistic Considerations

Media organizations consistently rely on court records as source material for news reports. Some of the most prized reportage in recent memory, to be sure, is contained in the NAA's list of news stories derived from judicial records. Journalists who cover the courts draw upon such records to assist them in both deadline reporting as well as longer, more in-depth investigations. Access to court records improves the all-around quality and accuracy of news journalism, values which the Judicial Conference is committed to fostering. Better access assures better accuracy. Electronic files, which can quickly survey a large pool of data, allows reporting that would otherwise be impossible whether it is reporting on patterns and practices of police forces, comparisons of sentencing burdens, recurring problems in product liability cases, trends in law enforcement, or otherwise undisclosed criminal histories of public figures or public officials. For this additional reason, both the federal judiciary and news organizations have a common interest in the construction a wide-spread system of electronic dissemination of court records.

We look forward to further opportunities to offer our comments and recommend that there be a public hearing, as the Judicial Conference develops its policy regarding access to electronic files.