



Judicial Council of California

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-176

For business meeting on September 19, 2023

Title

Judicial Council: Policy on Remote Access
to Electronic Court Records

Agenda Item Type

Action Required

Effective Date

September 20, 2023

Rules, Forms, Standards, or Statutes Affected

Cal. Rules of Court, Appendix D

Date of Report

August 7, 2023

Recommended by

Ad Hoc Workgroup on Post-Pandemic
Initiatives

Hon. Marsha G. Slough (Ret.), Chair

Contact

Shelley Curran, 415-865-4013
shelley.curran@jud.ca.gov

Saskia Kim, 916-643-6951
saskia.kim@jud.ca.gov

Executive Summary

The Ad Hoc Workgroup on Post-Pandemic Initiatives recommends adopting *Remote Access to Electronic Court Records—Policy, Rationale, and Guidance* to outline the roles and responsibilities of the Judicial Council going forward concerning rules and statutes relating to remote access to electronic court records. The proposed policy would provide guidance to the council's advisory bodies as they consider pending legislation, proposals for new legislation or rules of court, or any other action that implicates remote access to electronic court records. The workgroup also recommends that the council establish an advisory body to consider whether any recommendations to the council regarding the existing remote access rules of court are appropriate, consistent with the proposed policy.

Recommendation

The Ad Hoc Workgroup on Post-Pandemic Initiatives recommends that the Judicial Council:

1. Adopt *Remote Access to Electronic Court Records—Policy, Rationale, and Guidance*, effective September 20, 2023; and
2. Establish an advisory body to review existing rules of court related to remote access to electronic court records and determine whether further recommendations regarding those rules are appropriate, consistent with the proposed policy.

The proposed policy is attached at pages 12–13.

Relevant Previous Council Action

Over the past two decades, the council has adopted a number of rules relating to remote access to electronic court records. In particular, effective July 1, 2002, the Judicial Council adopted rules 2070–2076 (later renumbered as rules 2.500–2.506)¹ in response to a legislative directive to adopt uniform rules for electronic filing and service of documents, including statewide policies on vendor contracts, privacy, and access to public records.² The new rules broadly afforded the public a general right of access to electronic records, except for those sealed by court order or made confidential by law.³ While the rules affirmed the right to access court records generally, they limited *remote* access in certain case types because of the personal and sensitive nature of the information contained in those court records.⁴

Rule 2.503(b) requires courts to provide electronic access, both remotely and at the courthouse, to the extent feasible, to (1) registers of actions, calendars, and indexes in all cases and (2) all court records in civil cases, except those listed in rule 2.503(c). The rule then specifies that courts may not provide public remote access to records in certain proceedings including, among others, specified Family Code proceedings, juvenile court proceedings, guardianship or conservatorship proceedings, mental health proceedings, and criminal proceedings. This practical limitation on public remote access means records in these particular cases are available to the public only at the courthouse.

In its initial report recommending adoption of the new rules, the Court Technology Advisory Committee (CTAC)⁵ discussed how the proposed rules attempted to balance the right of public access to trial court records against the right of privacy afforded under the California Constitution, noting, “The rules recognize the fundamental difference between paper records that may be examined and copied only at the courthouse and electronic records that may be accessed

¹ Unless otherwise noted, all references to rules in this report are to the California Rules of Court.

² Judicial Council of Cal., Advisory Com. Rep., *Public Access to Electronic Trial Court Records* (Oct. 5, 2001), p. 1 (see Attachment A).

³ Judicial Council of Cal., Advisory Com. Rep., *Public Access to Electronic Trial Court Records* (Dec. 11, 2001), p. 6 (see Attachment B); rule 2.503(a).

⁴ Advisory Com. Rep. (Oct. 5, 2001), *supra*, p. 7.

⁵ The Court Technology Advisory Committee was renamed the Information Technology Advisory Committee in 2015.

and copied remotely.”⁶ CTAC concluded that “electronic records differ from paper records in three important respects[:] (1) ease of access, (2) ease of compilation, and (3) ease of wholesale duplication.”⁷ The rules were also based on CTAC’s view that the “judiciary has a custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of electronic case files.”⁸ At the time of its recommendation to the council, CTAC noted that public access to court records is afforded under the common law, citing *Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 373.⁹ And the committee also noted the rules were based in part on the United States Supreme Court’s decision in *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press* (1989) 489 U.S. 749, 773, in which the court described practical obscurity, the concept that public records may be “practically obscure” because they are not easily accessible.¹⁰

The following year, the council adopted rule 2077 (later renumbered as rule 2.507). The rule was proposed by the Court Executives Advisory Committee (CEAC) to address an issue that came to light after adoption of rules 2.500–2.506. Specifically, CEAC raised concerns that the adoption of rule 2.503 highlighted the fact that there was a lack of uniformity in the way courts were providing electronic access to court calendars, indexes, and registers of actions. As a result, CEAC recommended that the Judicial Council set minimum data elements to be included in these particular electronic court records.¹¹

In an effort to make public access to trial court and appellate court records more consistent, the council also adopted, effective January 1, 2016, rules 8.80–8.85 relating to public access to electronic appellate court records, including remote access, with limitations on remote access similar to those in the rules for trial courts.¹² Effective January 1, 2019, the council expanded remote access to electronic court records in the case types to which remote access by the public is otherwise not allowed, to allow remote access by parties, their designees and attorneys, and specified justice partners.¹³ These rules were adopted in order to fill a gap in the existing rules

⁶ Advisory Com. Rep. (Oct. 5, 2001), *supra*, p. 7.

⁷ *Id.* at p. 8.

⁸ *Ibid.*

⁹ A few years after rules 2070–2077 were adopted by the council, the voters approved Proposition 59 in 2004 to provide for an express state constitutional right of access to information concerning the conduct of the people’s business. (Cal. Const., art. I, § 3(b).)

¹⁰ Advisory Com. Rep. (Oct. 5, 2001), *supra*, p. 10.

¹¹ Judicial Council of Cal., Advisory Com. Rep., *Electronic Access to Court Calendars, Indexes, and Registers of Action* (Mar. 3, 2003), p. 2 (see Attachment C).

¹² Judicial Council of Cal., Advisory Com. Rep., *Appellate Procedure: Access to Electronic Appellate Court Records* (Aug. 25, 2015), p. 1 (see Link A).

¹³ See rules 2.515–2.528 and 2.540–2.545.

concerning persons and entities who are not the public at large and to provide structure, guidance, and authority for the courts.¹⁴

Analysis/Rationale

Background

In March 2021, former Chief Justice Tani G. Cantil-Sakauye named Judicial Council members to the Ad Hoc Workgroup on Post-Pandemic Initiatives and tasked the workgroup with identifying, refining, and enhancing successful court practices that emerged during the COVID-19 pandemic in order to increase access to justice, modernize services, and promote uniformity in practices going forward.¹⁵

As part of those efforts, the workgroup created the Remote Access to Electronic Court Records Subcommittee to develop a policy for use by advisory bodies when considering pending legislation, proposals for new legislation or rules of court, or any other action that implicates remote access to electronic court records. The workgroup considered that stakeholders had recently submitted various requests for amendments to the California Rules of Court relating to remote access, and some of these requests were conflicting.¹⁶ Moreover, these proposals had been submitted to, and considered by, different advisory bodies. As a result, the workgroup was concerned about the potential for inconsistent or piecemeal recommendations by different advisory bodies on the issue of remote access. The workgroup therefore concluded that a consistent policy would be appropriate and beneficial. *Remote Access to Electronic Court Records—Policy, Rationale, and Guidance* is thus intended to support a consistent approach to the council’s position on, and to advisory bodies’ consideration of, proposals relating to remote access to electronic court records.

The public’s right of access to court records is a constitutional right. Both the First Amendment to the United States Constitution and the state constitutional provision guaranteeing freedom of speech and the press¹⁷ have been interpreted to “provide broad access rights” to judicial hearings and records in criminal and civil cases.¹⁸

Furthermore, in 2004 voters approved Proposition 59, which amended the California Constitution to provide the people with “the right of access to information concerning the

¹⁴ Judicial Council of Cal., Advisory Com. Rep., *Rules and Forms: Remote Access to Electronic Records* (Aug. 31, 2018), pp. 2–3 (see Link B).

¹⁵ See “Ad Hoc Workgroup on Post-Pandemic Initiatives,” Purpose, www.courts.ca.gov/45585.htm.

¹⁶ For example, stakeholders proposed amendments to the California Rules of Court regarding electronic access to calendars, indexes, and registers of actions in criminal cases, with some stakeholders asking that remote access be broader and others asking that it be narrower. Another proponent suggested that the rules be amended to authorize trial courts to provide private criminal defense attorneys the same remote access as authorized for government attorneys.

¹⁷ Cal. Const., art. I, § 2(a).

¹⁸ *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106, 111.

conduct of the people’s business” including the writings of public officials and agencies.¹⁹ Article I, section 3(b)(2) further provides, in relevant part, that a rule of court be broadly construed if it furthers the people’s right of access and narrowly construed if it limits the right of access, and any rule of court adopted after the effective date of the initiative limiting the right of access must be adopted with specified findings. Courts have recognized the significance of the passage of Proposition 59, noting “the people’s right of access to information in public settings now has state constitutional stature, grounding the presumption of openness in civil court proceedings with state constitutional roots.”²⁰

Proposed policy

Remote Access to Electronic Court Records—Policy, Rationale, and Guidance is intended to reflect the roles and responsibilities of the council and the Legislature in this area. In developing the proposed policy, the workgroup focused on two key questions:

- What entity should determine who can access which court records remotely? and
- What entity should make decisions on the implementation and operations of remote access?

With respect to the first question, the proposed policy recognizes the Legislature’s policymaking role in determining what information contained in electronic court records may be disclosed and to whom. The workgroup concluded that the Legislature is better suited to balancing the competing constitutional interests of the right to privacy (Cal. Const., art. I, § 1) and the right to access court records (Cal. Const., art. I, § 3(b)), as well as evaluating any other relevant competing societal interests and goals.

In fact, the Legislature has, in numerous instances, balanced these interests and acted to keep information in certain court records confidential, or limited access in some way.²¹ For example, the Legislature has approved statutes in civil law cases (e.g., records of confidential name change because of domestic violence, stalking, or sexual assault remain confidential²² and access to records in unlawful detainer actions is restricted²³) and criminal law cases (e.g., dissemination of state²⁴ and local²⁵ criminal history information is restricted). Similarly, access to certain records in probate law, family law, and juvenile law is also restricted, such as reports regarding a

¹⁹ Cal. Const., art. I, § 3(b).

²⁰ *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 597.

²¹ In addition to the examples noted here, the *Trial Court Records Manual*, Appendix 1, Court Records Designated Confidential by Statute or Rule, www.courts.ca.gov/documents/trial-court-records-manual.pdf, contains a more comprehensive listing of statutes that characterize information in certain court records as confidential or limit access to court records.

²² Code Civ. Proc., § 1277; Gov. Code, § 6205 et seq.

²³ Code Civ. Proc., § 1161.2(a).

²⁴ Pen. Code, § 11144.

²⁵ Pen. Code, § 13300 et seq.

proposed guardianship or conservatorship²⁶ and recommendations regarding custody and visitation.²⁷ More recently, the Legislature restricted access to CARE Act filings, making all evaluations, reports, documents, and filings submitted pursuant to CARE Act proceedings confidential.²⁸

The Legislature has also balanced the various competing interests and goals and acted to expand public electronic access to certain court records. For example, in 2022, the Legislature approved legislation that would have allowed publicly accessible electronic indexes of defendants in criminal cases to be searched, and results filtered, using a defendant's driver's license number or date of birth, or both.²⁹

By recognizing that the Legislature is better suited to balancing competing constitutional, societal, and policy interests and goals with respect to who may access which court records remotely and largely removing the council from that determination, the proposed policy represents a shift in direction. As described above, the council has previously adopted rules relating to public remote access to electronic court records, and a number of these rules relate to who may remotely access which court records. In some cases, the rules were adopted in direct response to legislative mandates or to comport with statute while in other instances the council itself made the determination to allow, or impose limits on, access.

And the council has also used practical obscurity to protect private information in public records from being disseminated too widely. For example, as noted above, under rule 2.503(c), records in certain types of cases must be made available at the courthouse to the extent feasible but may not be made available remotely to the public. Here, the council essentially incorporated practical obscurity into rule 2.503 when it adopted the rule, effective July 1, 2002.

In and of itself, the proposed policy does not change which records may or may not be available remotely to the public at this time. It does, however, make clear that going forward the determination of whether to prohibit remote access to electronic court records is a decision for the Legislature. Any expansion or contraction of the application of the practical obscurity doctrine will thus be a legislative decision.

The proposed policy is consistent with the constitutional mandates concerning the public's right to access court records described above—the First Amendment to the United States Constitution and article I, section 2(a) of the state constitution and article I, section 3(b)(2), added by Proposition 59 in 2004, which provides the public's right to access court records with “state constitutional stature.”³⁰ The proposed policy is also consistent with the underlying principle

²⁶ Prob. Code, §§ 1513, 1826.

²⁷ Fam. Code, § 3025.5.

²⁸ Welf. & Inst. Code, § 5977.4(a).

²⁹ Senate Bill 1262 (2021–2022 Reg. Sess.) was vetoed by Governor Newsom on September 29, 2022.

³⁰ *Savaglio v. Wal-Mart Stores, Inc.*, *supra*, 149 Cal.App.4th at p. 597.

expressed by rule 2.503, that the public has the right to access court records that have not been made confidential by law or order.

In addition, the proposed policy recognizes that public expectations have changed, technology has advanced, and court users expect to be able to get information and records online. The COVID-19 pandemic in particular has highlighted many of these changes and is an opportunity to reevaluate how the public is interacting with the courts and reexamine the rules through an updated lens. Yet, at the same time, there are potential serious ramifications to these changes, and the balancing of interests has become more complicated and potentially more fraught with controversy.

The workgroup is thus recommending that the council take a different direction and that it should not be deciding—as a branch—whether to limit or grant remote access to electronic court records. Instead, the proposed policy recognizes that, while an individual judicial officer may appropriately decide to limit or grant remote access based on specific factual circumstances in a case, the Legislature is better suited to do the more general balancing of interests that sets policy in this area on a statewide basis for society as a whole. The Legislature is in a better position to listen to, and engage with, stakeholders and weigh their interests as it considers important policy questions regarding remote access, such as whether the purpose of a proposal for limited or expanded access is legitimate and is in the best interest of the public. These are concerns that go beyond the judicial branch and the rules of court, and, under the proposed policy, these are ultimately statewide policy determinations that are more appropriate for the legislative branch.

Regarding the second question, the rationale for the proposed policy states it is the Judicial Council, in its role related to setting policy to further the administration of justice, that is best suited to evaluating and addressing operational issues related to remote access to electronic court records. This is consistent with the council’s charge to “improve the administration of justice” (Cal. Const., art. VI, § 6) and “improv[e] the quality of justice and advanc[e] the consistent, independent, impartial, and accessible administration of justice by the judicial branch for the benefit of the public.” (Rule 10.1(a)(1).)

Thus, the council will establish the manner by which the public may remotely access electronic court records consistent with any laws passed by the Legislature. The proposed policy provides that the council is in the best position to determine how to implement remote public access because there are operational, administrative, security, and budgetary considerations best understood by the judicial branch (separate and apart from individual judicial decisions concerning whether a record should be sealed). Moreover, the proposed policy recognizes the council’s expertise in court operations—supported in large part in its advisory bodies comprised of judicial officers and court administrators. As the proposed policy notes, it is consistent with the council’s responsibility to carry out the fair administration of justice, and it is incumbent on the council to adopt rules that preserve efficient functionality of the courts.

Application

The aim of the workgroup in drafting the proposed policy was to develop a consistent policy advisory bodies could use when reviewing pending legislation, considering proposals for new legislation or rules of court, or considering any other action that implicates remote access to electronic court records. As a result, the proposed policy contains a Guidance section that is intended to assist advisory bodies in determining whether to recommend action by the council.³¹ As noted above, stakeholders have proposed amendments to the California Rules of Court that implicate remote access to electronic court records, and it is likely such efforts will continue and advisory bodies will be asked to consider proposals in this area in the future. The proposed policy is meant to provide structure, guidance, and some measure of uniformity as advisory bodies examine such proposals.³²

The Guidance section contains a series of questions advisory bodies should address when determining whether to recommend action by the council in this area. This section provides that advisory bodies generally may not recommend a position on legislation or a legislative proposal that relates only to *what* information may be accessed remotely or *by whom*, because such decisions are not council decisions under the proposed policy. But the advisory body may weigh in (with a recommendation to the Legislation Committee) if the proposal also raises or impacts operational, administrative, security, or budgetary issues for courts. So, as just one example, under rule 2.521, volunteer attorneys used by a court to mediate cases may be considered court-appointed persons for the purpose of accessing electronic records remotely, although they are not specifically listed. If there were legislation proposing they be specifically excluded, an advisory body may wish to provide feedback as the proposal may impact the ability of the court to serve litigants. Under the proposed policy, the advisory body may recommend a position on such a proposal to the extent the proposal would have operational impacts that would affect the ability of the courts to provide services to the public.

Furthermore, in instances where a proposal relates to *how* remote access to court records is provided, under the proposed policy the council may provide input and thus the advisory body may recommend a position or action. And in some cases, the proposal may be a hybrid; that is, it relates to both what information may be accessed remotely or by whom, *and* how remote access to court records is provided. In this case, the proposed policy provides that the advisory body should limit any recommendation concerning a position on the hybrid proposal or action by the

³¹ This is not the first time the council has adopted a policy providing advisory bodies with guidance on when and how to make recommendations to the council. Compare, for example, the *Policy on the Judicial Council's Rule-Making Authority*, adopted by the council effective September 1, 2000. The rule-making policy provides guidance to advisory committees and their staff when recommending a rule change or position on legislation and in presenting rules proposals to the council. Specifically, the policy provides guidance to “ensure that questions about a rule’s constitutionality are fully considered by the committees and presented to the council” and states principles to guide the analysis of whether a proposed rule is inconsistent with statute. (Judicial Council of Cal., Staff Rep., *Policy on the Judicial Council's Rule-Making Authority* (Aug. 14, 2000), pp. 3–4 (see Attachment D).)

³² The council’s policymaking generally is described in Judicial Council Governance Policies, which is located in Appendix D in the Rules of Court, available at www.courts.ca.gov/rules.htm. The proposed policy, setting out a specific policy on proposals relating to remote access to electronic court records, will be added to Appendix D.

council to the aspects of the proposal that address how remote access is provided. If, however, the portion of the hybrid proposal that relates to what information may be accessed remotely and/or by whom raises operational, administrative, security, or budgetary issues for courts, then it would be appropriate for advisory bodies to recommend a position or other action by the council as described above.

The workgroup also recommends that the guidance to advisory bodies be used as a prospective tool as advisory bodies consider pending legislation, proposals for new legislation or rules of court, or any other action that implicates remote access to electronic court records. The workgroup separately recommends the council establish an advisory body in order to evaluate whether further action may be appropriate consistent with the proposed policy, as explained below.

Proposed advisory body

As noted under the Comments section below, the workgroup received feedback on the proposed policy indicating it would be helpful to clarify the policy's relationship to the current rules of court on remote access to electronic court records. While the workgroup could have recommended the council repeal the existing rules of court relating to who may access which court records remotely (both decisions that the council would not make under the proposed policy), that recommendation would have created a vacuum in the rules relating to remote access, an undesirable result.

Instead, the workgroup is recommending a transitional plan in which the council establishes an advisory body to review existing rules of court to determine which of them fall under the Legislature's responsibility and which of them fall under the council's purview because they relate to how remote access to court records may be provided. Once that review of existing rules of court is completed, the advisory body could recommend a legislative proposal to the Legislation Committee containing those existing rules of court the advisory body recommends be proposed as statutory language or recommend some other appropriate action. After approval from the council and submission to the Legislature, the legislative branch can then consider relevant policy interests, hear from stakeholders, and amend the statutes as appropriate. Once that process is completed and statutory changes are enacted, the council can then act to ensure the rules on remote access to electronic court records are consistent with statute. Absent action by the Legislature on such proposed statutory changes, however, the rules and the current policies would remain in effect.

Policy implications

With respect to remote access to electronic court records, the proposed policy recognizes that there are competing interests—the constitutional right to privacy, the constitutional right to access court records, and any other relevant societal interests and goals—that are better balanced through the legislative policymaking process. At the same time, the proposed policy recognizes the council's role in promoting the fair administration of justice and establishing how the public may remotely access court records. The proposed policy thus recognizes these different roles of the judicial branch and the Legislature.

Comments

Because the proposed policy is an internal policy relating to council governance, it did not go through the council's traditional public invitation-to-comment process. Instead, a draft of the proposed policy was circulated to the chairs of the following ten council advisory committees, who were invited to take part in feedback sessions:

- Advisory Committee on Providing Access and Fairness
- Appellate Advisory Committee
- Civil and Small Claims Advisory Committee
- Court Executives Advisory Committee
- Criminal Law Advisory Committee
- Family and Juvenile Law Advisory Committee
- Information Technology Advisory Committee
- Probate and Mental Health Advisory Committee
- Traffic Advisory Committee
- Trial Court Presiding Judges Advisory Committee

In general, the feedback from the chairs of the advisory committees was overall positive, and they felt the proposed policy would be helpful particularly in clearly stating the differing roles of the Legislature and the council. Several advisory committee chairs suggested it would be helpful to clarify the relationship of the proposed policy to the current rules of court on remote access to electronic court records, and whether it would be within the purview of the council and thus its advisory bodies to weigh in on legislative changes that relate to who can access which court records remotely. As a result, the Guidance section discussed earlier was added to the proposed policy, and the workgroup recommends that an advisory body be established as described above.

Also, in response to the comments received, language was added to the proposed policy stating that it does not preclude the council from providing subject matter expertise to the Legislature as to the implications of any proposed legislation.

The proposed policy was circulated to the advisory committee chairs following the modifications, and no objections or further requests for changes were received.

Alternatives considered

In addition to the proposed policy, the workgroup considered the alternatives of either taking no action and maintaining the status quo or developing a policy that specifically included a role for the council in determining what information may be accessed remotely and by whom.

The workgroup identified a number of issues with these two alternatives. First, taking no action could lead to inconsistent and piecemeal recommendations by advisory bodies on the issue of remote access. For example, there could be situations where one advisory body is supportive of providing additional remote access while another advisory body recommends restricting such access in a similar situation. This would be contrary to the charge of the Workgroup on Post-

Pandemic Initiatives to promote uniformity in practices going forward as well as the goal of developing a policy or general framework to support consistent approaches in this area.

Second, while developing a more specific proactive policy might result in a more consistent approach, it would leave advisory bodies and ultimately the council in the position of grappling with broad policy decisions that are more appropriate for the Legislature to decide. The workgroup concluded that determining who in society gets remote access to which court records should not be a decision of the council.

Fiscal and Operational Impacts

Because the recommended proposal is an internal policy relating to council governance, it will not have a fiscal impact on the courts and court operations.

The recommendation that the council establish an advisory body to review existing remote access rules of court and make any appropriate recommendations to the council will require Judicial Council staff time to support the members who will also be asked to give additional time and effort to the review and recommendations.

Attachments and Links

1. *Remote Access to Electronic Court Records—Policy, Rationale, and Guidance*, at pages 12–13
2. Attachment A: Judicial Council of Cal., Advisory Com. Rep., *Public Access to Electronic Trial Court Records* (Oct. 5, 2001)
3. Attachment B: Judicial Council of Cal., Advisory Com. Rep., *Public Access to Electronic Trial Court Records* (Dec. 11, 2001)
4. Attachment C: Judicial Council of Cal., Advisory Com. Rep., *Electronic Access to Court Calendars, Indexes, and Registers of Action* (Mar. 3, 2003)
5. Attachment D: Judicial Council of Cal., Staff Rep., *Policy on the Judicial Council’s Rule-Making Authority* (Aug. 14, 2000)
6. Link A: Judicial Council of Cal., Advisory Com. Rep., *Appellate Procedure: Access to Electronic Appellate Court Records* (Aug. 25, 2015),
<https://jcc.legistar.com/View.ashx?M=F&ID=4069109&GUID=27926989-C9CA-4D47-B9FA-00B1567A69B0>
7. Link B: Judicial Council of Cal., Advisory Com. Rep., *Rules and Forms: Remote Access to Electronic Records* (Aug. 31, 2018),
<https://jcc.legistar.com/View.ashx?M=F&ID=6613671&GUID=DA39F21F-B0F6-464E-8E33-1A771C41B679>

Remote Access to Electronic Court Records—Policy, Rationale, and Guidance

Questions for analysis:

- *What entity should determine who can access which court records remotely? (the “who/what”)*
- *What entity should make decisions on the implementation/operations of the policy? (the “how”)*

Policy

The Judicial Council recognizes the Legislature’s policymaking role in balancing remote access to public electronic court records¹ against privacy interests, in determining what information contained in these records may be disclosed and to whom. At the same time, the Judicial Council affirms its role in promoting the fair administration of justice. In doing so, the Judicial Council will establish the manner by which the public may remotely access these records consistent with any laws passed by the Legislature and will prioritize efficiencies and ease of access for court users.

Rationale

When evaluating proposals that implicate remote access to electronic court records, the Judicial Council recognizes that the Legislature in its policymaking role is better suited to balancing the competing constitutional interests of the right to privacy and the right to access court records, as well as evaluating any other relevant competing interests. This balancing implicates important policy questions such as whether the purpose of the proposal is legitimate and is in the best interest of the public and what factors should be considered in that analysis. Other policy questions include whether any groups of court users should be limited from remotely accessing electronic court records, even though they may obtain the records in person at a courthouse. These are ultimately policy determinations that are more appropriate for the legislative branch.²

At the same time, the Judicial Council, in its policymaking role related to the administration of justice, is best suited to evaluating and addressing operational issues relating to remote access to electronic court records. It is therefore the Judicial Council’s responsibility to establish the manner by which the public may remotely access these records. This is consistent with the Judicial Council’s charge to “improve the administration of justice” (Cal. Const., art. VI, § 6) and “improv[e] the quality of justice and advanc[e] the consistent, independent, impartial, and accessible administration of justice by the judicial branch for the benefit of the public.” (Cal. Rules of Court, rule 10.1(a)(1).) It is also consistent with the Judicial Council’s expertise in court

¹ This policy addresses electronic court records other than those that are sealed by court order or otherwise made confidential by law. In addition, for purposes of this policy, “court records” includes documents, papers, or exhibits filed with a court, registers of actions, calendars, and indexes.

² This policy does not preclude the Judicial Council from providing subject matter expertise to the Legislature as to the implications of any proposed legislation.

operations—supported in large part in its advisory bodies comprised of judicial officers and court administrators.

Once the Legislature determines what information contained in public electronic court records may be disclosed remotely and to whom, the Judicial Council is in the best position to determine how to implement that remote access. In addition to individual decisions regarding whether to seal a record, there are operational, administrative, security, and budgetary considerations that the judicial branch best understands. It is incumbent on the Judicial Council to adopt rules that preserve efficient functionality of the courts. This policy is consistent with the Judicial Council's responsibility to carry out the fair administration of justice.

Guidance

This policy will come into play when advisory bodies are reviewing pending legislation, considering proposals for new legislation or rules of court, or considering any other action that implicates remote access to electronic court records. When determining whether to recommend action by the Judicial Council, advisory bodies should address the following questions:

- (1) Does the pending legislation or proposal for new legislation or rules of court relate to *what* information may be accessed remotely and/or *by whom*?
 - (a) Generally, under this policy, such decisions would be addressed by the Legislature.
 - (b) Does that legislation or legislative proposal also raise or impact operational, administrative, security, or budgetary issues for courts? If so, the advisory body may recommend a position on the legislation or legislative proposal addressing that impact but should explain and support the basis under the policy for that recommendation.
- (2) Does the pending legislation or proposal for new legislation or rules of court relate to *how* remote access to court records is provided? Under this policy, the Judicial Council may provide input and so the advisory body may recommend a position or action within this policy.
- (3) Is the pending legislation or proposal for new legislation or rules of court a hybrid? In other words, does it relate to *both* what information may be accessed remotely and/or by whom *and* how remote access to court records is provided? If the pending legislation or proposal for new legislation or rules of court is a hybrid, the advisory body should limit any recommendation regarding a position on legislation or action by the Judicial Council to the aspects of the proposal that address how remote access is provided (but see (1)(b) for when recommendations may be appropriate).

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3660**

Report Summary

TO Members of the Judicial Council

FROM Court Technology Advisory Committee
Hon Judith Donna Ford, Chair
Charlene Hammitt, Manager, Information Services Division, 415-865-7410, charlene.hammitt@jud.ca.gov

DATE October 5, 2001

SUBJECT Public Access to Electronic Trial Court Records (adopt Cal Rules of Court, rules 2070–2077, repeal Standards of Judicial Administration, section 38) (Action Required)

Issue Statement

Code of Civil Procedure section 1010.6(b) requires the Judicial Council, by January 1, 2003, to adopt uniform rules for electronic filing and service of documents in the trial courts. The rules must include statewide policies on vendor contracts, privacy, and access to public records. New rules 2070–2077 set forth such statewide policies. The Court Technology Advisory Committee will soon finalize its proposed rules for electronic filing and service.

Recommendation

The Court Technology Advisory Committee recommends that the Judicial Council, effective January 1, 2002

- 1 Adopt rules 2070–2077 of the California Rules of Court to
 - (a) Set forth statewide policies on providing public access to trial court records maintained in electronic form, while protecting privacy and other legitimate interests in limiting disclosure of certain records, and
 - (b) Set forth statewide policies regarding courts' contracts with vendors to provide public access to court records maintained in electronic form
- 2 Repeal section 38 of the Standards of Judicial Administration

The text of the proposed rules is attached at pages 26–33, and the text of the standard to be repealed is attached at pages 34–36

Rationale for Recommendation

The Legislature's charge to the council is to adopt uniform rules for the electronic filing and service of documents in the trial courts, including statewide policies on vendor contracts, privacy, and access to public records. The policies in the new rules are of particular statewide concern because many courts are implementing electronic filing but are uncertain what their obligations are with respect to providing public access to these filings through the Internet. The committee believes that even in the absence of the Legislature's charge to adopt statewide policies it is advisable for the council to do so, to ensure uniform access practices among the 58 counties.

The policy reasons considered by the committee and which support the committee's specific recommendations are presented in the Rationale for Recommendation in the Report.

Descriptions of the proposed rules follow.

Rule 2070 defines "trial court records," "trial court records maintained in electronic form," and "the public" as used in the new rules.

Rule 2071 states that the new rules do not limit access by parties or their attorneys, or access by others who are afforded a greater right of access by statute or California Rules of Court than that provided to the general public. Rule 2071 also states that the new rules do not limit remote electronic access to a court's register of actions or its calendars.

Rule 2072 states that the new rules are intended to provide the public with reasonable access to trial court records maintained in electronic form, while protecting privacy interests. Rule 2072 also states that the new rules are not intended to provide public access to court records to which the public does not otherwise have a right of access.

Rule 2073 states that (1) the public has a general right of access to trial court records maintained in electronic form except as otherwise provided by law, (2) courts must grant access only on a case-by-case basis, and (3) when records become inaccessible by court order or operation of law, courts are not required to take action with respect to copies of those records that were made by the public before the records became inaccessible.

Rule 2074 states that (1) electronic access to trial court records maintained in electronic form must be reasonably available to the public through industry-standard software and at terminals at the courthouse, (2) courts may provide electronic access to records in the following proceedings only through public terminals at the courthouse, and must not provide remote electronic access to records in them (a) proceedings under the Family Code, (b) juvenile court proceedings, (c) guardianship and conservatorship proceedings, (d) mental health proceedings, (e) criminal proceedings, and (f) civil harassment proceedings under Code of Civil Procedure section 527.6, (3) courts are not required to provide electronic access to their trial court records if this access is not feasible because of resource limitations, (4) persons accessing court records electronically must consent to access the records only as instructed by the court and must consent to the court's monitoring of access to its records, (5) courts must notify the public about the following information (a) whom to contact about requirements for accessing their records electronically, (b) copyright and other proprietary rights that may apply to information in their records, and (c) that a record available by electronic access does not constitute the official record of the court unless it has been electronically certified by the court, and (6) courts must post a privacy policy on their Web sites to inform users of the information they collect regarding access transactions and the uses they may make of the collected information

Rule 2075 states that courts must not provide electronic access to any court record maintained in electronic form that has been sealed under rule 243.1

Rule 2076 states that a court's contract with a vendor to provide public access to its records maintained in electronic form must be consistent with the new rules, must require the vendor to provide access and to protect confidentiality as required by law, and must specify that the court is the owner of the records and has the exclusive right to control their use

Rule 2077 states that courts may impose fees for providing public access to their records maintained in electronic form, as provided by Government Code section 68150(h), and that courts that provide exclusive access to their records through a vendor must ensure that any fees the vendor imposes for providing access are reasonable

Alternative Actions Considered

No alternative actions were considered because the Judicial Council is required by statute (Code Civ. Proc., § 1010.6(b)) to adopt rules of court governing vendor contracts, privacy, and access to public records filed electronically with the trial courts. A chronology of actions the committee has taken since it first began to consider developing statewide standards for providing public access to electronic court records is set forth in the Rationale for Recommendation in the Report

Comments From Interested Parties

The proposed rules were circulated for comment during the spring 2001 cycle. A total of 24 comments were received. The commentators included judges, court administrators, and representatives from the media. Representatives from the court and legal communities generally supported the rules, representatives from the news media did not. Some representatives from the media took the position that remote electronic access to court records should be limited only on a case-by-case basis, e.g., on a party's motion to seal, others took the position that remote electronic access should be afforded in all cases.

Some commentators proposed specific modifications, many of which the committee adopted. The modifications that were adopted are presented under Comments From Interested Parties in the report that follows this summary. However, the committee's conclusion that remote access should not be allowed in the cases specified was not changed in response to the comments received, for the reasons set forth in the Rationale for Recommendation in the report that follows this summary.

A chart summarizing the comments and the committee's responses is attached at pages 37–56.

Implementation Requirements and Costs

As courts begin to implement electronic filing, they must consider how they will provide public access to these records. Some courts already have public terminals in place, others will need to install them at the courthouse. Providing the public with electronic access to court records should result in a cost savings for courts, since this means of access does not require that a court clerk spend time making the records available for inspection and copying by the public, as is required with paper records. As provided in rule 2077, courts may impose a fee for providing electronic access to their records, however, it is anticipated that many, if not most, courts will not do so.

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3660**

Report

TO Members of the Judicial Council

FROM Court Technology Advisory Committee
Hon Judith Donna Ford, Chair
Charlene Hammitt, Manager, Information Services Division, 415-
865-7410, charlene.hammitt@jud.ca.gov

DATE October 5, 2001

SUBJECT Public Access to Electronic Trial Court Records (adopt Cal Rules of
Court, rules 2070–2077, repeal Standards of Judicial Administration,
section 38) (Action Required)

Issue Statement

Code of Civil Procedure section 1010.6(b) requires the Judicial Council, by January 1, 2003, to adopt uniform rules for electronic filing and service of documents in the trial courts. The rules must include statewide policies on vendor contracts, privacy, and access to public records.

Unlike many other states, California does not provide for a right of public access to court records by statute or rule of court, whether the records are in paper or electronic form. Instead, public access to court records is afforded under the common law. (See *Copley Press, Inc. v. Superior Court* (1998) 63 Cal App 4th 367, 373 [74 Cal Rptr 2d 69].) Court records are presumptively accessible to the public unless made inaccessible by statute, California Rules of Court, or court order. Currently, section 38 of the Standards of Judicial Administration (proposed by the committee and adopted by the council effective January 1, 1999) sets forth guidelines courts should follow in providing public access to electronic records.¹ Government Code section 68150(h) provides that court records preserved or reproduced in electronic form must “be made reasonably accessible to all members of the public for viewing and duplication as would the paper records.”

¹ Because the proposed rules will preempt section 38, the committee recommends that section 38 be repealed.

Under the mandate of Code of Civil Procedure section 1010 6(b), the Court Technology Advisory Committee developed a set of proposed rules on public access to electronic trial court records. The rules were circulated for public comment and, after incorporating a number of suggestions made in the comments, the committee has finalized a set of rules for submission to the council.

Proposed Rules

Rule 2070 defines “trial court records,” “trial court records maintained in electronic form,” and “the public” as used in rules 2070–2077.

Rule 2071 states that rules 2070–2077 do not limit access by parties or their attorneys, or access by others who are afforded a greater right of access by statute or California Rules of Court than that provided to the general public. Rule 2071 also states that the new rules do not limit remote electronic access to a court’s register of actions or its calendars.

Rule 2072 states that rules 2070–2077 are intended to provide the public with reasonable access to trial court records maintained in electronic form, while protecting privacy interests. Rule 2072 also states that the new rules are not intended to provide public access to court records to which the public does not otherwise have a right of access.

Rule 2073 states that (1) the public has a general right of access to trial court records maintained in electronic form except as otherwise provided by law, (2) courts must grant access only on a case-by-case basis, and (3) when records become inaccessible by court order or operation of law, courts are not required to take action with respect to copies of those records that were made by the public before the records became inaccessible.

Rule 2074 states that (1) electronic access to trial court records maintained in electronic form must be reasonably available to the public through industry-standard software and at terminals at the courthouse, (2) courts may provide electronic access to records in the following proceedings only through public terminals at the courthouse, and must not provide remote electronic access to records in them: (a) proceedings under the Family Code, (b) juvenile court proceedings, (c) guardianship and conservatorship proceedings, (d) mental health proceedings, (e) criminal proceedings, and (f) civil harassment proceedings under Code of Civil Procedure section 527.6, (3) courts are not required to provide electronic access to their trial court records if this access is not feasible because of resource limitations, (4) persons accessing court records electronically must consent to access the records only as instructed by the court and must consent to the court’s monitoring of access to its records, (5) courts must notify the public about the following information: (a) whom to contact about requirements for

accessing their records electronically, (b) copyright and other proprietary rights that may apply to information in their records, and (c) that a record available by electronic access does not constitute the official record of the court unless it has been electronically certified by the court, and (6) courts must post a privacy policy on their Web sites to inform users of the information they collect regarding access transactions and the uses they may make of the collected information

Rule 2075 states that courts must not provide electronic access to any court record maintained in electronic form that has been sealed under rule 243 1

Rule 2076 states that a court's contract with a vendor to provide public access to its records maintained in electronic form must be consistent with the new rules, must require the vendor to provide access and to protect confidentiality as required by law, and must specify that the court is the owner of the records and has the exclusive right to control their use

Rule 2077 states that courts may impose fees for providing public access to their records maintained in electronic form, as provided by Government Code section 68150(h), and that courts that provide exclusive access to their records through a vendor must ensure that any fees the vendor imposes for providing access are reasonable

Rationale for Recommendation

Balancing the right of access against the right of privacy

Rules 2070–2077 attempt to balance the right of public access to trial court records against the right of privacy afforded by article I, section 1 of the California Constitution. The rules recognize the fundamental difference between paper records that may be examined and copied only at the courthouse and electronic records that may be accessed and copied remotely. It is the conclusion of the Court Technology Advisory Committee that unrestricted Internet access to case files would compromise privacy and, in some cases, could increase the risk of personal harm to litigants and others whose private information appears in case files.

In recognition of these concerns, the rules set forth a three-part approach to public access

- First, the rules provide for a general right of access to trial court records maintained in electronic form (rule 2073(a))
- Second, the rules preclude *remote* electronic access by the public to filings in family law, juvenile, mental health, guardianship and conservatorship, criminal, and civil harassment proceedings because of the personal and sensitive nature of the information parties are required to provide to the

court in these proceedings Public access to electronic records in these proceedings is available only at public terminals at the courthouse (rule 2074(b))

- Third, the rules provide that a court must not provide electronic access to any court record that has been sealed (rule 2075)

Committee's conclusions

The rules are based on the conclusion of the Court Technology Advisory Committee that electronic records differ from paper records in three important respects (1) ease of access, (2) ease of compilation, and (3) ease of wholesale duplication Before the advent of electronic court records, the right to inspect and copy court records depended on physical presence at the courthouse Unless a case achieved notoriety, sensitive information in the case file was unlikely to circulate beyond those directly concerned with the case The inherent difficulty of obtaining and distributing paper case files effectively insulated litigants and third parties from the harm that could result from misuse of information provided in connection with a court proceeding

The rules are also based on the committee's conclusion that the judiciary has a custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of electronic case files Like other government entities that collect and maintain sensitive personal information, the judiciary must balance the public interest in open court records against privacy and other legitimate interests in limiting disclosure While there is no question that court proceedings should not ordinarily be conducted in secret, the public's right to information of record is not absolute When the public's right of access conflicts with the right of privacy, the justification for the requested disclosure must be balanced against the risk of harm posed by the disclosure (*Westbrook v County of Los Angeles* (1994) 27 Cal App 4th 157, 166 [32 Cal Rptr 2d 382])

Rule drafting history

The committee has been working on the issues covered by rules 2070-2077 for the past six years

In 1995, the committee established a Privacy and Access Subcommittee to develop statewide policies for public, commercial, and media access to court information in electronic form Membership encompassed a range of interests, including not only members of the committee, but a representative of the Justice Department, a member of the California Assembly, the director of the Privacy Rights Clearinghouse (a privacy advocate for consumer interests), the director of the First Amendment Coalition (an organization that represents primarily media interests), and the government affairs liaison officer of the Information Industry Association

(a trade association of direct marketers, credit reporting businesses, and the like) Public hearings were held in Southern and Northern California, inviting comment on assuring access, protecting privacy, and funding

In 1996, the privacy and access subcommittee drafted a rule that took a conservative approach to electronic access. To preclude the possibility of the dissemination and propagation of personal information that by law is available only for limited times or in partial and uncompiled form, the subcommittee recommended that remote electronic access to civil and criminal case data be restricted to specified index information and that the balance of case data, though available at the courthouse, not be provided by remote access. The full committee recommended revising the rule to require broad access. The redrafted rule provided that “any record that a judicial branch agency makes available to the public shall be made available electronically, to the extent that the agency has determined that it has sufficient resources to do so.” This rule essentially would have provided access to electronic records on the same terms as paper records. The committee circulated the rule for comment to various advisory committees and AOC staff in Appellate and Trial Court Services.

In 1997, the rule was circulated for public comment. Negative comments outnumbered positive comments by approximately 30 percent. The proposal was criticized for failing to account for differences between paper and electronic records. Many comments expressed concerns about privacy interests in court records (particularly in family law cases), legal restrictions on the dissemination of certain data in criminal case files, and problems with implementation. The committee established a working group to address the issues raised in the comments and to revise the proposal.

In 1998, the committee revised the rule (proposed rule 897) to apply only to trial court pilot projects for certain types of civil cases. The rule was circulated for comment and was criticized for failing to clarify the relationship between existing and new pilot projects. The committee then recast the rule as Section 38 of the Standards of Judicial Administration. The committee’s intent in changing the rule to a standard was to encourage innovative projects, to eliminate the contradiction between mandatory rules and permissive standards authorizing pilot projects, and to present recommendations that would not contradict statutory or case law. Section 38 was adopted by the Judicial Council and became effective January 1, 1999. This section was intended to provide trial courts with guidance on providing public access to electronic records until statewide rules of court could be adopted.

In 1999, section 1010.6 was added to the Code of Civil Procedure with the support of the Judicial Council, which believed that it was time to develop statewide standardized statutes and rules to safeguard the security of electronic documents,

the integrity of court electronic filing systems, and the rights of the parties, while facilitating electronic filing in the trial courts. Section 1010 6(b) requires the Judicial Council to adopt uniform electronic filing rules that include statewide policies on vendor contracts, privacy, and access to public records.

The committee and its Strategy Subcommittee worked throughout the past year on developing draft rules on vendor contracts, privacy, and access to public records. At the end of the year, the committee circulated the draft to the presiding judges and court executives for their comment. The committee revised the draft after this informal circulation and voted in January 2001 to submit the rules to the Rules and Projects Committee. The rules were circulated for public comment in the spring, and were revised by the committee in light of the public comments received. With minor adjustments, these are the rules the committee recommends for adoption effective January 1, 2002.

Court decisions

The rules are based in part on the U S Supreme Court's 1989 decision in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U S 749 (109 S Ct 1468, 103 L Ed 2d 774), in which the court referred to the relative difficulty of gathering paper files as "practical obscurity." In this case, which involved a request under the Freedom of Information Act for the release of information from a database summarizing criminal history, the court recognized a privacy interest in information that is publicly available through other means but is "practically obscure." The court noted that "the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by the disclosure of that information." (*Id.* at p. 764.) It specifically commented on "the vast difference between public records that might be found after a diligent search of courthouse files and a computerized summary located in a single clearinghouse of information." (*Ibid.*) In weighing the public interest in releasing personal information against the privacy interest of individuals, the court defined the public's interest as "shedding light on the conduct of any Government agency or official," rather than acquiring information about particular private citizens. (*Id.* at p. 773.) The court also noted that "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." (*Id.* at p. 770.)

In an earlier decision (*Whalen v. Roe* (1977) 429 U S 589 [97 S Ct 869, 51 L Ed 2d 74]), the U S Supreme Court considered the issue of informational privacy with respect to a constitutional challenge to a State of New York computer system for the reporting of the names and addresses of persons who obtained certain prescription drugs. The court did not find a constitutional violation, because the statute in question contained sufficient protections against unauthorized use and disclosure of the reporting system. It did, however, express

concern over the “vast amounts of personal information in computerized data banks or other massive government files ” (*Id* at p 599)

Although neither of these decisions involved the issue of public access to court records, they are cited because they shed light on the court’s concerns about the dissemination of presumptively public records in an electronic environment, and suggest that the U S Supreme Court believes there is a fundamental difference between records maintained in paper form and records maintained in electronic form that may be accessed and copied remotely

More recently, the U S Supreme Court has affirmed privacy rights in two cases involving access to government-held records

- 1 In *Reno v Condon* (2000) 528 U S 141 [120 S Ct 666, 145 L Ed 2d 587], the court unanimously upheld the Driver’s Privacy Protection Act, which prohibits the disclosure and resale of drivers’ and automobile owners’ personal information without their consent
- 2 In *Los Angeles Police Dep’t v United Reporting Pub Corp* (1999) 528 U S 32 [120 S Ct 483, 145 L Ed 2d 451], the court held that Government Code section 6254(f)(3), which requires a person requesting an arrestee’s address to declare that the request is made for one of five prescribed purposes, does not violate the First Amendment but merely regulates access to information in the government’s possession, and that states may decide not to give out arrestee information at all without violating the First Amendment

Other court decisions have also recognized the need to protect individual privacy because of the increasing computerization of public and private records See, for example, *White v Davis* (1975) 13 Cal 3d 757, 774–75 (120 Cal Rptr 94) (noting that the major impetus for adding privacy as one of the “inalienable rights” guaranteed under Cal Const , art I, § 1, was concern about computerization of public and private records), *Pantos v City and County of San Francisco* (1984) 151 Cal App 3d 258, 265 (198 Cal Rptr 489) (in this case, which involved the issue of public access to juror questionnaires, the court noted that, “[i]n this informational age, commercial misuse of this stored data has potential for unintended harm to which the judiciary may not wish to contribute Importantly, the court does not have the power to contain the extent to which the data may be used to yield information about a juror’s life”)

Legislation

The rules are also based on the committee’s concern that if courts do not recognize a distinction between electronic and paper records, the courts’ electronic records may be used to circumvent public policy protections that the Legislature has

extended to records held by other agencies and entities, e g , under various provisions of the Public Records Act (Gov Code, § 6250 et seq) and the California Information Practices Act (Civ Code, § 1798 et seq) that apply to state agencies but not to the courts Many bills addressing privacy issues, including identity theft and confidentiality of records, have been proposed in Congress and the California Legislature A particular area of concern is the protection of personal identifying information This type of information—e g , social security numbers and financial account numbers—is frequently contained in court files

Actions taken by the federal courts

The committee is not alone in being concerned about providing information from case files on the Internet The Committee on Court Administration and Case Management of the Judicial Conference of the United States recently drafted a report and recommendations for providing public access to federal case files while also protecting privacy and other interests in limiting disclosure The Judicial Conference approved the report and recommendations on September 19, 2001 The recommendations are as follows

- Public access to civil case files documents in civil case files should be made available electronically to the same extent that they are available at the courthouse, except for Social Security cases because they contain extremely detailed medical records and other personal information Personal data identifiers, for example, Social Security numbers, birth dates, financial account numbers, and names of minor children should be modified or partially redacted by the litigants Only the last four digits of a Social Security number or financial account number should be recited in a document If the involvement of a minor child must be mentioned, only the child's initials should be recited If a birth date is necessary, only the year should be recited
- Public access to criminal case files public remote access to documents in criminal cases should not be available at this time This policy will be reexamined within two years The committee determined that any benefits of remote electronic access to criminal case files were outweighed by the safety and law enforcement risks this access would create
- Public access to bankruptcy case files documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases The Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document

- Public access to appellate case files documents in appellate cases should be treated in the same manner in which they are treated in the trial court, an acknowledgment of the importance of uniform practice in the courts

The Report notes that

- To a great extent, the recommendations rely on counsel to protect the interests of their clients and may necessitate an effort by the courts to educate the bar and the public about the fact that documents filed in federal court cases may be available on the Internet. The proposed system requires counsel and pro per litigants to carefully review whether it is essential to their case to file certain documents containing private sensitive information and to seek sealing orders or protective orders, as necessary
- Federal courts are not required to provide electronic access to case files (assuming that a paper file is maintained), and the recommendations do not create any entitlement to such access
- Remote electronic access will be available only through the PACERNet system, which requires registration with the PACER (Public Access to Court Electronic Records) service center and the use of a log-in and password. Such registration “creates an electronic trail which can be retraced in order to determine who accessed certain information if a problem arises.”

The Administrative Office of the United States Courts staff paper, *Privacy and Access to Electronic Case Files in the Federal Courts*, lists the following factors that may justify electronic access restrictions (at pp. 30–32)

- Balancing access and privacy interests in public information would be consistent with recent actions by the executive branch, e.g., the President’s directive to federal agencies to review their privacy policies
- Congress is likely to recognize the judiciary’s responsibility to act in this area, for example, various bills have been introduced to implement safeguards for privacy interests in bankruptcy court records
- Access rights, whether based on the common law or on the Constitution, are not absolute
- The loss of “practical obscurity” suggests a need to evaluate access policy. Traditional methods of protecting privacy interests, inherited from the days

of paper case files, may offer inadequate protections in the coming era of electronic case files. Although judges currently balance privacy and access interests primarily through the consideration of motions to seal records on a case-by-case basis, the implementation of electronic case files may justify rethinking the generally passive role played by courts and judges in this area.

- The judiciary has a special custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of case files. The courts are custodians of personal and sensitive documents by virtue of the fact that litigants and third parties are compelled by law to disclose certain information to the courts for adjudicatory purposes. Although there is no “expectation of privacy” in case file information, there is certainly an “expectation of practical obscurity” that will be eroded when case file information is available on the Internet for all to see. Appropriate limits on electronic access to certain file information may allow the courts to balance these interests in the context of the new electronic environment.
- “Access” need not mean the easiest and broadest public access. Although courts have a duty to provide access, at this point there is no statutory obligation to disseminate case files electronically. Case law on access to documents that are not relevant to the performance of the judicial function may provide insights to developing a policy that appropriately limits access to certain electronic case files or to documents in them.
- New forms of access may unduly raise the privacy “price” that litigants must pay for using the courts. The prospect of unlimited disclosure of personal information in case files may undermine public confidence in the litigation process and in the courts.
- Unlimited electronic disclosure of case files may not promote the underlying goals of providing access to case files, that is, effective monitoring of the courts by the public may be accomplished without unlimited disclosure of all the documents in case files. This consideration is especially pertinent to documents in a file that are only marginally related to the adjudication process.

Much of the controversy over the federal courts’ electronic public access system (“PACER”) has centered on the availability of the detailed financial information that a debtor is required to provide in a bankruptcy proceeding. This has involved the issue of the debtor’s right to maintain some privacy versus the creditors’ right to have information about the debtor’s finances readily available. In January of

this year, the U S Justice Department, Treasury Department, and Office of Management and Budget issued a *Study of Financial Privacy and Bankruptcy*, which found substantial privacy concerns in public bankruptcy filings. This report notes that “[t]he emergence of new technologies has an impact on both general public access to information in bankruptcy and the debtor’s interest in the privacy of such information. Increased use of the Internet and other powerful databases—both in the judicial system and among the general public—is lowering the barriers to access for parties that have an interest in that information. Personal, often sensitive, information now may be accessed and manipulated from a distance and used in ways not envisioned when the rules that currently govern these records were created. This, in turn, heightens the interests of debtors in ensuring that this information is protected from misuse by private entities.” (*Id.* at p. 11.) The report also notes that “[m]uch of the data available to the general public from a bankruptcy proceeding generally is not available from other sources” and that the “comprehensive nature of the information required in bankruptcy proceedings, and the fact that such information is often restricted in other contexts, suggests that there may be reasons to reconsider the current system, which allows unrestricted access to such data by the general public.” (*Id.* at p. 19.) It makes the following recommendations:

- Protection of personal financial information should be given increased emphasis in the bankruptcy system, and bankruptcy information policy should better balance society’s interest in government accountability and the debtor’s privacy. Debtors should not be required to forgo reasonable personal privacy expectations and expose themselves unnecessarily to risk in order to obtain the protections of bankruptcy. (*Id.* at pp. 28–29.)
- The general public should continue to have access to general information so that the public can hold the bankruptcy system accountable, e.g., the fact that an individual has filed for bankruptcy, the type of proceeding, the identities of the parties in interest, and other core information, but the public should not have access to highly sensitive information that poses substantial privacy risks to the debtor, e.g., social security numbers, financial account numbers, detailed profiles of personal spending habits, and debtor’s medical information. Special attention should be given to protecting information about individuals or entities that are not parties to the bankruptcy proceeding. (*Id.* at p. 30.)
- The bankruptcy system should incorporate fair information principles of notice, consent, access, security, and accountability. Debtors should be informed in writing that certain information they disclose in their petitions and schedules may be disclosed to the general public. Debtors’ consent

should be required before this information may be disclosed for purposes unrelated to the bankruptcy case (*Id* at pp 34–35)

- Mechanisms should be developed to ensure that private entities that improperly use a debtor's personal financial information are held accountable (*Id* at p 37)

Actions taken by other state courts

For many years, rule 123 of the Arizona Rules of the Supreme Court has governed public access to the judicial records of all courts in Arizona, whether in paper or electronic form. In August 2000, the Chief Justice of the Arizona Supreme Court appointed an Ad Hoc Committee to Study Public Access to Electronic Court Records, to examine the issues surrounding public access to computerized court records and to develop recommendations to modify rule 123 with respect to disclosure of these records. The committee issued its report in March 2001, making the following recommendations

- Courts should protect from remote electronic public disclosure social security numbers, financial account numbers, credit card numbers, and debit card numbers, and courts should review their forms and processes to ensure that this type of information is not being gathered unnecessarily
- The Supreme Court should develop a form for sensitive data. Information in the form would be available for public inspection at the courthouse but not on the Internet
- The Supreme Court should notify judges, attorneys, and the public that case records are publicly accessible and may be available on the Internet
- Domestic relations, juvenile, mental health, and probate records should not be accessible to the public on the Internet
- Remote access should be afforded on a case-by-case basis, and bulk data should not be electronically accessible on the Internet

Other state courts limit their publicly accessible electronic court records to either (1) docket information (e g , Massachusetts) or (2) docket information, a description of the type of case, and the judgment (e g , Missouri)

In February 2001, the Virginia Legislature appointed a joint subcommittee to study the protection of information contained in the records, documents, and cases filed in the courts of Virginia

Comments From Interested Parties

The proposed rules were circulated for comment during the spring 2001 cycle. A total of 24 comments were received.

Comments were submitted by (1) representatives from many California courts, including Alameda, Amador, Butte, Los Angeles, Orange, Riverside, San Diego, San Mateo, Santa Clara, Siskiyou, and Stanislaus Counties, (2) the California Judges Association, (3) the California Court Reporters Association, (4) the Office of the Attorney General, (5) the California Newspaper Publishers Association et al., (6) the Reporters Committee for Freedom of the Press, (7) the Privacy Rights Clearinghouse, (8) Access Reports, (9) the California Appellate Project, (10) the Hemet/Mt. San Jacinto Bar Association, and (11) Consumer Attorneys of California.

Many of the commentators supported the rules as proposed. Some commentators suggested modifications to the rules and some opposed the rules, particularly the limitations on remote electronic access.

A chart summarizing the comments and the committee's responses is attached at pages 37–60.

Descriptions of the comments and the committee's responses follow.

Comments on the definition of "trial court records" in rule 2070(a), and the committee's responses

One of the commentators, John Avery, President of the California Court Reporters Association (comment 2), asked that the rules make clear that they do not apply to reporters' transcripts. In response to this comment, the committee amended the rule to specifically exclude from the definition reporters' transcripts for which fees are required.

Another commentator, Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8), proposed that the definition of "trial court records" include the definition of court records set forth in *Copley Press, Inc. v. Superior Court* (1992) 6 Cal App 4th 106, 113–15. One other commentator, Timothy Gee, Management Analyst at the Superior Court of San Mateo County (comment 10), proposed that the definition clarify whether court minutes are trial court records. The committee took no action on these proposals, concluding that the definition covers the court records set forth in *Copley* and also covers court minutes. These matters are noted in the advisory committee comment appended to this rule.

Comment on access to court's register of actions in rule 2071(b), and the committee's response

Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al (Comment 8) was concerned that, because this rule excludes the register of actions and court calendars from the application of the rules, the public would *not* have a right of access to these records in electronic form

This was *not* the intent of the committee. As a result, the committee amended this rule to specifically provide that the rules do not limit remote electronic access to a court's register of actions or its calendars

Comment on constitutional right of access versus constitutional right of privacy in rule 2072, and the committee's response

Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al (comment 8) was "concerned that the description of the purposes of the proposed rules emphasizes the constitutional status of the right to privacy while failing to recognize that the right of public access is also of constitutional stature "

The committee concluded that the reference in the rule to the constitutional right of privacy (under Cal Const , art I, § 1) should be deleted to avoid any implication that the rules favor privacy at the expense of access, instead the rules attempt to balance the two interests

Comment on the general right of access in rule 2073(a), and the committee's response

Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al (comment 8) was concerned that the reference limiting public access as required by "rule" might permit the adoption of local rules restricting public access to court records to which the public has a right of access

The committee never intended for courts, by local rule, to be able to limit access to categories of records not restricted by the California Rules of Court (or by statute or court order). Therefore, the committee changed the reference from "rule" to "California Rules of Court" so that the rule now reads "All trial court records maintained in electronic form must be made available to the public, except as otherwise provided by law, including, but not limited to, statutes, California Rules of Court, and court orders "

Comments on access only on a case-by-case basis in rule 2073(b), and the committee's responses

This was an area of great concern to a number of commentators, particularly with respect to the issue of complying with bulk requests and data compilations. David

De Alba, Special Assistant Attorney General, Office of the Attorney General (comment 7), noted the importance of safeguarding against the bulk and/or commercial distribution of sensitive personal information. Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al (comment 8) proposed doing away with this subdivision altogether because it imposes restrictions on access to electronic court records that are not currently imposed on access to paper court records—that is, members of the press can currently gather information about cases filed in paper form without knowing the parties' names, case number, and so on, and this rule would prohibit them from obtaining information about proceedings of which they are not already aware. Harry Hammitt, Editor at Access Reports (comment 14), completely disagreed with this rule, stating that to require a member of the public to identify a file with the specificity suggested is to limit access to it, in practical terms, to those who are already familiar with the case. J. Rumble of the Superior Court of Santa Clara County (comment 21) stated that courts should not be required to provide compilations or responses to requests for electronic data not directly linked to the official records. He added that the approach stated in the discussion accompanying the rule—that is, that it is left to individual courts to decide whether to comply with bulk requests—is inconsistent with the legislative mandate of Code of Civil Procedure section 1010.6(b), which requires the council to develop statewide policies on access, and that the issue is of such significance that it warrants a statewide policy.

The committee's legal justification for limiting access on a case-by-case basis has been that courts clearly have authority to place reasonable time, place, and manner restrictions on public access so as not to interfere with the business of the court. Access rules of other state and federal courts (see, e.g., Arizona Supreme Court rule 123(f)(1), (g)(2) and PACER) require a case name and/or number for access. The rule does not limit the number of searches that may be conducted and does not prohibit anyone from, for example, searching for all new cases filed in the court each day by checking the court's register of actions.

The committee was quite concerned by the problem Mr. Rumble faced in his court—how to respond to a media request for the court's entire database, which includes confidential information to which the public does not have a right of access. In order to comply with such a request, it would be necessary for court personnel to carefully review each record in the database and redact all confidential information from the records—a costly, time-consuming, and perhaps impossible task. The committee is aware that other courts have been confronted with similar requests, and concluded that a statewide policy is needed to address this issue. Therefore, in response, the committee deleted from the comment to the rule the sentence that indicated that it is left to individual courts to decide whether

to comply with bulk requests Under the rule, courts must comply with requests for records on a case-by-case basis only

Comments on denying remote electronic access to records in specified proceedings, as provided in rule 2074(b), and the committee's responses
David De Alba, Special Assistant Attorney General (comment 7), suggested adding the following to the list of records that are not available remotely (1) records in civil harassment proceedings under Code of Civil Procedure section 527.6, (2) records in personal injury and medical malpractice cases, which generally include personal medical information and which the Legislature has recognized require special privacy protection under Government Code section 6254(c), and (3) records filed under seal under Government Code section 12652(c)

The committee agreed that records in civil harassment proceedings under Code of Civil Procedure section 527.6 should be added to the list of records that are not available by remote electronic access but only by public terminals at the courthouse, and has done so by adding a subdivision (b)(6) to rule 2074. Allegations in these proceedings are analogous to those in domestic violence and dissolution stay-away orders to which subdivision (b)(1) limits access

Government Code section 6254(c), which Mr. De Alba references, is contained in the Public Records Act, which does not apply to the courts and exempts disclosure of personnel, medical, or similar files when such disclosure would constitute an unwarranted invasion of personal privacy. Records containing personal medical information (whether in personal injury and medical malpractice cases or in other types of cases) may be sealed on a case-by-case basis under rule 2075. Therefore, the committee declined to add these records to rule 2074(b).

Government Code section 12652(c), which Mr. De Alba also references, provides that complaints filed under the False Claims Act (Gov. Code, §§ 12650–12655) must be filed under seal and may remain under seal for up to 60 days. The committee also declined to add this record to rule 2074(b).

Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8) states that there is no substantial justification for distinguishing between the information available through electronic access at the courthouse and that available through remote electronic access, and that limitations on remote electronic access should be eliminated in favor of a requirement that records that are subject to statutory requirements of confidentiality or that have been ordered sealed not be subject to electronic access of any kind. This comment also proposes that parties be obligated to include an identifying statement on the cover of any document or exhibit that is subject to a

confidentiality requirement, and that the court is not responsible for public disclosure of a document so identified. Finally, it proposes that restrictions on remote electronic access to all criminal case records should be eliminated and replaced with a provision restricting electronic access only in regard to documents or exhibits sealed under statute or court rule.

As noted under Rationale for Recommendation, the reason the committee singled out the six enumerated proceedings for special treatment is because of the sensitive nature of the information that parties are required to provide in them. Government Code section 68150(h) requires that court records preserved or reproduced in electronic form “be made reasonably accessible to all members of the public for viewing and duplication as would the paper records.” The committee believes that this rule is a reasonable interpretation of the statute. It also reflects the fact that the Legislature has recognized that many of the records in these proceedings should be closed to the public. The approach the committee has taken in this subdivision is in accord with the approach being taken (or being considered) by both the federal courts and many other state courts, as noted under Rationale for Recommendation. For the policy reasons discussed at length there, the committee declined to eliminate the restrictions on remote electronic access.

Ashley Gauthier, Legal Fellow at the Reporters Committee for Freedom of the Press (comment 9), concurred with the comments made by Gray Cary Ware & Freidenrich. She also proposed that the rule not impose limitations on remote electronic access, on the basis that “any information that is contained in a court record is not subject to a privacy interest.”

The committee disagrees with this position. A right of privacy is specifically afforded under article I, section 1 of the California Constitution. Additionally, the federal courts have found an informational right of privacy in court records under the U.S. Constitution, which is an “individual interest in avoiding disclosure of personal matters” (*In re Crawford* (9th Cir. 1999) 194 F.3d 954, 958, following *Whalen v. Roe* (1977) 429 U.S. 589, 599 [97 S.Ct. 869, 51 L.Ed.2d 64]). For example, indiscriminate public disclosure of social security numbers that are contained in court filings, particularly when accompanied by names and addresses, “may implicate the constitutional right to informational privacy” (*Id.* at p. 958).

José Octavio Guillén, Executive Officer/Clerk at the Superior Court of Riverside County (comment 13), indicated in his comments that his court strongly disagrees with the courthouse-versus-remote distinction in rule 2074(b) because (1) it requires courts to “chase technology” and continually update access rules as new technology becomes available that allows court records to be electronically collected at the courthouse, (2) it poses access-to-justice issues because of the

limited hours a courthouse is open, and (3) it requires courts to make computer system modifications that would be unnecessary if there were no distinction

It certainly is not the committee's intention to make the work of the courts more difficult, but, as discussed under Rationale for Recommendation in this report, it is the position of the committee that there are important policy reasons for limiting remote access to the records specified. As noted in rule 2072, the committee recognizes the important public service that courts perform in providing remote electronic access in all other cases to which access is not otherwise restricted by law

Loree Johnson, Information Systems Manager at the Superior Court of Siskiyou County (comment 17), stated in her comments that information that is available to the public at the courthouse should also be available remotely if the court wishes it to be. She notes that Siskiyou is a very rural county, and it is a hardship for people in remote areas to travel many miles to the courthouse to view information that could be made available on the Internet

The rules *do* provide for remote electronic access to most types of court records, and rule 2072 specifically acknowledges the benefits to the public that should result from providing this access. However, courts may not decide, by local rule or policy, to provide remote access to the records specified in rule 2074(b). The purpose of the rules is to provide a statewide policy regarding public access and privacy that applies to all trial courts. There is also nothing in the rules that would prevent a court from sending a record by mail, fax, or e-mail to a person who cannot come to the courthouse

Comments on denying electronic access based on resource limitations, as provided in rule 2074(d), and the committee's response

Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al (comment 8), suggested that the rule clarify that if records are available only in electronic form, the court must ensure that the public's right of access is accommodated. Harry Hammit, Editor at Access Reports (comment 14), proposes that courts be encouraged, and be provided with funds, to move aggressively toward providing access

The committee amended the rule to provide that courts may limit electronic access as long as some type of access is provided

Comments on conditions of use in rule 2074(e), and the committee's response

Beth Givens, Director of Privacy Rights Clearinghouse (comment 11), and Linda Robertson, Supervising Attorney at the California Appellate Project (comment 20), both expressed concern about the language in this rule, which sets forth as one

of the conditions of access that the user consent to “monitoring” by the court of access to its records. They proposed that the rule specify the information that will be collected, and who will have access to it and under what circumstances.

The committee believes that this matter is adequately addressed by a change it made to rule 2074(g), which now provides as follows: “A court must post on its public-access Web site a privacy policy to inform members of the public accessing its records maintained in electronic form of the information it collects regarding access transactions and the uses that the court may make of the collected information.”

Comments on rule 2075’s limitation on public access based on overriding interest, and the committee’s responses

Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. (comment 8) proposed that this rule refer to rule 243.2 as well as rule 243.1 of the California Rules of Court with respect to requirements for a court’s sealing order.

The committee deleted the reference to the requirements for a court’s sealing order and amended the rule to provide: “A court must not provide electronic access to any court record maintained in electronic form that has been sealed under rule 243.1.”

Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al. also proposed that this rule provide that courts may adopt procedures for the separate filing, redaction, or other method of identifying and excluding certain types of information from remote electronic access, including social security numbers, financial account numbers, names of confidential informants in criminal proceedings, information about victims of sexual abuse crimes, and information about persons seeking temporary restraining orders in domestic violence, sexual abuse, or stalking cases.

In the advisory committee comment appended to the rule, the committee suggests the types of information that parties may request the court to seal, such as medical or employment records, tax returns, financial account numbers, credit reports, and social security numbers. In drafting the rules, the committee considered restricting remote access to specific data elements in a court record, such as a party’s financial account numbers, but concluded that the problem with this approach is one of practical implementation: it would require someone in the clerk’s office to carefully read each document filed with the court to ascertain whether there are any matters in the document that need to be redacted, and might subject the courts to liability for failing to redact all confidential data elements. Therefore, the committee concluded that the more workable approach is to limit remote

electronic access to certain categories of cases (as is done in rule 2074(b)) and not to items of information that must be provided in specified records

Comment on contracts with vendors in rule 2076, and the committee's response
Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al (comment 8) proposed that this rule require that a vendor provide public access to a court's records in a manner consistent with the requirements of law

The committee amended the rule in response to this comment so that it now reads as follows "A trial court's contract with a vendor to provide public access to its trial court records maintained in electronic form must be consistent with these rules, and must require the vendor to provide public access to these records and to protect the confidentiality of these records as required by law "

Comment on fees for electronic access in rule 2077, and the committee's response
Gray Cary Ware & Freidenrich on behalf of California Newspaper Publishers Association et al (comment 8) proposed that this rule should make clear that vendors may not charge fees in excess of those associated with the costs of duplication, as provided by Government Code section 68150(h)

The committee revised this rule in response to this comment by adding the following sentence to the rule "To the extent that public access to a court's records maintained in electronic form is provided exclusively through a vendor, the court must ensure that any fees the vendor imposes for the costs of providing access are reasonable "

Recommendation

The Court Technology Advisory Committee recommends that the Judicial Council, effective January 1, 2002

1 Adopt rules 2070–2077 of the California Rules of Court to

- (a) Set forth statewide policies on providing public access to trial court records maintained in electronic form, while protecting privacy and other legitimate interests in limiting disclosure of certain records, and
- (b) Set forth statewide policies regarding courts' contracts with vendors to provide public access to court records maintained in electronic form

2 Repeal section 38 of the Standards of Judicial Administration

The text of the proposed rules is attached at pages 26–33, and the text of the standard to be repealed is attached at pages 34–36

Attachments

Rules 2070, 2071, 2072, 2073, 2074, 2075, 2076, and 2077 of the California Rules of Court are adopted, effective January 1, 2002, to read

DIVISION VI
RULES FOR FAX AND ELECTRONIC FILING AND
SERVICE
CHAPTER 1 FAX FILING AND SERVICE RULES ***
CHAPTER 2. ELECTRONIC FILING AND SERVICE RULES
CHAPTER 3. PUBLIC ACCESS TO ELECTRONIC TRIAL
COURT RECORDS

Rule 2070. Definitions

- (a) **[Trial court records]** As used in this chapter, “trial court records” are all documents, papers, and exhibits filed by the parties to an action or proceeding, orders and judgments of the court, and those items listed in subdivision (a) of Government Code section 68151, excluding reporters’ transcripts for which the reporter is entitled to receive a fee for any copy. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel.
- (b) **[Trial court records maintained in electronic form]** As used in this chapter, “trial court records maintained in electronic form” are computerized records, regardless of the manner in which they have been computerized. The term does not include trial court records that are maintained only on microfiche, paper, or any other medium that can be read without the use of an electronic device.
- (c) **[The public]** As used in this chapter, “the public” is an individual, a group, or an entity, including print or electronic media, or the representatives of an individual, a group, or an entity.

Advisory Committee Comment

Subdivision (a) This subdivision sets forth a definition of “trial court records” that incorporates the definition of “court record” set forth in Government Code section 68151(a). It is also in accord with the definition of “judicial record” set forth in Code of Civil Procedure section 1904, which defines a “judicial record” as the record or official entry of the court proceedings, or the official act of a judicial officer in an action or special proceeding. Documents that reflect an official action of the court, such as the court minutes and the court’s written dispositions, are included within the definition of court records. The definition recognizes that the public right of access to court records does not apply to all of a court’s records and files, but only to records that

officially reflect the work of the court (See *Copley Press Inc v Superior Court* (1992) 6 Cal App 4th 106, 113–15 [7 Cal Rptr 2d 841])

Rule 2071. Applicability

(a) **[Access by parties and attorneys]** The rules in this chapter do not limit access to trial court records maintained in electronic form 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 California Rules of Court

(b) **[Access to court's register of actions]** The rules in this chapter do not limit remote electronic access to a court's register of actions, as defined in Government Code section 69845, or its calendars

Rule 2072. Purpose

The rules in this chapter are intended to provide the public with reasonable access to trial court records maintained in electronic form, while protecting privacy interests. 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 trial court records 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 trial court records may also foster in the public a more comprehensive understanding of the trial court system. The rules in this chapter are not intended, however, to provide public access to trial court records to which the public does not otherwise have a right of access.

Advisory Committee Comment

Under Code of Civil Procedure section 1010.6(b), the Judicial Council is required to adopt uniform rules for the electronic filing and service of documents in the trial courts, that include statewide policies on vendor contracts, privacy, and access to public records. The rules in this chapter set forth such statewide policies. These rules attempt to balance the right of public access to trial court records maintained in electronic form against the right of privacy and other legitimate interests in limiting disclosure of certain records.

Rule 2073. Public access

(a) **[General right of access]** All trial court records maintained in electronic form must be made available to the public except as

otherwise provided by law, including, but not limited to, statutes, California Rules of Court, and court orders. The extent to which trial court records are made available to the public must not be determined by the medium in which the records are maintained unless the rules in this chapter or another legal authority provides otherwise.

(b) [Access only on case-by-case basis] A trial court must grant public access to its trial court records maintained in electronic form only when the record is identified by the number of the case, the caption of the case, or the name of a party, and only on a case-by-case basis.

(c) [Records that become inaccessible] If a trial court record maintained in electronic form 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 copies of the record that were made by the public before the record became inaccessible.

Advisory Committee Comment

Subdivision (a) This subdivision states the general rule that trial court records are open to the public for inspection and copying. (See *Nixon v Warner Communications, Inc* (1978) 435 U S 589, 597 [98 S Ct 1306, 55 L Ed 2d 570] and *KNSD Channels 7/39 v Superior Court* (1998) 63 Cal App 4th 1200, 1203 [74 Cal Rptr 2d 595]) Currently, there are no statutes or California Rules of Court providing for public access to trial court records, whether in paper or electronic form. Public access is afforded under the common law. (See *Copley Press, Inc v Superior Court* (1998) 63 Cal App 4th 367, 373 [74 Cal Rptr 2d 69]) This subdivision indicates that public access to specified court records may be precluded by law. (See, e.g., Fam Code, § 3552 [sealing of tax returns filed in support proceedings] and Cal Rules of Court, rule 985(h) [confidentiality of indigent defendant's in forma pauperis records])

Subdivision (b) This subdivision provides that trial courts must grant public access to their records maintained in electronic form on a case-by-case basis only. This is consistent with the procedures courts employ for requests for access to paper files, i.e., courts make paper files available on request, one file at a time, to individuals who ask for a particular file. It addresses the concerns stated by the court in *Westbrook v County of Los Angeles* (1994) 27 Cal App 4th 157 [32 Cal Rptr 2d 382], in which the court denied a commercial vendor's request for periodic copies of the court's computerized database of docket information about every person against whom criminal charges were pending. The court found a "qualitative difference between obtaining information from a specific docket or on a specified individual, and obtaining docket information on every person against whom criminal charges are pending" in a particular court or group of courts. (*Id* at p 165) The court noted that "[i]t is the aggregate nature of the information which makes it valuable to respondent, it is that same quality which makes its dissemination constitutionally dangerous." (*Ibid*) The court also noted the adverse impact of disseminating a database to private vendors, with its potential for frustrating policies permitting the subsequent sealing or destruction of records, or limiting the dissemination of similar records by other criminal justice agencies. (*Id* at pp 166-67 [“If, for example, the court ordered a record maintained by a criminal justice agency to be sealed or destroyed because a defendant had been found factually innocent of the charges, the information would still be available for sale by

1 respondent Or, if a defendant was granted statutory diversion, this information would be
 2 available to the public from respondent even though it could not be obtained from the California
 3 Department of Justice”])

4
5
6 **Rule 2074. Electronic access**

7
8 **(a) [General rule]** Electronic access to trial court records maintained in
 9 electronic form must be reasonably available to the public by means of
 10 networks or software that is based on industry standards or is in the
 11 public domain Access must be provided at public terminals at the
 12 courthouse and by remote electronic access, except as otherwise
 13 provided in subdivision (b) of this rule Courts should encourage
 14 availability of access at public off-site locations

15
16 **(b) [Records not available by remote electronic access]** The following
 17 trial court records maintained in electronic form must not be made
 18 available to the public through remote electronic access but only
 19 through public terminals at the courthouse

20
21 (1) Trial court records in proceedings under the Family Code,
 22 including, but not limited to, proceedings for dissolution, legal
 23 separation, and nullity of marriage, child and spousal support
 24 proceedings, and child custody proceedings

25
26 (2) Trial court records in juvenile court proceedings

27
28 (3) Trial court records in guardianship and conservatorship
 29 proceedings

30
31 (4) Trial court records in mental health proceedings

32
33 (5) Trial court records in criminal proceedings

34
35 (6) Trial court records in civil harassment proceedings under Code of
 36 Civil Procedure section 527.6

37
38
39 **(c) [Limitation on public access by law]** Subdivision (b) of this rule is not
 40 intended to require public access to records in any specified proceeding
 41 to which the public does not otherwise have a right of access
 42

- 1 **(d) [Other limitations on electronic access based on resource**
 2 **limitations]** A court is not required to provide electronic access to its
 3 **trial court records if this access is not feasible because of the court's**
 4 **resource limitations, as long as the court provides reasonable public**
 5 **access in some form to these records**
 6
- 7 **(e) [Conditions of use by persons accessing records]** Electronic access to
 8 **trial court records by the public is subject to two conditions (1) the**
 9 **user's consent to access the records only as instructed by the court, and**
 10 **(2) the user's consent to the court's monitoring of access to its records**
 11 **A court must give notice of these conditions in any manner it deems**
 12 **appropriate The court may deny access to members of the public for**
 13 **failure to comply with the conditions of use Any member of the public**
 14 **who willfully destroys or alters any trial court record maintained in**
 15 **electronic form is subject to the penalties imposed by Government Code**
 16 **section 6201**
 17
- 18 **(f) [Notices to persons accessing records]** A court must give notice of the
 19 **following information to members of the public accessing its trial court**
 20 **records maintained in electronic form A court may give these notices in**
 21 **any manner it deems appropriate**
 22
- 23 **(1) The court staff member(s) to contact about the requirements for**
 24 **accessing the court's records electronically**
 25
- 26 **(2) Copyright and other proprietary rights that may apply to**
 27 **information in a case file absent an express grant of additional**
 28 **rights by the holder of the copyright or other proprietary right The**
 29 **notice should indicate that (a) use of this information is**
 30 **permissible only to the extent permitted by law or court order, and**
 31 **(b) any use inconsistent with proprietary rights is prohibited**
 32
- 33 **(3) The status of the trial court records available by electronic access**
 34 **Unless electronically certified by the court, trial court records**
 35 **available by electronic access do not constitute the official record**
 36 **of the court The notice should indicate the procedure and any fee**
 37 **required for obtaining a certified copy of an official record of the**
 38 **court**
 39
- 40 **(g) [Access policy]** A court must post on its public-access Web site a
 41 **privacy policy to inform members of the public accessing its records**
 42 **maintained in electronic form of the information it collects regarding**

access transactions and the uses that the court may make of the collected information

Advisory Committee Comment

Subdivision (a). This subdivision provides for noncommercial access to court records. The rationale for this provision is that the public should share the benefits of technology, including more efficient access to court records. The reasons for requiring access through industry-standard software and for putting terminals in publicly accessible places are to prevent any exclusive commercial control of court records, to make these records available to the public at little or no charge, and to accommodate members of the public who do not have access to personal computers.

Subdivision (b) This subdivision denies remote electronic access to records in the specified proceedings because of the personal and sensitive nature of the information parties are required to provide to the court in these proceedings. Public access to electronic court records in these proceedings is available only at public terminals at the courthouse. The Legislature has recognized that many of the records in the specified proceedings should be closed to the public (See, e.g., Fam Code, § 3552 [parties' tax returns filed in support proceedings must be sealed], Pen Code, § 1203.05 [probation reports are public only for 60 days], Prob Code, § 1513(d) [report of investigation and recommendation concerning proposed guardianship is confidential], Welf & Inst Code, § 827 (access to case files in juvenile court proceedings is generally restricted)). Government Code section 68150(h) requires that court records preserved or reproduced in electronic form must "be made reasonably accessible to all members of the public for viewing and duplication as would the paper records." The committee believes that this subdivision is a reasonable interpretation of the statute.

This subdivision is based on the committee's conclusion that there is a fundamental difference between paper records that may be examined and copied only at the courthouse and records maintained in electronic form that may be accessed and copied remotely. The committee concluded that unrestricted Internet access to case files would compromise privacy and, in some cases, could increase the risk of personal harm to litigants and others whose private information appears in case files.

This subdivision is based in part on the U.S. Supreme Court's 1989 decision in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press* 489 U.S. 749 [109 S.Ct. 1468, 103 L.Ed.2d 774], in which the court referred to the relative difficulty of gathering paper files as "practical obscurity." Unless a case achieved notoriety, sensitive information in the case file was unlikely to circulate beyond those directly concerned with the case. The inherent difficulty of obtaining and distributing paper case files effectively insulated litigants and third parties from the harm that could result from misuse of information provided in connection with a court proceeding. This subdivision is also based on other court decisions that have recognized the need to protect individual privacy because of the increasing computerization of public and private records (See, e.g., *White v. Davis* (1975) 13 Cal.3d 757, 774-75 [120 Cal.Rptr. 94] and *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 265 [198 Cal.Rptr. 489]).

This subdivision is based, as well, on the committee's conclusion that the judiciary has a custodial responsibility to balance access and privacy interests in making decisions about the disclosure and dissemination of case files. Like other government entities that collect and maintain sensitive personal information, the judiciary must balance the public interest in open

1 court records against privacy and other legitimate interests in limiting disclosure. While there is
 2 no question that court proceedings should not ordinarily be conducted in secret, the public's right
 3 to information of record is not absolute. When the public's right of access conflicts with the right
 4 of privacy, the justification supporting the requested disclosure must be balanced against the risk
 5 of harm posed by the disclosure. (*Westbrook v. County of Los Angeles* (1994) 27 Cal App 4th
 6 157, 166 [32 Cal Rptr 2d 382])

7
 8 This subdivision is also based on the committee's conclusion that if courts do not recognize a
 9 distinction between electronic and paper records, the courts' electronic records may be used to
 10 circumvent policy protections that the Legislature has extended to records held by other agencies
 11 and entities, e.g., under various provisions of the Public Records Act (Gov. Code, § 6250 et seq.)
 12 and the California Information Practices Act (Civ. Code, § 1798 et seq.)

13
 14 **Subdivision (d)** This subdivision acknowledges that courts may preclude or limit electronic
 15 access to trial court records because of resource constraints. The committee expects, however,
 16 that courts will meet the requirements of rule 2073(a) as these constraints are removed.

17
 18 **Subdivision (g)** This subdivision is based on Government Code section 11015.5, which requires
 19 state agencies (but not the courts) that electronically collect personal information about users of
 20 their Web sites to give notice to these users of the existence of the information-gathering method
 21 and the type of personal information that is being collected as well as the purpose for which the
 22 information will be used. This subdivision is also in accord with Government Code section
 23 11019.9, which requires state departments and agencies (but not the courts) to enact and maintain
 24 a permanent privacy policy in accordance with the California Information Practices Act (Civ.
 25 Code, § 1798 et seq.)

26
 27 Such a privacy policy might notify users that the court's server may gather and store the
 28 following information: (1) the user's Internet domain and IP address, (2) the type of browser and
 29 operating system used to access the site, (3) the date and time of access, (4) the pages viewed on
 30 the site, and, (5) if the user reached the site from another site, the address of the originating site.
 31 The policy might advise users that this information is collected to make the site more useful, to
 32 diagnose problems with the server, to keep the site running smoothly, to learn about the number
 33 of visitors to the site and the types of technology they use, and to improve the content of the site.

34 35 36 **Rule 2075. Limitation on public access to sealed records**

37
 38 A court must not provide electronic access to any court record maintained in
 39 electronic form that has been sealed under rule 243.1

40 41 **Advisory Committee Comment**

42
 43 This rule is based on numerous judicial decisions that have held that the right of public access to
 44 judicial records is not absolute but must be reconciled with overriding public or private interests.
 45 (See *Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589, 598 [98 S.Ct. 1306, 1312, 55
 46 L.Ed.2d 570], *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1211
 47 [86 Cal.Rptr.2d 778]) Overriding interests that may justify denying public access include
 48 preserving the litigants' right to a fair trial (see, e.g., *Press-Enterprise Co. v. Superior Court*
 49 (1986) 478 U.S. 1, 13-14 [106 S.Ct. 2735, 2743, 92 L.Ed.2d 1], *NBC Subsidiary (KNBC-TV)*,
 50 *supra*, 20 Cal.4th at pp. 1216-17) and protecting the privacy interests of litigants or third parties.

(See, e.g., *Press-Enterprise Co v Superior Court* (1984) 464 U S 501, 511–12 [104 S Ct 819, 824–25, 78 L Ed 2d 629], *Nixon, supra*, 435 U S at p 598, and *Copley Press, Inc v Superior Court* (1991) 228 Cal App 3d 77, 85 [278 Cal Rptr 443]) The rule anticipates that parties may ask the court to seal records that contain personal identifying information. This information may include, under appropriate circumstances, medical or employment records, tax returns, financial account numbers, credit reports, social security number, driver's license number, home address, or home or other personal telephone number. It may also include personal identifying information about minor children involved in court proceedings.

Rule 2076. Contracts with vendors

A trial court's contract with a vendor to provide public access to its trial court records maintained in electronic form must be consistent with these rules, and must require the vendor to provide public access to these records and to protect the confidentiality of these records as required by law, including but not limited to statute, California Rules of Court, and court order. Any contract between a court and a vendor to provide public access to the court's records maintained in electronic form must specify that the court is the owner of these records and has the exclusive right to control their use.

Advisory Committee Comment

This rule provides that courts that elect to contract with a vendor to provide public access to their electronic records must require the vendor to provide access to these records and to protect the confidentiality of these records as required by law, and that the contract must be consistent with these rules. This follows the general principle set forth in the California Information Practices Act (Civ Code, § 1798 et seq), which applies to state agencies but not to the courts (Civ Code, § 1798 3(b)(2))—that state agencies that contract with a private vendor to maintain records containing personal information must ensure that the vendor complies with the act's requirements (See *id* at § 1798 19).

Rule 2077. Fees for electronic access

Trial courts may impose fees for the costs of providing public access to their trial court records maintained in electronic form, as provided by Government Code section 68150(h). On request, a trial court must provide the public with a statement of the costs on which these fees are based. To the extent that public access to a court's records maintained in electronic form is provided exclusively through a vendor, the court must ensure that any fees the vendor imposes for the costs of providing access are reasonable.

Standard 38 of the California Standards of Judicial Administration is repealed, effective January 1, 2002

Sec. 38. Access to electronic records

~~(a) [Intent] Improved technologies provide courts with many alternatives to the historical paper-based record receipt and retention process, including the creation and use of electronic records. Access to trial courts' electronic records can save the public time, money, and effort and encourage the courts to be efficient in their operations. Improved access to court records may also foster a more comprehensive understanding of the trial court system. Because of such benefits, trial courts are encouraged to explore possibilities for creating electronic court records and to offer public access to such records if their resources permit. Such access should not harm legitimate privacy interests or compromise protections established by law or court order.~~

~~(b) [Definitions] The following definitions apply to this standard.~~

~~(1) A "record" is any information that is part of an official case file of a court, that constitutes court action, or that otherwise reflects an official action of a court. Records include those items listed in Government Code section 68151(a). Records do not include personal notes or preliminary memoranda of judges or other judicial branch personnel.~~

~~(2) An "electronic record" is any record that is accessible electronically, regardless of how it was created. The term does not include records on microfiche, paper, or any other medium that can be read without the use of an electronic or mechanical device.~~

~~(3) "Access" is the ability to obtain or make use of electronic records by any means.~~

~~(4) "Public access" is access that is not restricted by law or an order of the court.~~

~~(5) A "summary report" is a compilation of public records that is produced in the ordinary course of business.~~

~~(c) [Scope] This standard applies only to public access to the electronic records that trial courts prepare, own, use, or retain. The standard does not apply to electronic access by a person who is a party to a case or the attorney of such a person, the electronic filing of documents, or the electronic distribution of any~~

~~court calendar records. A court should not grant access to an electronic record that is sealed, is made confidential, or is required to be expunged after a time or event determined by law or an order of the court. Cases involving family law, child support, juvenile law, mental health, probate, criminal law, or public offenses, as they are defined in Penal Code section 15, should not be included in electronic records made available through remote access.~~

~~(d) [Policies] The objective of this standard is to provide a trial court ("a court") with a reasonable framework for providing public access ("access") to its electronic records.~~

~~(1) (Electronic records) A court should grant access to an electronic record only when the record is identified by the name or number of a case and only on a case-by-case basis. A court need not grant access to all or part of an electronic record if access is not feasible because of the court's resource limitations.~~

~~(2) (Summary reports) A court may provide access to electronic versions of summary reports.~~

~~(3) (Direct electronic access for the public) Direct electronic access to court records should be reasonably available to the public remotely, through the Internet, or by means of software based on industry standards or in the public domain. When feasible, remote access should be available at public off-site locations such as public libraries. Access should also be available at public terminals at the courthouse.~~

~~(4) (Contracts with vendors) A court that elects to contract with a vendor to release its records electronically should, in accordance with these policies, require the vendor to protect confidentiality as required by law or court order and should provide the public with direct electronic access to such records without requiring access through the vendor.~~

~~(5) (Disclaimers) As appropriate, a court should provide disclaimers regarding the accuracy of its electronic records.~~

~~(6) (Information on access) A court that provides access to its electronic records should provide the public with information on the requirements for access.~~

1 ~~(e) [Evaluation] Any trial court that provides public access to its electronic records~~
2 ~~should submit to the Judicial Council a copy and an evaluation of its access~~
3 ~~policies as directed by the council.~~

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
1	RoseAnn Alfaro Supervising Legal Clerk III Superior Court of Stanislaus County	A	N	No comment	No response required
2	John Avery President California Court Reporters Association			1 The relationship between a court reporter as an independent contractor or an employee of the court for purposes of transcript preparation and the obligation of a reporter to provide transcripts in electronic form are not addressed. It would appear that the policies, privacy issues and access to public records are not applicable to court reporters, court reporter transcripts and the stenographic notes retained by court reporters. It is suggested the rule clearly state it is not intended to apply to the circumstances stated above. 2 It is suggested specific reference to the prohibitions provided in Government Code §69954(d) be referenced.	1 Based on this comment, rule 2070(a) was revised to exclude from the definition of “trial court records” reporters transcripts for which fees are required. 2 The committee declined to include the reference.
3	Cindy Avila Supervising Legal Clerk Superior Court of Stanislaus County	A	N	No comment	No response required
4	Hon. Ronald L. Bauer Chair, Rules and Forms Committee Superior Court of Orange County	A	Y	For a first foray into previously untrodden territory, the proposed rules are excellent.	No response required
5	Susan Cichy Administrator Superior Court of Los Angeles County	A	N	1 I agree that criminal records are one of the areas that should not be remotely accessed.	1 Remote electronic access to records in criminal proceedings is not allowed for the reasons stated in the Advisory Committee Comment to rule 2074(b).

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				2 All other provisions seem to allow local court control of process – taking into consideration funding and other local restrictions	2 Local court control of process is permitted under the rules, however, the rules set forth <i>statewide</i> policies governing vendor contracts, privacy, and public access to electronic court records, as required by Code of Civil Procedure section 1010 6(b), with which all trial courts in this state must comply Contrary local restrictions are not permitted
6	John A Clarke Executive Officer/Clerk Superior Court of Los Angeles County	A	N	No comment	No response required
7	David De Alba Special Assistant Attorney General Office of the Attorney General		Y	Proposed Rule 2074 limiting remote electronic access to certain types of court records is a good example of the safeguards the proposed rules provide against unwarranted invasions of individual privacy interests The Judicial Council may wish to consider other types of proceedings which contain sensitive personal information, including the following 1 Proceedings under Civil Code section 527 6 (temporary restraining orders prohibiting harassment)	1 The committee agreed that records in civil harassment proceedings under Code of Civil Procedure section 527 6 should be added to the list of records that are not available by remote electronic access but only available at public terminals at the courthouse Subdivision (b)(6) has been added to rule 2074, which precludes remote electronic access to these records The committee's rationale is that

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				2 Personal injury and medical malpractice cases, which the legislature has recognized requires privacy protection, see Government Code section 6254(c) 3 The rules may wish to address actions filed under seal pursuant to the False Claims Act Propose — Rule 2073 [False Claims Action Under Seal] “Actions filed under seal pursuant to Government Code section 12652(c) are not to be maintained in electronic form or accessible to the public by electronic register while under seal Absent court order, only documents filed subsequent to the lifting of the seal shall be maintained in electronic form ”	allegations in these proceedings are analogous to those in domestic violence and dissolution stay-away orders to which rule 2074(b)(1) limits access 2 Government Code section 6254(c) is contained in the Public Records Act, which does not apply to the courts It exempts disclosure of personnel, medical, or similar files when such disclosure would constitute an unwarranted invasion of personal privacy Electronic court records containing this type of information may be sealed on a case-by-case basis under rule 2075 Therefore, the committee declined to add these records to rule 2074(b) 3 Government Code section 12652(c) provides that complaints filed under the False Claims Act must be filed under seal and may remain under seal for up to 60 days The committee also declined to add this record to rule 2074(b)
8	Attn Yvette Depina Office Manager for James M Chadwick Gray Cary Ware & Freidenrich LLP		Y	1 Rule 2070(a) should include in the definition of court records the terminology in the <i>Copley Press, Inc v Superior Court</i> 6 Cal App 4th 106 (1992) decision that the public’s right of access extends to all “the various documents filed in or received by the	1 The committee declined to amend rule 2070(a) based on this comment, concluding that the definition covers the court records set forth in <i>Copley</i> The advisory committee comment to this rule

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
	on behalf of California Newspapers Publishers Association, California First Amendment Coalition, The Copley Press, Inc , Freedom Communications, Inc , Hearst Corporation, Los Angeles Times, McClatchy Company, Reporters Committee for Freedom of the Press, and San Jose Mercury News, Inc			court” 2 Rule 2071(b) limits the application of the proposed rules by expressly excluding “a court’s register of actions court indexes, or court calendar records ” We submit that there is no sound foundation for this exclusion if the disclosure of such compilations is deemed to constitute an impermissible invasion of personal privacy, the remedy is to provide for the creation and maintenance of electronic databases designed to segregate any truly private information into non-public fields, and permit public disclosure of the rest of the information in the database 3 [Rule 2072] We suggest that the statement of purpose be revised to give explicit recognition to the constitutional stature of the right of public access, as found by the California Supreme Court in <i>NBC Subsidiary, Inc v Superior Court</i> 20 Cal 4th 1178 (1999) and as observed by the Judicial Council in issuing California Rules of Court 243 1 <i>et seq</i>	so states 2 The concern of this comment is that because rule 2071(b) excludes the register of actions and court calendars from the application of the rules that the public would <i>not</i> have a right of access to these records maintained in electronic form This was <i>not</i> the intention of the committee As a result, the committee revised the rule to specifically provide that the rules <i>do not limit remote electronic access</i> to a court’s register of actions or its calendars 3 <i>The committee considered the question but decided that there was no need to explicitly acknowledge the constitutional right of privacy declared in Article I, section 1 of the California Constitution</i>

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				4 [Rule 2073(a)] We are concerned that this provision of the rules appears to permit the adoption of local rules or standing orders restricting public access to court records that are subject to constitutional or statutory rights of public access. We believe that this rule should be revised to provide that local rules and standing orders may not restrict access in any manner inconsistent with the U S and California Constitutions or California statutes or rules of court.	4 The committee never intended that courts, by local rule, could limit access to categories of records not restricted by the California Rules of Court (or by statute or court order). Therefore, the committee changed the reference in rule 2073(a) from “rule” to “California Rules of Court” so that the rule now reads “All trial court records maintained in electronic form must

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				5 [Rule 2073(b)] We suggest that proposed rule 2073(b) be eliminated entirely The proposed rule imposes restrictions on access to trial court records maintained in electronic form that are not currently imposed on access to trial court records maintained in other forms The proposed rule would prohibit the public and the press from obtaining any information about proceedings of which they were not already aware The restrictions imposed contravene the mandate of Government Code section 68150(h) that electronic court records “shall be made reasonably accessible to all members of the public for viewing and duplication as would the paper records” Restrictions comparable to those imposed by this proposed rule are not and never have been imposed on access to paper records This restriction would prevent routine newsgathering techniques that the press have used for decades to provide information to the public about specific judicial proceedings and about the operations of the courts in general The practice of routinely seek[ing] access to all new cases filed in the courts each day [would be prohibited] because the reporter would not be able to provide a case name, number, or party	be made available to the public, except as otherwise provided by law, including, but not limited to, statute, California Rules of Court, or court order ” The committee also changed references to “rule” in rules 2071(a) and 2076 to “California Rules of Court ” 5 The committee’s legal justification for limiting access to access on a case-by-case basis is that courts clearly have authority to place reasonable time, place, and manner restrictions on affording public access so as not to interfere with the business of the courts Other state and federal court access rules require case name and/or number for access The rule does not limit the number of searches that may be conducted and does not prohibit anyone from, for example, searching for all new cases filed in the court each day by checking the court’s register of actions As is noted in the advisory committee comment to the rule, the provision that trial courts must grant public access to their records maintained in electronic form on a case-by-case basis only is consistent with the procedures courts employ with respect to requests for access to paper files, i e , courts make papers files available on request, one file at a time, to individuals who ask for a particular file It

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				6 [Rule 2074(b)] Another troubling provision of the proposed rules is its broad prohibition on remote public access to certain categories of records There is no substantial justification for distinguishing between the information available through local electronic access at the courthouse and through remote electronic access We suggest that the limitations on remote electronic access be eliminated, in favor of a requirement that records that are subject to statutory requirements of confidentiality or that have been specifically ordered to remain sealed not be subject to electronic access of any kind We recommend that the court provide that the parties have the obligation to identify on the cover or container of any document or exhibit that is subject to such a confidentiality requirement the express notation of that requirement, and that the courts are	addresses the concerns stated by the court in <i>Westbrook v County of Los Angeles</i> (1994) 27 Cal App 4th 157, in which the court denied a commercial vendor's request for periodic copies of the court's computerized database of docket information about every person against whom criminal charges were pending in the court, finding a "qualitative difference between obtaining information from a specific docket or on a specified individual, and obtaining docket information on every person against whom criminal charges are pending" (<i>Id</i> at p 165) 6 As is noted in the advisory committee comment to rule 2074(b), the reason the committee singled out the enumerated proceedings for special treatment is because of the sensitive nature of the information that parties are required to provide in them Government Code section 68150(h) requires that court records preserved or reproduced in electronic form must "be made reasonably accessible to all members of the public for viewing and duplication as would the paper records " The committee believes this rule is a reasonable interpretation of the statute It also reflects the fact that the Legislature

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				not responsible for public disclosure of documents or evidence not so identified The restrictions on remote electronic access to all criminal case records should be eliminated, and replaced with a provision restricting electronic access only to those documents or evidentiary exhibits properly sealed pursuant to statute or court order 7 [Rule 2074(d)] Our concern with proposed rule 2074(d) is primarily based on its ambiguity These rules may at some point govern public access to trial court records exclusively, because some or all records will be maintained only in electronic form We suggest that this provision be revised to clarify that to the extent that records are available only in electronic form, the courts must ensure that the public's right of access is accommodated 8 [Rule 2074(e)] The apparent intent of this provision is to permit the court to impose restrictions designed to prevent abuse of the electronic access system, for example hacking into or maliciously altering a database However, the language would apparently permit the imposition of conditions or instructions limiting access in a manner inconsistent with the public's constitutional, common law, and statutory access rights [The rule] should be clarified to provide that it does not permit restrictions on access to court records not otherwise provided for in these rules	has recognized that many of the records in these proceedings should be closed to the public The rationale for prohibiting remote electronic access is set forth in the advisory committee comment to this rule 7 The committee amended rule 2074(d) to provide that courts may limit electronic access as long as they provide some type of access 8 The committee declined to amend rule 2074(e), because rule 2073(a) already provides that trial court records maintained in electronic form must be made available to the public except as otherwise provided by law

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				9 [Rule 2075] We believe that it would be more appropriate to frame this provision in the negative than in the positive, in order to clarify that other provisions of the proposed rules do not grant the power to limit access in a manner that does not comply with the public's right of access and Rule 241 3 We are concerned that because the proposed rule does not expressly incorporate all of the provisions of Rules 243 1 and 243 2, it will not adequately protect the public's right of access We therefore propose that this provision be reworded to read "A court may not limit access to any trial court record maintained in electronic form unless necessary to protect an overriding interest A court may limit public access only by an order issued in accordance with the provisions of rules 243 1 and 243 2 " We suggest that Rule 2075 be augmented to provide that the courts may adopt procedures for the separate filing, redaction, or other methods for the identification and exclusion of certain types of information not subject to remote electronic access	9 Based on this comment, rule 2075 was revised to specifically provide that "[a] court must not provide electronic access to any court record maintained in electronic form that has been sealed under rule 243 1" (rule on sealing) This commentator also proposed that it would be more appropriate to frame the provision in the negative than in the positive to clarify that other provisions of the proposed rules do not grant the power to limit access in a manner that does not comply with the public's right of access The committee declined to do so because rule 2073(a) already provides that trial court records maintained in electronic form must be made available to the public except as otherwise provided by law This commentator also suggested that this rule should provide that courts may adopt procedures for the separate filing, redaction, or other methods for the identification and exclusion of certain types of information from remote electronic access In the advisory committee comment to rule 2075, the committee suggests the type of information that parties may request the court to seal In drafting the rules, the committee considered restricting remote

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				10 Rule 2076 should be revised to specifically provide that any vendor who contracts with a court to provide public access to trial court records in electronic form must provide the public with access to such records in a manner consistent with the requirements of the law. At present, this rule merely provides that vendors must maintain the confidentiality of court records, and makes no provision for access at all. 11 [Rule 2077] We believe that “overhead” costs cannot properly be passed along to the public, and we read proposed Rule 2077 as recognizing that fact. However, this provision is somewhat ambiguous, and clarification in this respect is probably advisable.	access to specific data elements in a court records, such as a party’s financial account numbers, but concluded that the problem with this approach is one of practical implementation. It would require someone in the clerk’s office to carefully read each document filed with the court to ascertain whether there are any matters in the document that need to be redacted, and might subject the courts to liability for failing to redact all confidential data elements. Therefore, the committee concluded that the more workable approach is to limit remote electronic access to certain categories of cases (as is done in rule 2074(b)) and not to items of information that must be provided in specified records. 10 Based on this comment, rule 2076 was revised, so that it now provides as follows: “A trial court’s contract with a vendor to provide public access to its trial court records maintained in electronic form must be consistent with these rules, and must require the vendor to provide public access to these records and to protect the confidentiality of these records as required by law.” 11 Based on this comment, rule 2077 was

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				Clarification would be advisable to make it clear that vendors providing electronic access under contract with the court may not charge fees in excess of those associated with the costs of duplication 12 The proposed rules should expressly provide that trial court records maintained in electronic form may either be sealed or made public in accordance with the provisions of Rule 243 2, which governs both the sealing and unsealing of court records	revised, so that it now provides as follows “To the extent that public access to a court’s records maintained in electronic form is provided exclusively through a vendor, the court must ensure that any fees the vendor imposes for the costs of providing access are reasonable ” 12 As noted under response 9 above, rule 2075 has been amended to specifically provide that a court may not provide electronic access to any record that has been sealed
9	Ashley Gauthier Legal Fellow The Reporters Committee for Freedom of the Press	N	Y	1 The <i>United States Department of Justice v Reporters Committee</i> 489 U S 749 (1989), which dealt with a complex executive branch regulatory scheme, should not be relied upon to create a broad policy regarding privacy and access to court records, which, under common law, have traditionally been open to the public	1 The Committee has cited this case because it sheds light on the Supreme Court’s concerns with respect to the dissemination of presumptively public records in an electronic environment, and suggests that the court believes there is a fundamental difference between records maintained in paper form and records maintained in electronic form that may be accessed and copied remotely The committee acknowledges that under the common law, court records have traditionally been open to the public However, the public right of access is a qualified right and such access may be limited based on privacy considerations and other overriding interests

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				2 The Reporters Committee urges the California Judiciary to reject any rules that would cut off public access to entire categories of documents and to reject rules that would limit access based upon the requester's identity or purpose	2 The rules do not cut off public access to entire categories of documents they merely restrict access to documents in the six proceedings specified in rule 2074(b) to access at the courthouse The rules do not limit public access based on the requester's identity or purpose Unlike PACER, which imposes a registration requirement on members of the public who wish to obtain access to federal court records, and unlike some other states which require members of the public to state their reasons for requesting court records and to disclose the purpose for which they intend to use the records, the proposed rules make court documents maintained in electronic form accessible to all members of the public, "no questions asked "
10	Timothy Gee Management Analyst III Superior Court of San Mateo County	N	Y	1 The proposed rules are overbroad and leave much of the right to access open to interpretation and create potential liability of the courts to litigation over the right to access 2 How different is the definition under Rule 2070(c) of public and the "public's right to access" under	1 The committee submits that the rules are sufficiently specific they set forth six categories of cases in which remote access is prohibited (rule 2074(b), they authorize courts to limit access to specific records on a case-by-case basis and in accordance with the rules on sealing (rule 2075), and they provide that the public has a right of access to court records except as otherwise provided by law (rule 2073(a)) 2 <i>Westbrook</i> involved a vendor's request for copies of the court's computerized

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				2074(b) from the situation in <i>Westbrook v County of Los Angeles</i> 27 Cal App 4th 157? 3 Rules 2070(c) and 2074(b) are in conflict 4 Does there need to be a statewide rule to define the distinction between an “electronic, public accessible record” and “official record” (when, if ever, can a publicly accessible electronic record be an official record)? 5 A further clarification is needed in Rule 2072 on what the public has a right to (see last sentence)	database of docket information about every person against whom criminal charges were pending in the court Rule 2073(b) (and the advisory committee comment to that rule) address the concerns raised by the court in <i>Westbrook</i> by providing for access on a case-by-case basis only Commercial vendors, as well as the media, are included within the definition of “the public” set forth in rule 2070(c), but are still only entitled to access on a case-by-case basis 3 The committee believes that rules 2070(c) and 2074(b) are consistent 4 This issue is addressed by rule 2074(f)(3), which requires courts to give notice that, unless electronically certified by the court, trial court records available by electronic access do not constitute the official record of the court, this notice should indicate the procedure and fee for obtaining a certified copy 5 The committee believes that the last sentence of rule 2072 and rule 2074(c) make it clear that the proposed rules do not give members of the public access to records to which they do not otherwise have a right of access

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				6 Providing public access at public terminals at the courthouse to all electronic records under Rule 2074 potentially opens access to other restricted case information 7 What is the basis for the distinction between remote and public access? 8 If these rules require the courts to make accessible all records kept in electronic format then how can a court restrict access to sensitive or confidential information in documents which may not, on their face, be confidential materials (e g exhibits to	6 The committee disagrees The rules do not give the public a right of access to confidential court records These records are not a part of the public electronic court file, just as confidential records in paper form are not a part of the public court file 7 The basis for the distinction is that there is a fundamental difference between records that may be examined and copied only at the courthouse and records that may be accessed and copied remotely The “practical obscurity” of records available only at the courthouse has effectively protected litigants and third parties whose personal information appears in case files from the widespread and virtually uncontrollable dissemination of this information, a protection that disappears when this information is available on the Internet The limitation on remote access does not apply to cases in general, but only in the cases specified in rule 2074(b) because of the personal and sensitive nature of the information that parties are required to provide in these cases 8 A party may request a sealing order under rule 2075 (and the sealing rules) to protect allegedly confidential material (not otherwise made confidential by statute or

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment , on behalf of group?	Comment	Committee response
				motions which may contain confidential materials) 9 There must be a better definition of what constitutes trial court records Are court minutes trial court records? 10 If a court engages in imaging its court files and records, does that put all of those documents imaged under the definition of electronic records, which are then to be made accessible?	California Rules of Court) 9 The advisory committee comment to rule 2070(a) states that “court minutes” are included within the definition of “trial court records ” 10 Yes
11	Beth Givens Director Privacy Rights Clearinghouse	A	N	1 The most sensitive of court records, such as divorce proceedings and other family law matters, will not be available in full-text format online I agree that this is a wise policy given the sensitive nature of these proceedings I also agree that records containing sensitive identifying information such as Social Security numbers and bank/credit account numbers should not be available publicly because of their role in identity theft and other financial fraud schemes 2 Rule 2074(e)(2) deserves additional discussion What is meant by “monitoring” in this provision?	1 No response required 2 Based on this comment, rule 2074(g) was revised so that it now provides as follows “A court must post on its public access Web site a privacy policy to inform members of the public accessing its records maintained in electronic form of the information it collects regarding access transactions and the uses that the court may make of the collected information ” 3 The committee believes that a limitation

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				3 Rule 2077 regarding fees I recommend adding the word “reasonable” after the word “impose ”	on the fees a court may charge is adequately provided by Government Code section 68150(h) However, the committee revised the rule to provide that any fees for electronic access charged by a vendor must be “reasonable ”
12	Sean P Griffith California Judges Association, Family Law Committee		Y	Good idea	No response required
13	Jose Octavio Guillen Executive Officer/Clerk Superior Court of Riverside County	AM	Y	1 [Rule 2070 (a)] We understand this to mean that all of the data in our case management system is available to the public without restriction This rule only covers document images Is this the correct interpretation? 2 [Rule 2070(c)] This may be difficult to implement because of the complexity of identifying a party attempting to gain access electronically Conceptually a party on a case has a right to electronically access that case as soon as they are named as a party 3 [Rule 2072] We completely agree 4 [Rule 2073] We completely agree 5 [Rule 2074] We strongly disagree with the courthouse vs remote access aspects of this	1 The rules cover public access to electronic documents (rule 2070(a), (b)), and do not limit remote electronic access to a court’s register of actions and calendars (rule 2071(b)) 2 The rules contemplate that there will be two levels of access unrestricted access by the court, parties, and attorneys, and possibly restricted access by the public Parties and attorneys will be able to access the entire court file by identifying themselves by a password or log-on This is a matter that will be addressed by the rules on electronic filing 3 No response required 4 No response required 5 It is certainly not the committee’s intention to make the work of the courts

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment, on behalf of group?	Comment	Committee response
				proposed rule We feel that this poses technical problems because the trial courts will need to 'chase technology' and continually update access rules as new technology becomes available that allows court records to be electronically collected at the courthouse This poses access to justice issues because of the limited hours that a courthouse is open Being able to implement this rule at a minimum cost to the trial court is very important The distinction between courthouse and remote access requires the court to make computer system modifications that would be unnecessary if there was no distinction 6 [Rule 2074(b)] indicates records in juvenile, guardianship, conservatorship and mental health proceedings will be available to the public at the courthouse It is our practice today, that those records are NOT available today via paper This rule would seem to then open up access to currently unavailable records Subdivision (b) also indicates that many family law and criminal records will be unavailable using remote access, where today those records are available in paper This is very inconsistent and the courts will be setting up a situation to be in a continual state of conflict with other statutes already in place Access to data should not be based on the media used to store that data 7 Rule 2076 We completely agree	more difficult, but, as set forth in the advisory committee comment to this rule, there are important policy reasons for limiting remote access to the records specified As noted in rule 2072, the committee recognizes the important public service courts perform in providing remote electronic access in all other cases to which access is not otherwise restricted by law 6 Rule 2074(c) and the last sentence of rule 2072 make clear that the rules do not provide public access to trial court records to which the public does not otherwise have a right of access Rule 2073(a) provides that the extent to which records are made available to the public must not be determined by the medium (i e , paper or electronic) in which they are maintained unless the rules or other legal authority provide otherwise Rule 2074(b) prohibits remote electronic access to the records specified, but these records are available at the courthouse as are the paper records All other records are available remotely, unless made confidential by law 7 No response required

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				8 Rule 2077 We agree with the need for this rule, but Riverside Superior Court will not charge fees for the following reasons The public has already paid, through taxes, for the court to create electronic records, the court is realizing an advantage by reducing the number of people in the court by providing electronic access	8 The committee recognizes that many courts will not charge fees, however, courts may do so subject to the limitations on fees set forth in the rule
14	Harry Hammitt Editor Access Reports		N	1 [Rule 2072] The benefits of electronic access to court records are spelled out reasonably well 2 [Rule 2073] I completely disagree with (b) To require a member of the public to identify a file with the specificity suggested is to limit access to it as a practical matter to only those who are already familiar with the case	1 No response required 2 The committee's legal justification for limiting access to access on a case-by-case basis is that courts clearly have authority to place reasonable time, place, and manner restrictions on affording public access so as not to interfere with the business of the courts Other state and federal court access rules require case name and/or number for access The rule does not limit the number of searches that may be conducted and does not prohibit anyone from, for example, searching for all new cases filed in the court each day by checking the court's register of actions As is noted in the Advisory Committee Comment to the rule, the provision that trial courts must grant public access to their records maintained in electronic form on a case-by-case basis only is consistent with the procedures courts employ with respect to requests for access to paper

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				3 [Rule 2074(b)] The availability of electronic access is too restricted. We have been led to believe that computers will make our ability to use information more efficient and easier, and while restricting access to certain kinds of sensitive information by limiting the physical locations where such records are available, probably puts into place a policy that will have severe unintended consequences in the future. I also believe that such restrictions on “criminal records” as a category is far too broad. Such records should not be treated in the same fashion as family and medical records.	files, i.e., courts make papers files available on request, one file at a time, to individuals who ask for a particular file. It addresses the concerns stated by the court in <i>Westbrook v. County of Los Angeles</i> (1994) 27 Cal App 4th 157, in which the court denied a commercial vendor’s request for periodic copies of the court’s computerized database of docket information about every person against whom criminal charges were pending in the court, finding a “qualitative difference between obtaining information from a specific docket or on a specified individual, and obtaining docket information on every person against whom criminal charges are pending.” (<i>Id.</i> at p. 165.) 3 The rules provide for remote electronic access to most types of court records, and rule 2072 specifically acknowledges the benefits to the public that should result from providing this access. Remote electronic access is prohibited in the cases specified for policy reasons. The rules do not deny access in these proceedings, but merely limit access to access at the courthouse.

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				4 Rule 2074(d) properly reflect that access to electronic records requires the expenditure of time and money on the part [of] courts and it probably should not be a requirement for smaller courts to move aggressively towards such access But all courts should be encouraged and perhaps provided grant money to move aggressively towards such access 5 Rule 2074(e) strikes me as fine on the surface, but to be effective the conditions a court may impose must be clearly spelled out, they must be reasonable, and they must be applied even-handedly 6 Rule 2075 is not an appropriate policy to pursue I realize that the concept of a public interest in non-disclosure already exists in California law, notably in the Public Records Act However, I believe that the public interest in an access regime should run only towards promoting access, not non-disclosure In other words, a record that could be withheld should be disclosed if the public interest in disclosure is deemed greater than the reasons for protecting the information, but a record should not be withheld because there is a deemed to be a public interest in doing so Decisions to withhold should be limited to statutory exemptions, not to subjective interpretation of the public access 7 Rule 2076 is adequate to the extent that it says nothing more than a contractor should follow the same rules of confidentiality as would the court	4 Courts are being encouraged to do so to the extent that resources allow 5 The committee certainly contemplates that the conditions will be clearly spelled out, reasonable, and applied even-handedly 6 Under California law, courts may order specified records sealed on making the findings specified in the rules on sealing (rule 243 1 et seq), which are based on the Supreme Court's decision in <i>NBC Subsidiary (KNBC-TV), Inc v Superior Court</i> (1999) 20 Cal 4th 1178, 1211 [86 Cal Rptr 2d 778] This decision, as well as numerous others, recognize that the right of public access to court records is not absolute, but must be reconciled with overriding public or private interests 7 Rule 2076 has been revised to provide

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				itself But using vendors for public disclosure brings a host of other problems, particularly invidious fees or other restrictions to access placed on the legitimate access needs of the public 8 Rule 2077 on fees seems to reflect that fees should be based on a schedule included in Government Code section 68150(h) Generally speaking, fees should be designed to cover marginal costs, and should not include reflexive use of out-moded per page fees that might allow for charging hundreds of thousands of dollars for electronic records which can be copied for only a few dollars Fees should not be used as a revenue center, but as a way to defray legitimate costs Experience has shown that fees are an obstacle to access, so it is important to hold fees at a reasonable level 9 The policy assumptions underlying the proposals really need more work before adoption The values of privacy and public access should be equally weighted, privacy should not be the presumed default position	that a court's contract with a vendor must require the vendor to provide public access as required by law The issue of fees is addressed by the committee's revision to rule 2077 8 The Committee contemplates that many courts will decide not to charge any fees for providing public access (as is noted in item 8 of comment 13 from Riverside County) The committee agrees that fees should be held at a "reasonable" level and has added a provision to this rule requiring vendors that provide access to limit their fees to a "reasonable" amount 9 The committee believes that the rules do not give greater weight to privacy than they do to the public right of access
15	Stephanie Harbin Supervising Legal Clerk II Superior Court of Stanislaus County	A	N	Agree with proposed changes	No response required
16	Hon Susan C Harlan Superior Court of Amador County	A	N	No comment	No response required
17	Loree Johnson	N	N	I believe that information which is available to the	The rules <i>do</i> provide for remote electronic

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
	IS Manager Superior Court of Siskiyou County			public at the courthouse should also be available remotely, if the court wishes to make it so I[t] seems to be a double standard to restrict information based on the means of delivery We do not tell people that they can have copies of documents at the counter, but not through the mail or fax Why should we have a separate rule about public information in electronic form? Siskiyou is a very rural county and it is a hardship on people in remote areas to travel many miles to the courthouse to view information that could be made available via the internet	access to most types of court records, and rule 2072 specifically acknowledges the benefits to the public that should result from providing this access However, courts may not decide, by local rule or policy, to provide remote access to the records specified in rule 2074(b) The purpose of the rules is to provide a statewide policy regarding public access and privacy that applies to all trial courts There is nothing in the rules that would prevent a court from sending a record to a person who cannot come to the courthouse, for example, by mail, fax, or e-mail
18	Larry Maligie Court Technology Officer Superior Court of Butte County		N	I have no comment that disagrees with the Statewide Technology Resource Group	No response required
19	Hon Wayne L Peterson Presiding Judge Superior Court of San Diego County		Y	The Trial Court Presiding Judges Advisory Committee recommends approval proposed new rules of court 2070–2077	No response required
20	Linda Robertson Supervising Attorney California Appellate Project	AM	Y	1 [Rule 2074(b)] We support the proposed rule’s provision protecting trial court records in family law, criminal, juvenile and mental health proceedings by allowing them to be accessed only from terminals in the courthouse, and not remotely We ask that “habeas corpus pleadings and exhibits” be added to the list of records specified since they implicate many of the same privacy considerations as criminal proceedings and often contain particularly sensitive	1 Habeas corpus pleadings filed in electronic form in the trial court would not be accessible remotely by virtue of 2074(b)(5) if they are filed as part of a criminal proceeding Habeas corpus pleadings filed in appellate courts cannot be covered by the rules because, under the mandate of Code of Civil Procedure section 1010 6(b), the scope of the rules is

Comments for SPR01-21
Public Access to Electronic Trial Court Records (adopt rules 2070–2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				matters about the petitioner's case or personal background, or that may affect his or her personal safety 2 [Rule 2074(e) and (g)] One troubling part of the rule is that these subsections suggest that the court will monitor public access transactions in ways the rule does not explain. We are concerned that this suggests collecting information that identifies people who access records, without articulating what information will be collected, who will have access to it, under what circumstances, and whether such information will be subject to disclosure in litigation. We believe that these questions should be addressed before any plan for collecting this information, with its potential infringement of the privacy rights of those who access public information, is put into place.	limited to trial court records 2 Based on this comment, rule 2074(g) was revised so that it now provides as follows: "On its public access web site, a court must post a privacy policy to inform members of the public accessing its records maintained in electronic form of the information it collects regarding access transactions and the uses that the court may make of the collected information."
21	J Rumble Superior Court of Santa Clara County		Y	Rule 2073(b) provides for access to court records on a case-by-case basis. We support that approach. Requests for court documents in electronic form should be handled in the same manner as access provided to paper files. Courts should not be required to provide compilations or responses to requests for electronic data that is not directly linked to the official record. The comments state that the CTAC left it to individual courts to decide whether to comply with "bulk requests." This approach is inconsistent with the legislative mandate of Code of Civil Procedure section 1010.6(b) that requires the Judicial Council to develop statewide policies on access to public records and privacy. Moreover, the	The committee was quite concerned by the problem this commentator faced in his court, i.e., how to respond to a media request for the court's entire database, which includes confidential information to which the public does not have a right of access. In order to comply with such a request, it would be necessary for court personnel to carefully review each record in the database and redact all confidential information from the records, a costly, time-consuming, and perhaps impossible task. The committee is aware that other courts have been confronted with similar

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
				issue is of such significance that it warrants a statewide policy so there is one rule for all courts in California	requests, and concluded that a statewide policy is needed to address this issue. The committee believes that this rule addresses the problem by providing that courts may only provide access on a case-by-case basis.
22	Arthur Sims Chair, Court Executive Advisory Committee Executive Officer, Superior Court of Alameda County	AM	Y	The Court Executives Advisory Committee recommends approv[al] as circulated for comment	No response required
23	Quinton Swanson President Hemet/Mt. San Jacinto Bar Association	A	N	Provision should be made to allow attorneys access to information. A password could be assigned to law firms that sign up for access and this access should include otherwise sealed cases if they are the attorney of record on a case.	Attorneys and parties will have access to the entire case file. These rules only apply to access by the public (rule 2071(a)).
24	Lea-Ann Tratten Legal Counsel Consumer Attorneys of California	A	N	Agree with proposed changes	No response required

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**
455 Golden Gate Avenue
San Francisco, California 94102-3660

Report

TO: Members of the Judicial Council

FROM: Court Technology Advisory Committee
Hon. Joanne C. Parrilli, Chair
Charlene Hammitt, Manager, Information Services Division,
415-865-7410, charlene.hammitt@jud.ca.gov
Melissa Johnson, Assistant General Counsel
Joshua Weinstein, Attorney

DATE: December 11, 2001.

SUBJECT: Public Access to Electronic Trial Court Records (adopt Cal. Rules of Court,
rules 2070–2076; repeal Cal. Standards Jud. Admin., § section 38)
(Action Required)

Introduction

This report supplements the one submitted to the Judicial Council at its October 2001 business meeting. At that meeting, the council asked the Court Technology Advisory Committee and staff to provide answers to certain questions and deferred action on the proposed rules to its December meeting. Memoranda addressing the issues raised at the October meeting are attached to this report as Appendixes A through E.

Recently, the Court Technology Advisory Committee met and approved a set of revised rules. These revised rules are equivalent in substance to the advisory committee's original proposal but are improved in organization and clarity. In addition, the Advisory Committee Comments to the rules were reduced in length to provide only the information that is the most critical to understanding and applying the rules.

Because the council deferred action on this item, the advisory committee now recommends that the proposed rules go into effect on July 1, 2002, rather than January 1, 2002, as previously proposed. The delayed effective date will give the courts time to learn about and comply with the rules.

Recommendation

The Court Technology Advisory Committee recommends that the Judicial Council, effective July 1, 2002:

1. Adopt rules 2070–2076 of the California Rules of Court to establish (a) statewide policies on public access to trial courts’ electronic records that provide reasonable electronic access while protecting privacy and other legitimate interests and (b) statewide policies regarding courts’ contracts with vendors to provide public access to electronic court records.
2. Repeal section 38 of the California Standards of Judicial Administration.

The text of the proposed rules and the standard to be repealed is attached at pages 5–13.

Summary of Major Provisions of the Proposed Rules

The rules apply to records that trial courts maintain in electronic form. They do not require courts to maintain any records electronically, but if a court does, the rules specify the requirements for providing public access to those records.

The rules require courts to provide electronic access to the following types of records to the extent feasible, both remotely and in the courthouse:

- Registers of actions and calendars in all cases; and
- Other records in civil cases (rule 2073(c)).

The register of actions includes the title of each cause, the date it commenced, “and a memorandum of every subsequent proceeding in the action with its date.” (Gov. Code, § 69845.) Thus, basic information about each case could be accessed through computer terminals at the courthouse or remotely (over the Internet).

Additional records in the following types of cases would be available electronically at the courthouse to the extent feasible, but not remotely:

- Family law;
- Juvenile;
- Guardianship or conservatorship;
- Mental health;
- Criminal; and
- Civil harassment (rule 2073).

If electronic access is not feasible because a court does not have the resources or technical capacity to provide it, the court must still make all of its electronic records available in some form—for example, by printing out copies of the information contained in electronic records (rule 2073(a)). However, the court may not provide electronic access to any part of a record that is sealed by court order or made confidential by law (rule 2073(a)).

When a court provides electronic access to records other than calendars, registers, and indexes, it may do so only on a case-by-case basis, using the case number, caption, or name of party to identify the record. Likewise, the court may not provide “bulk distribution” of its electronic records, other than registers, calendars, and indexes. “Bulk distribution” is defined as “distribution of all, or a significant subset, of the court’s electronic records.”¹

Rationale for Recommendation

The rationale for the recommendation is contained in the October 2001 report and in the memoranda in Appendixes A through E, which address the following issues:

- A. What are the arguments for and against limiting electronic access to a case-by-case basis?
- B. Why should the rule prohibit remote electronic access (other than to the register and calendar) in case types other than civil?
- C. What are other jurisdictions doing to provide electronic access to trial court records?
- D. What is the electronic access environment in California courts?
 - What electronic access is offered by California courts?
 - Do California courts have the ability to provide remote electronic access?
 - What is being done to improve courts’ ability to provide electronic access?
- E. Has the Judicial Council adopted relevant plans and policies?

Comments From Interested Parties

The comments on the proposal as it circulated for comment are summarized in the October 2001 report. After the October meeting, a coalition of newspaper and press-related organizations, represented by Gray, Cary & Freidenrich, submitted a letter with

¹ This definition of “bulk distribution” is based on the Justice Management Institute’s draft *Model Policy on Public Access to Court Records*

additional comments in response to the October 2001 report and proposal. The Gray Cary letter is attached at Appendix F.

Most of the points in the letter have been addressed in the earlier report or in the materials in appendixes A and E. However, one objection raised requires clarification. Gray Cary objects to the “case-by-case” limitation on electronic access on the following basis:

The proposed rules would . . . prohibit access where, for example, a requestor wants to see the cases filed on a particular day and does not know the case numbers, captions, or parties. The requestor would not have the necessary data to submit a request that would comply with the rule, and even if he or she did the rule would not permit the requestor to obtain more than one case at a time. Similarly, a requestor who wanted to see all cases filed by or against a particular party and had the name of the party would be precluded from obtaining more than a single case. (Gray Cary letter, Appendix F, p. 2.)

This objection misinterprets the rule. First, a reporter who wanted to see all of the cases filed on a particular day could identify the names or numbers of those cases by accessing the register of actions, which would be available remotely for all case types and to which the case-by-case limitation does not apply. With the case names or numbers supplied by the register, the reporter could then access the files (if available electronically) for each of the cases filed.

Second, the rules would not prohibit a reporter from accessing more than one case involving a single party. It is contemplated that a search for cases by party name would produce a list of cases involving that party, each of which the reporter could access on a case-by-case basis.

Rules 2070, 2071, 2072, 2073, 2074, 2075, and 2076 of the California Rules of Court are adopted, effective July 1, 2002, to read:

DIVISION VI
 RULES FOR FAX AND ELECTRONIC FILING AND SERVICE
 CHAPTER 1. FAX FILING AND SERVICE RULES ***
 CHAPTER 2. ELECTRONIC FILING AND SERVICE RULES
 CHAPTER 3. PUBLIC ACCESS TO ELECTRONIC TRIAL COURT
 RECORDS

Rule 2070. Statement of purpose

- (a) **[Intent]** The rules in this chapter are intended to provide the public with reasonable access to trial 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 trial 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 trial court records may also foster in the public a more comprehensive understanding of the trial court system.
- (c) **[No creation of rights]** These rules are not intended to give the public a right of access to any record that they are not otherwise entitled to access.

Advisory Committee Comment

The rules acknowledge the benefits that electronic court records provide but attempts 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 trial 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.

Rule 2071. Authority and applicability

- (a) **[Authority]** The rules in this chapter are adopted under the authority granted to the Judicial Council by article VI, section 6 of the California Constitution and Code of Civil Procedure section 1010.6.

(b) [Applicability] The rules in this chapter apply only to trial court records.

(c) [Access by parties and attorneys] The rules in this chapter 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 California Rules of Court.

Rule 2072. Definitions

(a) [Court record] As used in this chapter, “court record” is any document, paper, or exhibit filed by the parties to an action or proceeding; any order or judgment of the court; and any item listed in subdivision (a) of Government Code section 68151, excluding any reporter’s transcript for which the reporter is entitled to receive a fee for any copy. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel.

(b) [Electronic record] As used in this chapter, “electronic record” is a computerized court record, regardless of the manner in which it has been computerized. The term includes both a document that has been filed electronically and an electronic copy or version of a record that was filed in paper form. The term does not include a court record that is maintained only on microfiche, paper, or any other medium that can be read without the use of an electronic device.

(c) [The public] As used in this chapter, “the public” is an individual, a group, or an entity, including print or electronic media, or the representative of an individual, a group, or an entity.

(d) [Electronic access] “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 these rules.

Rule 2073. 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 those that are sealed by court order or are made confidential by law.

(b) [Electronic access required to extent feasible] A court that maintains the following records in electronic form must provide electronic access to them, both remotely and at the courthouse, to the extent it is feasible to do so.

- 1 (1) Register of actions (as defined in Gov. Code, § 69845), calendars, and
2 indexes; and
3
4 (2) All records in civil cases, except those listed in (c).
5
6 (c) **[Courthouse electronic access only]** A court that maintains the following
7 records in electronic form must provide electronic access to them at the
8 courthouse, to the extent it is feasible to do so, but may provide remote
9 electronic access only to the records governed by (b)(1):
10
11 (1) Any record in a proceeding under the Family Code, including, but not
12 limited to, proceedings for dissolution, legal separation, and nullity of
13 marriage, child and spousal support proceedings; and child custody
14 proceedings;
15
16 (2) Any record in a juvenile court proceeding;
17
18 (3) Any record in a guardianship or conservatorship proceeding;
19
20 (4) Any record in a mental health proceeding;
21
22 (5) Any record in a criminal proceeding; and
23
24 (6) Any record in a civil harassment proceeding under Code of
25 Civil Procedure section 527.6.
26
27 (d) **[“Feasible” defined]** The requirement that a court provide electronic access to
28 its electronic records “to the extent it is feasible to do so” means that a court is
29 required to provide electronic access to the extent it determines it has the
30 resources and technical capacity to do so.
31
32 (e) **[Access only on case-by-case basis]** A court may only grant electronic access
33 to an electronic record when the record is identified by the number of the case,
34 the caption of the case, or the name of a party, and only on a case-by-case
35 basis. This case-by-case limitation does not apply to a calendar, register of
36 actions, or index.
37
38 (f) **[Bulk distribution]** A court may provide bulk distribution of only its
39 electronic calendar, register of actions, and index. “Bulk distribution” means
40 distribution of all, or a significant subset, of the court’s electronic records.
41
42 (g) **[Records that become inaccessible]** If an electronic record to which the court
43 has provided electronic access is made inaccessible to the public by court order

(1) Register of actions (as defined in Gov. Code, § 69845), calendars, and indexes; and

(2) All records in civil cases, except those listed in (c).

(c) [Courthouse electronic access only] A court that maintains the following records in electronic form must provide electronic access to them at the courthouse, to the extent it is feasible to do so, but may not provide remote electronic access:

(1) Any record in a proceeding under the Family Code, including, but not limited to, proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; and child custody proceedings;

(2) Any record in a juvenile court proceeding;

(3) Any record in a guardianship or conservatorship proceeding;

(4) Any record in a mental health proceeding;

(5) Any record in a criminal proceeding; and

(6) Any record in a civil harassment proceeding under Code of Civil Procedure section 527.6.

(d) [“Feasible” defined] The requirement that a court provide electronic access to its electronic records “to the extent it is feasible to do so” means that a court is required to provide electronic access to the extent it determines it has the resources and technical capacity to do so.

(e) [Access only on case-by-case basis] A court may only grant electronic access to an electronic record when the record is identified by the number of the case, the caption of the case, or the name of a party, and only on a case-by-case basis. This case-by-case limitation does not apply to a calendar, register of actions, or index.

(f) [Bulk distribution] A court may provide bulk distribution of only its electronic calendar, register of actions, and index. “Bulk distribution” means distribution of all, or a significant subset, of the court’s electronic records.

(g) [Records that become inaccessible] If an electronic record to which the court has provided electronic access 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 the public before the record became inaccessible.

(h) [Off-site access] Courts should encourage availability of electronic access to court records at public off-site locations.

Advisory Committee Comment

The rule allows a level of access 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 (c) excludes certain records (those other than the register, calendar, and indexes) in specified types of cases from remote electronic access. The committee 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.

Subdivisions (e) and (f) limit electronic access to records (other than the register, calendars, or indexes) 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.

Rule 2074. Limitations and Conditions

(a) [Means of access] A court must provide electronic access 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 trial court record available by electronic access does not constitute the official record of the court.

(c) [Conditions of use by persons accessing records] A court may condition electronic access to its records on (1) the user's consent to access the records only as instructed by the court and (2) the user's consent to the court's monitoring of access to its records. A court must give notice of these

conditions, in any manner it deems appropriate. The court may deny access to a member of the public for failure to comply with any of these conditions of use.

(d) [Notices to persons accessing records] A court must give notice of the following information to members of the public accessing its electronic records, in any manner it deems appropriate:

- (1) The court staff member to contact 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. The notice should indicate that (A) use of such information 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 constitute the official records of the court. The notice should indicate the procedure and any fee required for obtaining a certified copy of an official record of the court.
- (4) 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 court must post a privacy policy on its public-access Web site to inform members of the public accessing its electronic records of the information it collects regarding access transactions and the uses that the court may make of the collected information.

Rule 2075. Contracts with vendors

A court's contract with a vendor to provide public access to its electronic records must be consistent with these rules and must require the vendor to provide public access to court records and to protect the confidentiality of court records as required by law or by court order. Any contract between a court and a vendor to provide public access to the court's records maintained in electronic form must specify that the court is the owner of these records and has the exclusive right to control their use

Rule 2076. Fees for electronic access

A court may impose fees for the costs of providing public access to its electronic records, as provided by Government Code section 68150(h). On request, a court must provide the

1 conditions, in any manner it deems appropriate. The court may deny access to
2 a member of the public for failure to comply with these conditions of use.

3
4 **(d) [Notices to persons accessing records]** A court must give notice of the
5 following information to members of the public accessing its electronic
6 records, in any manner it deems appropriate:

7
8 (1) The court staff member to contact about the requirements for accessing
9 the court's records electronically.

10
11 (2) That copyright and other proprietary rights may apply to information in a
12 case file absent an express grant of additional rights by the holder of the
13 copyright or other proprietary right. The notice should indicate that (A)
14 use of such information is permissible only to the extent permitted by law
15 or court order and (B) any use inconsistent with proprietary rights is
16 prohibited.

17
18 (3) Whether electronic records constitute the official records of the court. The
19 notice should indicate the procedure and any fee required for obtaining a
20 certified copy of an official record of the court.

21
22 (4) Any person who willfully destroys or alters any court record maintained
23 in electronic form is subject to the penalties imposed by Government
24 Code section 6201.

25
26 **(e) [Access policy]** A court must post a privacy policy on its public-access Web
27 site to inform members of the public accessing its electronic records of the
28 information it collects regarding access transactions and the uses that the court
29 may make of the collected information.

30
31 **Rule 2075. Contracts with vendors**

32
33 A court's contract with a vendor to provide public access to its electronic records must be
34 consistent with these rules and must require the vendor to provide public access to court
35 records and to protect the confidentiality of court records as required by law or by court
36 order. Any contract between a court and a vendor to provide public access to the court's
37 records maintained in electronic form must specify that the court is the owner of these
38 records and has the exclusive right to control their use.

39
40 **Rule 2076. Fees for electronic access**

41
42 A court may impose fees for the costs of providing public access to its electronic records,
43 as provided by Government Code section 68150(h). On request, a court must provide the

1 public with a statement of the costs on which these fees are based. To the extent that
2 public access to a court's electronic records is provided exclusively through a vendor, the
3 court must ensure that any fees the vendor imposes for the costs of providing access are
4 reasonable.
5

Section 38 of the California Standards of Judicial Administration is repealed, effective July 1, 2002.

~~Sec. 38. Access to electronic records~~

~~(a) [Intent]~~ Improved technologies provide courts with many alternatives to the historical paper-based record receipt and retention process, including the creation and use of electronic records. Access to trial courts' electronic records can save the public time, money, and effort and encourage the courts to be efficient in their operations. Improved access to court records may also foster a more comprehensive understanding of the trial court system. Because of such benefits, trial courts are encouraged to explore possibilities for creating electronic court records and to offer public access to such records if their resources permit. Such access should not harm legitimate privacy interests or compromise protections established by law or court order.

~~(b) [Definitions]~~ The following definitions apply to this standard:

(1) A "record" is any information that is part of an official case file of a court, that constitutes court action, or that otherwise reflects an official action of a court. Records include those items listed in Government Code section 68151(a). Records do not include personal notes or preliminary memoranda of judges or other judicial branch personnel.

(2) An "electronic record" is any record that is accessible electronically, regardless of how it was created. The term does not include records on microfiche, paper, or any other medium that can be read without the use of an electronic or mechanical device.

(3) "Access" is the ability to obtain or make use of electronic records by any means.

(4) "Public access" is access that is not restricted by law or an order of the court.

(5) A "summary report" is a compilation of public records that is produced in the ordinary course of business.

~~(c) [Scope]~~ This standard applies only to public access to the electronic records that trial courts prepare, own, use, or retain. The standard does not apply to electronic access by a person who is a party to a case or the

1 attorney of such a person, the electronic filing of documents, or the
2 electronic distribution of any court calendar records. A court should not
3 grant access to an electronic record that is sealed, is made confidential,
4 or is required to be expunged after a time or event determined by law or
5 an order of the court. Cases involving family law, child support,
6 juvenile law, mental health, probate, criminal law, or public offenses, as
7 they are defined in Penal Code section 15, should not be included in
8 electronic records made available through remote access.
9

10 **(d) [Policies]** The objective of this standard is to provide a trial court (“a
11 court”) with a reasonable framework for providing public access
12 (“access”) to its electronic records.
13

14 (1) *(Electronic records)* A court should grant access to an
15 electronic record only when the record is identified by the
16 name or number of a case and only on a case-by-case basis. A
17 court need not grant access to all or part of an electronic
18 record if access is not feasible because of the court’s resource
19 limitations.
20

21 (2) *(Summary reports)* A court may provide access to electronic
22 versions of summary reports.
23

24 (3) *(Direct electronic access for the public)* Direct electronic
25 access to court records should be reasonably available to the
26 public remotely, through the Internet, or by means of
27 software based on industry standards or in the public domain.
28 When feasible, remote access should be available at public
29 off-site locations such as public libraries. Access should also
30 be available at public terminals at the courthouse.
31

32 (4) *(Contracts with vendors)* A court that elects to contract with a
33 vendor to release its records electronically should, in
34 accordance with these policies, require the vendor to protect
35 confidentiality as required by law or court order and should
36 provide the public with direct electronic access to such
37 records without requiring access through the vendor.
38

39 (5) *(Disclaimers)* As appropriate, a court should provide
40 disclaimers regarding the accuracy of its electronic records.
41

1 ~~(6) (Information on access) A court that provides access to its~~
2 ~~electronic records should provide the public with information~~
3 ~~on the requirements for access.~~
4

5 **(e) [Evaluation]** ~~Any trial court that provides public access to its electronic~~
6 ~~records should submit to the Judicial Council a copy and an evaluation~~
7 ~~of its access policies as directed by the council.~~)
8



Judicial Council of California
Administrative Office of the Courts

Office of the General Counsel
455 Golden Gate Avenue ♦ San Francisco, CA 94102-3660
Telephone 415-865-7446 ♦ Fax 415-865-7664 ♦ TDD 415-865-4272

RONALD M. GEORGE
Chief Justice of California
Chair of the Judicial Council

WILLIAM C. VICKREY
Administrative Director of the Courts

RONALD G. OVERHOLT
Chief Deputy Director

MICHAEL BERGEISEN
General Counsel

TO: Chief Justice Ronald M. George
Members of the Judicial Council

FROM: Melissa Johnson, Assistant General Counsel
Joshua Weinstein, Attorney
Victor Rowley, Special Consultant

DATE: December 10, 2001

SUBJECT/ PURPOSE OF MEMO: Case-by-Case Electronic Access

CONTACT FOR FURTHER INFORMATION:	NAME: Joshua Weinstein	TEL: 415-865-7688	EMAIL: joshua.weinstein@jud.ca.gov
---	----------------------------------	-----------------------------	--

At the October 26, 2001, Judicial Council meeting, council members asked for a discussion of the arguments for and against restricting electronic access to court records to a case-by-case basis. This memorandum discusses the advantages and disadvantages to the court system of restricting electronic access to a case-by-case basis and the underlying policy and resource issues.

Background

The proposed rules require, to the extent feasible:

- Remote electronic access to the electronic register of actions, indexes, and calendars in all cases, and to other electronic records in civil cases.
- Electronic access at the courthouse to electronic records other than the registers, indexes, and calendars in other types of cases (family law, criminal, probate, etc.).

Members of the Judicial Council
December 10, 2001
Page 2

Except for the register, calendars, and indexes, electronic access is allowed only on a case-by case basis. This means that a court could not provide access—either remotely or at the courthouse—in a manner that would allow its database of case records to be searched except by caption, case number, or name of party. In addition, a court could not provide “bulk distribution” of its electronic records, i.e., distribution of all or a large part of its records in bulk, except for the register, calendar, and indexes.

Discussion

One of the major advantages of electronic record-keeping over paper record keeping is the increased ease of (1) extracting data from individual files that can show trends and statistics, and (2) compiling information about individuals from a large number of different files. Allowing public access to electronic information in a form from which information can be easily extracted would make it much easier for members of the public to compile information from court records. With sufficient resources, courts could provide this type of access, either by access to a database of case files with search capabilities (similar to WestLaw or Lexis) or by bulk distribution of data that individuals could use to construct their own search mechanism. However, the Court Technology Advisory Committee (“the committee”) believes that the public benefit of providing this type of access is outweighed by the costs, particularly by the potential damage to privacy interests.

1. Privacy issues

The primary reason that the committee recommends limiting remote electronic access to a case-by-case basis is the protection of privacy interests. Bulk distribution of case files presents privacy concerns because there is a tremendous amount of sensitive or personal information in court records that could be compiled and exploited. For example, many civil and family law cases include financial information about individuals, including their account numbers or balances, tax returns, pay stubs, or Social Security numbers. Personal identifying information, such as date of birth, address, and telephone number, is included in many documents filed with the court.

While these records may be public, providing them in bulk electronic format is qualitatively different from providing them on a case-by-case basis. Currently, those seeking information contained in court records must physically visit the court that has them with the knowledge that an action was filed in the particular court by a specific

Members of the Judicial Council
 December 10, 2001
 Page 3

party or against one or more specific parties. With that information, they can review the case index or register and identify documents or records, which they can then request be made available to them for their physical inspection at the court clerk's office. Getting information from court files, therefore, imposes a burden in terms of knowledge and effort. The U.S. Supreme Court has noted that information in case records enjoys what it has termed "practical obscurity."¹

Practical obscurity provides significant privacy protection to individuals who are involved in adjudications as parties or witnesses and who have been compelled to disclose their private information in court proceedings. As the custodian of their records, courts should be cognizant of the privacy interests in the records they keep. (See *Pantos v Superior Court* (1984) 151 Cal.App.3d 258, [court, as custodian of records, may assert privacy interests of person submitting the private information].) Many court records are obtained from members of the public who are compelled to participate in the court system involuntarily, such as defendants, jurors, and witnesses who are subpoenaed. This information is obtained for a specific purpose related to the case, either because it is needed for a fair adjudication or because it is needed for administrative reasons. Making the records available only on a case-by-case basis will, it is hoped, help to ensure that the aggregations that were not feasible before the records were electronic will be prevented when they are electronic.

2. Resource issues

The case-by-case limitation also recognizes that court resources are limited and that providing either a searchable database or bulk distribution of court records would entail

¹ The United States Supreme Court in *United States Department of Justice v Reporters Committee for Freedom of the Press* (1989) 489 US 749, 109 S Ct 1468, 103 L Ed 2d 774, referred to the relative difficulty of gathering paper files as "practical obscurity." In this case, which involved a request under the Freedom of Information Act for the release of information contained in a database that summarized criminal history data, the Court recognized a privacy interest in information that is publicly available through other means, but is "practically obscure." The court noted that "the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information." It specifically commented on "the vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country, and a computerized summary located in a single clearinghouse of information." (489 US at p 764.) In weighing the public interest in releasing personal information against the privacy interest of individuals, the court defined the public's interest as "shedding light on the conduct of any Government agency or official," rather than acquiring information about particular private citizens (489 US at p 773.) The court also noted "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information" (489 U.S. at p 770.)

Members of the Judicial Council
December 10, 2001
Page 4

costs. The argument in favor of the case-by-case limitation is that courts should not invest their limited resources to provide such data, which may be used for private purposes that have nothing to do with the function of the court or with the reasons that court records are open to public access

The courts have a strong public policy reason for making case data available upon request to persons seeking information about a particular case. Court case management systems are designed to retrieve and display case data based on a request noting the name of a party or the case number. However, case management systems are currently not designed to provide bulk case data or to compile information except on a very limited basis.

In the near future, systems are expected to provide the statistical information required by the Judicial Branch Statistical Information System (JBSIS). The experience with trying to adapt case management systems to return the data needed by JBSIS has shown that extracting data from a case management system is neither a trivial nor a low-priced task. In theory, any case management system can be programmed to return any data desired. In practice, the determination of what data is obtainable is often sharply limited by the cost of modifying the case management system to provide the data.

The case-by-case approach also avoids some of the practical limitations with data interpretation that are posed by definitional and historical problems. Commentary on a provision for Access to Compiled Information from Court Records (Section 4.50) included in the Justice Management Institute's *Model Policy on Access to Court Records* notes that compiled data presents two significant problems in interpretation.

First, "Analysis of the data without an understanding of the meaning of the data elements or codes used, or without an understanding [of] the limitations of the data can result in conclusions not substantiated by the data." Second, electronic records can represent a skewed set of data that results from norms that have not been applied consistently to all case types or over the entire span of time covered by the case inventory. In other words, computer-generated reports will be unreliable if data elements have not been clearly defined and the definitions consistently applied. Case management systems do not yet consistently apply standard data definitions across all case types. Even if they did, a correct interpretation of the reports would require explanatory materials that do not exist in standardized form. For the time being, case-by-case access would obviate these problems.

Members of the Judicial Council
December 10, 2001
Page 5

3. Arguments against case-by-case limitation

The same ease of compiling information from electronic records that causes the committee's concerns for privacy interests also has public benefits. With paper records or even with case-by-case electronic access, anyone who wishes to determine a case trend must go through a tedious process of reviewing individual files. For example, if someone wanted to find out how many times a particular type of civil case resulted in a jury verdict for plaintiff or defendant, the researcher would have to go through individual cases to find out if (1) it is the type of civil case in which the researcher is interested; (2) a jury trial was held; and (3) the judgment was for the plaintiff or defendant. The process is time-consuming and labor-intensive.

If bulk case data is available electronically and the proper software tools have been developed to interrogate the database, a computer can quickly and easily search the database to find the desired information.

Bulk data would be of interest to individuals, academics, and members of the press for a variety of purposes that would arguably be of benefit to the public without interfering with personal privacy. Examples of information that might be extracted or compiled from bulk data include:

- ◆ How mediation affects the rate of settlement in civil cases;
- ◆ How specific judges in a court tend to rule in particular type of cases;
- ◆ How often specific attorneys or law firms are found on the winning or losing side of general civil cases or in specific types of civil cases; and
- ◆ Average jury awards in general civil cases or specific types of civil cases.

The argument against the case-by-case limitation is that the benefit to the public of having this data available outweighs the privacy concerns.

Furthermore, as a practical matter, if electronic access is available remotely, as it would be under the proposed rules in civil cases, a private individual or entity can undermine the case-by-case limitations. Anyone who has the interest and the resources could program a "robot" or "drone" computer to continuously request and download files sequentially,

Members of the Judicial Council
December 10, 2001
Page 6

eventually compiling bulk data. Such a scenario has occurred in one county that already allows remote electronic access. That individual or entity could then market access to the bulk-compiled data. Thus, if remote access is allowed, the attempt to protect privacy interests by limiting access may be futile.

Since the court cannot prevent private interests from compiling data from electronic records that are provided remotely, the question becomes whether the court should be the provider of compiled data or whether it should be left up to market forces to determine what electronic data will be compiled. If compilation of court data is left exclusively to the private sector, there is a risk that compilations may be inconsistent with public policy objectives. There is also a risk that those without the requisite money, tools, or skill would effectively be denied access to compiled data.

Conclusion

There are significant privacy concerns warranting restricting electronic access to court records to a case-by-case basis. Court records often contain private or sensitive information. Court records, while public, are usually only accessed for case-specific purposes. Making electronic records available remotely only on a case-by-case basis guards against the possibility that the destruction of individual privacy (and the accompanying harms) that would otherwise flow from access to electronic case records will be minimized while still permitting the increased efficiency in judicial administration that electronic court records offer.



Judicial Council of California
Administrative Office of the Courts

Information Services Division
455 Golden Gate Avenue ♦ San Francisco, CA 94102-3660
Telephone 415-865-7400 ♦ Fax 415-865-7496 ♦ TDD 415-865-4272

RONALD M. GEORGE
Chief Justice of California
Chair of the Judicial Council

WILLIAM C. VICKREY
Administrative Director of the Courts

RONALD G. OVERHOLT
Chief Deputy Director

PATRICIA YERIAN
Director
Information Services Division

TO: Chief Justice Ronald M. George
Members of the Judicial Council

FROM: Charlene Hammitt, Manager
Victor Rowley, Special Consultant

DATE: December 10, 2001

SUBJECT/ PURPOSE OF MEMO: Proposed Rules on Electronic Access to Court Records

CONTACT FOR FURTHER INFORMATION:	NAME: Charlene Hammitt	TEL: 415-865-7410	FAX: 415-865-7497	EMAIL: charlene.hammitt@jud.a.gov
---	-------------------------------	--------------------------	--------------------------	--

QUESTION PRESENTED

Why should the rule prohibit remote electronic access (other than to the register and calendar) in case types other than civil?

REASONS FOR PRECLUDING REMOTE ACCESS TO SPECIFIC CATEGORIES OF CASE FILES

Proposed rules 2070-2076 require courts to provide electronic access to general information about court cases and prohibit them from providing access to case files in certain types of cases.

Rule 2073(b) would require courts to provide remote access to registers of actions (as defined in Government Code section 69845) and calendars when they can feasibly do so.

Chief Justice Ronald M. George
December 5, 2001
Page 2

Rule 2073(c), however, would require courts to restrict access to electronic versions of the documents and other records that are found in case files. Under this rule, only case files in civil cases would be available remotely. Files in other types of cases, which are listed in 2073(c), would not be accessible remotely at this time.

The proposed rules represent an initial approach to providing remote access to electronic case files that are likely to contain sensitive and personal information. Electronic records in all case types could be available through terminals at the courthouse. This approach provides them the same de facto privacy protection traditionally afforded paper records. The United States Supreme Court has characterized this protection as a “practical obscurity” that is attributable to the relative difficulty of gathering paper files. See *United States Dep’t of Justice v. Reporters Committee for Freedom of the Press* 489 U.S. 749 [109 S.Ct. 1468, 103 L.Ed.2d 774].

Delivery of court records on the Internet constitutes publication and typically facilitates republication. With the exception of docket information, trial courts generally have not been publishers of case records. Electronically published data can be easily copied disseminated, and its dissemination is irretrievably beyond the court’s control. Publication of court records on the Internet creates a much greater threat to privacy interests than does access to paper records, or access to electronic records through terminals at the courthouse.

The case-types set out in rule 2073 (c) would be precluded from remote access for the following reasons:

- *Sensitive personal information unrelated to adjudication.* Courts sometimes collect sensitive personal information that has no bearing on the merits of a case but that assists the court in contacting parties or in record keeping. Such information could include unlisted home telephone numbers, home addresses, driver’s license numbers, and Social Security numbers. Before such information is published on the Internet, the Judicial Council should survey trial courts to identify the sensitive or personal information they collect, determine whether or not this information is essential to workload management, and then consider how to protect such information when it is legitimately needed.
- *Privacy of involuntary participants.* Individuals who are sued, subpoenaed, or summoned for jury duty are involuntary participants in legal proceedings and may be

Chief Justice Ronald M. George
 December 5, 2001
 Page 3

compelled to provide the court with sensitive personal information. As records custodians, courts should proceed with caution in publishing such information, as it has relatively little relevance to the public's ability to monitor the institutional operation of the courts but relatively great impact on the privacy of citizens who come in contact with the court as defendants, litigants, witnesses, or jurors. Publication of sensitive financial, medical, or family information provided by involuntary court participants could, for instance, harm individuals by holding them up to ridicule, damaging their personal relationships, and foreclosing business opportunities.

- *Investigations in criminal cases.* The Federal Judicial Conference¹ in September 2001 adopted a policy that makes criminal cases unavailable remotely for a two-year period. The Judicial Conference identified two reasons for this exclusion of criminal cases. First, electronic publication of criminal case records could jeopardize investigations that are under way and create safety risks for victims, witnesses, and their families. Second, access to preindictment information, such as unexecuted arrest and search warrants, could severely hamper law enforcement efforts and put law enforcement personnel at risk. These reasons would apply to the proposed California policy as well.
- *Criminal histories.* Allowing remote electronic access to criminal cases would greatly facilitate the compilation of individual criminal histories, in contravention of public policy as established in statute. (See *Westbrook v. City of Los Angeles* (1994) 27 Cal.App.4th 157 [court note required to provide to public database containing criminal case information].) For this reason, the Attorney General supports excluding criminal cases from remote electronic access:

Our principal concern is with criminal records and the threat that the electronic release of these records poses to individual privacy and to the legislative and judicial safeguards that have been created to insure that only accurate information is disclosed to authorized recipients. (See, e.g., Penal Code sec. 11105.) The

¹ "The federal court system governs itself on the national level through the Judicial Conference of the United States. The Judicial Conference is a body of 27 federal judges. It is composed of the Chief Justice of the United States, who serves as the presiding officer, the chief judges of the 13 courts of appeal, the chief judge of the Court of International Trade, and 12 district judges from the regional circuits who are chosen by the judges of their circuit to serve terms of three years. The Judicial Conference meets twice yearly to consider policy issues affecting the federal courts, to make recommendations to Congress on legislation affecting the judicial system, to propose amendments to the federal rules of practice and procedure, and to consider the administrative problems of the courts." See http://www.uscourts.gov/understanding_courts/89914.htm

Chief Justice Ronald M. George
December 5, 2001
Page 4

electronic dissemination of criminal records is a tremendous danger to individual privacy because it will enable the creation of virtual rap sheets or private databases of criminal proceedings which will not be subject to the administrative, legislative or judicial safeguards that currently regulate disclosure of criminal record information. (Letter from Attorney General Daniel E. Lungren commenting on draft rules (March 6, 1997); See letter from Attorney General Bill Lockyer (Dec. 15, 2000), reaffirming position taken in March 6, 1997 letter.)

- *Risk of physical harm to victims and witnesses.* The safety of victims and witnesses could be compromised if courts were to publish their addresses, telephone numbers, and other information that would allow them to be located. Such risk is perhaps most common in criminal and family cases.
- *Fraud and identity theft.* Although sensitive personal information, such as Social Security and financial account numbers, may already be available in paper files at the courthouse, its “practical obscurity” has provided it with de facto privacy protection. Publishing such information on the Internet exposes it to a substantial risk of criminal misuse. Participation in court proceedings, whether voluntary or involuntary, should not expose participants to such victimization.
- *Determination of reliability.* Ex parte allegations, particularly in family cases, present a problem in that they may be skewed by self-interest and subsequently determined to be unreliable. Although such allegations could be read in case files at the courthouse, the physical demands of accessing such files would afford them “practical obscurity.” Courts should not broadcast ex parte allegations on the Internet until there are policies and procedures to address the problems of unvetted ex parte allegations.
- *Statutory rehabilitation policies.* Various sections of the Penal Code allow for sealing of a defendant’s criminal record provided that certain conditions are met. Such sealing does not occur by operation of law; see for instance the entries on arrest or conviction for marijuana possession and the record of a “factually innocent” defendant in Table 1. If such information is published before conditions for sealing are met, the publication would make the subsequent sealing ineffectual and thus thwart the rehabilitative intent of the authorizing legislation. Admittedly, information could be published from files accessed at the courthouse, but the “practical obscurity” of such files has lessened the likelihood of publication and reduced the risk of thwarting rehabilitation policies. Publication on the Internet would make it difficult to implement such policies.

Chief Justice Ronald M. George
December 5, 2001
Page 5

- *Tools to apply confidentiality policies.* By statute, courts are obligated to protect confidential information in many types of case records, including some of the types of case records specified in rule 2073(c) (see Table 1). This obligation may be absolute or defined by statutorily set or judicially determined time limits. Courts have traditionally met these obligations on an ad hoc basis, as individual case records have been requested at the courthouse. To respond in a responsible manner to remote electronic requests, courts would need to meet these obligations by applying appropriately protective criteria to all records, not only those that are requested but those that might be. Courts simply do not have staff who can review and monitor all records to make them available for remote electronic access. They will need to use automated tools to address the review and monitoring problem. Effective tools should be based on standards. Standards should then be applied by case management systems. Until these standards can be developed and applied by case management systems, the proposed rules would make specified case types unavailable by remote electronic access.
- *Inadvertent exposure of sensitive or personal information.* Parties to the excepted case types (particularly family law) who are unaware that sensitive or personal information included in court filings is publicly accessible will also be unaware they can take steps to protect such information, by requesting a sealing or protective order. For example, in family law proceedings, it is not unusual for litigants to attach copies of their tax returns to their filings, even though tax returns are made confidential by statute. Similarly, in family law proceedings, allegations of abuse are not uncommon; however, litigants may not be aware that there are procedures for limiting public access to this highly sensitive and personal information to protect not only their own privacy, but that of their minor children. The exceptions to remote access in rule 2073 (c) afford time for the Judicial Council to consider how the privacy interests of litigants, particularly the self-represented, might be protected before courts electronically publish case files that include sensitive or personal information that litigants have inadvertently disclosed.

Policy development. While the proposed rules encourage courts to use technology to facilitate access to court records (in accordance with long-term goals of the judicial branch), they do so cautiously, providing breathing room while privacy issues and records policies are more thoroughly reexamined at state and federal levels. The rules allow remote access to civil case files. Civil cases do present some of the same privacy

Chief Justice Ronald M. George
December 5, 2001
Page 6

concerns discussed above, but generally to a lesser degree than in the types of case records that are unavailable under 2073(c). The courts' experiences with remote access to civil cases will guide the council's policy-making in the future. This incremental approach allows further debate and experimentation. Such an approach is in line with the approach adopted by the Judicial Conference of the United States and other states.

Proposed Rule 2073(c)
RECORDS NOT AVAILABLE BY REMOTE ELECTRONIC ACCESS

Under proposed Rule 2073(c), the public would be provided with electronic access to court records in specified case types only at the courthouse and not remotely, pending the development and implementation of software standards that enable the courts to meet their legal obligations to protect confidentiality and privacy. This table illustrates the confidentiality and privacy issues that the courts must resolve before providing such remote electronic access to the public.

<i>Case type</i>	<i>Record type</i>	<i>Restricted data</i>	<i>Legal authority</i>	<i>Comment</i>
CIVIL				
Civil or criminal	Subpoenaed business records	Entire record	Evid Code § 1560(d) (confidential until introduced into evidence or entered into record)	As with court records generally, these records are not accessible by public unless and until relied on by court as part of adjudicative process. See <i>Copley Press Inc v Superior Court</i> (1992) 6 CA4th 106, 113-15 (public right of access to court records does not apply to all of court's records and files, but only to records that officially reflect work of court)
All cases involving fee waiver application	Fee waiver application	Entire record	Cal Rules of Court, rule 985(h) (records of application to proceed without paying court fees and costs are confidential)	
All cases involving attachment	Records in attachment action	Entire record	Code Civ Proc § 482.050(a) (attachment action records are confidential for 30 days from filing complaint or return of service, on plaintiff's request).	Purpose is to prevent disclosure of applicant's financial information
All cases involving garnishment	Judicial Council forms 982.5 (11S) and 982.5 (14S)	Entire form	Judicial Council forms 982.5 (11S) and 982.5 (14S)	Purpose is to prevent disclosure of debtor's Social Security Number (SSN)
Unlawful detainer	Register of Actions	Case title, date of commencement, memorandum of	Code Civ Proc § 1162(a) (in certain unlawful detainer actions, Register of Actions unavailable for 60 days from	

		every subsequent proceeding and date (see Gov Code § 69845)	filing of complaint)	
CIVIL HARASSMENT				
Harassment generally		Address and telephone number of applicant for restraining order.	CCP § 527 6 (requires showing of unlawful violence, credible threat of violence, or course of conduct resulting in “substantial emotional distress,” including stalking)	No explicit statutory authority, but publication of the restricted information might facilitate further harassment Analogous to authority given to court under Fam Code to prohibit disclosure of identifying information in proceeding under Domestic Violence Prevention Act (see below) Publication of the restricted information might facilitate further harassment
Domestic Violence		Address and telephone number of applicant for restraining order and or his or her minor children.	Fam Code § 6322 5 (court may issue ex parte order prohibiting disclosure of address or other identifying information of a party, child, parent, guardian, or other caretaker of child in proceeding under Domestic Violence Prevention Act)	
CRIMINAL				
	Grand jury proceedings		Pen Code § 938 1(b) (transcript not subject to disclosure until 10 days after delivery to defendant or attorney, subject to specified conditions)	Records not public unless indictment returned
	Search warrants and affidavits	Entire record until return of service or 10 days after issuance, whichever is first	Pen Code § 1534(a) (these records are confidential for time period specified)	
	Police reports	Address or telephone number of victims, witnesses	Pen Code § 1054 2 (no attorney may disclose unless permitted to do so by the court after a hearing and a showing of good cause)	Conforms to policy of Pen Code § 841 5 (no law enforcement officer or employee of law enforcement agency shall disclose to any arrested person, or to any person who may be a defendant in a criminal action, address or telephone number of victim or witness in alleged offense)
	Pre-sentence	Entire record	Pen Code § 1203 05 (pre-sentence	Publication on Internet would effectively be

probation report		probation report is confidential after 60 days from sentencing or granting of probation and under certain other conditions)	permanent and thus thwart policy behind making record unavailable after 60 days
Pre-sentence diagnostic report Defendant's statement of assets	Entire record	Pen Code § 1203 03 (report is confidential)	Unavailable as public record in any form absent change in legislative policy
	Entire record	Pen Code § 1202 4 (mandatory Judicial Council form (CR-115) is confidential)	Purpose is to prevent disclosure of defendant's financial information
Criminal history information	Summaries of criminal history information "	Summaries of criminal history information are confidential (<i>Westbrook v Los Angeles</i> (1994) 27 CA4th 157, 164, Pen Code §§ 11105, 13300-13326) Public officials have duty to preserve confidentiality of defendant's criminal history (<i>Craig v Municipal Court</i> (1979) 100 CA3d 69, 76)	Court in <i>Westbrook</i> noted adverse impact of disseminating this information with its potential for frustrating policies permitting subsequent sealing or destruction of records, or limiting dissemination of similar records by other criminal justice agencies (pp 166-67) Pen Code § 11105 limits access to state summary criminal history information to public agencies and others given express right of access by statute Pen Code § 13300 contains similar limitations on public access with respect to local summary criminal history information
Arrest or conviction for marijuana possession	All records except for transcripts or appellate opinions, see Health & Saf Code § 11361 5(d) Any information	Health & Saf Code §§ 11361 5-11361 7 (generally, records of arrest or conviction for marijuana possession to be destroyed two years from date of arrest or conviction)	Publication on Internet would effectively be permanent and thus thwart policy behind sealing after sentencing
		42 CFR 2.12 (restricts disclosure of patient identity in federally assisted alcohol or drug abuse rehabilitation program)	Publication is antithetical to goal of rehabilitation
Record of "factually innocent" defendant	Entire record	Pen Code §§ 851 8, 851 85 (on acquittal, or if no accusatory pleading is filed or, after filing, there is a judicial determination that defendant was	Publication on Internet would effectively be permanent and thus thwart policy behind sealing

			“factually innocent” of the charges, court records, including arrest records may be sealed)	
	Indigent defendant requests	Indigent defendant's in forma pauperis records and request for experts in capital case	Cal Rules of Ct 985(h) (indigent defendant's in forma pauperis records are confidential) and Pen Code § 987.9 (request for experts in capital case are confidential)	Purpose of Rule 985(h) is to prevent disclosure of defendant's financial information Purpose of sec 987.9 is to preserve confidentiality of defense
	Plea based on insanity or defense based on defendant's mental or emotional condition	Entire record	Evid Code § 1017 (psychotherapist appointed by order of court on request of lawyer for defendant in criminal proceeding, to provide lawyer with information to advise defendant whether to enter or withdraw plea based on insanity or to present defense based on mental or emotional condition)	Purpose is to preserve confidentiality of defense
	Reports concerning mentally disordered prisoners	Entire record	Pen Code § 4011.6 (reports to evaluate whether prisoners are mentally disordered are confidential)	
	Victim/witness information	Specified victim personal identifying information and victim impact statements	Gov Code § 6254(f)(2) and Pen Code § 293 (in specified abuse and sexual assault cases, victim's name and address, and the offense, confidential on victim's request). Pen. Code § 293.5(a) (at request of victim of certain sexual offenses, court may order that victim's identity in all records be either Jane Doe or John Doe, on finding that order is reasonably necessary to protect victim's privacy and will not unduly prejudice prosecution or defense) Pen. Code § 1191.15 (victim impact	Purpose is to protect victim's privacy

Misdemeanor proceedings	Dismissal of accusatory pleading and setting aside of guilty verdict		statements are confidential before judgment and sentencing and may not be copied After judgment and sentencing, statement must be made available as public record of court)	
Fines, fees, forfeitures	Any record containing Social Security Number (SSN)	Social Security Number	Pen Code § 1203 4a (misdemeanor proceedings resulting in conviction may be modified on petition and proof that one year has elapsed from date of judgment, sentence has been fully complied with, and no other crimes have been committed) Gov Code § 68107 (court may order criminal defendant on whom fine, forfeiture, or penalty is imposed to disclose social security number to assist court in collection, but number is not a public record and is not to be disclosed except for collection purposes), see also 42 U S C § 405(c)(2)(C)(viii) (I)	Publication is antithetical to goal of rehabilitation Purpose is to prevent disclosure of defendant's Social Security Number (SSN)
FAMILY				
Child or spousal support	Tax return	Entire record	Fam Code § 3552 (parties' tax returns filed in support proceedings must be sealed)	Unavailable as public record in any form absent change in legislative policy
Child custody	Custody evaluation report All, when noncustodial parent is registered sex offender, or convicted of child	Entire record Custodial parent's place of residence and employment, and child's school	Fam Code § 3111 (report is available only to court, parties, and their attorneys) Fam Code § 3030(e) (this information may not be disclosed unless court finds that disclosure would be in child's best interest)	In general, these records are made confidential to protect privacy of parties and their minor children

Other	abuse, child molestation, or rape that resulted in child's conception		
	Records in conciliation proceedings	Entire record	Fam Code § 1818(b) (files of family conciliation court shall be closed)
	Records in action under Uniform Parentage Act (UPA)	All records, except for final judgment	Fam Code § 7643(a) (records are subject to public inspection only in exceptional cases, on court order for good cause shown).
	Petition and probation or social services report in proceeding to terminate parental rights	Entire record	Fam Code § 7805 (records are to be disclosed only to court personnel, the parties, and persons designated by the judge)
	Adoption records	Entire record	Fam Code § 9200(a) (judge may not authorize public inspection except in exceptional circumstances and for good cause "approaching the necessitous")
	Support enforcement, child abduction	Entire record	Fam Code § 17212 (records generally confidential with specified exceptions)
	Support enforcement under Uniform Interstate Family Support	Address of child or party or other identifying information	Fam Code § 4926 (on finding that health, safety, or liberty of party or child would be unreasonably put at risk by disclosure of identifying information, court shall order that address of child or party or other identifying information not be disclosed in any pleading or other document filed

	Act		in proceeding under Act)	
	Confidential Counseling Statement (Marriage)	Judicial Council Form 1284	Judicial Council Form 1284	
GUARDIANSHIP, CONSERVATORSHIP				
	Confidential Guardian Screening Form (Probate Guardianship)	Entire Judicial Council Form GC- 212	Prob Code § 1516, Cal Rules of Court, rule 7 1001	Unavailable as public record in any form absent change in legislative policy
	Confidential Conservator Screening Forms (Probate Conservatorship)	Entire Judicial Council Forms GC-314 and GC- 312	Prob Code § 1821(a), Cal Rules of Court, rule 7 1050	
	Report and recommendation re proposed guardianship	Entire record	Prob Code § 1513(d) (report of investigation and recommendation concerning proposed guardianship is confidential)	
	Report and recommendation re proposed conservatorship	Entire record	Prob Code § 1826(n) (report of investigation and recommendation concerning proposed conservatorship is confidential, except that court has discretion to release report if it would serve conservatee's interests)	
	Report arising from periodic review of conservatorship	Entire record	Prob Code § 1851(e) (report is confidential, except that court has discretion to release report if it would serve conservatee's interests)	
	Periodic accounting of assets in estate or	Accounting containing ward's or conservatee's	Prob Code § 2620(d) [AB 1286, 1517] (accounting containing this information should be filed under seal)	

	ward or conservatee	Social Security number or any other personal information not otherwise required to be submitted to court		
JUROR RECORDS				
	Juror questionnaires and personal identifying information	Jurors' names, addresses, and telephone numbers	Code Civ Proc § 237 (juror personal identifying information after verdict in criminal case, to be confidential) <i>Bellas v Superior Court</i> (2000) 85 CA4th 636, 646 (jurors' responses to questionnaires used in voir dire are accessible by public unless judge orders them to be sealed) <i>Townsel v Superior Court</i> (1999) 20 C4th 1084, 1091 (trial courts have inherent power to protect juror safety and juror privacy) <i>Copley Press, Inc v Superior Court</i> (1991) 228 CA3d 77, 88 (public should not be given access to personal information furnished to determine juror qualification or necessary for management of the jury system, but not properly part of voir dire, e g, the prospective juror's telephone number, SSN, or driver's license number) See also Cal Rules of Court, rule 33.6 (sealing juror-identifying information in record on appeal).	Do courts have an obligation to protect the privacy of these nonparties to the proceeding?
JUVENILE				
All	All	Entire record	Welf & Inst Code § 827 and Cal Rules of Court 1423 (access to case files in juvenile court proceedings is generally restricted), Pen Code § 676 (certain violent offenses excepted)	General purpose behind confidentiality of these records is to promote rehabilitation of juvenile offenders

	Adult court criminal records		Pen Code § 851 7 and Welf & Inst Code § 707 4 (adult court criminal records involving minors that do not result in conviction to be sent to juvenile court, to obliterate minor's name in adult court index or record book) Pen Code § 1203 45 (minor would qualify for judgment modification as a probationer or misdemeanor)	
	Record of "factually innocent" defendant Judgments	Entire record, including arrest record	Pen. Code § 851 85 (any criminal proceedings, after acquittal plus judicial finding of factual innocence) Pen. Code § 1203 4 (criminal judgments may be modified for convicted probationers after successful completion of probationary period) or Pen Code § 1203 4a (criminal judgments may be modified for convicted misdemeanants after one year and successful completion of sentence)	
	All records, papers, and exhibits in the person's case in the custody of the juvenile court (see Welf. & Inst Code §781)	Entire juvenile court record, minute book entries, and entries on dockets, and any other records relating to the case	Welf & Inst. Code §781 (juveniles declared wards of the court may on petition have their juvenile court records (including those made public by Welf & Inst Code § 676) sealed five years after the jurisdiction of the court ceases or the juvenile reaches 18, if there are no subsequent convictions involving felonies or moral turpitude, and there is a finding of rehabilitation)	
MENTAL HEALTH				

Civil and criminal	Mental health service records	Entire record	Welf & Inst Code §§ 5328-5330 (specified records confidential and can be disclosed only to authorized recipients, including records related to the Dept. of Mental Health; Developmental Services; Community Mental Health Services, services for developmentally disabled, voluntary admission to mental hospitals and mental institutions)	Publication on Internet would effectively be permanent and thus thwart policy behind sealing after sentencing
	Developmentally Disabled Assessment Reports	Entire record	Welf & Inst Code § 4514 (Developmentally Disabled Assessment Reports, to be sealed after sentencing)	Publication on Internet would effectively be permanent and thus thwart policy behind sealing after sentencing

SOCIAL SECURITY NUMBERS By statute SSNs are required in the following court proceedings

- (1) The judgment debtor's SSN (if known to the judgment creditor) must be set forth on the abstract of judgment CCP § 674(a)(6)
- (2) The application for an earnings withholding order must include the judgment debtor's SSN (if known to the judgment creditor CCP § 706 121(a) The earnings withholding order and the employer's return must also include this SSN if known CCP §§ 706 125(a) (order), 706 126(a)(3) (return)
- (3) As noted above with regard to criminal cases, courts are authorized to collect SSNs from criminal defendants with fines, forfeitures, or penalties imposed, but these numbers are not to become public records and are not to be disclosed except for collection purposes Govt Code § 68107

In civil and bankruptcy cases in the federal courts, only the last four digits of a party's SSN should be set forth in any document filed with the court See http://www.uscourts.gov/Press_Releases/att81501.pdf



Judicial Council of California
Administrative Office of the Courts

Information Services Division
455 Golden Gate Avenue ♦ San Francisco, CA 94102-3660
Telephone 415-865-7400 ♦ Fax 415-865-7496 ♦ TDD 415-865-4272

RONALD M. GEORGE
Chief Justice of California
Chair of the Judicial Council

WILLIAM C. VICKREY
Administrative Director of the Courts

RONALD G. OVERHOLT
Chief Deputy Director

PATRICIA YERIAN
Director
Information Services Division

TO: Chief Justice Ronald M. George
Members of the Judicial Council

FROM: Charlene Hammitt, Manager
Jane Evans, Senior Business Systems Analyst

DATE: November 27, 2001

SUBJECT/ PURPOSE OF MEMO: Proposed Rules on Electronic Access to Court Records

CONTACT FOR FURTHER INFORMATION:	NAME: Jane Evans	TEL: 415-865-7414	FAX: 415-865-7497	EMAIL: jane.evans@jud.ca.gov
---	----------------------------	-----------------------------	-----------------------------	--

QUESTION PRESENTED

What are other jurisdictions doing to provide electronic access to trial court records?

FEDERAL COURTS

The Judicial Conference of the United States approved on September 19, 2001 a report and recommendations by the Committee on Court Administration and Case Management that provides that:

- Public access to civil case files: documents in civil case files should be made available electronically to the same extent that they are available at the courthouse, except for Social Security cases because they contain detailed medical and other personal information. Bankruptcy case files should also be made available electronically, except that personal data identifiers should be removed.

Chief Justice Ronald M. George
November 27, 2001
Page 2

- Public access to criminal case files: documents in criminal case files should not be available to the public remotely at this time. This policy will be reexamined in two years. The committee determined that any benefits of remote access were outweighed by public safety and law enforcement risks.
- Federal courts are not required to provide electronic access to case files if a paper file is maintained.
- Remote electronic access will be available only through the PACERNet system, requiring registration, a log-in and password.

The approach taken by the federal courts is similar to that in the proposed rules, providing the broadest access to civil documents while recommending a cautious approach to criminal documents and recognizing that sensitive personal information is contained in case files.

OTHER STATE COURTS

Currently, state courts that provide electronic access offer docket information only with the exception of Arizona. About half the states offer little or no electronic access, but some of these states are analyzing issues related to privacy and access, and have appointed committees to investigate policy issues and technological readiness with a goal of developing court rules (see State-by-State Comparison, first attachment).

ARIZONA

At this time, only Arizona provides broad electronic access to court documents. For many years, Arizona has had a rule (Rule 123) that provides for public access to electronic court records. This rule was recently reviewed by an ad hoc committee appointed by the Chief Justice of the Arizona Supreme Court. The committee's charge was to examine the issues surrounding public access to electronic court records and to develop recommendations to modify Rule 123 and to suggest additional rules governing access to electronic court records.

The Report and Recommendation of the Ad Hoc Committee to Study Public Access to Electronic Court Records (March 2001) specifically recommends that electronic records be made available at public terminals at the courthouse, but that courts have the option of providing access on the Internet (p. 8). It recommends phasing in Internet access by case type, beginning with civil and criminal, followed by family, juvenile, and probate.

Chief Justice Ronald M. George
November 27, 2001
Page 3

The committee notes that Rule 123 was written before the Internet came into prominent usage. The electronic access the rule envisioned was not via the Internet, but by a subscription dial-up into a private network. The rule anticipated that this system would probably be used only by those with a need to know, i.e., attorneys, litigants, investigators, credit bureaus, and commercial data resellers. It did not anticipate that the general public would access court records remotely in large numbers. The report notes that courts may choose to delay making case information available on the Internet for a variety of good reasons, including lack of resources (p. 8). It specifically recommends that records in domestic relations, juvenile, mental health, and probate cases not be made available on the Internet until Social Security and financial account numbers are redacted (p. 9).

FLORIDA

On November 15, 2001, a committee of judges, lawyers, court officials and others recommended that the Florida Supreme Court impose a moratorium on public access to complete court documents via the Internet. Florida law (Florida Statutes, section 28.2221) requires clerks to have electronic images of documents available on the county's official web site by January 1, 2006. The state's Judicial Management Council recommended that courts not provide unrestricted electronic access to records until policies balancing privacy and access are developed. (see article *Partial Ban for Records on Net*, second attachment).

VIRGINIA

Virginia has recently established a pilot project to put the case management abstract data of selected courts on the Internet, after removing parties' Social Security numbers, telephone numbers, and street addresses. It has also recently adopted a rule (Virginia Supreme Court Rule 1.17, Electronic Filing and Service) restricting access to electronically filed data filed to the parties, their attorneys, and court personnel.

OTHER STATES

A few states, such as Vermont (Vermont Supreme Court Rules for Public Access to Court Records 1-8), provide remote access to commentary in connection with docket entries that describe the contents of the filings and not just their titles. Other states, such as Missouri (Missouri Court Operating Rule 2), provide electronic access to judgments, but not to other filings.

ADDITIONAL INFORMATION

Chief Justice Ronald M. George
November 27, 2001
Page 4

The National Center for State Courts maintains a web page on public access to court records (<http://ctl.ncsc.dni.us/publicaccess/>), which describes the actions being taken by most state courts with respect to providing public access while addressing the privacy issues that are arising as courts move from paper to electronic filing. The Arizona report and the various rules and policies of other states, noted above, are accessible through this web page.

OTHER POLICY INITIATIVES

The Justice Management Institute and the National Center for State Courts are developing Model Rules for providing access to electronic court records. Under the Model Rules, remote access is limited to the register of actions, calendars of court proceedings, and final judgments, orders, and decrees.

The Conference of State Court Administrators (COSCA) is also considering the issue of providing public access to electronic court records. In August 2000, COSCA issued a Concept Paper on Access to Court Records (see cosca.ncsc.dni.us) that states that the conference should do all it can to encourage Internet access to public court records, both in its own self interest and to fulfill a more fundamental obligation to encourage convenient access to the courts (pp. 13-14). It concludes that it "should work diligently and with consummate public input to determine which court records should be restricted and to obtain funding for the most convenient access available" (p. 14).

STATE POLICY ON ELECTRONIC ACCESS TO COURT RECORDS

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
ALABAMA	yes	State employs dial-up access program similar to Maryland. Public access terminals are available in every county. Remote access sites are available for a monthly fee. New rule charges a fee for requests that require a special computer program to locate information, which discourages people from requesting wholesale information.	yes
ALASKA	yes	Nothing documented on electronic access.	yes
ARIZONA	yes	State employs dial-up access program similar to Maryland. Recent report from Ad Hoc Committee recommended the opening of court records electronically, with the general exception of personal information, such as social security and credit card numbers, and cases related to domestic relations, juvenile, mental health, and probate. For the most part, criminal information should be accessible.	yes
ARKANSAS	no	Electronic access is provided for a small fee. The AOC is working towards employing an electronic case management system for many of the trial courts that will be made available to the public. No electronic access policies yet. Access guidelines are covered by law rather than by court rules. Aside from juvenile and adoption records, most records are open.	yes
CALIFORNIA	yes	Proposed rule changes include a general right of electronic access to trial court records, and preclude remote electronic access to filings in family law, juvenile, mental health, guardianship, and criminal proceedings. Also, the court may limit access to any court record based on overriding public or private interests.	yes

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
CONNECTICUT	yes	The Judicial Branch offers to members of the press, bar and public, dial-in access to its civil/family system for a fee. This access allows users of the system to inquire directly into the civil and family case records contained in the Superior Court's database and to review the status of computerized court records. Available information includes: whether an appearance has been filed on behalf of a party and by whom; whether a motion has been filed or acted upon; whether the case is pending or disposed, and calendar information for the short calendar, family magistrate, civil assignment list, family assignment list and dormancy short calendar. The Electronic Bulletin Board System allows the electronic transfer of information from the Judicial Branch to a subscriber's personal computer. In addition to viewing the information, subscribers are able to download text onto their personal computers.	yes

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
COLORADO	yes	<i>CoCourts.com</i> is the first online, real-time court records site in the United States. It was created as an initiative of the Colorado Judicial Branch and developed, under contract, by a private company, e-InfoData.com of Boulder. Users can search both open and closed cases. Sealed cases are not available on the site. Also not included are these case types— probate, mental health and juvenile. Additionally, certain information within each case is non-public. Social security numbers are omitted, as are street addresses. All parties to a case except the plaintiff and defendant (and in domestic relations cases, the petitioner and the respondent) are considered non-public. This includes judges, victims, police officers and jurors. Attorney names, however, are public. Long narratives are excluded from the database, as are suppressed, sealed, or confidential filings. Financial information such as fines are summarized.	yes
Delaware	yes	Few court record data is on the Internet. Court rules are linked to judiciary's main site. Court access policy varies depending on jurisdiction and type of court. Courts for the most part set their own policies regarding access.	no
District of Columbia	yes	Could not locate access to court records on the web sites.	no
FEDERAL		Federal Judiciary has several electronic access services to obtain federal court information, including records.	yes
FLORIDA	yes	Electronic access authorized by statute, but not uniform statewide. A few jurisdictions provide web access to civil and/or criminal case information.	no

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
HAWAII		Program titled <i>Ho'ohiki</i> is the state's online public records access system. Court pleadings and home addresses are not available online. <i>Ho'ohiki</i> has an interesting disclaimer which must be read before proceeding to the program.	yes
Georgia		No perceived electronic access to court records.	yes
Idaho	yes	No perceived electronic access to court records.	yes
ILLINOIS	yes	Special Supreme Court Committee on Electronic Transmission of Data studies and will make recommendations to the Supreme Court on permitting the service of notice and other papers and the filing of documents by facsimile transmission to the clerk's offices and on allowing the electronic receipt of dissemination of information regarding cases and other court business.	yes
INDIANA	yes	Judges Technical Committee is looking into electronic records-keeping access. Will likely institute a limited access policy. 1998 Task Force recommended broader implementation of electronic access to public records.	yes
IOWA	no	Electronic Iowa Court Information System (ICIS) is available at courthouses.	no
KANSAS	yes	Some general docket/case information is available online.	yes

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
KENTUCKY	no	The State will soon implement a new policy that will provide more electronic access to court information. Currently, each county collects informaiton that feeds into a mainframe. State is looking into providing access to that information via the Internet. Contact Ed Crocket at 502/573-2350 ext. 2029 for specifics on the policy and electronic access to court records.	no
LOUISIANA	varies	No electronic access.	no
Maine	yes	Newly created web page to include all administrative orders. Information will soon be available via public access terminals, but is already implemented in some jurisdictions. Criminal data information pretty much open and computerized. However, civil information more restricted.	yes
MASSACHUSETTS	yes	A web advisory committee is seeking comments on a draft report regarding the dissemination of court records on the Internet. Draft report includes specific recommendations on what should and should not be made available on the Internet.	yes
MICHIGAN	yes	No statewide electronic access policy as of yet, and no real firm plans for one in the future. However, a few trial courts are offering electronic access to court records. Dan Voss 517/373-2106	no
Minnesota	yes	No perceived electronic access to court records.	yes

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
MISSISSIPPI	no	State supreme court is moving toward electronic access to its docket, and soon will have links to the actual motions and petitions before the court. Citizen electronic access to the trial courts far down the road.	yes
MISSOURI	yes	Case.net provides access to the Missouri State Courts Automated Case Management System. From here you are able to inquire on case records including docket entries, parties, judgments, and charges in public court. Only courts that have implemented the case management software as part of the Missouri Court Automation Project and only cases that have been deemed public under the Missouri Revised Statutes can be accessed through Case.net.	yes
MONTANA	yes	Supreme Court is far behind in terms of electronic access to court records.	no
NEBRASKA	yes	No electronic access.	no
Nevada	no	Rules not yet available on the Internet. Courts seeking funds to establish web site for rules and other pertinent court information.	no
NEW HAMPSHIRE	yes	No perceived electronic access to court records.	no
New Jersey	no	Almost all court records on paper are available electronically. Nominal fee is charged for electronic services, but special program requests are not accepted.	yes

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
NEW MEXICO	no	Electronic access provided without fee. Addresses and phone numbers not provided on the Internet. Internet contains case management information for all cases in the state, as well as statutes and rules.	yes
NEW YORK	yes	Electronic access to court records is provided. Fees are charged based on costs and revenue. State was in litigation over denying access to entire database for resale.	yes
NORTH CAROLINA	no	State has an electronic criminal calender, which can be searched by county, court type, or last name of the defendant.	yes
North Dakota	no	Online Dakota Information Network provides general judicial information, but no access to court records.	no
OHIO	yes	Currently no electronic access to court records. Supreme Court website provides party names, filing dates, entries, attorney names, and summaries.	no
Oklahoma	no	Electronic access is provided at no charge. No difference between electronic and paper in terms of public information access.	no
Oregon	yes	State maintains 18 regional databases known as Oregon Judicial Information Network. Dial-up access is permitted for all non-confidential (defined by statute) court cases.	no
Pennsylvania	yes	State provides electronic access for a fee. Court system is moving towards better unification.	no

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
Rhode Island	no	Electronic access is limited. State was involved in access lawsuit with local paper. Paper requested detailed statewide traffic court information, but was refused because state sells that information to private insurance companies. State argued that if information was given to the paper, they would have to also provide it to private insurance companies free of charge. By law, state can either refuse or charge for information not normally collected.	yes
SOUTH CAROLINA	no	Technology plan is looking at making all records electronic, first for internal use and then for the public. A few counties provide electronic access of some court information for free.	no
SOUTH DAKOTA	yes	Electronic access to court records not provided.	no
TENNESSEE		No apparent electronic access to court records.	no
TEXAS	yes	No apparent electronic access to court records.	yes
Utah	yes	Utah Court Information Xchange database charges monthly fee, service charge; and usage fee; contract.	yes
Vermont	no	Electronic access to court records is limited for the time being. Recent committee, comprised of citizens, judicial officers, administrative personnel, and media, will offer suggestions regarding public access to court documents. Recommendations will address what should and should not be public accessible, what information should be provided on the Internet, and how to handle juvenile records.	yes

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
VIRGINIA		Electronic access is available for many Circuit Court records in a pilot format. Committee is looking into the issues surrounding electronic access vs. paper access.	yes
WASHINGTON	yes	Under statute, electronic access is available for a fee. New legislation has been drawn up to limit Internet access to private information and some records. State has encountered cases of identity theft.	yes
West Virginia	varies	No specific provisions covering electronic case records. Majestries use the same electronic case system, but only accessible on a case-by-case basis. Limited information available via dial-up for a fee. Currently looking at web application that will make limited, basic case information available on main site.	no
Wisconsin	no	All unrestricted cases—excluding juvenile, mental, paternity, and adoption cases—are available on the Internet. However, text field may be missing, which may cause confusion. For example, a case may note that a motion was passed, but it may not explain what type of motion was passed. Internet service free and often includes phone numbers, addresses, date of birth, etc. Site gets between 200,000 and 250,000 hits per day, receives positive press, and has saved Clerks of the Court substantial time previously spent collecting court records requests. However, privacy advocates have complained about easy access to information deemed sensitive. Legislatures have contacted the Admin. office complaining, but nothing has advanced further...yet.	yes

State	Court Rules on Public Access?	Electronic Access?	Materials/Info on the web?
Wyoming		At this point, no electronic access to court records, but moving in that direction.	no

Note: All available court rules and state judicial sites can be accessed via *www.courts.net*.

States in SMALL CAPS have recent changes.

Access chart prepared by Todd Silver, Maryland Judiciary Court Information Office.



Judicial Council of California
Administrative Office of the Courts

Information Services Division
455 Golden Gate Avenue ♦ San Francisco, CA 94102-3660
Telephone 415-865-7400 ♦ Fax 415-865-7496 ♦ TDD 415-865-4272

RONALD M. GEORGE
Chief Justice of California
Chair of the Judicial Council

WILLIAM C. VICKREY
Administrative Director of the Courts

RONALD G. OVERHOLT
Chief Deputy Director

PATRICIA YERIAN
Director
Information Services Division

TO: Chief Justice Ronald M. George
Members of the Judicial Council

FROM: Charlene Hammitt, Manager
Jane Evans, Senior Business Systems Analyst

DATE: November 27, 2001

SUBJECT/ PURPOSE OF MEMO: Proposed Rules on Electronic Access to Court Records

CONTACT FOR FURTHER INFORMATION:	NAME: Jane Evans	TEL: 415-865-7414	FAX: 415-865-7497	EMAIL: jane.evans@jud.ca.gov
---	----------------------------	-----------------------------	-----------------------------	--

QUESTION PRESENTED

What is the electronic access environment in California courts?

What electronic access is offered by California courts?

Currently, of the California trial courts providing electronic access to court information, most offer only calendar and docket information on the Internet, searchable by entering the case name or case number (see Electronic Access in the Trial Courts, first attachment). Accessing and searching calendar and docket information is not standardized statewide, but requires a different approach in each county (see Electronic Access to Trial Court Case Management Information, screen views, second attachment). Case types and years covered also vary from court to court.

A few courts are providing images of the actual documents filed by the parties and the court, but only for very limited case types or consolidated complex litigation.

Chief Justice Ronald M. George
November 27, 2001
Page 2

- Alameda County Superior Court, on its web site, has recently begun providing images of documents filed in all civil cases, both limited and general.
- Riverside County Superior Court provides access to imaged case files, but only at the courthouse.
- San Francisco Superior Court provides Internet access to orders filed in its complex asbestos litigation, but provides for public access only on public terminals at the courthouse to documents that have been electronically filed in that litigation.
- Los Angeles County Superior Court provides web access to complaints, answers, and orders in the coordinated diet drug cases.
- San Diego County Superior Court is providing web access to calendar, orders, and minutes in coordinated breast implant, latex glove, tobacco, and firearm cases.

California courts have had little experience with providing remote access to court records and with evaluating how providing such access might impact litigants and third parties. This limited access to electronic case materials currently offered by a handful of courts would comply with the proposed rules.

Do California courts have the ability to provide remote electronic access?

Most courts are currently not equipped to provide more than basic case information on the Internet, even if they wanted to. Sixteen courts have a local version of a static web site developed by the Information Services Division of the AOC, offering directory-type information only, with no link to case information. Case management system (CMS) vendors offering products to California courts have had difficulty developing web-based CMS's, and CMS's currently in use in California courts are unlikely to have the ability to segregate or redact confidential information from a specific case file. An incremental approach to remote access allows the Judicial Council to develop programs that support the objective of maximum availability of records by remote access, initially by addressing basic needs of all the courts and then by prioritizing their secondary needs.

What is being done to improve courts' ability to provide electronic access?

Because most courts do not currently have the technological capability to provide electronic access to case information, and because most case files are available in paper only, the Court Technology Advisory Committee is overseeing several statewide initiatives by the AOC Information Services Division to upgrade court information systems so that courts can offer electronic access to case information in the future. The Telecommunications Architecture initiative is evaluating the current physical infrastructure (cabling, equipment rooms, physical connectivity) and networking

Chief Justice Ronald M. George
November 27, 2001
Page 3

capability in the trial courts while developing standards for cabling, network performance, and bandwidth to enable the courts to improve information flows. The Service Bureau initiative is working with a vendor to develop a centrally-supported, up-to-date CMS for small courts. The CMS Certification initiative is working to insure that case management systems, either vendor or local, meet California-specific needs.

In addition, the courts have identified imaging as a technology priority for the 2002-2003 budget. Imaging technology would allow courts to convert paper case files to electronic documents that could be remotely accessed. The Finance Division, in developing budget requests for 2002-2003, received requests from several trial courts for records management projects that included imaging, so that these courts would be able to create an electronic database of their paper documents.

Finally, Information Services is supporting electronic filing in two initiatives, so that courts would have original documents in an electronic medium and would not have expend resources to convert them to an electronic medium using imaging technology. The first initiative is grant funding for e-filing projects and the second is development of the California Electronic Filing Technical Standards, working with Legal XML, a national organization engaged in the definition of electronic filing standards based on Extensible Markup Language (XML). Filing standards would integrate with a variety of case management systems, and would for example allow court case management systems to segregate sensitive personal information data elements to render them unreadable by the public on a remote system.

Given time, adequate resources, and technological innovation, courts in California will be able to move toward a more electronic environment and thus provide increased electronic access to information.

**Electronic Access in the Trial Courts
Current Status
Nov. 2001**

While all courts have web sites, many offer only static information about location, hours, organization, judges, and court personnel. Sixteen courts have web sites developed by AOC Information Services Division with basic information. Some courts have web sites that offer searchable information about specific cases as listed below. Coverage ranges from Sacramento's probate case index starting in 1991 to San Francisco's civil index that started October 9, 2001.

TRIAL COURT	SEARCHABLE FEATURES	ELECTRONIC FILING
Alameda	▪ Case summary by case number ▪ Register of actions with imaged document links where available ▪ 30 days calendar ▪ Complex litigation	▪ Unlawful detainer using XML
Contra Costa	▪ Dial up access to civil, probate, family law CMS for \$100 yearly subscription	
Kern	▪ Daily calendar by name, number, date	
Los Angeles	▪ Civil, small claims case summary by case number ▪ Calendars by number, type, location	▪ E-filing projects in planning stage
Marin	▪ Calendar by name	
Mariposa	▪ Stayner case docket	
Monterey	▪ Calendar by name, date, case type, number	
Orange	▪ Calendars by case name for civil, family, probate ▪ Case information "coming soon" ▪ Name indexes on CD-Rom for sale	▪ Family law using XML

TRIAL COURT	SEARCHABLE FEATURES	ELECTRONIC FILING
Riverside	- Telnet access to civil, criminal, family, probate, and traffic to print dockets. Also calendars, name searches, minute orders, parties, bail status - Imaged case files searchable at courthouse	Civil, family, small claims and unlawful detainer
Sacramento	Indexes in civil, family, criminal, and probate by number, name, date, case type	Web-enabled small claims filing using XML
San Diego	- New cases filed five days name search - CD-Rom for sale civil, criminal, domestic, mental, probate by name, number, dates, party types, category codes	
San Francisco	Case management system for civil cases	Traffic, complex litigation
San Joaquin	Register of actions or case summaries by number	
Santa Cruz	- Case index for civil, family, probate, small claims by name - Calendar by number	
Shasta	Case index for criminal and civil by name to get case number	
Solano	- Case management system by name, case type - Civil docket report gives name, number, party type, filing date, case type	
Ventura	- Case inquiry for criminal, traffic, civil by name and DOB together, driver's license number, bail receipt number - Calendar by date, time, courtroom together, date and attorney together, attorney	Civil and family

Electronic Access to Trial Court Case Management System Information

Alameda <http://www.co.alameda.ca.us/courts/> select *DomainWeb*

 Superior Court of California County of Alameda	Welcome Page Calendar Information Case Summary Complex Litigation
Case Summary	
Case Summary Enter the case number Submit Reset	
<i>Note</i> - Please consult the Local Rules and/or Civil Divisions regarding Tentative Ruling procedures <i>Note</i> - Effective May 24, 1999, pursuant to Code of Civil Procedure § 1161.2, DomainWeb will not display any information regarding unlawful detainer matters until 60 days following the date the complaint was filed. Parties to whom this statute does not apply should contact the court location in which a case is pending to obtain information	

Los Angeles <http://www.lasuperiorcourt.org/> select *Civil Case Summary*

Superior Court of California County of Los Angeles		
Home Search Court Locations		About the Court News & Media Jury Civil Small Claims Family Probate Juvenile Traffic Criminal Mental Health
Civil General Information Case Summary Calendars Tentative Rulings ADR Appear by Phone Dial Drug	Case Summary The Courts and County of Los Angeles declare that information provided by and obtained from this site, intended for use on a case-by-case basis and typically by parties of record and participants, does not constitute the official record of the court. Any user of the information is hereby advised that it is being provided as is and that it may be subject to error or omission. The user acknowledges and agrees that neither the Los Angeles Superior Court nor the County of Los Angeles are liable in any way whatsoever for the accuracy or validity of the information provided. This site includes general and limited jurisdiction civil cases from all districts, except for Van Nuys (general jurisdiction) cases filed before January 8, 2001. Case Number: Filing Court: (Optional) Apply to limited civil only ☐	

Monterey <http://www.co.monterey.ca.us/court> select *Calendar*



SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

November 8, 2001

To find a court case, enter any information that you have on the case and click "Search"

Search all cases for a specific name or case number

Search all cases by case type

Search all cases for a specific date
 / /

Or search a specific case type by date
 / / AND

Home

General Court Information

State Judicial Council

Legal Forms

Self Help Center

Public Classes

Local Rules/ Fee Schedule

Employment Opportunities

Small Claims

Traffic

Calendar/ Tentative Rulings

Jury Duty

Grand Jury

County Law Library

Sacramento <http://www.saccourt.com> select *Online Services/Case Index Program*



Civil Index - Basic Inquiry

Please enter search information:

(Please use the Advanced Search feature for Business Names)

Civil

Criminal

Family Law

Probate

Home

San Francisco <http://www.sftc.org> select *New* for civil CMS



**Superior Court of California
County of San Francisco**

Electronic Information System

This site is designed to provide the user with the capability to access available data within the Court Case Management Systems. To use this site, you will need to have all of the necessary software and browser plug-ins.

San Joaquin <http://www.stocktoncourt.org/courts/> select *Calendars*



Home Calendars Local Rules
Tentative Rulings Self-Help Search

San Joaquin County Superior Court

Please note: The information on this site is provided to increase public access to your local courts. We make every attempt to keep the information current but that is not always possible. The information contained here does not constitute the official record of the court and may contain errors or omissions. By selecting an option below, you signify that you have read the foregoing.

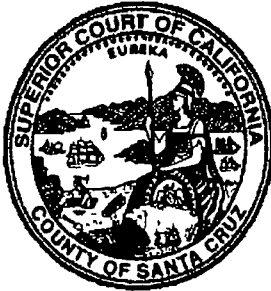
Select from the list below how you want to search the Calendars:

- [Court Calendar by Date](#)
- [Court Calendar by Department and Date](#)
- [Court Calendar by Case Number](#)
- [Court Calendar by Party Name](#)

Please contact the [webmaster](#) with your suggestions or comments
[Privacy Policy](#)

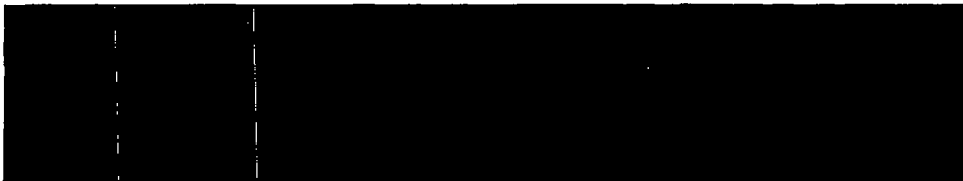
Santa Cruz <http://www.co.santa-cruz.ca.us/crt/courts.htm> select *Civil Case Index*

Superior Court of California, County of Santa Cruz



Civil, Family Law, Probate and Small Claims

Case and Calendar Information



To find the case number, click on Index Menu.

To find the court date when you know the case number, click on Court Date Menu.

Index Menu

For Person or Business Name Search

Court Date Menu

For Calendar Information by Case Number

Court Home Page



CONTACT US! court@co.santa-cruz.ca.us

You are visitor number 128

Solano <http://www.solanocourts.com> select *Court Connect*

Banner CourtConnect



**Superior Court of California
County of Solano**

☐ [Search by person name, business name or case type](#)
☐ [Search for judgments against a person or business](#)
☐ [Display case information and activities](#)



[Help for First
Time Users](#)

Powered by SCT
Web Technology



Ventura <http://courts.countyofventura.org> select *Public Access/Case Inquiries*



Superior Court of California
County of Ventura



- [General Information](#)
- [Services & Programs](#)
- [Public Access](#)
- [Legal Self-Help](#)
- [Virtual Courtroom](#)
- [Email Directory](#)
- [Press Releases](#)
- [What's New](#)
- [Search](#)
- [FAQ](#)
- [Home](#)

What do you know about the case?

Court Case Number

Case Type

Defendant Name - Last

First

Business

Plaintiff Name Last

First

Business

Calendar - Date

Dept

Please qualify your search further by specifying one or more of the following:

Filed Date

through

Limit results to

items



Judicial Council of California
Administrative Office of the Courts

Information Services Division
455 Golden Gate Avenue ♦ San Francisco, CA 94102-3660
Telephone 415-865-7400 ♦ Fax 415-865-7496 ♦ TDD 415-865-4272

RONALD M. GEORGE
Chief Justice of California
Chair of the Judicial Council

WILLIAM C. VICKREY
Administrative Director of the Courts

RONALD G. OVERHOLT
Chief Deputy Director

PATRICIA YERIAN
Director
Information Services Division

TO: Chief Justice Ronald M. George
Members of the Judicial Council

FROM: Charlene Hammitt, Manager
Jane Evans, Senior Business Systems Analyst

DATE: November 27, 2001

SUBJECT/ PURPOSE OF MEMO: Proposed Rules on Electronic Access to Court Records

CONTACT FOR FURTHER INFORMATION:	NAME: Jane Evans	TEL: 415-865-7414	FAX: 415-865-7498	EMAIL: jane.evans@jud.ca.gov
---	----------------------------	-----------------------------	-----------------------------	--

QUESTION PRESENTED

Has the Judicial Council adopted relevant plans and policies?

JUSTICE IN THE BALANCE 2020

The long-term goals of the judicial branch in affording public access to electronic records were succinctly described in the Report of the Commission on the Future of the California Courts: *Justice in the Balance 2020*. That report envisions that by 2020, paper will have nearly vanished from the courts, and all pleadings and other documents will be transmitted, processed, and filed electronically (p. 101). It foresees that technology will make justice more efficient, more accessible, more understandable, and of higher quality, while at the same time unburdening judicial branch personnel of routine and mechanical tasks, freeing them to focus on the needs of court users (p. 101). The report acknowledges that public access to court records under the current system, which requires an individual to go to the courthouse, stand in line to request a case file that may or may not be in the

Chief Justice Ronald M. George
November 27, 2001
Page 2

courthouse, and search through the file page by page, in many cases has the practical result of giving only the legal community effective access to court-related information (p. 105). It argues that technology has the proven potential to provide more accessible, user-comprehensible justice, which is basic to the commission's vision of a preferred future for the courts (p. 105). With respect to the protection of privacy in court records that are accessible by the public electronically, the report suggests that by 2020, the information technology revolution will have changed notions of privacy fundamentally, but that the public debate about whether the Bill of Rights protects people in cyberspace will be a thing of the past, because the Supreme Court "will have reaffirmed every person's right to a legitimate expectation of privacy, in any medium" (p. 102).

JUDICIAL COUNCIL OPERATIONAL AND STRATEGIC PLANS

Both the Judicial Council Operational and Strategic Plans, *Leading Justice Into the Future*, in Goal VI, note that "[t]echnology will enhance the quality of justice by improving the ability of the judicial branch to collect, process, analyze, and share information and by increasing the public's access to information about the judicial branch." The Operational Plan, in Goal VI(f), proposes an E-government initiative to "Expand the ability of the California Courts, Serranus, and local trial court Web sites to provide information and services."

STRATEGIC PLAN FOR COURT TECHNOLOGY

The plan, approved by the Judicial Council August 14, 1998, in its Goal IV, calls to "Make justice system information more accessible through the use of common, well-understood technology."

TACTICAL PLAN FOR COURT TECHNOLOGY

The Tactical Plan, adopted by the Judicial Council January 26, 2000, provides the framework discussed elsewhere for the statewide initiatives to upgrade and enhance court information systems capabilities, including telecommunications architecture, the Service Bureau, and certification of case management systems as meeting California needs.

STANDARDS OF JUDICIAL ADMINISTRATION, SECTION 38

Section 38, Access to Electronic Records, was adopted by the Judicial Council and became effective January 1, 1999. The standard has provided guidance to trial courts as they have begun small projects to provide public access to electronic records in limited case types. Feedback from courts on their project outcomes under Section 38 has informed the Court Technology Advisory Committee as it developed the proposed rules.

Chief Justice Ronald M. George
November 27, 2001
Page 3

Much of the language in Section 38 has been incorporated into the proposed rules, as the provisions, although only advisory in nature, have proved workable for both the courts and the public seeking access to electronic court information.

RECEIVED

NOV 28 2001

CHAMBERS OF THE
CHIEF JUSTICE

November 27, 2001
VIA FEDERAL EXPRESS

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

**Re: Response to October 5, 2001 Report of the Court Technology Advisory Committee
Regarding Public Access to Electronic Court Records**

Dear Justice George and Honorable Members of the Judicial Council:

We are writing on behalf of the California Newspaper Publishers Association, the California First Amendment Coalition, The Copley Press, Inc., Freedom Communications, Inc., Hearst Corporation, the Los Angeles Times, McClatchy Company, the Reporters Committee for Freedom of the Press, and the San Jose Mercury News. As you know, this group of concerned organizations and media previously submitted comments on the rules regarding electronic access to court records proposed by the Court Technology Advisory Committee ("CTAC" or "Committee"). We take the liberty of writing again at this time to express our profound concern regarding certain aspects of the proposed rules as finally described by the CTAC.

Legal Standard.

First, the CTAC Report of October 5, 2001 ("Report") proceeds from an incomplete legal analysis. This may explain some of the conclusions it reaches, and therefore requires some clarification. The CTAC states that "[u]nlike many other states, California does not provide for a right of public access to court records by statute or rule of court, whether records are in paper or electronic form. Instead, public access to court records is afforded under the common law." Report, p. 5. However, the Judicial Council, relying on the California Supreme Court's decision in *NBC Subsidiary, Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999), has adopted rules of court expressly addressing public access to court records, and narrowly circumscribing the situations in which public access to court records can be denied. See Cal. Rules of Court 243.1, *et seq.* Moreover, the right of the public and the press to court records is not merely a creature of California common law. On the contrary, it is guaranteed by both the First Amendment to the United States Constitution and by the California Constitution. *NBC Subsidiary*, 20 Cal. 4th at 1212; *Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367, 373 (1998); *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992). The Legislature has provided that court records maintained in electronic form must "be made reasonably accessible to all members of the public for viewing and duplication as would the paper records." Gov't Code § 68150(h). Thus, the standards imposed by the First Amendment, the California Constitution, California statute, and the California Rules of Court govern access to electronic court records.

Gray Cary Ware & Freidenrich LLP

California Judicial Council
November 27, 2001
Page Two

Case-by Case Access Restriction.

Second, the CTAC has maintained the proposed restriction of "case-by-case" access, and it has eliminated any discretion on the part of the trial courts to permit access on any other basis. We believe that this restriction is both pragmatically and legally unjustified.

As it now reads, proposed rule 2073(b) provides that "[a] trial court must grant public access to its trial court records maintained in electronic form only when the record is identified by the number of the case, the caption of the case, or the name of the party, and only on a case-by-case basis." Report, p. 28 Although the proposed rule is ambiguous, it apparently imposes two sets of limitations. First, it apparently permits access to court records only if a requestor already has some information regarding a matter, i.e., the case number, caption, or name of a party. Second, it apparently permits the electronic access system to display cases only one at a time.

The proposed rule would therefore prohibit access where, for example, a requestor wants to see the cases filed on a particular day and does not know the case numbers, captions, or parties. The requestor would not have the necessary data to submit a request that would comply with the rule, and even if he or she did the rule would not permit the requestor to obtain more than one case at a time. Similarly, a requestor who wanted to see all cases filed by or against a particular party and had the name of the party would be precluded from obtaining more than a single case. (Moreover, it is unclear how the electronic access system would determine which case to display if there was more than a single responsive case, or whether the electronic access system could or would be configured to recognize that a subsequent query from the same user should be answered with a different case than that originally provided.) In addition, a requestor would not be able to search for and retrieve cases by any criteria other than the case number, case caption, or party name. Thus, it would be impossible to retrieve a case by, for example, the name of the judge who decided it, the type of case, or the counsel involved.

The Report states that "[t]he committee's legal justification for limiting access on a case-by-case basis has been that courts clearly have authority to place reasonable time, place, and manner restrictions on public access so as not to interfere with the business of the court." Report, p. 19 However, the CTAC does not explain why providing access to multiple cases in response to a single inquiry or permitting inquiries to employ fields other than the case number, caption, or party would in any way interfere with the business of the courts. Given the practicalities of modern computer databases, there is no reason to believe that it would. In fact, there is every reason to believe that enhancing electronic access to court records will reduce the burden on court personnel, and thereby minimize interference with the business of the courts. It is difficult to imagine that a court's own information system would not permit its personnel to call up cases sorted by any number of fields (a day's, week's or month's filings, or by party, counsel, or judge names, etc.), and likewise difficult to imagine why the system would not or should not permit the same facility to be shared with the public.

The Committee suggests that the problems created by the proposed rule can be overcome by submitting multiple requests. Report, p. 19 However, unless the electronic access system is specifically designed to recognize repeated requests from a unique user and provide a different response (i.e., the next responsive case in a sequence), submitting multiple requests will achieve nothing. The Committee also asserts that new cases could be identified by referring to the court's

Gray Cary Ware & Freidenrich LLP

California Judicial Council
November 27, 2001
Page Three

register of actions. Report, p. 19. To the extent that the trial courts maintain an electronic register of actions, and to the extent that the proposed rules require an electronic register of actions to be made available to the public without the limitations on access imposed by the proposed rules (as they now apparently do), this may indeed provide a solution. However, while the Superior Courts may maintain a register of actions, they are not required to do so. See Gov't Code 698554.

The CTAC offers different justifications for the case-by-case limitation in the proposed "Advisory Committee Comment" on proposed rule 2073(b). It asserts that the case-by-case limitation is "consistent with the procedures courts employ for requests for access to paper files; i.e., courts make paper files available upon request, one file at a time, to individuals who ask for a particular file." Report, p. 28. However, the fact that this may be the manner in which access is typically provided does not mean that it is the *only* manner in which access is provided. For example, trial courts in California have traditionally provided access to all new cases filed each day without demanding that the requestor identify the case by number, caption, or party name, and without insisting that the requestor can review only one case at a time. In addition, members of the public and the media have generally been permitted to obtain and review multiple case files at the same time.

The proposed Advisory Committee Comment also asserts that the case-by-case limitation is necessary to address the court of appeal's decision in *Westbrook v. County of Los Angeles*, 27 Cal. App. 4th 1157 (1994). Report, pp. 28-29. *Westbrook* addressed a request by a commercial information provider for the regular periodic delivery of computer tapes containing Los Angeles Municipal Court's compilation of information regarding criminal defendants, and held that the requester was not entitled to such tapes. The viability of the *Westbrook* decision is questionable, however, for several reasons. First, it failed even to consider the well-developed body of law establishing the constitutional right of access to court records under both the First Amendment and the California Constitution, and thus failed to apply the correct standard in determining whether access should be granted to the information sought in that case. *Westbrook* held, in essence, that court records can be withheld whenever there is "a countervailing public policy." *Id.*, at 163-64. As discussed above, that is not the standard that governs access to court records. Second, to the extent that the *Westbrook* decision could be deemed to establish any valid precedent with respect to public access to court records, it has clearly been superseded by the California Supreme Court's decision in *NBC Subsidiary*, 20 Cal. 4th 1178. Finally, it is important to recognize that the information at issue in the *Westbrook* case was not ordinary court records of individual cases, but rather a court-created compilation of many categories of data, sometimes obtained from multiple cases. *Westbrook*, 27 Cal. App. 4th at 160-61. As the *Westbrook* court itself emphasized, "[t]his information goes far beyond that which would routinely be found in a minute order, court file or the public index of criminal cases." *Id.*, at 161. Ultimately, then, this case also fails to support the imposition of restrictions on electronic access to ordinary court records.¹

The Report further states that the "committee was quite concerned by the problem Mr. Rumble faced in his court [the Superior Court of Santa Clara County]—how to respond to a media request for the court's entire database, which includes confidential information to which the public does not

¹ It should be noted that the Los Angeles County Superior Court subsequently adopted a policy of selling civil case management information to information providers like Westbrook.

Gray Cary Ware & Freidenrich LLP

California Judicial Council
November 27, 2001
Page Four

have a right of access.” Report, p. 19. The Committee expressed the concern that “[i]n order to comply with such a request, it would be necessary for court personnel to carefully review each record in the database and redact all confidential information from the records—a costly, time-consuming, and perhaps impossible task.” Report, p. 19. The CTAC apparently concluded that the case-by-case limitation was necessary to ensure that no trial court would be required or permitted to comply with such a request.

However, the Committee’s pragmatic concerns do not justify the restrictions it has proposed. The request directed to the Santa Clara Superior Court, to which the comments of Mr. Rumble and the CTAC pertain, was made by the San Jose Mercury News, Inc., and did not seek access to “the court’s entire database,” nor to a database containing the actual content of any court filing. Rather, the request was only for access to the Superior Court’s civil case management database, which consists exclusively of case history information regarding civil cases that has long been available to the public both through computer terminals in the courthouse and through printed case dockets provided by the court clerks.

Furthermore, this database contains little if any confidential information. The only possible exception would be information pertaining to cases which by law are required to be sealed in their entirety, so that even the identity of the parties is not made public. Adoptions and perhaps a few other civil cases may fall into this category. There is little foundation for any concern that public access to the Santa Clara Superior Court database would present any issues of privacy or confidentiality, given that the public had access to the database through computers located in the courthouse for many years. Moreover, even if redaction of a few cases from the database were necessary, it does not follow that access to the entire database must be denied. An alternative solution that would eliminate any burden on the courts—and that would better comply with the mandates of the First Amendment and California law—would be to require the requestor to pay for the cost of automated redaction of any categories of cases in which access to ordinary docket information might disclose information required to be kept confidential as a matter of law. (It should be noted that this is precisely what the San Jose Mercury News offered to do.)

Looking forward, even this process of retroactive redaction would not be necessary with regard to databases of information generated in the future. Rather, with some planning it would be relatively simple to incorporate into the data entry process or the database software a system for automatically restricting public access to any confidential information. For example, every new case filed in the Superior Courts is required to be accompanied by a civil case cover sheet, which identifies among other things the case type. Cases of a type in which information required to be kept confidential will necessarily be provided to the court can simply be coded in a manner such that, by automatic operation of the database software, confidential information will not be made public. Similarly, requests such as that of the Mercury News—which are motivated primarily by the desire to search the courts’ case histories using data fields other than or in addition to case number, caption, or party name, and to identify all cases responsive to each search—could be readily accommodated without disclosure of any confidential information. In addition, if the electronic access system configured to permit all responsive cases to be displayed in response to a search employing any available data field (i.e., if the system were not restricted to searches using case number, caption, or party names), the need for copying a court database would be largely if not entirely eliminated.

Gray Cary Ware & Freidenrich LLP

California Judicial Council
 November 27, 2001
 Page Five

Finally, it must be emphasized that court records are not exempt from constitutional and common law mandates of public access simply because they are maintained in electronic rather than paper form. Those mandates require that any restrictions on public access to court records that exist only in electronic form must meet the same stringent requirements that limitations on access to traditional paper records must meet. Court records subject to the public's right of access may not be sealed unless a court expressly finds that "(i) there exists an overriding interest supporting closure and/or sealing, (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." *NBC Subsidiary*, 20 Cal. 4th at 1217-18. See also California Rules of Court 243.1 *et seq.* There is no justification for imposing a different standard when the public or the press seek access to an electronic database of court records rather than a single file, and the restrictions imposed by proposed rule 2073(b) simply do not satisfy this standard.

Categorical Exemptions from Remote Access.

Third, the Judicial Council should carefully consider the CTAC's recommendation that broad categories of cases be exempted from remote electronic access, and in particular the exclusion of any form of remote access to criminal cases. The CTAC states that its exclusion of the enumerated categories of cases is based on "the sensitive nature of the information that parties are required to provide in them." Report, p. 21. However, the public benefits to be derived from removing barriers to access to information about criminal proceedings clearly outweigh any competing privacy concerns. The courts have consistently recognized that crimes and those who commit them are legitimate subjects of public interest, and therefore that the subjects of criminal proceedings have substantially reduced privacy interests. See, e.g., *Kapellas v. Kofman*, 1 Cal. 3d 20, 38 (1969) ("Newspapers have traditionally reported arrests or other incidents involving suspected criminal activity, and courts have universally concluded that such events are newsworthy matters of which the public has the right to be informed."). Furthermore, broad public access to information about public proceedings is necessary to promote the "'community therapeutic value' of openness." *Press-Enterprise II*, 478 U.S. at 13. "Criminal acts, especially certain violent crimes, provoke public concern, outrage, and hostility. 'When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions.'" *Id.* Moreover, criminal cases typically involve fewer records containing less factual detail (with the exception of reporters' transcripts, which are apparently exempted from the electronic access rules). To the extent that sensitive victim or witness information is contained in court records—which should by no means be presumed—the courts have the power and the opportunity to prevent public access to such information by sealing it. If there is a sound basis for keeping such information from the public, then it can and should be sealed. If not, there is no sound reason for permitting it to be disclosed to anyone who is willing to go to the courthouse while denying it to those who establish accounts permitting them to obtain remote access.

Finally, we refer the Judicial Council to our previous comments. The CTAC has declined to address a number of other problematic aspects of the proposed rules, and its summary of our comments on those issues is by no means comprehensive. We therefore respectfully request that the Judicial Council consider our previous comments on the proposed rules, and request that revisions to the proposed rules be made to address those comments.

Gray Cary Ware & Freidenrich LLP

California Judicial Council
November 27, 2001
Page Six

It is difficult to free ourselves from an understanding of access to court records that is based on tradition, that is, on the way in which the courts have in the past provided the public with access to paper court records. However, in order to establish functional rules that preserve and promote the values served by public access to the courts, we have to project those rules into a future in which electronic access is the dominant means of public access to court records. These rules will therefore become not a mere adjunct to the traditional means of access, but the governing principles of public access to all court records. We therefore ask that the Judicial Council consider the proposed rules with the greatest care and deliberation, and ensure that they will protect and promote the public access to the courts that has been a bulwark of public discourse and democracy since the foundation of this country.

We very much appreciate the Judicial Council's careful attention to these rules, which are of profound importance to the media and the public. We also appreciate the Council's consideration of our comments.

Sincerely,

Gray Cary Ware & Freidenrich LLP

By: 

James M. Chadwick
jchadwick@graycary.com

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Court Executives Advisory Committee
Alan Slater, Chair
Kiri Torre, Chair, Access to Electronic Records Administrative
Working Group
Marlene Hagman-Smith, Committee Staff, 415-865-7617,
marlene.smith@jud.ca.gov
Joshua Weinstein, Attorney, 415-865-7688,
joshua.weinstein@jud.ca.gov

DATE: March 3, 2003

SUBJECT: Electronic Access to Court Calendars, Indexes, and Registers of
Action (adopt Cal. Rules of Court, rule 2077)

Issue Statement

Rules 2070-2076 of the California Rules of Court, which became effective July 1, 2002, established statewide policies for reasonable public access to electronic court records while protecting privacy and other legitimate interests. Under these new rules, courts are required to provide electronic access to their electronic register of action, calendar, and indexes to the extent it determines it has the economic resources and technical capacity to do so. These new rules brought to light a corollary issue; the need for a statewide definition of "register of action" and minimum standard for court calendar or index information that would soon be made available at public-access computer terminals.

Recommendation

The Court Executives Advisory Committee (CEAC) recommends that the Judicial Council, effective July 1, 2003;

1. Adopt rule 2077 of the California Rules of Court to:

- a. Define minimum content and information to be included in electronic court calendars, indexes, and registers of action for public access under rule 2073(b); and
 - b. Define information that must be excluded from public-access electronic court calendars, indexes, and registers of action.
2. Direct the Administrative Office of the Courts' Information Services Division to incorporate rule 2077 as functional requirements of existing case management system certification efforts, or the judicial branch's California Case Management System.

Rationale for Recommendation

This proposed new rule sets minimum requirements, or a floor, for data elements to be included in court calendars, indexes, and registers of actions available electronically to the public. The rule also allows a court to provide information in addition to the minimum requirements if it has the capability and chooses to do so. This rule will assist a court in providing access to its electronic records to the extent it has the resources and technical capacity to do so.

Government code section 69845 provides a broad definition for the term "register of actions." That section provides that the register of actions shall contain "the title of each cause, with the date of its commencement and a memorandum of every subsequent proceeding in the actions with its date." (Gov. Code, § 69845.) The CEAC has discovered that as a result of this broad definition, courts across the state had been interpreting this term loosely as well as differently from each other. Uniformity needs to be explored as the courts migrate towards statewide standards of electronic access to court records.

The new rule of court also tries to balance reasonable access to trial court records maintained in electronic form and the protection of privacy. The CEAC is mindful of the privacy of citizens using the courts. Many people are not involved with the courts voluntarily and do not expect the information in the court file to be broadcast to anyone with a computer and Internet connection. With this privacy protection purpose in mind, the CEAC identified additional information that should be excluded from public access computer terminals inside the courts as well as from other remote electronic resources. These additional data elements to be excluded are specified in the proposed rule of court.

Alternative Actions Considered

The present situation could be left unchanged. Trial courts could continue to interpret the term “register of actions” differently from each other and information available electronically would be inconsistent from court to court as the trial courts migrate toward statewide standards of electronic access to court records.

Comments From Interested Parties

The proposed rule received a total of thirteen comments. The commentators included supervising legal clerks, an information services manager, a supervising courtroom clerk, a court executive officer, bar associations, and an individual attorney. Ten commentators agreed that the rule should be adopted without comments. Two commentators agreed that the rule should be adopted subject to modification, and one commentator did not agree with the proposal.

One commentator suggested that the term “date of court calendar” in subdivision (b)(1)(A) should be revised to “date of calendared event.” The CEAC disagreed with this revision because the subdivision, as written, addresses the calendar for one specific date, and thus, “date of court calendar” is sufficient. This commentator also suggested modifying subdivision (b)(2)(C) regarding electronic indexes, and subdivision (b)(3)(F) regarding electronic register of actions to clarify the term “party type” by adding additional words such as “e.g., plaintiff, defendant, cross-complainant, cross-defendant” or words to that effect. The CEAC disagreed with these modifications. The intent of the rule is to establish minimum standards for data elements. The rule allows a court that wants to, or has the capability to do so, to provide information above and beyond the minimum. This same commentator suggested replacing “type of each activity” in subdivision (b)(3)(H) with the term “description of each activity.” The CEAC agreed with this modification and has made the change in the draft rule.

Another commentator suggested amending subdivision (b)(1) to add a new subsection (f) so that the title of the action on the court’s calendar could be added (i.e., “calendar action: motion for discovery”). The CEAC disagreed with this amendment because the minimum standards for court calendar data elements were developed to address the original purpose of the court calendar, which is to direct parties who have a hearing or trial on a given date and time to the correct court department within the courthouse. This commentator also suggested amending subdivision (b)(2) regarding electronic indexes, to include the name and address of the attorney for the party. The CEAC disagreed with this amendment because the minimum standards were developed to comply with Government Code section 69842, which requires indexes to contain a list of parties, not attorneys.

One of the bar associations submitting comments on the proposal recommended that date of birth (DOB) should be a data element that is included (and not excluded) from electronic court calendars, indexes, and register of actions. The CEAC disagreed with this suggestion. The CEAC acknowledges that some courts currently collect sensitive personal information that has no bearing on a case, but that it assists the court in record keeping or identifying parties with the same first and last names. One of these practices includes collecting a party's DOB as a data element and using it as a search query in case management systems. Nevertheless, the CEAC recommends that the DOB should be excluded from electronic court calendars, indexes, and registers of action for the following reasons:

1. It is not a traditional entry within a register of action; and
2. It prohibits access to a confidential field in criminal cases as well as bans the creation of a local criminal history summary as proscribed by Penal Code section 13300.¹

The final commentator did not agree with the proposal and believed that draft rule 2077 does not reference or exclude cases that are identified as "confidential" by statute, including juvenile, adoption, and PATREL (parental relationship) cases. The rule was amended to clarify that where appropriate, case titles and party names would remain confidential.

A chart summarizing the comments on proposed rule 2077 and the committee's responses are attached at pages seven through thirteen.

Implementation Requirements and Costs

Subdivision (a) of the proposed rule states that electronic court calendars, indexes, and registers of action must be consistent with the minimum standards to the extent it is feasible for the court to do so. This includes a court's economic ability to conform to the rule's changes. There may be some costs involved in programming to mask the proposed confidential information. These costs, however, will probably be offset by savings for the courts, since electronic access will not require a court clerk to spend time making records available for inspection and copying by the public, as is required with paper records.

The text of the proposed rule is attached at pages five and six.

¹ In an electronic database, the date of birth is a confidential field in criminal cases. In *Westbrook v County of Los Angeles* (1994) 27 Cal App.4th 157, the court held that the municipal court's electronic case management system was confidential as access would allow the compilation of a local criminal history summary in violation of Penal Code section 13300. Under the same reasoning, the court should not allow narrowing the register of actions by DOB as doing so would essentially be creating a local criminal history

Rule 2077 of the California Rules of Court would be adopted effective July 1, 2003, to read:

Rule 2077. Electronic access to court calendars, indexes, and registers of actions

(a) **[Intent]** The intent of this rule is to specify information to be included in and excluded from the court calendars, indexes, and registers of actions to which public access is available by electronic means under rule 2073 (b). To the extent it is feasible to do so, the court must maintain court calendars, indexes, and registers of actions available to the public by electronic means in accordance with this rule.

(b) **[Minimum contents for electronically accessible court calendars, indexes, and register of actions]**

(1) The electronic court calendar must include:

(A) Date of court calendar;

(B) Time of calendared event;

(C) Court department number;

(D) Case number; and

(E) Case title (unless made confidential by law.)

(2) The electronic index must include:

(A) Case title (unless made confidential by law);

(B) Party names (unless made confidential by law);

(C) Party type;

(D) Date on which the case was filed; and

(E) Case number.

(3) The register of actions must be a summary of every proceeding in a case, in compliance with Government Code section 69845, and must include:

(A) Date case commenced;

(B) Case number;

(C) Case type;

(D) Case title (unless made confidential by law);

(E) Party names (unless made confidential by law);

(F) Party type;

(G) Date of each activity; and

(H) Description of each activity.

(c) **Information that must be excluded from court calendars, indexes, and registers of action** The following information must be excluded from a court's electronic calendar, index, and register of actions:

(1) Social security number;

(2) Any financial information;

(3) Arrest warrant information;

(4) Search warrant information;

(5) Victim information;

(6) Witness information;

(7) Ethnicity;

(8) Age;

(9) Gender;

(10) Government-issued identification card numbers (i.e., military);

(11) Driver's license number; and

(12) Date of birth.

W03-03

Electronic Access to Court Calendars, Indexes, and Registers of Action (adopt Cal. Rules of Court, rule 2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Ms Sandy Almansa Supervising Legal Clerk II Superior Court of Stanislaus County	N	N	The proposed rule changes do not exclude cases that are identified as “confidential” by statute, including juvenile, adoption and PATREL (parental relationship) cases. Until this is taken into consideration within the parameters of this proposed rule, I do not think this should be adopted as written.	Agree. The rule was amended to clarify that where appropriate, case titles and party names would remain confidential.
2.	Mr. Saul Bercovitch The State Bar of CA	AM	Y	The State Bar of California’s Committee on Administration of Justice (CAJ) believes the purpose behind proposed Rule 2077 is commendable. CAJ is concerned, however, that a few of the terms in proposed Rule 2077 are ambiguous, and, as a result, the information contained might be inconsistent and cause confusion. The specific terms are: 1. Contents of Electronic Court Calendar. For the sake of clarity and consistency, CAJ suggests amending subdivision (b)(1)(A) by striking “date of court calendar” and substituting “date of calendared event” if that is the intent of the subdivision, 2. Contents of Electronic Index. To avoid confusion, CAJ suggests modifying subdivision (b)(2)(C) by adding after “party type” something to clarify the term. CAJ suggests inserting “e.g., plaintiff, defendant, cross-complainant, cross-defendant” or words to that effect.	1. Disagree. Subdivision (b) addresses the calendar for one specific date and thus, “date of court calendar” is sufficient. 2. Disagree. The intent of the rule of court is to establish minimum standards for data elements for court calendars, registers of action and indexes. They allow a court that wants to, or has the capability to do so, provide information above and beyond the minimum standards.

W03-03

Electronic Access to Court Calendars, Indexes, and Registers of Action (adopt Cal. Rules of Court, rule 2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				3. Contents of Electronic Register of Actions: To avoid confusion, CAJ suggests modifying subdivision (b)(3)(F) by adding after "party type" something to clarify the term CAJ suggests inserting "e.g , plaintiff, defendant, cross-complainant, cross-defendant" or words to that effect 4 The meaning of the phrase "type of each activity" in subdivision (b)(3)(H) is unclear A better term might be "description of each activity," but CAJ is not sure of the intent behind this subdivision.	3. Disagree. See response number 2 above. 4 Agree The intention behind the proposed data element standard was to define "type of each activity" as a description of each activity that occurred on a case
5.	Mr Raymond Coates President California Defense Counsel	A	N		
6	Mr. Alan Crouse Information Services Manager Superior Court of San Bernardino County	A	N		
7.	Ms Angie Gonzalez SLCI Superior Court of Stanislaus County	A	N		
8	Richard L. Haeussler Haeussler & Associates	AM	N	1 For section (b)(1), the title of the action on the court's calendar should be added as item (b)(1)(F) "calendar action motion for	1 Disagree The minimum standards for court calendar data elements were developed in order to address the

W03-03

Electronic Access to Court Calendars, Indexes, and Registers of Action (adopt Cal. Rules of Court, rule 2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				discovery, etc ” 2 Section (b)(2) as an electronic index should also include the name and address of the attorney for the party. 3. Because of limited resources which each clerk's office has, and due to limited budgets at both the State and County level, I believe that all register of actions should be based upon a machine readable form submitted by the party with the party's pleading a. At the time of the filing of the initial pleading [complaint] the party would submit two forms developed by the Judicial Council, one filed in with the name of the submitting party, the title of the pleading being submitted, the name and address of the attorney, and such other information as the Judicial Council will assist in preparing the register of actions. The other form would be blank and the clerk would return it with the case number stamped in place This blank form would have to be served with the complaint or other initial pleading on the defendants When the defendant responds with either an answer and or cross action, each	original purpose of the court calendar, which is to direct parties in a matter who have a hearing or trial on a given date and time are directed to the correct court department within the courthouse. Courts have the authority to provide greater detail as their case management systems allow 2. Disagree The minimum standards were developed to comply with Government Code section 69842 that requires the courts to keep such indexes that will insure ready reference to any action or proceeding filed in the court. The code requires indexes to contain a list of parties, not attorneys 3 and 4 This recommendation will be forwarded to the Judicial Council's Court Technology Advisory Committee to determine its feasibility and impacts on court administration as well as current court technology plans

W03-03

Electronic Access to Court Calendars, Indexes, and Registers of Action (adopt Cal. Rules of Court, rule 2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				pleading submitted would be accompanied by this machine readable form including the information called for by the Judicial Council 1. All subsequent pleadings would be accompanied by a machine readable form, including information about the pleading which would fill the requirements of the Judicial Council's register of actions rule and such other information as the county clerk may require - b The clerk's office could use personnel to 1 Compare the machine readable form with the pleading; - ii Have the document read by a computer and assigned a document number, - iii Compare the document with the computer generated information, and - iv Post the information to the electronic register of action	

W03-03

Electronic Access to Court Calendars, Indexes, and Registers of Action (adopt Cal. Rules of Court, rule 2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				4 Several years ago, the San Diego Superior Court added bar codes to many of the Judicial Council forms and to all of its local forms. Instead of having the forms bar coded, the register of action form would give the clerk's office a means of getting the information necessary of register of actions entries without having to have personnel retyping information into the computer. In the event that a party did not submit a required form with the pleading, the pleading would be accepted for filing, but the party would be notified to submit the required form, and would have to pay some sort of extra fee for submitting the form late [\$5 00 or \$10 00 for example]	
9	Ms Stephanie Kennedy SLC II Superior Court of Stanislaus County	A	N		
10	Ms Mary Nickles Supervising Courtroom Clerk Superior Court of Stanislaus County	A	N		
11	Orange County Bar Association P O Box 17777	AM	N	[Section (c)(12)] Include date of birth as a standard element	Disagree. While the date of birth is not confidential in court records, it should not be accessible on court electronic records

W03-03

Electronic Access to Court Calendars, Indexes, and Registers of Action (adopt Cal. Rules of Court, rule 2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
					for the following reasons 1) it is not a traditional entry within any of the case record types that proposed Rule 2077 addresses; 2) the Judicial Council, in adopting Rules 2070-2076 was mindful of the privacy of citizens using the courts and approached electronic access to court records cautiously. Many people are not involved with the courts voluntarily and do not expect the information in the court file to be broadcast to anyone with a computer and Internet connection. Not including date of birth in any of the case record types that proposed Rule 2077 addresses is consistent with this council policy; and 3) in an electronic database, the date of birth is a confidential field in criminal cases In <i>Westbrook v County of Los Angeles</i> (1994) 27 Cal App 4th 157, the court held that the municipal court electronic case management system was confidential as it would allow the compilation of a local criminal history summary in violation of Penal Code section 13300 Under this same reasoning, the court may not allow narrowing any of the case record types that proposed Rule 2077 addresses by date of birth as doing so would essentially be creating a local criminal history

W03-03

Electronic Access to Court Calendars, Indexes, and Registers of Action (adopt Cal. Rules of Court, rule 2077)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
12.	Charles D Ramey Court Executive Officer Superior Court of Solano County	A	N		
13	Superior Court of Ventura County P.O. Box 6489	A	N		

Policy on the Judicial Council's Rule-Making Authority

The following policies and positions should be applied (1) by the council's advisory committees when recommending a rule change or a position on legislation and (2) by AOC staff when presenting rules proposals to the council.

1. Before presenting a proposed rule change to the council, the advisory committee and staff should consider whether the proposed rule is arguably inconsistent with statute. In making recommendations to the council, advisory committees and staff should consider both the likelihood that a rule might be found inconsistent with statute and the benefits of the rule. If a reasonable argument can be made that the rule is not inconsistent with statute, the change may be recommended despite the risk that the rule might be challenged and held to be invalid. The report to the council should identify the benefits and balance it against the risk of unconstitutionality of the rule. The report should also present the authorities and arguments that support the validity of the rule.

2. On topics that have been addressed by statute, the analysis of whether a rule adopted by the council is "inconsistent with statute" should take into account the following principles:

- a. Even if the rule is "not perfectly congruent" with the statute, the rule is valid as long as it does not conflict with and can be reconciled with the statute..¹
- b. The fact that a rule goes beyond what is contained in a statute does not make it inconsistent with the statute. Unless the circumstances show otherwise, it should be presumed that the Legislature simply chose not to establish specific procedures in that area and that the council is free to do so..²
- c. The mere failure to enact legislation does not create an inconsistency between a rule and a statute that was adopted. .³

Approved by the Judicial Council, eff. September 1, 2000.

¹ See *People v. Reeder* (1984) 152 Cal.App.3d 900.

² See *People v. Mendez* (1999) 19 Cal.4th 1084; *In re Juan C.* (1993) 20 Cal.App.4th 748; compare *Simpson v. Smith* (1989) 214 Cal.App.3d Supp. 7 (statute that was amended to delete notice requirement inconsistent with rule requiring notice).

³ See *Grupe Development v. Superior Court* (1993) 4 Cal.4th 911 (noting that unpassed bills have little value in determining legislative intent because varying inferences can be drawn from the failure to adopt legislation); compare *California Court Reporters Assn. v. Judicial Council* (1995) 39 Cal.App.4th 15 (noting that while unadopted proposals ordinarily have little value in determining legislative intent, they may be more persuasive in deciding whether an administratively promulgated rule is consistent with legislation; given the uncertain status of unadopted proposals, the court reached its conclusion independent of the Legislature's rejection of proposed amendments).

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**
455 Golden Gate Avenue
San Francisco, California 94102-3660

Report Summary

TO: Members of the Judicial Council

FROM: Administrative Office of the Courts
Michael Bergeisen, General Counsel *MB*
Melissa Johnson, Managing Attorney

DATE: August 14, 2000

SUBJECT: Policy on the Judicial Council's Rule-Making Authority
(Action Required)

Issue Statement

Questions frequently arise as to whether a proposed rule violates the constitutional requirement that rules "shall not be inconsistent with statute." (Cal. Const., art. VI, § 6.) Some recent cases, which take a narrower view of the scope of the council's rule-making authority than earlier cases did, have made it difficult in many instances to predict whether a rule will pass constitutional muster. (See *Trans-Action Commercial Investors v. Firmateer* (1997) 60 Cal.App.4th 352; *California Court Reporters Assn. v. Judicial Council* (1995) 39 Cal.App.4th 15.) Advisory committees are often uncertain about whether a proposal should be submitted to the council if there are some doubts about its constitutionality. Given the lack of clarity in the law, staff is uncertain about whether and how a rule's potential inconsistency with statute should be addressed in a report to the council.

Recommendation

Administrative Office of the Courts staff recommends that the Judicial Council adopt, effective September 1, 2000, the attached proposed policy on the council's rule-making authority, which:

1. Directs staff to balance the risk of unconstitutionality against the benefits of a proposed rule in reports to the council; and
2. States principles to guide the analysis of the constitutionality of rules.

The text of the proposed policy is attached at page 11.

Rationale for Recommendation

Absent guidance from the council, committees and staff have sometimes been inclined to take a conservative approach, avoiding any risk that a rule might be held inconsistent with statute. The effect of this approach, if followed consistently, would be to narrow the scope of the council's authority to those areas in which there is no conceivable argument that the rule conflicts with legislation. Thus, opportunities to improve court administration and procedures in the California courts would be lost.

The proposed policy on the council's rule-making authority would clarify, for the benefit of staff and advisory committees, that the council does not encourage an overly narrow view of its authority. The policy would also ensure that questions about a rule's constitutionality are fully considered by the committees and presented to the council.

The proposed policy is grounded in the constitutional provisions creating the council and in the case law interpreting those provisions. It is also consistent with many scholarly authorities and with the policies of other states and the federal government, which recognize that the judicial branch, because of its experience, knowledge, and interest, is well suited to make rules of court administration and procedure.

Alternative Actions Considered

We considered adopting an internal policy to guide legal staff in analyzing these issues. However, without some indication from the council about its position on these issues, staff would not know whether its approach was consistent with the views of the council.

Implementation Requirements and Costs

Staff will distribute the policy to relevant advisory committee members and their staffs, and will include a summary of the policy in a brochure about the rule-making process that is now being prepared for the public.

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**
455 Golden Gate Avenue
San Francisco, California 94102-3660

Report

TO: Members of the Judicial Council

FROM: Administrative Office of the Courts
Michael Bergeisen, General Counsel *MB*
Melissa Johnson, Managing Attorney

DATE: August 14, 2000

SUBJECT: Policy on the Judicial Council's Rule-Making Authority
(Action Required)

Introduction

Questions frequently arise as to whether a proposed rule violates the constitutional requirement that Judicial Council rules "shall not be inconsistent with statute." (Cal. Const., art. VI, § 6.) Some recent cases, which take a narrower view of the scope of the council's rule-making authority than earlier cases did, have made it difficult in many instances to predict whether a rule will pass constitutional muster. (See *Trans-Action Commercial Investors v. Firmateer* (1997) 60 Cal.App.4th 352; *California Court Reporters Assn. v. Judicial Council* (1995) 39 Cal.App.4th 15.) Advisory committees are often uncertain about whether a proposal should be submitted to the council if there are some doubts about its constitutionality. Given the lack of clarity in the law, staff is uncertain about whether and how a rule's potential inconsistency with statute should be addressed in a report to the council.

Absent guidance from the council, committees and staff have sometimes been inclined to take a conservative approach, avoiding any risk that a rule might be held inconsistent with statute. The effect of this approach, if followed consistently, would be to narrow the scope of the council's authority to those areas in which there is no conceivable argument that the rule conflicts with legislation. Thus, opportunities to improve court administration and procedures in the California courts would be lost.

The proposed policy on the council's rule-making authority would ensure that questions about a rule's constitutionality are fully considered by the committees and presented to the council. The policy would clarify that the council does not

encourage an overly narrow view of its authority, and would provide guidance for staff and committees in analyzing whether a proposed rule is inconsistent with statute.

The proposed policy is grounded in the constitutional provisions creating the council and in the case law interpreting those provisions. It is also consistent with many scholarly authorities and with the policies of other states and the federal government, which recognize that the judicial branch is well suited to make rules of court administration and procedure because of its experience, knowledge, interest, and ability to withstand pressure from special interest groups. (See, e.g., Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California* (1977) 24 Pepp. L. Rev. 455; Levin and Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision* (1958) 107 U. Penn. L. Rev. 1; Pound, *The Rule-Making Power of the Courts* (1926) 12 A.B.A.J. 599.)

The Constitutional Standard

The Judicial Council is charged by the state Constitution with “improv[ing] the administration of justice.” (Cal. Const., art. VI, § 6.) The council is authorized to “adopt rules for court administration, practice and procedure. . . . The rules adopted shall not be inconsistent with statute.” (*Id.*)

The constitutional provisions creating the council reflect the intent to make the council responsible for governing the operation of the judicial branch. The ballot argument in favor of the proposition that created the council stated that the intent of the provision was to “organize the courts of the State on a business basis” in order to address “one of the troubles with our court system . . . that the work of the various courts is not correlated, and nobody is responsible for seeing that the machinery of the courts is working smoothly.” (Ballot Argument in Favor of Senate Constitutional Amendment No. 15, November 2, 1926.) The council would “meet from time to time as a sort of board of directors, and will be charged with the duty of seeing that justice is being properly administered.” (*Id.*)

Interpreting and applying the constitutional standard, courts have recognized that rules adopted by the council have “the force of positive law and must be complied with provided they do not *conflict* with any act of the Legislature.” (*Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 884 [Emphasis added].) Furthermore, the mere fact that a rule goes beyond a statute does not make it inconsistent with the statute. (*Butterfield v. Butterfield* (1934) 1 Cal.2d 227.) A court should uphold the rule even if it is “not perfectly congruent” with the statute, so long as the two are reconcilable. (*People v. Reeder* (1984) 152 Cal.App.3d 900.)

Recent Cases

Two recent cases have narrowly interpreted the scope of the council's rule-making authority by (1) requiring that rules be "consistent" rather than "not inconsistent" with statute; and (2) requiring that rules be consistent with the intent behind the "legislative scheme," which may include a variety of statutes enacted at different times and for different purposes.

A Judicial Council rule authorizing electronic recording of proceedings in the superior courts was invalidated in *California Court Reporters Assn. v. Judicial Council of California* ("CCRA") (1995) 39 Cal.App.4th 15. In that case, the trial court had interpreted "not inconsistent" as meaning "not . . . merely inharmonious or unsymmetrical, but connot[ing] impossibility of concurrent operative effect, or contradictory." (*Id.* at p. 23.) The appellate court rejected the trial court's definition, stating that, when evaluating whether a rule of court is "not inconsistent with statute," a court must determine the Legislature's intent behind the statutory scheme that the rule was intended to implement, and measure the rule's consistency with that intent. (*Id.* at pp. 25–26 (citing *People v. Hall* (1994) 8 Cal.4th 950, 953).)¹

CCRA recognized that no statute directly prohibited electronic recording of superior court proceedings, but inferred a legislative intent to prohibit it after examining a variety of legislative actions, including (1) a statute that requires the official reporter to record the proceedings in shorthand at the request of either party or the court; (2) legislative authorization of a pilot project to assess the feasibility of electronic recording in superior court proceedings; (3) a statute that states that the transcript prepared by the official reporter is prima facie evidence of the testimony and proceedings; (4) statutes addressing the fees and costs of an official reporter; (5) a provision authorizing electronic recording of municipal court proceedings if an official reporter is unavailable; and (6) the failure to enact proposed legislation specifically authorizing electronic recording.

Using a similar approach, the Court of Appeal held that rule 227 was invalid in *Trans-Action Commercial Investor v. Firmateer* (1997) 60 Cal.App.4th 352. Rule 227 broadly authorizes sanctions for any failure to comply with the rules of court,

¹ In developing this test, CCRA relied on the Supreme Court's decision in *People v. Hall* (1994) 8 Cal.4th 950, which invalidated a rule of court that limited the circumstances under which the upper term could be imposed for certain sentencing enhancements. However, CCRA did not acknowledge that the rule at issue in *Hall* was not adopted under the council's constitutional authority to adopt rules of procedure. The sentencing rules are substantive, not procedural; they were adopted under Penal Code section 1170.3(a), which authorizes the council to "seek to promote uniformity in sentencing" by adopting rules providing criteria for the judge to consider when, among other things, deciding whether to impose the lower or upper term. (See *People v. Wright* (1982) 30 Cal.3d 705 (upholding the Legislature's delegation of power to the council to adopt the sentencing rules).) In that context, *Hall* found that a rule adopted by the council, under authority delegated by the Legislature, was invalid because it was "inconsistent with the statutory scheme it was intended to implement." (*Hall, supra*, 8 Cal.4th at p. 953.)

local rules, or an order of court. The sanctions may include payment to the county, payment of the opposing party's attorney fees and expenses, and a change in the status of the case. In *Trans-Action*, the trial court had awarded attorney fees to the opposing party as a sanction for repeated violation of a court order.

The appellate court stated that "if a statute even implicitly or inferentially reflects a legislative choice to require a particular procedure, a rule of court may not deviate from that procedure." (*Id.* at p. 364 (citing *People v. Hall* (1994) 8 Cal.4th 950, 961-962; *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 26-31; and *Cox v. Superior Court* (1993) 19 Cal.App.4th 1046, 1050-1051).)²

In *Trans-Action*, the court inferred a legislative intent to prohibit attorney's fee awards for violating court orders by looking at a broad range of legislative activity on sanctions, including (1) the absence of a specific statute authorizing attorney's fees for violating a court order; (2) the existence of statutes allowing attorney's fees as sanctions for other types of conduct; and (3) the existence of statutes allowing limited monetary sanctions (payable to the county) for violating a court order. None of these statutes, however, explicitly addressed attorney's fees as a sanction for violating a court order.

The analysis in these cases, if extended to other rules, could considerably reduce the council's authority. One could make a tenable argument that almost any rule is invalid if it concerns an area in which "the Legislature has been active." The Legislature's failure to provide for a particular procedure, while addressing other matters related to the same subject, could be viewed as evidencing an intent to prohibit that procedure, even if the procedure is not specifically addressed by statute.

Both *Trans-Action* and *CCRA* have made it difficult to predict whether a particular rule proposal may be inconsistent with statute. These cases found rules to be inconsistent with statute even though they did not directly conflict with any particular statute. Rather, the rules were inconsistent with a more general legislative intent as inferred from a statutory "scheme," or series of statutes that were enacted at different times and were related to the subject addressed by the rule.

² *Cox v. Superior Court* (1993) 19 Cal.App.4th 1046 invalidated a local court rule that required a criminal defendant to give notice of a motion to suppress evidence allegedly obtained through an illegal search or seizure. The court held that the rule conflicted with a statute that permitted the defendant to make such a motion "at the preliminary hearing." The court interpreted the phrase "at the preliminary hearing" to mean that a defendant could move to suppress evidence during the hearing without prior notice to the prosecution. (*Id.* at p. 1050.)

The Proposed Policy

1. Process for presenting issues to the council.

The first part of the proposed policy would provide guidance to committees and committee staff on presenting rule proposals to the council if there were some question about the constitutionality of the proposal. The policy directs committees and staff to consider both the likelihood that a rule might be found inconsistent with statute and the benefits of the rule, and authorizes committees to recommend adoption of a rule even if there is some risk of unconstitutionality. The policy requires that the report to the council (1) identify the risk and balance it against the benefits of the rule, and (2) present the authorities and arguments on the issue of the validity of the rule.

Because of recent cases striking down council rules, committees and staff have been reluctant to risk any proposal that might be invalidated by a court. This policy would inform committees and staff that a worthwhile proposal should not automatically be rejected merely because there is some arguable risk that the proposed rule might be inconsistent with statute under the type of analysis applied in recent cases. The policy would also ensure that when the council makes a decision on a proposed rule, it has before it a complete analysis of the constitutional question and can make an informed decision.

2. Guiding principles

The second part of the proposed policy points to principles that committees and staff should consider when analyzing the constitutional question. In situations that present a close question, there is no simple test for determining whether a rule is inconsistent with statute. In those situations, the proposed policy would direct staff and committees to consider the specified principles and the supporting case law rather than apply only the analysis used in the more recent cases, which more severely limits the council's authority.

- a. Even if the rule is "not perfectly congruent" with the statute, the rule is valid as long as it does not conflict with and can be reconciled with the statute.*

This principle was stated in *People v. Reeder* (1984) 152 Cal.App.3d 900. In that case, a statute prohibited a judge, when sentencing, from using a fact as the basis for imposing the upper term if that fact had also been used as the basis for imposing certain sentence enhancements. The council's rule was broader. It prohibited the court from using a fact as the basis for imposing the upper term if that fact had also been used as the basis for imposing any sentence enhancement, including a consecutive term (which is a type of sentence enhancement). (Former Cal. Rules of Court, rule 441(c).) "Although the rule is broader than the statute, it is not irreconcilable with the statutory scheme." (*Reeder, supra*, at p. 919.)

The court also found that the rule was not inconsistent with another statute, which authorized the imposition of full consecutive sentences. “Since the rule does not prohibit full term consecutive sentencing, there is no irreconcilable conflict between it and the statute. . . . Although the rule and the statute are not perfectly congruent, they are nevertheless reconcilable.” (*Id.* at p. 921.)

- b. The fact that a rule goes beyond what is contained in a statute does not make it inconsistent with the statute. Unless the circumstances show otherwise, it should be presumed that the Legislature simply chose not to establish specific procedures in that area and that the council is free to do so.*

Even in areas where the Legislature has been active, statutes often do not address the specific details of procedure. A rule of court may provide for procedures that the legislation does not address. For example, *Butterfield v. Butterfield* (1934) 1 Cal.2d 227 upheld a rule requiring a memorandum of points and authorities in support of a motion for change of venue even though the statute on change of venue did not mention this requirement. The court stated that the “mere fact that the rule goes beyond the statutory provision does not make it inconsistent therewith. . . . [T]he rule . . . is a reasonable provision in furtherance of the statutory purpose.”

Similarly, the Supreme Court recently upheld a rule that set a 60-day time limit for a defendant to file a statement of grounds for appeal from a guilty plea, even though the statute that required the written statement did not set a time limit. (*People v. Mendez* (1999) 19 Cal.4th 1084). The court explained:

[The statute] is altogether silent on such procedural matters as how and when a defendant may take an appeal. Its silence cannot reasonably be understood as a statement that the defendant may take an appeal how and when he pleases. (*Id.* at p. 1101.)

Applying similar reasoning, *In re Juan C.* (1993) 20 Cal.App.4th 748 upheld a rule requiring the juvenile court judge to state reasons for dismissing a petition in the minute order, even though (1) the juvenile statute did not require a statement of reasons, and (2) an analogous adult criminal statute did. The court did not infer from this omission that the Legislature intended to preclude the council from requiring a statement of reasons:

It is of no moment that the requirement of reasons in the minutes is spelled out in the statute for adult criminal law, while it is contained in a court rule for the juvenile proceedings. . . . Court rules such as rule 1493 have the

force of positive law and are as binding as procedural statutes as long as they do not transcend legislative enactments or constitutional guidelines.

On the other hand, the absence of a particular procedural requirement in a statute may be inconsistent with a rule requiring it if there is other, specific legislative action that demonstrates an intent to preclude such a requirement. (See, e.g., *Simpson v. Smith* (1989) 214 Cal.App.3d Supp. 7 (statute that was amended to delete notice requirement inconsistent with rule requiring notice); *Sadler v. Turner* (1987) 186 Cal.App.3d 245 (rule requiring noticed motion was inconsistent with statute that did not require notice, given decisional law specifically recognizing the absence of a notice requirement).)

c. The mere failure to enact legislation does not create an inconsistency between a rule and a statute that was adopted.

In *CCRA, supra*, the court considered whether the Legislature's failure to enact legislation that would have authorized electronic recording was evidence of a legislative intent to prohibit electronic recording. (39 Cal.App.4th at p. 32.) The court stated that the California Supreme Court had been inconsistent in its treatment of the effect to be given to the Legislature's failure to act. It stated that legislative rejection of an authorizing statute may be persuasive when determining whether an administratively promulgated regulation is consistent with controlling legislation, and analogized Judicial Council rules to administrative regulations. (*Id.* at p. 33, citing *Cooper v. Swoap* (1974) 11 Cal.3d 856.)

Because of the uncertainty in the law, the court decided to arrive at its conclusion independent of the Legislature's rejection of the proposed legislation. Nevertheless, it stated that "we cannot ignore the fact that the Legislature's rejection of the Judicial Council's proposed amendments is in accord with our interpretation of the existing statutory scheme." (*CCRA, supra*, at p. 33.) And it also stated that the council, by seeking legislation, "impliedly admitted that legislative authorization is needed before electronic recording of superior court proceedings may be made." (*Id.*)

Thus, despite the court's disavowal of any reliance on the Legislature's failure to adopt a statute, dicta in the opinion could be read to suggest both that (1) failure to adopt legislation authorizing a procedure makes a rule authorizing that procedure invalid, and (2) if the council seeks legislation authorizing a particular procedure, it impliedly admits it lacks authority to adopt that procedure as a rule.

Neither of these suggestions is well supported by logic or case law. In *Grupe Development v. Superior Court* (1993) 4 Cal.4th 911, the Supreme Court noted that unpassed bills have little value in determining legislative intent because varying inferences can be drawn from the failure to adopt legislation. Likewise,

varying inferences might be drawn from the council's attempts to seek legislation; given that it is often unclear whether a particular procedure is inconsistent with statute, the council might simply want to ensure the constitutionality of the procedure rather than take a risk.

If these dicta in *CCRA* were relied upon in analyzing the constitutionality of proposed rules, the council's ability to establish rules would be diminished. And it would be difficult to determine the constitutionality of many rules, because the analysis would require examining not only the history of existing legislation but also the history of bills that were not adopted.

Recommendation

Administrative Office of the Courts staff recommends that the Judicial Council adopt, effective September 1, 2000, the attached proposed policy on the council's rule-making authority, which:

1. Directs staff to balance the risk of unconstitutionality against the benefits of a proposed rule in reports to the council; and
2. States principles to guide the analysis of the constitutionality of rules.

The text of the proposed policy is attached at page 11.

Policy on the Judicial Council's Rule-Making Authority

The following policies and positions should be applied (1) by the council's advisory committees when recommending a rule change or a position on legislation and (2) by AOC staff when presenting rules proposals to the council.

1. Before presenting a proposed rule change to the council, the advisory committee and staff should consider whether the proposed rule is arguably inconsistent with statute. In making recommendations to the council, advisory committees and staff should consider both the likelihood that a rule might be found inconsistent with statute and the benefits of the rule. If a reasonable argument can be made that the rule is not inconsistent with statute, the change may be recommended despite the risk that the rule might be challenged and held to be invalid. The report to the council should identify the risk and balance it against the benefits of the rule. The report should also present the authorities and arguments that support the validity of the rule.
2. On topics that have been addressed by statute, the analysis of whether a rule adopted by the council is "inconsistent with statute" should take into account the following principles:
 - a. Even if the rule is "not perfectly congruent" with the statute, the rule is valid as long as it does not conflict with and can be reconciled with the statute.¹
 - b. The fact that a rule goes beyond what is contained in a statute does not make it inconsistent with the statute.² Unless the circumstances show otherwise, it should be presumed that the Legislature simply chose not to establish specific procedures in that area and that the council is free to do so.³
 - c. The mere failure to enact legislation does not create an inconsistency between a rule and a statute that was adopted.⁴

Approved by the Judicial Council, eff. September 1, 2000.

¹ See *People v. Reeder* (1984) 152 Cal.App.3d 900.

² *Butterfield v. Butterfield* (1934) 1 Cal.2d 227.

³ See *People v. Mendez* (1999) 19 Cal.4th 1084; *In re Juan C.* (1993) 20 Cal.App.4th 748; compare *Simpson v. Smith* (1989) 214 Cal.App.3d Supp. 7 (statute that was amended to delete notice requirement inconsistent with rule requiring notice).

⁴ See *Grupe Development v. Superior Court* (1993) 4 Cal.4th 911 (noting that unpassed bills have little value in determining legislative intent because varying inferences can be drawn from the failure to adopt legislation); compare *California Court Reporters Assn. v. Judicial Council* (1995) 39 Cal.App.4th 15 (noting that while unadopted proposals ordinarily have little value in determining legislative intent, they may be more persuasive in deciding whether an administratively promulgated rule is consistent with legislation; given the uncertain status of unadopted proposals, the court reached its conclusion independent of the Legislature's rejection of proposed amendments).

JUDICIAL COUNCIL MEETING
Minutes of August 24, 2000, Meeting

The Judicial Council of California meeting began at 8:45 a.m. on Thursday, August 24, 2000, at the Administrative Office of the Courts Judicial Council Conference Center in San Francisco, California, on the call of Justice Marvin R. Baxter, designated chair for the meeting.

Judicial Council members present: Chief Justice Ronald M. George (for part of the meeting); Justices Richard D. Aldrich, Marvin R. Baxter, Carol A. Corrigan, and Richard D. Huffman; Judges J. Richard Couzens, Leonard P. Edwards, Donna J. Hitchens, Steven E. Jahr, Melinda A. Johnson, Ana Maria Luna, Ronald B. Robie, and Ronald L. Taylor; Mr. John J. Collins, Ms. Pauline W. Gee, and Mr. Sheldon H. Sloan; and **advisory members:** Judge David John Danielsen, Commissioner David L. Haet, Mr. Ron Barrow, Mr. Stephen V. Love, Mr. Frederick Ohlrich, and Mr. Arthur Sims.

Absent: Judges James A. Bascue and Paul Boland; Senator Adam B. Schiff; Assembly Member Sheila James Kuehl; and Mr. Michael Case.

Others present included: Mr. William C. Vickrey; Justice Gary E. Strankman, Judges Gail Andrea Andler, Aviva K. Bobb, Judith Donna Ford, William C. Harrison, Ray L. Hart, Brad R. Hill, Wayne L. Peterson, and Ronald M. Sabraw; Commissioner Bobby Vincent, Mr. Aaron Alden, Mr. J. Barlettanz, Mr. Rex Heeseman, Ms. Beth Jay, Ms. Sharon Ruddell, Mr. Alan Slater, and Ms. Sheri Wert; **staff:** Ms. Heather Anderson, Ms. Jessica Fiske Bailey, Ms. Deirdre Benedict, Mr. Michael Bergeisen, Mr. Roy Blaine, Ms. Francine Byrne, Ms. Angel Contreras, Mr. James Carroll, Ms. Deborah Collier-Tucker, Ms. Francine Collier, Mr. Blaine Corren, Ms. Lesley Duncan, Ms. Diane Eisenberg, Mr. Robert Emerson, Ms. Rita Finchum, Ms. Denise Friday, Ms. Beth Gatchalian-Litwin, Ms. Charlene Hammitt, Ms. Christine (Tina) Hansen, Ms. Jacquelyn Harbert, Ms. Pat Kilkenny, Ms. Lynn Holton, Ms. Melissa Johnson, Mr. Dennis Jones, Ms. Camilla Kieliger, Mr. Peter Kiefer, Mr. Ray LeBov, Mr. Ben McClinton, Mr. Fred Miller, Ms. Vicki Muzny, Ms. Annemarie O'Shea, Mr. Victor Rowley, Mr. Frank Schultz, Ms. Dale Sipes, Ms. Sonya Smith, Ms. Marcia Taylor, Ms. Linda Theuriet, Ms. Karen Thorson, Ms. Diane Tong, Ms. Alice Vilardi, Ms. Karen Viscia, Mr. Jonathan Wolin, Ms. Pat Yerian; **media representative:** Ms. Donna Domino, *The L.A. Daily Journal*.

Except as noted, each action item on the agenda was unanimously approved on the motion made and seconded. (Tab letters and item numbers refer to the binder of Reports and Recommendations dated August 24, 2000, which was sent to members in advance of the meeting.)

Council Committee Presentations

Executive and Planning Committee

Justice Richard D. Huffman, chair, reported that the Executive and Planning Committee met six times since the last council meeting.

Council action:

The vote was called on a motion that the Judicial Council, effective January 1, 2001:

1. Repeal rules 204, 205, 205.1, 206, 207, 214, 532.5, 532.6, 532.7, 533, and 835, regarding the duties of the presiding judge, duties of all judges, and duties of the court executive officer or court administrator;
2. Adopt rule 6.603 on the authority and duties of the presiding judge as amended regarding complaints against assigned judges so that complaints are directed to the Chief Justice by forwarding them to the attention of the Administrative Director of the Courts and the presiding judge assists the Administrative Director in investigating and making recommendations on complaints against assigned judges to the Chief Justice.
The rule:
 - a. Establishes the presiding judge's responsibilities and authority to carry out those responsibilities;
 - b. Requires the presiding judge to allow judges to take a specified amount of vacation time, which increases with years of service;
 - c. Limits the amount of vacation time that the presiding judge may allow judges to carry over from one year to the next to 30 days, or fewer if local rules so provide; and
 - d. Enumerates the duties of the presiding judge;
3. Adopt rule 6.605 to authorize the establishment of an executive committee to advise the presiding judge or to establish policies and procedures for the court;
4. Adopt rule 6.608 on the duties of all judges, including the duty to follow the directives of the presiding judge in matters of court management and administration; and
5. Adopt rule 6.610, to enumerate the responsibilities and duties of the court executive officer.

The motion passed.

Council action:

The vote was called on the motion that the Judicial Council, effective January 1, 2001, adopt rule 6.602, on selection of the presiding judge, enumerating the types of experience and skills that are recommended for consideration, and increasing the term of the presiding judge to at least two years in courts with three or more judges

The motion passed.

Item 17 Policy on the Judicial Council's Rule-Making Authority

Mr. Michael Bergeisen, AOC General Counsel, presented the report. He stated that questions arise as to whether a proposed rule violates the constitutional requirement that rules not be inconsistent with statute. Some recent cases, which take a narrower view of the scope of the council's rule-making authority than earlier cases did, have made it difficult in

many instances to predict whether a rule will pass constitutional muster. He said that advisory committees are uncertain about whether a proposal should be submitted to the council if there are some doubts about its constitutionality.

Mr. Bergeisen summarized the proposed policy on the issue. The first part of the policy provides guidance to committees and staff on presenting rule proposals to the council if there could be questions about the constitutionality of the proposal. The policy directs committees and staff to consider both the likelihood that a rule might be found inconsistent with statute and the benefits of the rule, and authorizes committees to recommend adoption of a rule even if there is some risk of unconstitutionality. The policy requires that the report to the council on a rule: (1) identify the risk and balance it against the benefits of the rule, and (2) present the authorities and arguments on the issue of the validity of the rule.

Mr. Bergeisen said that the second part of the proposed policy states guiding principles for committees and staff to follow when developing rule proposals.

Judge Edwards asked where the new policy would be recorded. Mr. Bergeisen responded that the Rules and Projects Committee has a policy and procedures manual. This new policy would be included in that, in the minutes of the August council business meeting, and in a brochure being developed about the council's rule-making process.

Chief Justice George suggested rewording recommendation number one so that staff is directed to balance the benefits against the risk of unconstitutionality, in reports to the council.

Council action:

Judge Edwards moved that the council, effective September 1, 2000, adopt the following policy on the council's rule-making authority:

1. Before presenting a proposed rule change to the council, the advisory committee and staff should consider whether the proposed rule is arguably inconsistent with statute. In making recommendations to the council, advisory committees and staff should consider both the likelihood that a rule might be found inconsistent with statute and the benefits of the rule. If a reasonable argument can be made that the rule is not inconsistent with statute, the change may be recommended despite the risk that the rule might be challenged and held to be invalid. The report to the council should identify the benefits and balance it against the risk of unconstitutionality of the rule. The report should also present the authorities and arguments that support the validity of the rule.
2. On topics that have been addressed by statute, the analysis of whether a rule adopted by the council is "inconsistent with statute" should take into account the following principles:
 - a. Even if the rule is "not perfectly congruent" with the statute, the rule is valid as long as it does not conflict with and can be reconciled with the statute.
 - b. The fact that a rule goes beyond what is contained in a statute does not make it inconsistent with the statute. Unless the circumstances show otherwise, it should be presumed that the Legislature simply chose not to establish specific procedures

in that area and that the council is free to do so.

- c. The mere failure to enact legislation dose not create an inconsistency between a rule and a statute that was adopted.

The motion passed.

Circulating Order Approved

Circulating Order CO-00-03: Statewide Mandatory Notice to Appear Forms

For information only; no action necessary.

Circulating Order CO-00-06: SCA 4 Certification of Voting Results of Kern County

For information only; no action necessary.

Circulating Order CO-00-07: Advisory Membership of the Judicial Council

For information only; no action necessary.

Appointment Orders

For information only; no action necessary.

The meeting was adjourned at 1:25 p.m.

Respectfully submitted,

William C. Vickrey
Secretary