JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
August 11, 2015

To
Members of the Court Technology Advisory Committee

From
Katherine Sher, Attorney,
Legal Services Office

Heather Anderson, Supervising Attorney,
Legal Services Office

Subject
Public comments received in response to rules proposal SPR15-03 – Access to Electronic Appellate Court Records

Action Requested
Please review for August 18 meeting

Deadline
August 18, 2015

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Introduction

Earlier this year, on the recommendation of the Joint Appellate Technology Subcommittee (JATS), the Appellate Advisory Committee (AAC) and Court Technology Advisory Committee (CTAC) recommended circulating for comment new rules addressing public access to electronic appellate court records, proposed rules 8.80 to 8.85. The proposed appellate rules are based on the existing rules regarding public access to electronic trial court records, rules 2.500 to 2.507, with some changes recommended by JATS to reflect the practices and needs of the appellate courts. The Judicial Council's Rules and Projects Committee approved that recommendation, and the proposal was circulated for public comment between April 17, 2015 and June 17, 2015. This memo discusses the public comments received.

Attached to this memo are the text of the proposed rules, reflecting, for the committee's consideration, minor changes from the proposed rules as circulated that are recommended by

JATS and have been considered and approved by the AAC. Also attached is a chart containing comments received in response to the Invitation to Comment and proposed responses. JATS considered these comments at its meeting on July 30, 2015. The AAC considered the comments, and JATS's recommendations made in response to the comments, at its meeting on August 4, 2015.

Public Comments

Comments from seven organizations were received, many of them lengthy and detailed with suggestions for specific changes. One commentator agreed with the proposal, three agreed if modified, two disagreed, and one suggested modifications but did not indicate a position on the proposal. The full comment chart, showing the full text of all comments received (with one lengthy comment attached separately) and staff's proposed committee responses, is attached. The main substantive comments and proposed responses are discussed below, but there are other comments and responses discussed only in the draft comment chart.

Second District Court of Appeal Comment

The Second District Court of Appeal objects to the second sentence of the definition of "court record" in proposed rule 8.82 (1), which states that "The term does not include the personal notes or preliminary memoranda of justices, judges or other judicial branch personnel." The Second District Court of Appeal argues that the references to "personal notes" and "preliminary memoranda" in this sentence could be taken to mean that some "notes" and "memoranda" are included in the definition of "court records." The commentator further notes that the first sentence of the proposed definition adequately lists the documents that are court records and that the second, potentially confusing, sentence is not needed.

JATS recommends against making the commentator's suggested change. In considering this comment, JATS noted that the sentence in question is taken directly from the definition of "court records" in rule 2.502(1), applicable to the trial courts, with the exception that the reference to "justices" was added. Neither the members of JATS nor staff are aware of any trial courts facing demands for the release of memoranda, draft rulings, or comments on draft rulings based on the language of rule 2.502(1). Moreover, if the rule adopted for the appellate courts were to move forward expressly removing this sentence, the difference between the two rules might raise questions as to the interpretation of rule 2.502(1).

The AAC, at its August 4th meeting, discussed whether the sentence in question should be moved to the Advisory Committee Comment. The AAC decided to keep the sentence in the rule itself, to keep the proposed appellate rule parallel to the trial court rule.

Courthouse News Service Comment

Courthouse News Service (CNS), a nationwide news service that focuses on court records, commented extensively from the perspective of a news organization needing frequent and timely access to court records for news-gathering purposes. CNS "found much to like" in the proposed rules, but raised concerns regarding proposed rule 8.85(b), which requires that if public access to electronic records is provided exclusively through a vendor, the contract must ensure that fees charged for access are reasonable.

General comments

CNS states generally that it is best if access to court records is provided directly rather than through a vendor. CNS suggests that access through a vendor raises issues as to control over access to the records and the fees charged for such access which can be avoided by a court providing access directly. CNS notes that many of the companies that provide e-filing services and access to electronic court records are part of larger organizations that also engage in news reporting activities, such as Thomson Reuters and LexisNexis. CNS states that a company that controls access to court records may gain an unfair advantage for its news reporting arm, which can instantly access the records without cost – while other news organizations get the information later, for a fee.

The proposed response to this general comment notes that at this time the issue of vendor control of electronic access to records is not relevant in the appellate courts. The electronic records now available to the public from the appellate courts (such as dockets and limited case information) are available directly from the courts. Over time, as electronic filing and electronic case records become more commonly used in the appellate courts, the appellate courts may begin using vendors to provide public access to those records. Whether additional rules are needed to govern agreements with those vendors, and what those rules should be, will be better determined when the appellate courts have had more experience with their own particular needs in using, and providing public access to, electronic court records.

With respect to the suggestion that additional subjects be added to the rules, the proposed committee response indicates that it is the committees' view that it is important that rules be put into effect governing access to electronic appellate court records now, so that there will be appropriate rules regarding public access to electronic records in effect as the appellate courts move towards more widespread use of e-filing. The experiences of the appellate courts with the implementation of the rules and of systems for public access to electronic records can be used to refine the rules in the future.. However, at this point, revising the proposed rules as suggested by CNS would only lead to delay in the adoption of any rules at all.

Proposal for limiting vendor control

Citing standards in effect in Georgia and Tennessee for vendors providing e-filing services, as well as contracts used by the Superior Court of San Francisco County and the Superior Court of Los Angeles County, CNS suggests specific language to be added to proposed rule 8.85 to limit vendor control over public access to documents. CNS's proposed added language states that a contract with a vendor must provide that the vendor is "prohibited from reselling, recombining, reconfiguring or retaining any copies of the court's electronic records or any portion thereof" other than as needed to provide the public access services agreed upon.

Rather than adding this language or any other language to proposed rule 8.85, JATS instead recommends deleting paragraph (b) from the rule entirely. JATS bases its recommendation on its understanding that at the present time, appellate courts provide public access to any electronic court records directly, not using vendors. Moreover, in the appellate courts' dealings with vendors used for e-filing services, the courts have maintained control over documents (as required by rule 8.75(c)). JATS thus believes that the promulgation of rules regarding requirements for vendor agreements is better left until the appellate courts have more experience with any issues that arise in providing public access to electronic court records, and can create rules based on that experience.

The AAC discussed JATS's recommendation at its August 4th meeting, and recommends adoption of the proposed rules with paragraph (b) deleted from rule 8.85. Members of the AAC noted that the appellate courts now provide only limited public access to electronic documents, allowing the public to access electronic records such as court calendars or case dockets, but not generally case documents. The appellate courts thus have not needed to use vendors to provide that access. As use of electronic court records becomes more widespread in the appellate courts, those courts may need to use vendors to provide public access to electronic records. However, the AAC agreed with JATS's recommendation to delete paragraph (b) from rule 8.85, noting that rule making relating to use of vendors for public access is better left until the appellate courts have had more experience with use of electronic records, and see what issues need to be addressed in providing public access to those records.

Proposals regarding fees for access

CNS raises three concerns as to vendors charging fees for access to public records. First, CNS notes that if a fee is charged for remote access to electronic records over the Internet, there should also be a way to access records at the courthouse without charge. Second, so as to ensure that members of the public and the press can get timely access to records, CNS notes that if there is a fee charged for remote internet access to newly filed records, there should be a way to access those records on the day they are filed without a fee being charged. CNS notes that in two

California trial courts, CNS has experienced the problem of newly filed records being uploaded after the court is closed for the day, so that these records are available online for a fee before they can be accessed for free at the courthouse the next day. Finally, CNS asks that fees for remote access be structured so that it remains affordable for frequent users of court records, such as members of the press.

CNS suggests two additions to proposed rule 8.85(b) to address these concerns. The first addition would state, as newly added 8.85(b)(1): "To the extent access to a court's electronic record is the exclusive means for the public to review that record, such access must be provided at no charge upon filing on public access terminals available at the courthouse." This proposed addition addresses both the issue of timely access and the concern that there be some means of public access to records without charge.

CNS's second proposed addition on the subject of fees would add language requiring that there be some fee option to allow those who need frequent access to get it without incurring excessive costs.

As discussed above, JATS recommends against CNS's proposed additions to rule 8.85 and instead recommends that paragraph (b) of that rule be deleted. The AAC, after discussion of the JATS recommendation, also recommends adoption of the proposed rules without any of the suggested additions, and with rule 8.85(b) deleted. At this time, the appellate courts are not using vendors to provide public access to records, and the suggested provisions, and the provisions of rule 8.85(b), are not needed. Until the appellate courts have more experience with their own implementation of public access to electronic appellate court records, it is difficult to say what issues will arise and how best to address those issues.

Comments of Orange County Bar Association and San Diego County Bar Association Regarding Proposed Rule 83(d)

The Orange County Bar Association (OCBA) notes that the title of rule 8.83 (d), "Remote electronic access allowed in extraordinary cases," has been changed from the title of the parallel trial court rule, 2.503(e), "Remote electronic access allowed in extraordinary criminal cases" and asks that the title be changed to correspond to the trial court rule. The San Diego County Bar Association (SDCBA) also addresses this rule, noting that, as circulated, it only applied to extraordinary criminal cases. SDCBA suggests adding language to the rule which would give an appellate court discretion to allow remote public access to records in other extraordinary cases

The intent of the committees in putting forward the proposed rule, as reflected in the Invitation to Comment, was that appellate courts be given broader discretion than trial courts to provide remote access to records not just in extraordinary criminal cases, but in other types of

extraordinary cases as well. The proposed rule as circulated, however, inadvertently kept the word "criminal" in the first sentence of rule 8.83(d).

JATS recommends that the word "criminal" be deleted from the first sentence of proposed rule 8.83(d) as the rule moves forward, as originally intended and as reflected in the Invitation to Comment memorandum. JATS discussed, at its July 30th meeting, whether this change should be deferred and an Invitation to Comment with the correct language of the rule circulated. JATS decided that this was unnecessary, as the Invitation to Comment on the rules proposal was clear with regard to the intent to give appellate courts discretion to allow remote access to case records in any of the case types listed in rule 8.83 (c)(2). The AAC agrees with the JATS recommendation and recommends that the word "criminal" be deleted from the first sentence of rule 8.83(d), and that the sentence accordingly should refer to rule (c)(2), rather than (c)(2)(E).

Comments of Orange County Bar Association and State Bar of California Standing Committee on the Delivery of Legal Services Regarding Absence of Rule Similar to Rule 2.507

OCBA suggests that the proposed appellate rules should include a rule similar to trial court rule 2.507. That rule lists specific types of information that must be included and excluded from those electronic records that are made available remotely and in bulk. In the trial court rules, rule 2.507's list of information to be excluded from these records serves as a protection against the release of sensitive information. The comment of the State Bar Standing Committee on the Delivery of Legal Services (SCDLS) also addresses the topic of providing protection against the release of such information. SCDLS specific suggestion is that the protections under 8.83(d), requiring that certain information be redacted when records are made available remotely in extraordinary criminal cases, should be extended whenever electronic information is made available to the public.

Prior to circulation of the proposed rules, JATS members discussed whether to include a rule similar to rule 2.507 in the proposed appellate rules. JATS recognized that the information that rule 2.507 requires to be included in electronic court calendars, indexes and registers of actions – to the extent the appellate courts have the information similar to that listed in rule 2.507(b) – is already included in appellate court online calendars and case dockets. Similarly, it was the view of JATS members that the information required to be excluded from electronic calendars, indexes and registers of actions is already excluded from online appellate court information. Thus, JATS did not believe the creation of an adapted version of rule 2.507 was necessary.

After discussion of the OCBA and SCDLS comments on this topic, JATS recommends against adding to the proposed appellate rules a rule similar to rule 2.507, or extending the redaction

requirements of rule 8.83(d)(2) to other records made available remotely. The members of JATS agreed that the proposed rule as circulated is adequate given the current practices of the appellate courts in making information available remotely and the proposed additions are not needed.

The AAC at its August 4, 2015 meeting agreed with JATS, and recommends adoption of the rule as proposed, without the commentators' suggested additions.

Other Orange County Bar Association Comments

The Orange County Bar Association (OCBA) made several other specific suggestions regarding the scope and language of the proposed rules:

- OCBA notes that the proposed rules do not cover electronic records in appeals to the superior court appellate divisions, which also do not appear to be covered by the rules regarding electronic records in the trial courts. JATS recommends that this be prioritized for future rule-making cycles. The AAC agrees with JATS and recognizes the need for such a rule to be promulgated in the future.

- OCBA asks for language to be added in a new rule 8.83(h) to match the trial court rule 2.503(i), encouraging the courts to make electronic records available at "public off-site locations." In the proposed appellate rules, this language was moved from the rule text into the proposed Advisory Committee Comment for rule 8.83. In its earlier discussions of the proposed new rules, JATS decided that this non-mandatory language was more appropriately the subject of a comment rather than being included in the proposed rule itself. JATS continues to recommend that the language remain in the Advisory Committee Comment. The AAC also recommends that the proposed rule, and Advisory Committee Comment, be adopted without the suggested change.

- OCBA points out that the proposed rules do not include a rule parallel to rule 2.505, applicable to contracts with vendors for the provision of public access to electronic records. Rule 2.505(a) requires that the vendor provide access and protect confidentiality as required by law or court order. Rule 2.505(b) further requires that the contract provide that the court owns the records and has the exclusive right to control their use. In discussions of these proposed rules prior to circulation, JATS recognized that the situation for the appellate courts contracting with vendors for records access services differs from that of the trial courts. While the fifty-eight trial courts might have many forms of contract and use many different vendors, the appellate courts will almost certainly all have the same contract with the same vendor, if a vendor is used at all, for access to records. In discussion of this comment, members of JATS also noted that these issues can appropriately be addressed in contract

negotiations with vendors. JATS recommends against adding a rule parallel to rule 2.505. The AAC also recommends that the proposed rules be adopted without this addition.

Other San Diego County Bar Association Comments

In addition to its comments regarding proposed rule 8.83(d), the San Diego County Bar Association (SDCBA) recommends a few relatively minor changes:

- SDCBA suggests adding the word "electronic" before "court records" in proposed rule 8.81(b). JATS recommends against this addition, and the AAC recommends adoption of the proposed rules without the change. The language of rule 8.81(b) is taken directly from existing rule 2.501(e). Thus, if any change were to be considered, changes to both the trial and appellate rules should be considered at the same time. In addition, the proposed rules, in some respects, discuss both electronic and non-electronic records.

- SDCBA suggests that e-mail addresses of parties, victims, witnesses and court personnel be included in the information required to be redacted from records to be made available online in extraordinary cases. As with many other aspects of the proposed appellate rules, the language at issue in rule 8.83(d)(2) is taken from the equivalent trial court rule, 2.503(e)(2). Making the change suggested by the SDCBA would thus result in the trial and appellate rules not being parallel on this point. In this case, however, JATS recommends that this minor addition be made to the proposed rule, as a common sense update to the list of information to be protected, and the AAC recommends adoption of the rule with the change. JATS and the AAC both further recommend that CTAC consider recommending a similar change to rule 2.503(e)(2) next year.

State Bar of California Committee on Appellate Courts and State Bar of California Standing Committee on the Delivery of Legal Services

The Committee on Appellate Courts (CAC) and the Standing Committee on the Delivery of Legal Services (SCDLS) raise similar concerns regarding whether the distinctions made in the proposed rules as to which records will be available remotely make sense in terms of either privacy protection or supporting the public's right to access public court records.

CAC notes that requiring courthouse access may impose a disproportionate burden on individuals in rural areas and those with limited financial resources, while failing to protect the privacy rights of litigants, as records will still be available to determined seekers of information. Moreover, CAC points out that the distinction between civil cases and other cases is not an adequate way to distinguish when records are likely to contain sensitive information. CAC asks that a more tailored approach to protecting particular information be considered.

Similarly, SCDLS questions whether the proposed rule "adequately balances interests in publicly available court records and interests in the protection of personal and private information," and asks for a more nuanced consideration of these issues before rules are put into effect.

In its discussion of these comments, JATS noted that the proposed rules are based closely on the trial court rules regarding access to court records that have been in effect for many years. These initial proposed rules are intended to build on the experience of the trial courts. When JATS considered these issues during the development of this proposal, it specifically decided that the appellate rules should generally follow the model of the trial court rules. JATS therefore recommends that the rules should move forward using the trial court model and that, if changes are considered in terms of what records should be available remotely, those changes should be simultaneously be considered for the trial and appellate rules. The AAC agrees with JATS's recommendation on this point, and does not recommend any changes to the proposed rules in response to these comments.

In addition to stating its general concerns and the suggestion, discussed above, that the protections under 8.83(d), requiring that certain information be redacted when records are made available remotely in extraordinary criminal cases, should be extended whenever electronic information is made available to the public, SCDLS makes several other specific suggestions:

- SCDLS argues that the term "mental health proceedings" in proposed rule 8.83(c)(2)(D) is unclear. JATS recommends against changing this provision, and the AAC agrees. The language at issue has not, to the knowledge of the committees, been a problem for trial courts in implementing the parallel rule.

- SCDLS asks for an addition to proposed rule 8.85(b) to require that fees charged by a vendor "promote equitable public access while covering the cost of providing access". As discussed above, in response to the comments of the Courthouse New Service suggesting additions to proposed rule 8.85, JATS recommends instead deleting paragraph (b) of that proposed rule. JATS found, and the AAC agreed, that issues relating to requirements for vendors who may eventually be used by the appellate courts to provide access to electronic court records are better left to be considered at a later time, when the appellate courts have had more experience with the use of, and need to provide public access to, electronic court records.

Superior Court of San Diego County

The Superior Court of San Diego County agrees with the proposal and asks that the rule drafters remain mindful of the importance of protecting the confidentiality of confidential documents, such as those in juvenile cases.

The Committee's Task

The committee is tasked with reviewing the rules proposal to create rules 8.80 to 8.85, including any public comments received in response to the proposed new rules, and:

- Asking staff or group members for further information an analysis;
- Recommending to RUPRO that all or part of the proposal be submitted to the Judicial Council for consideration during its October 27, 2015 meeting; or
- Rejecting the proposal.

Attachments

- Comment chart with proposed responses
- Language of proposed new rules 8.80 to 8.85, showing changes to the language circulated with the Invitation to Comment recommended by JATS and the AAC.

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 27, 2015

Title
Appellate Procedure: Access to Electronic Appellate Court Records

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rules 8.80-8.85

Recommended by
Appellate Advisory Committee
Hon. Raymond J. Ikola, Chair

Information Technology Advisory Committee
Hon. Terence L. Bruiniers, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2016

Date of Report
August 11, 2015

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Executive Summary

The Appellate Advisory Committee (AAC) and the Information Technology Advisory Committee (ITAC) recommend the adoption of new rules to address public access to electronic appellate court records. The proposed appellate rules are based on the existing rules regarding public access to electronic trial court records. The new rules are intended to provide the public with reasonable access to appellate court records that are maintained in electronic form while protecting privacy interests.

Recommendation

The AAC and ITAC recommend that the Judicial Council, effective January 1, 2016:

1. Adopt rule 8.80 to:

- State the purpose of the rules in the article as providing the public with reasonable access to appellate court records maintained in electronic form while protecting privacy interests; and

- State the benefits of public access to appellate court records maintained in electronic form; and

- State that the rules of the article do not create new rights of access to records.

2. Adopt rule 8.81 to state the application and scope of the new rules, applying only to records of the Supreme Court and Courts of Appeal, and only to access by the public.

3. Adopt rule 8.82 to define terms used in the new rules, including a definition of "court records" to reflect the types of records maintained by the Courts of Appeal.

4. Adopt rule 8.83 to:

    - Provide that all electronic records must be made reasonably available to the public in some form; and

    - Provide that electronic access, both remote and at the courthouse, will be provided to certain records including dockets or registers of actions, calendars, opinions, certain Supreme Court records, and records in civil actions if maintained in electronic form; and

    - Provide that access to certain documents in electronic form will be at the courthouse only, including any reporter's transcript for which the reporter is entitled to a fee and records in ten types of proceedings; and

    - In extraordinary cases, give appellate courts discretion to allow remote access to records that would not be otherwise be available remotely, with requirements for notice to be given to the parties and the public in advance and for certain information to be redacted from the records to be made available remotely; and

    - Limit electronic access to most electronic case records to be available only on a case-by-case basis, with bulk distribution allowed only of certain specified types of records;

5. Adopt rule 8.84 to set certain limitations and conditions on electronic access to appellate court records, including requirements for the means of providing access and requirements for notice to persons accessing records.

6. Adopt rule 8.85 to state that a court may impose fees for the costs of providing copies of electronic records.

The text of the proposed rules is attached at pages __-__.

Previous Council Action

The Judicial Council has not previously adopted rules relating to access to electronic appellate court records. However, the council adopted the predecessors to rules 2.500 to 2.506, the rules governing access to electronic trial court records, which served as the model for the proposed rules, effective July 1, 2002. The predecessor to rule 2.507, relating to electronic access to trial court calendars, indexes, and registers of actions, was addedeffective July 1, 2003. These trial court rules were amended and renumbered effective January 1, 2007. Some provisions have been added to these rules since that time, and other provisions have been amended.

Rationale for Recommendation

California Rules of Court, rules 2.500 to 2.507, address public access to electronic trial court records. These rules are intended to provide the public with reasonable access to trial court records that are maintained in electronic form, while protecting privacy interests. The rules address, among other things, what electronic trial court records can be made available remotely, what records may be made available only at the courthouse, what records can be made available in bulk, and what records can only be accessed on a case-by-case basis.

As more documents are electronically filed in the Courts of Appeal and Supreme Court and stored in electronic form, it is anticipated that questions will arise about public access to these electronic records. The committees are therefore recommending adoption of a set of rules to address public access to the electronic records of the Courts of Appeal and the Supreme Court. The proposed appellate rules are based on the trial court rules, but have some substantive differences based primarily on differences in the nature of the records maintained by trial and appellate courts and in existing public access to these records.

Criteria for remote access and bulk distribution

The proposed rules keep in place the basic scheme used in the trial court rules to determine which records must be made available remotely, where feasible, and which must be made available only at the courthouse; which records are to be made available only on a case-by-case basis; and which can be subject to bulk distribution.

As in the trial courts, electronic access to registers of actions, calendars, and indexes would be required to be provided both remotely and at the courthouse where feasible. In recognition of the current practices of the appellate courts, the proposed appellate court rule would also require remote and courthouse access to dockets, opinions, and specified Supreme Court records, as listed in proposed rule 8.83(b)(1). Bulk distribution of these records would be permitted under proposed rule 8.83(f).

The dividing line as to whether other types of electronic records would be made available remotely is drawn, as it is in the trial court rules, according to case type. In most civil cases, the appellate courts would be required, where feasible, to provide public access to electronic court records both remotely and at the courthouse under rule 8.83(b)(2). These records would only be available on a case-by-case basis, where the person requesting the record is able to identify the case by information such as the case number or a party's name.

In criminal cases, juvenile court cases, family law cases and other proceedings specified in proposed rule 8.83 (c)(2), remote access to case records (other than those listed in rule 8.83 (b)(1) such as calendars, dockets and indexes) would not be allowed. As with trial court electronic records, public access to these electronic appellate court records would be available at the courthouse only.

Under rule 8.83(d), however, a presiding justice or a justice assigned by a presiding justice would be given discretion to allow remote public access to records in a proceeding type listed under 8.83(c)(2) in a case of extraordinary public interest. In the trial court rule, the discretion to allow such access is limited to extraordinary criminal cases. The proposed appellate rule would give broader discretion to allow remote access in any of the types of proceedings listed in 8.83(c)(2).

Requirements for vendor contracts

In the trial court rules, rule 2.505 establishes requirements for any contract between a trial court and a vendor to provide public access to electronic records, including that the contract must provide that the court is the owner of the records and has the right to control their use. The proposed appellate rules do not contain a parallel provision. In developing the proposed appellate rules, ITAC and the AAC determined that it was not necessary to address issues relating to vendor contracts in the rules at this time. The current practice of the appellate courts is to provide access to electronic court records directly, through the courts.ca.gov website, rather than using vendors to create and maintain systems for access. Although it is possible that the appellate courts will begin to use vendors to provide public access when the use of electronic records becomes more common in those courts, it is likely that all of the appellate courts will use the same vendor and have the same contract. Thus it will be easier for the appellate courts to put in place appropriate controls on a vendor – as determined by the particular needs of the appellate courts – in the course of negotiating the single contract for those services.

Requirements for information to be included in and excluded from records made available remotely

The trial courts, under rule 2.507, are required to include certain information in calendars, indexes and registers of actions that are made electronically accessible to the public. Other information is required to be excluded from those records, including social security numbers, financial information, and victim and witness information. The proposed appellate rules do not contain a parallel provision. In developing the proposed appellate rules, ITAC and the AAC

found that the appellate courts, are already including the information required under rule 2.507 when dockets, registers of actions, and calendars are made available electronically. Some of the information required to be excluded from records under rule 2.507 – such as social security numbers – is excluded from the electronic records made available by the appellate courts. However, because the appellate courts make opinions available electronically, which by their nature may include certain kinds of information excluded under rule 2.507, such as information regarding the age or gender of parties, the requirements of rule 2.507 regarding information to be excluded cannot easily be adapted to apply to appellate court records. Because of these differences, and as the existing practices of the appellate courts have been adequate both to provide information to the public and to protect privacy, ITAC and the AAC did not include in the proposed appellate court rules a rule similar to 2.507.

Comments, Alternatives Considered, and Policy Implications

External Comments

This proposal was circulated from April 17, 2015 to June 17, 2015 in the regular spring 2015 comment cycle. Comments from seven organizations were received, many of them lengthy and detailed with suggestions for specific changes. One commentator agreed with the proposal, three agreed if modified, two disagreed, and one suggested modifications but did not indicate a position on the proposal. The full comment chart, showing the full text of all comments received (with one lengthy comment attached separately) and the committees' responses is attached at pages __-__.

Definition of "court record"

The Second District Court of Appeal objected to the second sentence of the definition of "court record" in proposed rule 8.82 (1), which states that "The term does not include the personal notes or preliminary memoranda of justices, judges or other judicial branch personnel." The Court commented that the sentence is unnecessary and could create confusion as to whether some notes and memoranda might be considered court records. This language in the proposed language is taken verbatim from trial court rule 2.502, and the committees have not heard of any difficulties in applying that rule in the trial courts. The committees therefore declined to revise the proposed rule as suggested, choosing to keep the appellate court rule consistent with the trial court rule.

Criteria for remote access

The State Bar of California's Committee on Appellate Courts (CAC) and the State Bar of California Standing Committee on the Delivery of Legal Services (SCDLS) questioned whether the distinctions made in the proposed rules as to which records will be available remotely, and which records only at the courthouse, make sense in terms of either privacy protection or supporting the public's right to access public court records. The CAC noted that the distinction between civil cases, in which records will generally be available remotely, and other types of cases including criminal, juvenile, and family law cases, is not an adequate way to distinguish when records are likely to contain sensitive information. Moreover, the line drawn between

remote access and courthouse access may place unfair burdens on residents of rural areas or others for whom it is difficult to get to a courthouse, while potentially allowing determined seekers to gain access to sensitive information. The SCDLS similarly asked for a more nuanced consideration of how to protect private information while maintaining public access to public records.

The committees declined to revise the proposed rules in response to these comments. The committees in their discussion of these comments noted that the proposed rules are based closely on the trial court rules regarding access to court records that have been in effect for many years. These initial proposed rules are intended to build on the experience of the trial courts. If changes are considered in the future as to what records should be available remotely, or as to restrictions on information available at the courthouse, the committee's view was that those changes should be simultaneously be considered for the trial and appellate rules

Remote access in extraordinary cases

Both the Orange County Bar Association (OCBA) and the Appellate Practice Section of the San Diego County Bar Association (SDCBA) commented on the scope of discretion given to appellate courts under proposed rule 8.83(d) to allow remote access to court records in extraordinary cases of case types where remote access would not generally be allowed. The intent of the committees in drafting the proposed rule was to give the appellate courts discretion to allow remote access in an extraordinary case of any type, where trial courts can do so only in extraordinary criminal cases. However, the word "criminal" was inadvertently left in the first sentence of proposed rule 8.83 (d) as circulated – although the Invitation to Comment was clear that the discretion was intended to extend to all case types.

OCBA accordingly commented that the title of proposed rule 8.83(d) should be "Remote electronic access allowed in extraordinary criminal cases" to reflect more accurately the language of the proposed rule. SDCBA commented that the rule should be revised to give discretion to allow remote access in certain other types of cases.

In response to these comments, the committees revised the rule to read as originally intended, and as summarized in the Invitation to Comment memorandum, deleting the word "criminal" from the first sentence of rule 8.83(d) and correcting the reference in that sentence from "Notwithstanding (c)(2)(E)" to "Notwithstanding (c)(2)".

Inclusion or exclusion of specific information from electronic records

OCBA suggested that the appellate rules should include a rule similar to trial court rule 2.507, which lists specific types of information that must be included in and excluded from those electronic records which are made available remotely and in bulk. In a similar vein, SCDLS suggested that the redactions required by rule 8.83(d) (2) when records are made available

remotely under the discretion granted in rule 8.83(d) should be applied whenever electronic court records are made available remotely.

The committees declined to make these changes to the rules, agreeing that the proposed rule as circulated is adequate given the current practices of the appellate courts in making information available remotely and that the proposed change is not needed. As discussed above, in developing the proposed appellate rules, the committees recognized, first, that the appellate courts currently include in those records made available remotely the types of information required to be included under rule 2.507. The committees further recognized that because of the types of case records made available remotely by appellate courts, the requirements of rule 2.507 regarding information to be excluded cannot easily be adapted to apply to appellate court records. Because of these differences, and as the existing practices of the appellate courts have been adequate to provide information to the public and to protect privacy, the committees declined to make these suggested changes.

SDCBA suggested that the e-mail addresses of parties, victims, witnesses and court personnel be included in the information required to be redacted from records to be made available online in extraordinary cases. Based on this comment, the committees have revised proposed rule 8.83(d)(2) to change "addresses and phone numbers of parties, victims, witnesses and court personnel" to "addresses, e-mail addresses and phone numbers of parties, victims, witnesses and court personnel".

Contracts with vendors

OCBA suggested that the appellate rules should include a rule similar to trial court rule 2.505, which sets certain requirements for contracts with vendors for the provision of public access to electronic services. As discussed above, in developing the proposed appellate rules, the committees recognized that the needs of the appellate courts with regard to vendor contracts differ from those of the trial courts. The committees expressly decided not to include provisions similar to rule 2.505 in the proposed appellate court rules as they believed such provisions were not needed. The committees therefore declined to make this suggested change.

Several commentators also suggested additions to rule 8.85 to address concerns regarding the use of vendors to provide public access to electronic court records, the control such vendors might exercise over those records and the fees that might be charged for access. Courthouse News Service (CNS), in particular, submitted extensive comments regarding issues of vendor control over access to records and the fees that might be charged for such access. CNS suggested several provisions to be added to rule 8.85 to put in place limits on vendor control of records, requirements for free public access to newly filed records, and a requirement for a fee option to allow frequent users of court records to get information without incurring excessive fees. SCDLS similarly suggested adding language to 8.85 (b) requiring that any vendor fees promote equitable public access.

In response to these comments, rather than adding any of the suggested provisions, the committees revised proposed rule 8.85 to delete paragraph (b) entirely. As noted above, at the present time, appellate courts provide public access to any electronic court records directly, not using vendors. The committees concluded that the promulgation of rules regarding requirements for vendor agreements for the appellate courts is not necessary at this time.

Alternatives Considered

In addition to the alternatives considered as a result of the public comments, discussed above, in developing these rules the committees considered a variety of alternatives with respect to the scope and proposed language of the proposed rules. The committees considered where the rules for the appellate courts should differ from those of the trial courts, and the rules as proposed reflect the decisions made with regard to those alternatives. For example, the committees considered whether the rules should provide for remote access only to those types of electronic records that are remotely accessible under the trial court rules, but decided that the proposed rules should reflect and maintain the current remote access to additional court records.

The committees also considered not proposing these rules at all. However, the committees concluded that it would be helpful to the public and the courts to clarify the scope of public access to electronic appellate court records.

Implementation Requirements, Costs, and Operational Impacts

This proposal should not impose significant implementation requirements on the courts because it mandates access to those electronic appellate court records that are already currently being made available electronically and, like the trial court rules, provides for further access only to the extent feasible. The proposed rules should provide guidance with respect to electronic access to appellate court records, which may reduce questions about such access for litigants and thus costs associated with inquiries about this access for both litigants and the courts.

Attachments and Links

1. Cal. Rules of Court, rules 8.80-8.85, at pages __-__.
2. Chart of comments, at pages __-__, including as an attachment the full comment of the Courthouse News Service.

Rules 8.80–8.85 of the California Rules of Court would be adopted, effective January 1, 2016, to read:

Article 6. Public Access to Electronic Appellate Court Records

Rule 8.80. Statement of purpose

(a) Intent

The rules in this article are intended to provide the public with reasonable access to appellate court records that are maintained in electronic form, while protecting privacy interests.

(b) Benefits of electronic access

Improved technologies provide courts with many alternatives to the historical paper-based record receipt and retention process, including the creation and use of court records maintained in electronic form. Providing public access to appellate court records that are maintained in electronic form may save the courts and the public time, money, and effort and encourage courts to be more efficient in their operations. Improved access to appellate court records may also foster in the public a more comprehensive understanding of the appellate court system.

(c) No creation of rights

The rules in this article are not intended to give the public a right of access to any record that they are not otherwise entitled to access. The rules do not create any right of access to sealed or confidential records.

Advisory Committee Comment

The rules in this article acknowledge the benefits that electronic court records provide but attempt to limit the potential for unjustified intrusions into the privacy of individuals involved in litigation that can occur as a result of remote access to electronic court records. The proposed rules take into account the limited resources currently available in the appellate courts. It is contemplated that the rules may be modified to provide greater electronic access as the courts' technical capabilities improve and with the knowledge gained from the experience of the courts in providing electronic access under these rules.

Subdivision (c). Rules 8.45–8.47 govern sealed and confidential records in the appellate courts.

Rule 8.81. Application and scope

(a) Application

The rules in this article apply only to records of the Supreme Court and Courts of Appeal.

(b) Access by parties and attorneys

The rules in this article apply only to access to court records by the public. They do not limit access to court records by a party to an action or proceeding, by the attorney of a party, or by other persons or entities that are entitled to access by statute or rule.

Rule 8.82. Definitions

As used in this article, the following definitions apply:

(1) "Court record" is any document, paper, exhibit, transcript, or other thing filed in an action or proceeding; any order, judgment, or opinion of the court; and any court minutes, index, register of actions, or docket. The term does not include the personal notes or preliminary memoranda of justices, judges, or other judicial branch personnel.

(2) "Electronic record" is a court record that requires the use of an electronic device to access. The term includes both a record that has been filed electronically and an electronic copy or version of a record that was filed in paper form.

(3) "The public" means an individual, a group, or an entity, including print or electronic media, or the representative of an individual, a group, or an entity.

(4) "Electronic access" means computer access to court records available to the public through both public terminals at the courthouse and remotely, unless otherwise specified in the rules in this article.

(5) Providing electronic access to electronic records "to the extent it is feasible to do so" means that electronic access must be provided to the extent the court determines it has the resources and technical capacity to do so.

(6) "Bulk distribution" means distribution of multiple electronic records that is not done on a case-by-case basis.

Rule 8.83. Public access

(a) General right of access

All electronic records must be made reasonably available to the public in some form, whether in electronic or in paper form, except sealed or confidential records.

(b) Electronic access required to extent feasible

(1) Electronic access, both remote and at the courthouse, will be provided to the following court records, except sealed or confidential records, to the extent it is feasible to do so:

(A) Dockets or registers of actions;

(B) Calendars;

(C) Opinions; and

(D) The following Supreme Court records:

i. Results from the most recent Supreme Court weekly conference;

ii. Party briefs in cases argued in the Supreme Court for at least the preceding 3 years;

iii. Supreme Court minutes from at least the preceding 3 years.

(2) If a court maintains records in civil cases in addition to those listed in (1) in electronic form, electronic access to these records, except those listed in (c), must be provided both remotely and at the courthouse, to the extent it is feasible to do so.

(c) Courthouse electronic access only

If a court maintains the following records in electronic form, electronic access to these records must be provided at the courthouse, to the extent it is feasible to do so, but remote electronic access may not be provided to these records:

(1) Any reporter's transcript for which the reporter is entitled to receive a fee; and

(2) Records other than those listed in (b)(1) in the following proceedings:

(A) Proceedings under the Family Code, including proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; child custody proceedings; and domestic violence prevention proceedings;

(B) Juvenile court proceedings;

(C) Guardianship or conservatorship proceedings;

(D) Mental health proceedings;

(E) Criminal proceedings;

(F) Civil harassment proceedings under Code of Civil Procedure section 527.6;

(G) Workplace violence prevention proceedings under Code of Civil Procedure section 527.8;

(H) Private postsecondary school violence prevention proceedings under Code of Civil Procedure section 527.85;

(I) Elder or dependent adult abuse prevention proceedings under Welfare and Institutions Code section 15657.03; and

(J) Proceedings to compromise the claims of a minor or a person with a disability.

(d) Remote electronic access allowed in extraordinary cases

Notwithstanding (c)(2)~~(E)~~, the presiding justice of the court, or a justice assigned by the presiding justice, may exercise discretion, subject to (e)(1), to permit remote electronic access by the public to all or a portion of the public court records in an individual ~~criminal~~ case if (1) the number of requests for access to documents in the case is extraordinarily high and (2) responding to those requests would significantly burden the operations of the court. An individualized determination must be made in each case in which such remote electronic access is provided.

(1) In exercising discretion under (d), the justice should consider the relevant factors, such as:

(A) The privacy interests of parties, victims, witnesses, and court personnel, and the ability of the court to redact sensitive personal information;

(B) The benefits to and burdens on the parties in allowing remote electronic access; and

(C) The burdens on the court in responding to an extraordinarily high number of requests for access to documents.

(2) The following information must be redacted from records to which the court allows remote access under (d): driver's license numbers; dates of birth; social security

numbers; Criminal Identification and Information and National Crime Information numbers; addresses, e-mail addresses and phone numbers of parties, victims, witnesses, and court personnel; medical or psychiatric information; financial information; account numbers; and other personal identifying information. The court may order any party who files a document containing such information to provide the court with both an original unredacted version of the document for filing in the court file and a redacted version of the document for remote electronic access. No juror names or other juror identifying information may be provided by remote electronic access. Subdivision (d)(2) does not apply to any document in the original court file; it applies only to documents that are made available by remote electronic access.

(3) Five days' notice must be provided to the parties and the public before the court makes a determination to provide remote electronic access under this rule. Notice to the public may be accomplished by posting notice on the court's website. Any person may file comments with the court for consideration, but no hearing is required.

(4) The court's order permitting remote electronic access must specify which court records will be available by remote electronic access and what categories of information are to be redacted. The court is not required to make findings of fact. The court's order must be posted on the court's website and a copy sent to the Judicial Council.

(e) Access only on a case-by-case basis

With the exception of the records covered by (b)(1), electronic access to an electronic record may be granted only when the record is identified by the number of the case, the caption of the case, the name of a party, the name of the attorney, or the date of oral argument, and only on a case-by-case basis.

(f) Bulk distribution

Bulk distribution may be provided only of the records covered by (b)(1).

(g) Records that become inaccessible

If an electronic record to which electronic access has been provided is made inaccessible to the public by court order or by operation of law, the court is not required to take action with respect to any copy of the record that was made by a member of the public before the record became inaccessible.

Advisory Committee Comment

The rule allows a level of access by the public to all electronic records that is at least equivalent to the access that is available for paper records and, for some types of records, is much greater. At the same time, it seeks to protect legitimate privacy concerns.

Subdivision (b). Courts should encourage availability of electronic access to court records at public off-site locations.

Subdivision (c). This subdivision excludes certain records (those other than the register, calendar, opinions, and certain Supreme Court records) in specified types of cases (notably criminal, juvenile, and family court matters) from remote electronic access. The committees recognized that while these case records are public records and should remain available at the courthouse, either in paper or electronic form, they often contain sensitive personal information. The court should not publish that information over the Internet. However, the committees also recognized that the use of the Internet may be appropriate in certain criminal cases of extraordinary public interest where information regarding a case will be widely disseminated through the media. In such cases, posting of selected nonconfidential court records, redacted where necessary to protect the privacy of the participants, may provide more timely and accurate information regarding the court proceedings, and may relieve substantial burdens on court staff in responding to individual requests for documents and information. Thus, under subdivision (e), if the presiding justice makes individualized determinations in a specific case, certain records in criminal cases may be made available over the Internet.

Subdivisions (e) and (f). These subdivisions limit electronic access to records (other than the register, calendars, opinions, and certain Supreme Court records) to a case-by-case basis and prohibit bulk distribution of those records. These limitations are based on the qualitative difference between obtaining information from a specific case file and obtaining bulk information that may be manipulated to compile personal information culled from any document, paper, or exhibit filed in a lawsuit. This type of aggregate information may be exploited for commercial or other purposes unrelated to the operations of the courts, at the expense of privacy rights of individuals.

Courts must send a copy of the order permitting remote electronic access in extraordinary criminal cases to: Judicial Council Support, Judicial Council of California, 455 Golden Gate Avenue, San Francisco, CA 94102-3688.

Rule 8.84. Limitations and conditions

(a) Means of access

Electronic access to records required under this article must be provided by means of a network or software that is based on industry standards or is in the public domain.

(b) Official record

Unless electronically certified by the court, a court record available by electronic access is not the official record of the court.

(c) Conditions of use by persons accessing records

Electronic access to court records may be conditioned on:

(1) The user's consent to access the records only as instructed; and

(2) The user's consent to monitoring of access to its records.

The court must give notice of these conditions, in any manner it deems appropriate. Access may be denied to a member of the public for failure to comply with either of these conditions of use.

(d) Notices to persons accessing records

The court must give notice of the following information to members of the public accessing its records electronically, in any manner it deems appropriate:

(1) The identity of the court staff member to be contacted about the requirements for accessing the court's records electronically.

(2) That copyright and other proprietary rights may apply to information in a case file, absent an express grant of additional rights by the holder of the copyright or other proprietary right. This notice must advise the public that:

(A) Use of such information in a case file is permissible only to the extent permitted by law or court order; and

(B) Any use inconsistent with proprietary rights is prohibited.

(3) Whether electronic records are the official records of the court. The notice must describe the procedure and any fee required for obtaining a certified copy of an official record of the court.

(4) That any person who willfully destroys or alters any court record maintained in electronic form is subject to the penalties imposed by Government Code section 6201.

(e) Access policy

A privacy policy must be posted on the California Courts public-access website to inform members of the public accessing its electronic records of the information collected regarding access transactions and the uses that may be made of the collected information.

Rule 8.85. Fees for copies of electronic records ~~access~~

~~(a) Court may impose fees for copies~~

The court may impose fees for the costs of providing copies of its electronic records, under Government Code section 68928.

~~(b) Fees of vendor must be reasonable~~

~~To the extent that public access to a court's electronic records is provided exclusively through a vendor, the contract with the vendor must ensure that any fees the vendor imposes for the costs of providing access are reasonable.~~

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All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	[Proposed] Committee Response
1.	Court of Appeal, Second Appellate District by Thomas Kallay, Managing Attorney	NI	The Second Appellate District of the Court of Appeal has reviewed the materials, including the Invitations to Comment, forwarded to us by your message of April 20, 2015. The Second Appellate District has one comment on subdivision (1) of proposed rule 8.82. Subdivision (1) of proposed rule 8.82 provides: "Court record" is any document, paper, exhibit, transcript, or other thing filed in an action or proceeding; any order, judgment, or opinion of the court; and any court minutes, index, register of actions, or docket. *The term does not include the personal notes or preliminary memoranda of justices, judges, or other judicial branch personnel.* It is the view of the Second Appellate District that the second sentence of subdivision (1) of proposed rule 8.82, shown by italics, should be eliminated. The references to "personal notes" and "preliminary memoranda" in the second sentence suggest that some notes and some memoranda would be accessible. This would be undesirable in that draft opinions and comments on draft opinions obviously need to be protected from disclosure. Apart from this consideration, the second sentence should be eliminated since it serves no purpose. The first sentence of subdivision (1) of proposed rule 8.82 satisfactorily lists documents that should be and	The language of the sentence in question in proposed rule 8.82, subdivision (1), is taken directly from existing Rule 2.502, subdivision (1), pertaining to electronic access to trial court records, except that a references to "justices" has been added. This sentence is meant to clarify that these materials are not court records and therefore will not be subject to the rules regarding electronic access to court records. The language of rule 2.502 has not, to the committees' knowledge, posed difficulties for the trial courts with regard to determining what materials are available for public access, nor have private notes or memoranda been made publicly accessible. Moreover, differences in wording between the rule applicable to the trial courts and the rule applicable to the appellate courts might inadvertently create difficulties for the trial courts by calling into question the interpretation of what materials are meant to be included in "court records." The committees therefore recommend against making the language of the proposed rule for the appellate courts different from that of the existing rule for the trial courts.

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	Commentator	Position	Comment	[Proposed] Committee Response
			in fact are now accessible to the public. The second sentence is surplusage.	
2.	Courthouse News Service by Rachel E. Matteo-Boehm	AM	See full comment, attached. The central points of the comment are summarized below in numbered paragraphs for reference in reading the responses given. 1. Courthouse News Service (CNS) begins its comment by noting that that its experience is that electronic access is "best performed by the court itself" and that in its view, ideally, the rule would not allow for vendor controlled access. CNS asks that the proposed rules address the two main concerns raised by use of vendors: vendor control over the public court record and both the amount of, and the circumstance under which a fee may be charged.	1. As a preliminary matter, the committees note, in response to CNS's general concerns regarding the use of vendor services for access to electronic records, that the electronic information currently available from the appellate courts is accessed directly through the courts.ca.gov website. At the present time, the appellate courts expect to provide access to electronic records directly, as they do for paper records. The committees view, therefore, is that it is not necessary to adopt rules relating to vendors at this time. In addition, the committees' view is that it is important to move forward now with adopting the proposed rules. Adoption of the proposed rules is critically important to provide standards for allowing appropriate access to electronic appellate court records. Courthouse News Service (CNS) raises issues which should be considered and addressed as the appellate courts move forward in implementing procedures for electronic access. However, under rule 10.22, substantive changes to the Rules of Court need to circulated for public comment before they may be recommended for adoption by the Judicial Council. Since these

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	Commentator	Position	Comment	[Proposed] Committee Response
				subjects were not addressed in the proposal that was circulated for comment, rules addressing these subjects cannot be recommended for adoption at this time. The committee's view is that, consideration of the suggested changes should not hold up the adoption of the rules that were circulated. As the appellate courts, the public, CNS and other news services gain experience with the new rules and with new procedures for access to electronic appellate court records, the concerns raised by CNS can be considered in light of that experience, and the rules amended as needed. Indeed, the Information Technology Advisory Committee is leading a two-phase Rules Modernization Project, which in its second phase of substantive revision will offer an opportunity for comprehensive review of the rules governing access to electronic court records in both the trial courts and the appellate courts. The committees can consider CNS's suggestions as part of that comprehensive review.
			2. With regard to the issue of vendor control over access to public records, CNS notes the issues that arise when a vendor providing e-filing and e-access services to a court is also a part of a larger organization that engages in news reporting – for example, LexisNexis. These organizations may be able to use their access to and control over court records to gain a competitive advantage over other news organizations, because they have earlier access to information and can get it at no cost. CNS gives examples of standards and contracts used	2. The committees' view is that because the appellate courts are not currently using vendors to provide public access to records, the proposed addition is not necessary at this time. For the same reason, the committees further recommend that paragraph (b) of proposed rule 8.85 be deleted from that rule. As noted above, the electronic information currently available from the appellate courts is accessed directly through the courts.ca.gov website. At the present time, the appellate courts expect to continue to provide access to electronic records directly, rather than

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	Commentator	Position	Comment	[Proposed] Committee Response
			by trial courts in California and by courts in other states to prevent e-filing and e-access vendors from using their position to gain such a competitive advantage, and proposes language that would prohibit a vendor from "reselling, recombining, reconfiguring, or retaining any copies of the court's electronic records" except as called for by the agreement. 3. With regard to the fee related issues, CNS asks for two specific additions to the proposed rule: First, a new rule 8.85 (b)(1) would require that courthouse access be available, upon filing,through public access terminals at the courthouse at no charge. 4. Second, CNS proposes that rule 8.85(b)(2) be added to require that there be an option to allow frequent users of court records to access them without excessive cost.	through a vendor. 3. As noted above, the committees recommend against the suggested addition and recommend that paragraph (b) of rule 8.85 be deleted from that rule. 4. As noted above, the committees recommend against the suggested addition and recommend that paragraph (b) of rule 8.85 be deleted from that rule.
3.	Orange County Bar Association by Ashleigh Aitken, President Newport Beach	AM	1) The proposed rules do not appear to cover electronic records for small claims appeals & appeals of limited jurisdiction cases which are heard in the superior court [see Rule 8.81(a)]; those appeals are also not covered by the trial court rules found at Rules 2.500 - 2.507; those records must be addressed somewhere or a new set of rules adopted for them. (2) Rule 8.83 "Title" should be changed to "Remote electronic access allowed in extraordinary criminal cases" to match Rule	1) The committees appreciate this suggestion and intend to undertake consideration of rules to govern access to electronic records (as well as electronic filing) in the appellate divisions of superior courts. 2) As noted in the Invitation to Comment, proposed rule 8.83(d) is intended to allow an appellate court discretion to provide remote access

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	Commentator	Position	Comment	[Proposed] Committee Response
			2.503(e) and to more accurately describe that subsection.	to additional court records not only in extraordinary criminal cases but in other extraordinary cases as well. However, the proposed rule was inadvertently circulated without striking the reference to "criminal" in the language borrowed from rule 2.503(e) to achieve this broader application. The committees recommend that rule 8.83(d) be adopted as intended and as reflected in the Invitation to Comment memorandum, deleting the word "criminal" from the first sentence of rule 8.83 (d).
			(3) Language should be added under a new Rule 8.83(h) that matches existing Rule 2.503(i) concerning a requirement that the Courts should encourage the availability of electronic access "at public off-site locations"; no reason exists for downplaying this encouragement for appellate courts while keeping it for trial courts.	3) The language of rule 2.503(i) encouraging public off-site access is incorporated into the Advisory Committee Comment on proposed rule 8.83.
			(4) The language from existing Rule 2.505 concerning "Contracts with Vendors" should be included somewhere in these appellate court rules as no valid reason can exist for excluding these requirements for appellate court vendors.	4) Please see the response to the comments of Court News Service above. The committees recommend that the proposed rules be adopted without adding a rule parallel to Rule 2.505. The committee note that public access to electronic appellate court records is currently provided through the courts and contracting with a vendor to provide this service in not contemplated at this time. The committees view, therefore, is that it is not necessary to adopt rules relating to vendors at this time. In addition, the committees recognized that the situation for the appellate courts contracting with vendors for records access services will differ from that of the trial courts.

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				While the fifty-eight trial courts might have many forms of contract and use many different vendors, all of the appellate courts will likely have the same contract with the same vendor, if a vendor is used, for access to records. Committee members noted that, in the event that a contract with a vendor is contemplated, the issues addressed in rule 2.505 for trial court contracts with vendors can be addressed in the appellate courts' negotiations with vendors. 5) The committees recommend against adding a rule parallel to rule 2.507 to this proposal. The current practices of the appellate courts with regard to the electronic information now made available to the public are in line with the requirements of the proposed addition. The committees therefore did not find it necessary to add an appellate rule similar to rule 2.507.
			(5) Similar language from existing Rule 2.507 for trial courts must be added as may be modified for appellate court actions since as proposed there is no language about the "intent" of these rules, the "minimum contents" for certain court records, and the "excludable information" not allowed to be accessible through those electronic records (protections for both the courts and the parties/participants are required).	
4.	San Diego County Bar Association, Appellate Practice Section by Victoria E. Fuller, Chair	AM	The Appellate Practice Section (formerly the Appellate Court Committee) of the San Diego County Bar Association appreciates the opportunity to comment on the latest proposed revisions to the California Rules of Court and, in particular, changes to the rules regulating civil appellate practice. We continue to support the Appellate Advisory Committee's ongoing effort to refine the Rules for the benefit of judges, appellate practitioners, and unrepresented litigants. In our comments below, we suggest modest modifications and identify a	

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	Commentator	Position	Comment	[Proposed] Committee Response
			few issues for further consideration. Our section approves of the new rules specifically addressing public access to electronic appellate court records. We understand that these proposed new rules are based on the existing rules addressing public access to electronic trial court records. We offer two minor revisions and suggest two substantive changes to the proposed rules: • The first and second sentences of proposed Rule 8.8l (b), should be revised to include the word "electronic" before the term "court records": • Under Rule 8.81(d)(2), the information to be redacted from records to which the court allows remote public access should include the Email addresses of parties, victims, witnesses, and court personnel. This appears to be just an oversight in the proposed rule. • Substantively, it appears Rule 8.83(d) does not provide a procedure for the court to exercise	The committees recommend against the suggested change to proposed rule 8.81(b). The language of the proposed rule as circulated is taken directly from rule 2.501(b). Moreover, in some places the proposed rules make reference to non-electronic court records. This appears to be a reference to proposed rule 8.83(d) (2). Again, the language of the proposed rule is taken directly from the parallel trial court rule, rule 2.503(e). Here, however, the committees agree that adding e-mail addresses to the list of information to be redacted is a sensible change. To address this concern, the committees have revised their proposal, in proposed rule 8.83(d) (2), to change "addresses and phone numbers of parties, victims, witnesses and court personnel" to "addresses, e-mail addresses and phone numbers of parties, victims, witnesses and court personnel". As noted above in the response to the comment by the Orange County Bar Association, the proposed

	Commentator	Position	Comment	[Proposed] Committee Response
			its discretion. We suggest that the proposed rule include language stating that a motion may be presented. For example, the first sentence of Rule 8.83(d) could be revised to read (underscored language added): "Notwithstanding (c)(2)(E), by written motion or on the court's own motion, the presiding justice of the court ..." • Finally, Rule 8.83(d) should be revised to allow the presiding justice of the court, or a justice assigned by the presiding justice, to exercise discretion, subject to (e)(l), to permit remote electronic access by the public to all or a portion of the public court records in not only an individual criminal case under subdivision (c)(2)(E), but also in civil harassment proceedings, workplace violence prevention proceedings, and postsecondary school violence prevention proceedings addressed under (c)(2)(F), (G), and (H). The rationale for permitting remote access to criminal proceedings in high publicity cases applies with equal force to these quasi-criminal proceedings. In such an instance, the judicial officer should have the discretion, in a particular individual proceeding, to allow online public access.	rule was intended to give the appellate court discretion to allow remote access in any of the case types listed, but the limitation to criminal cases was inadvertently left in the language of the rule as circulated from the parallel trial court rule used as a model for this rule. As noted above in response to the comments of the Orange County Bar Association, committees recommend that rule 8.83(d) be adopted as intended and as reflected in the Invitation to Comment memorandum, deleting the word "criminal" from the first sentence of rule 8.83 (d)
5.	State Bar of California Committee on Appellate Courts by John Derrick, Chair	N	The Committee supports generally the principle of providing the public with "reasonable access" to appellate court records that are maintained in electronic form, but opposes the Rule's proposal to institute a bifurcated system wherein most	The committees appreciate the concerns raised by the Committee on Appellate Courts and are sensitive to the need to find an appropriate balance between the privacy rights of litigants and the public interest in making court records.

	Commentator	Position	Comment	[Proposed] Committee Response
			civil records are made available remotely whereas records in other types of cases (notably criminal, juvenile, and family court matters) are limited to in-court access. The Committee believes that if the Court of Appeal or Supreme Court intends to make a judicial record publicly available, the California Rules of Court should not make certain types of records more difficult to access than others. Requiring the public to travel to a courthouse to access certain types of records threatens to impose a disproportionate burden on individuals in rural areas and those with the fewest financial resources. It also is a dubious strategy for protecting the privacy rights of litigants. While the rule makes it more tedious for the public to access a document in certain types of cases, it does nothing to actually prevent a motivated member of the public from accessing the underlying information. The Committee also notes that the rule's distinction between civil cases on the one hand, and criminal, juvenile, and family court matters on the other hand appears extremely overbroad. Certain criminal, juvenile, and family court matters include the filing of documents with sensitive information, but others do not. Likewise, civil matters also may involve the filing of sensitive personal information. Despite imposing greater access restrictions on certain types of matters, the rule does not appear narrowly tailored to the public interest in	accessible. As the appellate courts move towards modernization of their systems to allow more widespread e-filing of documents it is critical that guidelines be in place regarding access to electronic appellate court records. In creating the proposed rules on this subject, the committees looked to the rules already in place for the trial courts regarding access to electronic court records. These rules have proved over many years to provide a workable framework for the courts. The proposed rules for the appellate courts seek to build on the success of the rules for access to electronic court records in the trial courts, allowing for possible later amendment based on the experience of the public and the appellate courts with the implementation of these proposed rules. Although a general dividing line between access to electronic records in civil cases and access to electronic records in the other types of proceedings listed in proposed rule 8.83(c)(2) may be an imperfect means of balancing these interests, the proposed adoption of these rules is based on a record of workability in the trial courts. The committees' view is that if an alternate approach to establishing a dividing line is to be considered, it should be considered for both the trial and appellate rules at the same time. In the meantime, as noted in the responses above, the committees urge adoption of these rules to facilitate access to electronic access as the appellate courts modernize their records systems. Further changes can be made later, perhaps as part

	Commentator	Position	Comment	[Proposed] Committee Response
			protecting individual privacy. It bears noting that although a 2002 report drafted for the Conference of Chief Justices on public access to judicial records contemplated that certain records might be made electronically available at the courthouse but not online, it cautioned that such a restriction should be limited to discrete categories of information such as identifying information for victims in criminal or domestic abuse cases, photographs of involuntary nudity, and medical records. *See* Nat'l Ctr. for State Courts, *Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts* 39-44 (2002). The Committee encourages the drafters of the rule to consider a more tailored approach like that contemplated by the CCJ report and/or to explore further alternative methods identified in the CCJ report for protecting private information, such as remote access by subscription. *See id*. at 41-42.	of the ongoing Rules Modernization Project, to refine the distinctions made as to which records can be accessed remotely and which not.
6.	State Bar of California Standing Committee on the Delivery of Legal Services by Maria C. Livingston, Chair	N	<u>Does the proposal appropriately address the stated purpose?</u> No. The proposal adds new rules on public access to appellate court records of the Supreme Court and Courts of Appeal. The rules attempt to balance providing the public with reasonable access to records, while also protecting privacy interests that may be compromised with unlimited remote access. Therefore, the rules distinguish between records that would be available remotely and at the courthouse, and	

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All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	[Proposed] Committee Response
			records that would only be available at the courthouse. SCDLS recommends that the rules be redrafted with additional consideration and explanation of issues outlined in the additional specific comments below. Major issues include whether the rules adequately balance interests in publicly available court records and interests in the protection of personal and private information. In addition, some "line drawing" in the proposed rules, regarding the treatment of different categories of information, would benefit from additional clarification and explanation. **Additional Specific Comments** In general, SCDLS believes additional development may be needed to ensure that the rules more effectively attain the twin goals of providing for public access to court records and protecting individual privacy. In proposed rule 8.83(c) (courthouse access only), a large number of terms are not defined by reference to statute or otherwise, including "mental health proceedings." The rule is thereby unclear. The lack of clarity may make it difficult for a court to follow, as well as for a litigant to predict how the records would be treated. For example, is a mental health disability discrimination case a "mental health proceeding"? The committee's rationale for	With regard to the general concern as to whether the distinction made in the proposed rules as to which records will be made available remotely strikes the correct balance between privacy concerns and access concerns, please see response to comment by the State Bar Committee on Appellate Courts. With regard to the use of the term "mental health proceedings" in proposed rule 8.83(c)(1)(D), the committees note that this language is taken verbatim from the trial courts (in rule 2.503 (c)(4)) The committees are not aware that any difficulties have arisen in the trial courts with respect to the use of this term. The committees' view is that if a definition is to be considered, it should be considered for both the trial and appellate rules at the same time.

	Commentator	Position	Comment	[Proposed] Committee Response
			selecting the particular proceedings that are exempt from remote access also appears unclear. Without such a rationale, the list contains some items that seem somewhat arbitrary. As to proposed rule 8.83 generally, the Judicial Council may want to consider whether the protections of private information in subdivision (d) (extraordinary disclosure of criminal records) – requiring redaction of personal, financial and health information – should apply more broadly to all publicly available information in electronic case records. Consideration should also be given to whether such privacy protections should apply equally to information obtained remotely and at a courthouse. There is a risk that the court may underestimate the extent to which case-by-case access and courthouse-only access may nevertheless be subject to data mining, invasion of privacy, and bulk distribution. The court's rule against bulk distribution, alone, may be readily circumvented by simply transmitting one case at a time, and in any event if the rule is broken there may be no effective remedy for the person whose personal data was mined. To ensure equitable access by members of the public and to prevent unreasonable charges to the public by private contractors, the Judicial Council is encouraged to consider modifying Rule 8.85(b) as follows: To the extent that public access to a court's electronic records is	As discussed above in response to the comment of the Orange County Bar Association suggesting that the proposed rules include a rule parallel to rule 2.507, the committees found that the current practices of the appellate courts are in line with the requirements placed on the trial courts, as to the information included in and excluded from electronic records made available remotely, and that a rule on the subject is not needed. Specifically as to Standing Committee's suggestion that the requirements for redaction under proposed rule 8.83(d)(2) apply to all publicly available information in electronic records, the committees note that the structure of the proposed new rules as to when the requirement for redaction applies is taken directly from the trial court rules. Based on the experience of the trial courts, the committees did not find it necessary to extend the protections of rule 8.83(d)((2). If the rules are adopted as proposed, and issues arise, the appellate courts can later consider whether changes are needed based on their experience in implementing the rules and providing public access to electronic records. Please see the response to the comments of the Courthouse News Service regarding proposed rule 8.85 (b), above. The committees' view is that because the appellate courts are not currently

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			provided exclusively through a vendor, the contract with the vendor must ensure that any fees the vendor imposes for the costs of providing access are reasonable and promote equitable public access while covering the cost of providing access.	using vendors to provide public access to records, the addition suggested by the Standing Committee on the Delivery of Legal Services is not necessary at this time. For the same reason,the committees further recommend that paragraph (b) of proposed rule 8.85 be deleted from that rule.
7.	Superior Court of San Diego County by Michael M. Roddy, Executive Officer San Diego	A	Our court would like to emphasize the need to make sure that confidential documents, such as juvenile cases, remain confidential. We recognize the proposal does address this, but wanted to make sure this requirement was at the forefront of the drafters' consideration when making any additional changes to this rule.	The committees appreciate the commentator's reminder with regard to the importance of maintaining the confidentiality of confidential documents.

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June 17, 2015

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VIA HAND DELIVERY

Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102-3688

Re: Comments of Courthouse News Service on Proposed Rules on Access to Electronic Appellate Court Records

Dear Sir/Madam:

On behalf of Courthouse News Service, we respectfully submit these comments and suggestions in response to the invitation to comment by the Judicial Council of California on the proposed rules related to Access to Electronic Appellate Court Records (SPR 15-03) ("Proposed Rules").

I. Introduction

Courthouse News Service is a nationwide news service that focuses on the court record, from the initial pleading through judgment and appeal. Its more than 3,000 subscribers include law firms in California and throughout the nation, as well as other media outlets, such as the Los Angeles Times and San Jose Mercury News, putting Courthouse News in the position of a pool reporter. On a national level, Courthouse News has a greater number of reporters covering courthouses than any other media outlet. Its web site, www.courthousenews.com, is updated daily with staff-written articles and columns and averages about 1 million readers per month. In recent months, Courthouse News has been credited as the source for stories by media outlets such as The Wall Street Journal, the Washington Post, and many others.

As a news service that focuses on the court record, Courthouse News is keenly interested in any proposed rules related to access to electronic court records, including appellate records. In reviewing the Proposed Rules, Courthouse News found much to like. However, it did identify one area of concern, namely, Proposed Rule of Court 8.85, which provides, in subsection (b), that "[t]o the extent that public access to a court's electronic records is provided exclusively through a vendor, the contract with the vendor must ensure that any fees the vendor imposes for the costs of providing access are reasonable."

As a preliminary matter, it has been Courthouse News' experience that public access to court records is best performed by the court itself, rather than by a vendor. There are several reasons for this, but the most important are the practical control over the court record that a court loses when a vendor controls that record, coupled with the higher user fees for access that tend to be charged by vendors (who by their very nature are seeking to maximize their profits). To this end, ideally, the proposed rules would not allow for vendor-controlled access systems at all.

However, to the extent a decision is made to allow courts to make their electronic records available exclusively through a vendor, at the very least the rules should address the two main issues that make in-house public access the preferred option: (1) vendor control over the public court record; and (2) the amount of, and circumstances under which, a fee may be charged.

Courthouse News is aware that the Proposed Rules are in many respects similar to the Rules of Court already in place for access to electronic trial court records. *See* Rules of Court 2.500-2.507. The concerns noted below are not unique to appellate records, but rather are informed, in large part, by Courthouse News' experience over the years in accessing electronic trial court records, including in California under Rules 2.500-2.507.

II. Vendors As Electronic Public Access Providers

The scope of a vendor's permitted use of court records is a serious issue, and becomes even more important when a court's chosen vendor – or its affiliates – are also engaged in news reporting activities. For example, the vendors currently active in the court records space include Thomson Reuters Court Management Solutions, formerly LT Court Tech, which is part of one of the world's leading publishers of legal information through Thomson Reuters' Westlaw division; Journal Technologies, Inc., which represents the merger of three smaller case management vendors – Sustain Technologies, ISD Corporation and New Dawn – and is owned by the Daily Journal Corporation, publisher of legal newspapers in California and Arizona; and LexisNexis, also one of the world's leading publishers of legal information, including offerings such as alerts and trackers through its CourtLink division.

It is important to keep in mind that the nature of the media and news reporting has changed dramatically in recent years. Whereas reporting about the courts used to be the exclusive domain of traditional print and broadcast media outlets, media entities reporting news and information about the courts now include a variety of electronic publishers that can instantly transmit information to targeted audiences.[1] Accordingly, news reporting about the courts now includes not only more

[1] As recently noted in The Guardian, "News nuggets are back and new gatekeepers emerging as we hark back to the days of the SMS text alert." Emily Bell, *Apple Watch Highlights the Need for Shorter News As Screen Sizes Shrink*, The Guardian, April 26, 2015, *available at* http://www.theguardian.com/media/media-blog/2015/apr/26/apple-watch-shrinking-news-apps. Indeed, many traditional news organizations are keenly aware of the importance of finding ways to push news alerts and other breaking news products to

traditional in-depth reports about high-profile cases, but also summaries or alerts of what was filed in a given court on a given day or the latest developments in a case. These are often referred to euphemistically as "value-added services."

In those instances where a single private vendor acts as the electronic gatekeeper for the public court record – where copies of court records pass through or reside on the vendor's computer servers as part of a case management or e-filing system, or where the same vendor provides remote public access – that vendor also has priority access to the public court record. This control is valuable, especially for those vendors that also act as electronic publishers, because it gives them a virtually insurmountable advantage over their competitors in the news media in two ways: (1) timing and (2) cost.

With respect to timing, the chosen vendor will always be the first to receive the court records (including both the documents themselves and docket information about filings and case events), simply by virtue of its position with the court. Moreover, it receives those records in an electronically readable form that can be instantly analyzed and used to prepare and disseminate news reports to subscribers in a matter of minutes. Conversely, competing news entities must manually review these records (whether on paper or on a public access computer terminal), take notes, and create a news report, all of which takes time and means that the competing news entity is always "scooped" by the vendor. [2]

Similarly, with respect to cost, the vendor gets not only instantaneous access to court records, but access without charge, with those records delivered directly to the vendor's electronic doorstep. In contrast, competing media entities must either pay a fee to the very vendor they're competing with

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their audiences. For example, The New York Times, NBC News, Fox News, BBC News and The Guardian now all offer various alert products and options to their readers so they can stay abreast of breaking news – from emailed alerts to SMS messages to Twitter updates. As The Guardian explained, "It's an incredibly exciting time for news organisations to explore new and better ways to reach their audiences. And breaking news is the key editorial area where this is most important." Mario Andrade, *Extra! Extra! Rethinking the Guardian Breaking News Experience*, The Guardian, April 28, 2015, *available at* http://www.theguardian.com/info/developer-blog/2015/apr/28/extra-extra-rethinking-the-guardian-breaking-news-experience.

[2] More than ever, with the explosion of the Internet, "real-time reporting [has become] more prevalent." Peter Funt, *The Newswatch Never Stops – Nor Should It*, The Wall Street Journal, Jan. 21, 2011, at A13. "News outlets and individual reporters risk losing their relevance and their readerships if they fail to get stories up and out there in real-time." Elana Kirsh, *Untangling the Web: the 24-Minute News Cycle*, The Jerusalem Post, March 10, 2012, available at http://www.jpost.com/OnTheWeb/Article.aspx?id=286473. To "stand apart" in the competitive business of specialized news, one must "start[] earlier, writ[e] more and publish[] faster." Binyamin Appelbaum, *Joe Weisenthal vs. the 24-Hour News Cycle*, The New York Times, May 10, 2012, *available at* http://www.nytimes.com/2012/05/13/magazine/joe-weisenthal-vs-the-24-hour-news-cycle.html?pagewanted=all.

for remote access, or send a reporter to the courthouse on a continual basis to review newly e-filed records, a significant cost that the vendor does not have to bear.

In short, giving a vendor that also engages in news reporting a preferential position with respect to access to the court record, whether as part of a case management, public access or e-filing system, is no different than telling the local newspaper that it can control the door to the courthouse and will always have a head start – at a lower cost – in reporting newsworthy new civil cases than all other media outlets.[3]

These concerns have come to fruition in other courts where publishers have control of one or more components of the court's computer system. A prime example is the Delaware Court of Chancery, which has an e-filing system built around what was formerly LexisNexis' File & Serve arm (which was acquired in 2012 by a third-party group and re-named File & ServeXpress). In a 2009 email blast advertising its "Reduced Pricing for Delaware Superior Court Documents" and its alert service – which, for a fee, provided instant notification when a lawsuit against a particular defendant had been filed – Lexis boasted, "Remember, File & Serve has these documents first because we are the Court's official e-filing provider." This notice was a clear exploitation of the vendor's unfair advantage, and in any instance where an e-filing or case management system vendor is also given control over public access, this inequality will always be a serious risk.

To address this risk, many state and local judicial entities are taking affirmative steps to ensure there are safety mechanisms in place, i.e., through court rules and/or contractual provisions, that limit what vendors who have access to electronic court records can do with court information and records that pass through their systems. As experience has shown, it is not enough for the contract to simply state that the court is the owner of its records and has the right to control their use, as existing Rules of Court currently require for contracts with vendors for trial court records. *See* Rule 2.505(b). Rather, the contract must make clear that the vendor may not use the court records for any purpose other than the service it is providing to the court. For example:

- Georgia's Statewide Minimum Standards for Electronic Filing, effective September 25, 2014 ("Georgia Minimum Standards"), provide that a vendor may be authorized to conduct e-

[3] It is fundamental that the government may not grant one media entity preferential access to the court record. *See Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095 (C.D. Cal. 2003) (city violated First Amendment by giving television station exclusive access to an official city event while requiring other broadcasters to rely on a video feed); *accord, e.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (trial court "erred in granting access [to discovery materials] to one media entity and not the other"); *American Broadcasting Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) ("once there is ... participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable"); *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) ("All representatives of news organizations must not only be given equal access, but within reasonable limits, access with equal convenience to official news sources.").

filing only if the vendor "disclaims any ownership right in any electronic case or document or portion thereof, including any commercial right to resell, recombine, reconfigure or retain any database, document or portion thereof transmitted to or from the court." (§ 4(b))

- Tennessee Supreme Court Rule 46 prohibits e-filing vendors from "providing any fee-based services related to the e-filed documents." (Subsection B.4)

- A contract between the California Superior Court for the County of San Francisco and LexisNexis specifies that "Contractor shall not permit access to, release or distribute copies of case filings and document submissions retained in its system," except to the parties and Court users, and that "Contractor shall not provide access to or release Court records, official or unofficial, directly or indirectly, except as expressly authorized by the Court." (¶ 18)

- A contract between the California Superior Court for the County of Los Angeles and Journal Technologies, Inc., for case management services provides, "LASC Data shall be and remain the property of LASC and LASC shall retain exclusive rights and ownership thereto. The data of LASC shall not be used by Contractor for any purpose other than as required under this Agreement, nor shall such data or any part of such data be disclosed, sold, assigned, leased, or otherwise disposed of to third parties by Contractor or commercially exploited or otherwise used by or on behalf of Contractor, its officers, directors, employees, or agents." (§ 20.10)

Copies of these standards, rules and contracts are enclosed for your reference.

As the foregoing demonstrates, more and more courts recognize the importance of ensuring that vendors may not use their preferential position with respect to the electronic court record to gain an unfair advantage in disseminating information about courts. With this in mind, Courthouse News respectfully suggests that Proposed Rule 8.85 be amended to add language similar to that used in the Georgia Minimum Standards, as follows:

Rule 8.85. Fees for electronic access

* * *

(c) To the extent that public access to a court's electronic records is provided exclusively through a vendor, the contract with the vendor must ensure that the vendor is prohibited from reselling, recombining, reconfiguring, or retaining any copies of the court's electronic records or any portion thereof, other than in connection with providing the public access services pursuant to the agreement.

III. Fees for Access

Whether access is provided by a vendor or the court itself, Courthouse News does not necessarily oppose charging a reasonable fee for the convenience of remote access over the Internet, so long as three concerns are addressed. *First*, to the extent a fee is charged for remote access over the Internet, there must also be some way for interested members of the press and public to access court records at the courthouse itself free of charge. *Second*, to the extent a fee is charged for remote access to newly filed court records, there should be some way for the press and public to review those records on the day they are filed without paying a fee. And *third*, any fee for remote access over the Internet should be structured in a way that makes it affordable to members of the press who have a legitimate and frequent need to access court records.

As currently drafted, the Proposed Rules fail to address these three concerns, and Courthouse News respectfully submits that the Proposed Rules should be amended accordingly.

First, as currently drafted, the rules allow a vendor to impose a fee for access to electronic records under all circumstances, even if that access is provided via a public access terminal at the courthouse itself, and even if those records are not available for review in paper form, such as an e-filed record. *See, e.g.*, Proposed Rules 8.85(b) ("To the extent that public access to a court's electronic records is provided exclusively through a vendor, the contract with the vendor must ensure that any fees the vendor imposes for the costs of providing access are reasonable."); 8.82(2) (defining "electronic record" as "a court record that requires the use of an electronic device to access," including, inter alia, e-filed records). While it is one thing to impose a fee to review records remotely over the Internet, respectfully, imposing a fee to simply look at a public court record, without any alternative for a free review, is presumptively unconstitutional.

Second, to the extent public access to electronic court records is provided free of charge via computer terminals at the courthouse, but for a fee over the Internet, care must be taken to avoid a situation in which records are available online for a fee before they may be reviewed free of charge at the courthouse itself, in effect imposing a fee for timely access to newly filed court records while only providing free-of-charge access on a delayed basis. This issue can arise if, for example, a court uploads newly filed electronic records after the courthouse has closed for the day, so that the only way to review newly filed court records on the same day they are filed is remotely over the Internet, with fees that can quickly add up. Indeed, this exact problem has arisen in at least two of California's trial courts. There are several ways to address this issue, including waiving any remote access fees for newly filed court records, such as those filed within the past 24 hours.

Third, to the extent that records can be viewed free of charge at the courthouse but a fee is assessed to review those same records remotely over the Internet, Courthouse News respectfully submits that the fee should be structured in a way that it does not become cost-prohibitive for journalists to perform their traditional role of reviewing newsworthy case records on a daily basis as they flow into the court. This problem arises when even seemingly modest fees are assessed to review

records on a per-document or per-page basis. While such fees may not impose an undue burden on members of the public who only need to see a few documents on an occasional basis, they quickly add up for news organizations such as Courthouse News that have a frequent and legitimate need to review court records, with the effect that paid online access can become cost-prohibitive. Such a result would seem to be contrary to public policy, which should ***encourage*** press review of court records. *See, e.g., Cox Broad. Co. v. Cohn*, 420 U.S. 469, 492 (1975) ("in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations").

There are a couple of different ways to address this concern. One way is to provide remote access to newly filed appellate court records free of charge. A second way is to offer a subscription-based fee for remote access, such as a reasonable monthly fee for unlimited remote access. Either set-up ensures that traditional free access at the courthouse continues, while giving journalists the ability to easily and conveniently access court records over the Internet so that they may provide information about new cases and case developments to the public.

With these three concerns in mind, Courthouse News urges the judiciary to amend the Proposed Rules as follows:

> Rule 8.85. Fees for electronic access
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> * * *
>
> (b) To the extent that public access to a court's electronic records is provided exclusively through a vendor, the contract with the vendor must ensure any fees the vendor imposes for the costs of providing access are reasonable. In addition:
>
> > (1) To the extent access to a court's electronic record is the exclusive means for the public to review that record, such access must be provided at no charge upon filing on public access terminals available at the courthouse.[4]

[4] *See, e.g.*, Georgia Minimum Standards, No. 3(d), which provides, "The clerk ensures that electronic documents are publicly accessible upon filing for viewing at no charge on a public access terminal available at the courthouse during regular business hours." In addition, the Advisory Committee note to Proposed Rule 8.85(b) could clarify that in situations where the court is unable to provide electronic public access at the courthouse itself to court records filed late in the day because the court has closed its doors to the public for the day, but those records are available via remote access after hours, fees for remote access to those records will be waived for a period of time – for example, for 24 hours after filing, or until the court opens for business the following day.

(2) To the extent the vendor is permitted to impose a fee for the cost of providing access remotely over the Internet, there must be an option available to members of the public who have a frequent need to access records to do so without incurring excessive costs, such as through subscription-based fees.[5]

IV. Conclusion

Courthouse News greatly appreciates the consideration of its views on these matters. To the extent you have any questions, or would like to discuss these comments further, please do not hesitate to contact us.

Respectfully submitted,

Rachel E. Matteo-Boehm
On behalf of Courthouse News Service

cc: Courthouse News Service

[5] Alternatively, the instruction in suggested Proposed Rule 8.85(b)(2) could be provided as part of an Advisory Committee note to Proposed Rule 8.85.