STATE OF MINNESOTA
IN SUPREME COURT
No. C4-85-1848

Comments of the Silha Center for the Study of Media Ethics and Law on the Preliminary Recommendations of the Minnesota Supreme Court Advisory Committee on Rules of Public Access to Records of the Judicial Branch.

The Silha Center for the Study of Media Ethics and Law submits the following comments on the Preliminary Recommendations on Rules of Public Access to Records of the Judicial Branch.

The Silha Center is a research center located within the School of Journalism and Mass Communications at the University of Minnesota. Its primary mission is to conduct research on and promote the understanding of legal and ethical issues affecting the mass media. The Center also sponsors an annual lecture series, hosts forums, produces a newsletter and other publications, and provides information about media law and ethics. More information about the Center can be found at its website: www.silha.umn.edu.

SUMMARY

The Silha Center applauds the underlying presumption of the Advisory Committee's Preliminary Recommendations: court records are public documents and should be accessible to the public. This presumption plays a central role in maintaining the legitimacy of our legal system by providing the public with information about the system in general, and with the opportunity to examine the courts' actions in particular cases and controversies. The Advisory Committee's commitment to chart a course toward greater remote access to court records is an important affirmation of the principle that public information should be accessible to all.

The first tentative steps toward embracing remote access appear in Rule 8, subd. 2(a)(1-4). The commentary to Rule 8, subd. 2, demonstrates the Advisory Committee's view that the move toward some remote access is a "measured step" that eventually will lead to greater remote access as public opinion and technology permit. But the Silha Center questions whether such a piecemeal approach is necessary, for the following reasons.

- Information that is public in one format should not become confidential when it is converted to another format.
- Redacting court records is feasible using current technology.
- Remote access to court records would reduce administrative burdens on court administrators, not increase them. Once an effective redaction process is adopted, persons seeking court records will not have to burden court personnel with in-person requests for access and copies.

The Silha Center also would endorse:

- Changes in the rules to provide information about the existence of records that are not public documents under Rule 5 (specifically subd. 6-8), and Rule 6.
- The proposal (proposed Rule 11) to grant immunity to court administrators who inadvertently release nonpublic information. This immunity would prevent court administrators from overzealously withholding public information out of fear of liability.

However, commendable as these proposals are, the Advisory Committee's Preliminary Recommendations do not go far enough. They will dramatically limit the

public information available through remote access. The Advisory Committee apparently fears that making public records available on the Internet will raise compelling privacy concerns that can be addressed only by restricting access to public documents. The restrictions set forth in the Preliminary Recommendations, however, are inconsistent with common-law and Constitutional presumptions of public access to court records. They should be replaced with a clear commitment to provide remote access to all otherwise public court records.

The government should not withhold entire categories of public information based on theoretical fears about possible "misuses" of that information. By emphasizing hypothetical problems associated with full remote access to court records, the Advisory Committee undercuts the overriding public benefit of such access, a benefit that has been repeatedly acknowledged by the courts themselves. In specific cases, where clearly articulated dangers exist, judges may exercise their prerogative to seal parts of court records. But a blanket exclusion of certain types of public information from remote access violates the presumption of openness.

The Advisory Committee's Preliminary Recommendations create the strong impression that making court records available to the public serves a valuable public purpose only if the public's opportunity to examine that information is limited to courthouse records rooms. In situations where it is asserted that current law and procedure governing access to paper records are inadequate to protect privacy, the solution is to change the law and procedure regarding all records. Attempting to solve these perceived problems by allowing access to the paper records while restricting remote access to those same records makes no sense. The Silha Center would encourage the

Advisory Committee, in its final report, to adopt a policy of full remote access to court records that are currently available in paper form.

I. PRESUMPTIONS OF ACCESS TO COURT PROCEEDINGS AND COURT RECORDS ARE SUPPORTED BY COMMON LAW AND CONSTITUTIONAL PRINCIPLES.

a. The common-law presumption.

The public enjoys a presumptive right of access to court documents. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn. 1986). In *Schumacher*, the Minnesota Supreme Court said that this right of access is "considered fundamental to a democratic state and is based on the principle that what transpires in the courtroom is public property." 392 N.W.2d at 202 (internal citations and quotation marks omitted). This presumption of access controls unless a party seeking to restrict access to specific court records can assert a countervailing interest against disclosure that is strong enough to overcome *both* the public interest in release of the documents *and* the strong presumption in favor of access. *Id*.

b. The Constitutional presumption.

The First Amendment guarantees a right of access to criminal proceedings and related documents. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("Press-Enterprise II"); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

The legitimacy of the criminal justice system depends on the ability of the public to observe and evaluate for itself government actions that may deprive individuals of their liberty and, in some states, their lives. Such observation and evaluation is possible only through the broadest public access to criminal proceedings and the documents related to those proceedings. Chief Justice Burger summed up this interest in *Richmond*:

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. at 572.

A court seeking to overcome the Constitutional presumption of access must make specific findings that withholding documents is necessary to protect a compelling government interest. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press-Enterprise I"). Even where such a government interest exists, courts may withhold only those portions necessary to protect the interest. *Id.*

c. The Preliminary Recommendations do not state specific countervailing interests that are strong enough to overcome the presumptions of access.

The Advisory Committee's Preliminary Recommendations appear to be based on the assumption that Internet access to otherwise public court records would promote identity theft and harassment. These fears are speculative at best, and fall far short of the specific findings of harm required under the Constitutional presumption of openness discussed above. They also lack the specificity and concreteness necessary to outweigh the public interest in open court records and the strong presumption in favor of access described in *Schumacher*. Moreover, the Minnesota Supreme Court has held that the risk that the state may inadvertently disclose confidential information is not sufficient to justify withholding other, nonconfidential information. *Minnesota Medical Ass'n v. State*, 274 N.W.2d 84, 91 (Minn. 1978).

Even assuming that the possibility of "misuse" of public information poses a genuine threat, it is the job of the legislature, not the courts, to define and take steps to prevent illegal acts. Furthermore, other less Draconian remedies exist, such as the implementation of "verify and correct" procedures mentioned on page 4 of the

Preliminary Recommendations, and increased emphasis on effective and thorough correction and redaction procedures, such as those described in the alternative formulation of Rule 7, subd. 5. The appropriate method to avoid the inadvertent release of erroneous or non-public information contained in otherwise public documents is not to withhold documents, but to make sure that non-public information is redacted from the document before it is made public, and that erroneous information is identified and corrected as swiftly as possible.

The advent of fully computerized "electronic courthouses" will eliminate the need to limit Internet availability to documents generated by the court itself, as proposed in the Advisory Committee Note to Rule 8, subd. 2. Electronic filings by parties will be easily redactable using existing technology readily available to those who prepare and submit them. The Silha Center encourages the Advisory Committee to address this aspect of law office and courtroom records technology in its final report.

II. THE GOVERNMENT MUST PROVIDE EQUAL PUBLIC ACCESS TO RECORDS.

Just as the government may not pick and choose among persons requesting access to government documents, *see generally Minneapolis Star & Tribune Co. v. State*, 168 N.W.2d 46, 48-49 (Minn. 1968), neither should the government pick and choose the method of release of public records. This approach is consistent with holdings of the Minnesota Supreme Court. *See, e.g., Minnesota Medical Ass'n*, 274 N.W.2d at 88-89 ("[W]hether records are 'public records' depends not on the form in which they are kept but on whether they are necessary to a 'full and accurate knowledge' of official activities."). The assertion that remote access to otherwise public information should be

limited creates the impression that, in the Advisory Committee's view, making government information public is theoretically desirable, but only on the condition that very few members of the public actually can see it. The practical effect will be to provide discriminatory access to commercial brokers and others who have the means to make repeated trips to the courthouse, while limiting the access enjoyed by other members of the public, contrary to democratic principles.

III. THE PRELIMINARY RECOMMENDATIONS GIVE SHORT SHRIFT TO THE ADVANTAGES PROVIDED BY REMOTE ACCESS TO COURT RECORDS.

a. Broader availability of court records advances the public interest.

Rule 8, subd. 1 dramatically limits remote access to court records, despite the fact that the information withheld from remote access is publicly available at the courthouse. Although wholesale disclosure of some of the information categorically excluded from remote access (such as social security numbers and financial account numbers) conceivably might implicate legitimate privacy concerns, other information, such as addresses and telephone numbers, does not. But the central issue is not whether the Preliminary Recommendations exempt too much or too little information from remote access, but whether a different standard for remote access is justifiable in the first place. The Silha Center believes that it is not.

Public access to court records enhances public knowledge of the legal system and protects the legitimacy of the system by reducing any possible public perception of deception or injustice. And if access to public information in a court clerk's office or courthouse records room serves important interests – a proposition universally recognized

by the courts – then surely easier access to that same information must only increase the benefits realized by making court records available to the public.

b. Remote access increases the chances that errors will be identified and corrected.

The Advisory Committee asserts that errors are more likely to occur in records that are available for remote access. It is unclear, however, why this would be so. Although it is true that more people will see errors or mistakenly released information if those errors are posted on the Internet, the Minnesota Supreme Court has said that such risks are not sufficient to bar release of public documents. *See Minnesota Medical Ass'n,* 274 N.W.2d at 91. Moreover, the Advisory Committee fails to fully consider the potential benefits of exposing erroneous information in court files to the public. As more people are able to gain access to court records, it is more likely that interested parties or members of the public will see or otherwise become aware of the error. That, in turn, increases the likelihood that the error will be brought to the court's attention and corrected, rather than being allowed to remain indefinitely in the paper files. The Silha Center encourages the Advisory Committee to recognize this potential benefit of providing remote access to court records.

IV. THE GOVERNMENT SHOULD NOT USE PUBLIC RECORDS AS A REVENUE-GENERATING DEVICE.

The Advisory Committee's decision to leave unchanged Rule 8, subd. 6, which would allow the government to levy "commercially reasonable" fees for access to public documents that have commercial value, is ill-advised. The Silha Center agrees with the minority viewpoint, which proposes limiting fees to the actual costs of providing the data.

Such a policy is more consistent with the presumption of access to public documents, and will not force individuals to rely on commercial ventures or other well-financed organizations to serve as clearinghouses (and filters) for such bulk data.

By viewing public documents as potential profit centers, the Advisory Committee apparently discounts the compelling interest in providing meaningful access to court records. The Preliminary Recommendations would erect a significant barrier between the public and the information it needs in order to maintain confidence in government institutions such as the courts. The Preliminary Recommendations would drive another wedge between the government and the governed, as a practical matter restricting access to public information for the average citizen, while allowing those who can afford to pay a premium full access. This proposal runs directly counter to core democratic principles and should be rejected.

V. THE COMMITTEE'S "PRACTICAL OBSCURITY" JUSTIFICATION DOES NOT APPLY TO PRIMARY-SOURCE MATERIALS SUCH AS COURT RECORDS.

The Silha Center disagrees with the Advisory Committee's assertion that court records should enjoy "practical obscurity" as discussed by the Supreme Court in *Reporters Committee for Freedom of the Press v. Department of Justice*, 489 U.S. 749, 763 (1989). In *Reporters Committee*, the Court considered whether FBI computerized "rap sheets" – compilations of otherwise public records from jurisdictions all over the country – should be disclosed under the Freedom of Information Act. Here, however, the question is whether the court's own records – records made public by both common law and Constitutional principles, and that the *Reporters Committee* Court would have

deemed "freely available," *Id.* – should be disclosable through remote access. This is a crucial distinction that should not be ignored by the Advisory Committee.

VI. INCREASED USE OF ELECTRONIC FILING SYSTEMS MEANS THAT RESTRICTING PUBLIC ACCESS TO PAPER RECORDS WILL DRAMATICALLY CURTAIL MEANINGFUL PUBLIC OVERSIGHT OF THE LEGAL SYSTEM.

Courtrooms across the country are becoming computerized. Legal technology companies tout products that will permit cases to be filed and managed without generating paper documents.

New York Times reporter Sherri Day wrote about the trend in her May 29, 2003, article, "All Rise (and Power On)." Day cited Professor Frederic Lederer of William and Mary Law School, who helped develop an electronic courtroom project at the law school. Lederer, Day wrote, "foresees a substantial increase in remote appearances by trial judges, lawyers and witnesses. More evidence will also be presented electronically, he said, and entire court cases and exhibits will be filed over the Internet."

The full text of Day's article is included as Appendix A.

As courtrooms move toward greater automation and computerization of cases, paper records will cease to provide the kind of full and complete access to trial records that the public needs. In fact, it is likely that paper records will eventually cease to exist at all. Accordingly, the presumption of access will be preserved only if expansive electronic remote access is available.

The Advisory Committee's Preliminary Recommendations appear to treat remote electronic access to court records as a luxury, rather than a soon-to-be necessity. The

Silha Center encourages the Advisory Committee to address this issue in its final report by acknowledging that remote access must be expansive if meaningful public access to court records is to be preserved.

Other information on so-called "electronic courtrooms" can be found at: www.pamd.uscourts.gov/docs/elec-cr.pdf; www.courtroom21.net; and www.verilaw.com.

VII. CONCLUSION

For all of the foregoing reasons, the Silha Center encourages the Advisory Committee to modify or delete those aspects of the Preliminary Recommendations, proposed rules and notes that would limit remote access to otherwise public records. And it encourages the Advisory Committee to add language that either embraces full remote access, or sets forth a detailed plan for making such access possible.

The Silha Center appreciates the opportunity to share its views with the Advisory Committee, and would be pleased to provide further comment, including by participating in future public hearings.

Respectfully submitted,

Jane E. Kirtley, Director, and Silha Professor of Media Ethics and Law
Doug Peters, Silha Fellow
Silha Center for the Study of Media Ethics and Law
111 Murphy Hall
206 Church Street S.E.
Minneapolis, MN 55455
(612) 625-9038
kirtl001@tc.umn.edu
pete2412@umn.edu

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APPENDIX A

The New York Times, May 29, 2003

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May 29, 2003, Thursday, Late Edition - Final
Correction Appended

All Rise (and Power On)

By SHERRI DAY

AS Judge Lewis A. Kaplan took his seat in Courtroom 12D in United States District Court in Manhattan, the plaintiff's lawyer sheepishly raised a question. He needed help connecting a laptop that contained a PowerPoint presentation that a witness would use during questioning. A court clerk sprang into action, and minutes later the cover page of the witness's presentation appeared on the courtroom's monitors.

As a result of an initiative by federal and state judges, Judge Kaplan's courtroom is one of many across the country where computer technology is becoming as much a fixture as the American flag.

When lawyers present and summarize a case, they need to do it "in a way that people now expect to see information presented to them," said James E. McMillan, a management consultant in technology services at the National Center for State Courts, a nonprofit organization in Williamsburg, Va. "We are a TV generation now."

These days, opening and closing arguments are often augmented with PowerPoint

presentations and video clips from depositions that jurors can view on monitors in the jury box. Through audio conferencing, foreign language translators in remote locations can take part in courtroom proceedings.

In some cases, the courtroom itself is becoming outdated. More courtroom proceedings occur through videoconferences in which a camera transmits a judge's image to lawyers in offices elsewhere.

At a recent trial in Chattanooga, Tenn., in which Tyson Foods was acquitted of charges of smuggling immigrants, lawyers for the company and the federal government wore tiny wireless microphones on their lapels that amplified their voices. In Judge Kaplan's federal courtroom in Manhattan, lawyers who approach the judge's bench for a sidebar conversation are unlikely to be overheard by jurors because the judge can activate sound-neutralizing white noise in the jury box from a touch-screen panel that controls the court's audio and visual equipment.

The amount of evidence presented in court has increased strikingly in the last 40 years, Judge Kaplan said, and improved technology makes it easier for jurors to sift through the information.

"The benefit is that it makes the trial go a lot faster and thus enables us to do more in the same amount of time, and it is much clearer to the jury to be able to get information this way," Judge Kaplan said. "When it's well used, the juries love it."

Judge Kaplan is a member of a committee of the Judicial Conference of the United States that makes recommendations about improving technology in the federal courts. According to the Courtroom 21 Project, an experimental and demonstration site for students at the College of William and Mary law school in Virginia that is a testing ground for such technology, one-quarter of the courts in the nation's 94 federal districts have at least one high-tech courtroom. Such a courtroom is defined as one with advanced electronic presentation systems; real-time court reporting, in which court reporters' notes are available as they type; digital audio recording; and Internet access that allows the judge to research legal and administrative materials from the bench.

In Judge Kaplan's courtroom, which was outfitted last year, the jury box has nine flat-screen computer monitors that are shared by the jurors. Flat-screen monitors also sit on the desks of lawyers, the judge, the court clerk and the witness stand. The 15-inch monitors display evidence from the lawyers' laptops and serve as television screens when VHS tapes or digital clips are played. Judge Kaplan posts his instructions to the jury on the monitors rather than reading them out loud. (He still reads the jury its charge, however.)

Minutes before a hearing began in Judge Kaplan's courtroom last week, the court clerk, Andrew Mohan, offered to show lawyers how to operate the courtroom equipment. Eight lawyers surrounded a presentation machine, an electronic imaging device that functions as a projector but also has a video camera on top that allows exhibits like weapons to be

shown on monitors in the courtroom.

"Just put your object there on the screen underneath the camera," said Mr. Mohan, placing a ring of keys on the screen to demonstrate. The keys instantly appeared on four monitors on the lawyers' tables and on a 42-inch plasma screen.

The lawyers need only master two buttons, one for zooming in on an object and another that shows it at a distance, Mr. Mohan said. With the presentation machine, lawyers no longer have to walk around the courtroom to display evidence.

Highlighting capabilities on the flat-screen monitors at the lawyers' lectern and in the witness box allow information to be entered into evidence quickly. Lawyers and witnesses can use their fingers to underline or circle text or images. The highlighted document appears immediately on the monitors throughout the courtroom and is entered into evidence after it emerges from a small printer beneath the lawyers' lectern. Ballpoint pens and markers are no longer needed.

"I'm a big believer in technology in the courtroom," said Kathleen M. McKenna, a partner with the New York law firm of Proskauer Rose who recently tried a case in Judge Kaplan's courtroom. "I think jurors expect it. They're used to talking heads with things moving behind them. They're used to seeing bulleted points even when they see magazine news shows."

Ms. McKenna added, "Lawyers who don't come prepared to use the technology do their clients a disservice and, in the eyes of the jurors, appear less prepared and less sophisticated."

Courtrooms will probably never have the latest equipment because technology is always evolving and is too expensive for the government to try to keep up, said Judge John Robertson, a federal judge in Washington who heads the Judicial Conference's information technology committee. "It doesn't sound like space-age stuff, but I tell jurors that what they see -- for the judiciary -- is state of the art," he said. "For the rest of the world, it's pretty ordinary."

Federal and state judges are keeping a close watch on developments at Courtroom 21, the experimental court at William and Mary, which is said to be the most technologically developed courtroom in the country. Founded in 1993 as a joint project with the National Center for State Courts, the courtroom is a harbinger of technology that could one day show up in courts across the nation.

This spring, students at the school tried a case involving questions of law in the United States, England and Australia. Judges in each of the three countries presided through videoconferencing. Students also recently conducted a trial using immersive virtual reality, reconstructing the scene of a crime with computer graphics. Wearing headsets and goggles, witnesses were able to view the scene as if they were there. Those in court were able to see the scene though the witness's eyes, said Frederic I. Lederer, a law professor at

William and Mary who developed Courtroom 21.

Professor Lederer foresees a substantial increase in remote appearances by trial judges, lawyers and witnesses. More evidence will also be presented electronically, he said, and entire court cases and exhibits will be filed over the Internet. Court reporters' notes could also be made available instantly on the Internet.

Legal experts say the use of electronic equipment raises new questions, like whether testimony from a witness who is not present to be sworn in is admissible. Moreover, they say, the posting of evidence on the Internet could compromise a judge's control over what information leaves the courtroom.

"Technology is only a means to an end; it is not an end in itself," Professor Lederer said. "The goal is justice at all times, not technology."

CORRECTION-DATE: June 3, 2003, Tuesday

CORRECTION:

An article in Circuits on Thursday about technology in courtrooms misstated the given name of a federal judge who heads the information technology committee of the Judicial Conference of the United States. He is James Robertson, not John.