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Panel Three: Implementation—What Methods, If Any, Can Be Employed To Promote the Existing Rules' Attempts to Protect Private Identifier Information From Internet Access?

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CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL THREE: IMPLEMENTATION—WHAT METHODS, IF ANY, CAN BE EMPLOYED TO PROMOTE THE EXISTING RULES' ATTEMPTS TO PROTECT PRIVATE IDENTIFIER INFORMATION FROM INTERNET ACCESS?

MODERATOR

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SPEAKER

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Hon. Elizabeth Stong[3]

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JUDGE LEIGHTON: My name is Ron Leighton. I am a United States District Judge from the Western District of Washington, a member of the Court Administration and Case Management Committee.

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The panel we have here is the panel on implementation. We are here to discuss the means and methods by which the judiciary seeks to disseminate information and, at the same time, protect privacy.

When I was given responsibility by Judge Raggi for the implementation side of the aisle, I said this is a committee in need of a job description. When the other committees identified a policy, we would go to work in developing an appropriate method for achieving that objective—easy. As I have drilled a little deeper, I have come to the conclusion that, just as the competing legitimate interests of the courts and its constituencies make policy making difficult, so too these important and oftentimes mutually exclusive interests make it difficult to select an appropriate method to best achieve what would otherwise be deemed a laudable goal.

To help us navigate through these choppy waters, we have assembled an interesting and informed panel of speakers.

To begin, we are going to ask Joe Cecil, who is a senior researcher for the Federal Judicial Center (FJC), to talk about a study that was just conducted by the FJC on unredacted Social Security numbers within the federal judiciary over a two-month period. Joe?

DR. CECIL: Thank you, Judge Leighton.

This is the implementation panel, and one of the things that we were asked to do was to determine the extent to which the protections in the rules to guard against improper disclosure of Social Security numbers have, in fact, been properly implemented. You will recall that the attorneys are instructed to redact the Social Security numbers upon filing.

Our study is essentially the study that you heard described by Peter Winn earlier. It was a Google search of all the documents filed in federal court, district court, and bankruptcy court in November and December of this year. We were looking for something that was very specific. We were looking for a pattern of numbers that followed the pattern that Social Security numbers have, the three digits, hyphen, two digits, hyphen, four digits.

The result of that search revealed about 2900 Social Security numbers in all the documents filed, the 10 million documents filed, during those two months.

The rules themselves have some exceptions for filing of Social Security numbers, and it looks to us like probably about five million of those Social Security numbers fall under some of the exceptions. There were numbers that were from the previous day's court proceedings that were not restricted. Some of the documents were, in fact, filed earlier than December of 2007. But in the end, we got down to 2400 Social Security numbers that look like they are still knocking around in the system, numbers that should have been redacted.

Two final points.

First, we are talking about 2400 documents. Some of these documents have more than one Social Security number. In a large commercial bankruptcy, we would find documents that listed Social Security numbers for all of the employees that worked at the business that went bankrupt. We

would find documents and financial account numbers for investors in a failed enterprise. So some of these documents are really rich in Social Security numbers. We estimate that about twenty percent of them have more than one.

The last thing is that when we think about the 2400 Social Security numbers that still exist in the records, you have to keep in mind that we are talking about ten million records that are filed in court. So, really, only one out of every 3400 documents that we examined had a Social Security number.

Thank you.

JUDGE LEIGHTON: Joe, thank you.

The first member of the panel to speak is Michel Ishakian. She is the Chief of the Public Access and Records Management Division at the Administrative Office of the United States Court. Prior to joining the Administrative Office, she worked as a management consultant for the EDS [Electronic Data Systems] Corporation and as a Foreign Service officer. Michel?

MS. ISHAKIAN: Thank you, Judge Leighton. Good morning.

I would like to begin by giving you a very brief overview of the judiciary's electronic public access program, the mission of which is to facilitate and improve public access to court records and court information. Although I am here today to discuss access to court records through PACER, I would be remiss not to mention that the program is broader and encompasses the judiciary's public websites, courtroom technology, and noticing.

PACER was established in 1988 as a dial-up service. In the last decade, through the implementation of CM/ECF—that would be the electronic case filing system—PACER has evolved into an Internet-based service. In other words, PACER is a portal to CM/ECF, which is integral to public access. PACER provides access to various reports, court dockets for more than 30 million cases, and over 500 million—that is 500 million—documents filed with the courts.[7] This is by any standard a massive collection.

During 2009, the program reached a new milestone, with over one million registered PACER accounts. In any given year, approximately one-third of those accounts are active, and many accounts do, in fact, have multiple users. PACER has several categories of users. They are fairly discrete. Fully 75% are from the legal sector or are litigants, 10% are commercial users, approximately 5% are background investigators, which we have sorted out from commercial institutions, 2% belong to the media, and 2% represent academia.

As I mentioned, PACER users are registered. All PACER access requires user authentication through the use of a log-in and password.

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7. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 12 (2009), *available at* http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/Viewer.aspx?doc=/uscourts/FederalCourts/AnnualReport/2009/includes/annualReport2009_screenResolution.pdf.

Usage information is collected and stored, as set forth in the PACER privacy and security notice on our website, as well as the PACER log-in banner. This provides a deterrent to those who would use PACER to obtain information for nefarious purposes. I can tell you that the Administrative Office does respond promptly to subpoenas for information on PACER usage. Information that we have provided has been used quite effectively in the courts.

The judiciary proactively works to strike a reasonable, reasoned balance between providing public access to court files and protecting sensitive information, as evidenced by the evolution of national policies, federal rules, and procedures over the years. We have not done so in a vacuum. We seek expert advice and input from all the various interested parties—especially all of you here today—which, as we have already heard today, are often seeking different, sometimes mutually exclusive outcomes. On a personal note, I will let you know that this is just the type of territory—fraught, ongoing, seemingly intractable issue—that a former diplomat really relishes.

Our efforts to inform the public of our policies, rules, and procedures extend to the Internet. We have published extensively at the following website: www.privacy.uscourts.gov.

In the interest of time, I would like to summarize just a few of the more recent steps that have been taken to protect sensitive information, while preserving a high level of public access to which we are committed.

In 2003, CM/ECF was modified so that only the last four digits of the Social Security number can be seen on the docket report in PACER. In May 2007, the Forms Working Group, comprising judges and clerks of court, reviewed over 500 national forms to ensure that they did not require personal-identifier information.[8] Although, as Judge Morris pointed out earlier, there is still work to be done, we only found six forms which required that information, and those forms were revised or modified to delete those fields.

Last August, the courts were asked to implement a new release of CM/ECF that was specifically designed to heighten the awareness of the filer's requirement to redact. The CM/ECF log-in screen now contains a notice of redaction responsibility and provides links to the federal rules on privacy. CM/ECF users must check a box acknowledging the requirement to comply with the rules in order to complete the log-in process. CM/ECF also displays another reminder to redact each and every time a document is filed.[9] Judging from the complaints we have received, these changes have certainly served to heighten awareness.

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8. *Good Form! Working Group Restyles, Improves Federal Court Forms*, THE THIRD BRANCH (Admin. Office of the U.S. Courts), May 2009, at 1, 7, *available at* http://www.uscourts.gov/uscourts/News/TTB/archive/200905%20May.pdf?page=1#page=1.

9. *News Item: Notice Enhanced for Redaction Responsibilities*, U.S. COURTS (July 27, 2009), http://www.uscourts.gov/News/NewsView/09-07-27/Notice_Enhanced_for_Redaction_Responsibilities.aspx.

The judiciary continually seeks to expand public access. An important initiative to do so was approved by the Judicial Conference last month. Namely, the Digital Audio Pilot, which provides access to audio files of court hearings through PACER, was approved for national implementation.[10] During the pilot phase of this initiative, a major concern was assuring that personal information not be made available to the public through the audio files. Eight courts participated in the pilot, including the Nebraska and Pennsylvania Eastern District Courts, as well as the North Carolina Eastern, Maine, Alabama Northern, Rhode Island, and New York Eastern and New York Southern Bankruptcy Courts. Each of the pilot courts warned lawyers and litigants, in a variety of ways, not to introduce personal identifiers nor to ask questions which would elicit personal identifiers unless absolutely necessary. Lawyers and litigants were also warned that they could and should request that recorded proceedings that include information covered by the privacy rules or other sensitive matters not be posted. Of course, the presiding judge ultimately determines which audio files should be posted.

A word on the use of software to redact. Algorithms can and have been developed to identify Social Security numbers, and they are effective in most, but certainly not all, cases. Unfortunately, it is far more difficult, and in some instances not presently possible, to develop algorithms to identify other types of sensitive information, such as the name of a minor, which, I would argue, is far more sensitive in nature than a Social Security number. Be that as it may, technology is a wonderful tool. I know—we use it liberally. But it is not a fail-safe, and it is certainly not an adequate substitute for filer vigilance with respect to protecting sensitive information from disclosure.

I think it is fair to say that the judiciary's national and court-based efforts, which you will be hearing more about shortly, appear to be having the desired effect, as illustrated by the Federal Judicial Center's excellent study. We really took heart that, of the ten million recently filed documents that the researchers reviewed, less than .03% were found to contain Social Security numbers. Of those, 17% had a readily apparent basis for a waiver. Upon further scrutiny, we believe that we will find more documents that qualify for the waiver for pro se litigants. All in all, this is very valuable information, and we will use the results of the study to zero in on lapses and address them.

Thank you.

JUDGE LEIGHTON: Thank you, Michel.

Our next presenter is Professor Edward Felten. He is the Director of the Center for Information Technology Policy and Professor of Computer Science and Public Affairs at Princeton University. His research on topics such as web security, copyright and copy protection, and electronic voting

10. *News Item: Judiciary Approves PACER Innovations To Enhance Public Access*, U.S. COURTS (Mar. 16, 2010), http://www.uscourts.gov/News/NewsView/10-03-16/Judiciary_Approves_PACER_Innovations_To_Enhance_Public_Access.aspx.

has been covered extensively in the popular press. In 2004, *Scientific American* magazine named him to its list of fifty worldwide science and technology leaders. Professor Felten.

PROF. FELTEN: Thanks.

I would like to respectfully challenge the standard narrative about this issue. The standard narrative is that there is a longstanding tension between transparency and privacy, and that technology makes this worse. I would like to argue that technology can be our friend on these issues, in two ways. First, advanced technology can help us to address the privacy challenges we face. Second, advanced technology increases the benefits of openness.

First, we can use advanced technology to help address the privacy challenges. We have already seen an example of this earlier in the session, with the study of how many Social Security numbers are present in documents. That is a valuable step. Of course, Social Security numbers, as Michel said, are probably the easiest case, because there is a very fixed pattern that is easy to scan for technically. It is possible to find and automatically redact Social Security numbers in a lot of cases.

But I believe that technology can be pushed a lot farther to help identify failures to redact, not as a replacement for human attention, but to augment it. There are some simple things we can do, and some more technologically advanced things. As an example of a simple practice, if a particular name or piece of information is redacted in one case document, but not in another, a system could flag that fact at the time of filing and alert counsel or the court employee who is filing that document to take another look.

As an example of a more advanced use of technology in these fields, I am convinced that advanced machine learning methods can be very valuable in helping to find failures to redact, even for difficult types of information, such as names of minor children. This is a topic on which we have ongoing research at Princeton, and we are hoping to be in a position to talk about positive results soon.

So I believe that we can do a lot to help find redactions that are done wrong, and I think there is a lot that can be done in terms of how the system is structured and how users interact with it in order to make it more evident when certain kinds of sensitive information is available.

I would also like to talk about some of the benefits of transparency, of putting documents out there for people to use. The kind of research that I was talking about into machine learning, the kind of research into different interfaces, as well as research about the extent of privacy problems in the documents of the sort that we have been doing, is only possible because we do have access to a large number of documents. We have assembled a corpus of about two million documents by a variety of lawful means that has served to enable our research. But many people who are itching to do constructive research along these lines have been held back by lack of access to documents. It is simply not feasible to buy two million documents from PACER. That would cost too much money, as well as not really being feasible even to download them all. So access to documents has a lot of value.

Indeed, there are many new types of constructive and valuable research which will become possible when documents are available to researchers in bulk. This includes research on issues of direct interest to the judiciary, such as questions of judicial workload and case management, historical and journalistic research to look at global pictures and trends across the entire judicial system, as well as development of new tools for improved legal research. I am convinced that if and when a large quantity of court documents becomes available to the great minds of Silicon Valley, we will see great new ideas, improved ways of doing legal research that really put the sort of technology that has enabled companies like Google to succeed to work on the specific problems of lawyers and legal researchers. I think there is a lot that can be done in that area, but it is not quite possible today because information and documents are not as available as they could be.

If the judiciary is going to move ahead toward a system that is more open and makes more documents available, the next logical question is how best to enable positive uses of those documents of the sorts that I described. From the viewpoint of researchers looking to use these documents, there are really two things that we would like to see.

First, we would like to see bulk access to the raw documents. There is no substitute for actually having the data on which your study is going to operate.

Second, I would argue for authentication of the documents by using a technology such as digital signatures, which is a kind of electronic seal of authenticity put on a document. The advantage of doing that is that it makes it self-evident that the document is authentic, regardless of from whom you received it. That makes it possible for, say, a commercial service to provide a document to a working lawyer. The lawyer can be sure that the document is authentic because it bears the digital signature of the Administrative Office of the courts or some other authoritative body.

I think there is a lot to learn, actually, from other branches of government which do face, not the same, but similar kinds of issues in balancing transparency against cases where information should legitimately be withheld. The executive branch and the legislative branch have been working through these issues, on a larger scale in some respects than the judiciary has. I think there is a significant amount to be learned there.

Finally, on this question of how best to enable access for positive use, let me just put in a brief plug for our paper on this topic, called *Government Data and the Invisible Hand*, which appeared in the *Yale Journal of Law & Technology*, Volume 11, last year.[11]

Thank you.

JUDGE LEIGHTON: Thank you, Professor.

Our next speaker is Judge Elizabeth Stong. Judge Stong has served as a United States Bankruptcy Judge for the Eastern District of New York, one of the pilot-project districts, since 2003. Before taking the bench, she was a

11. David Robinson, Harlan Yu, William P. Zeller & Edward W. Felten, *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160 (2009).

litigation partner and associate at Willkie Farr & Gallagher in New York and associate at Cravath, Swaine & Moore and law clerk to the Honorable David Mazzone, U.S. District Judge in the District of Massachusetts.

Judge Stong.

JUDGE STONG: Thank you so much. Thank you especially to Professor Capra and Judge Raggi and Judge Rosenthal for convening this and for inviting me to participate.

It has been quite an interesting experience to step back and look at these issues systematically and from the special window that we have on personal information in the bankruptcy process. What we look at in the bankruptcy arena is the most personal detailed information about an individual's situation that you can imagine. We do it at a point where they have come to the bankruptcy process for a fresh start, probably because something bad has happened—for whatever reason, not at a high point, but at a comparative low point in their lives.

So the question we are looking at is not like the question of the prior panel—whether to redact, what the tradeoffs are—because that decision was made back in 2003 when the bankruptcy process adapted to the need, the requirement, to get Social Security number information out of our public documents, at about the same time that we were going, universally throughout the system, in the bankruptcy courts in the United States, to electronic filing, electronic access to information.

So think about where this puts us. Disclosure drives our process. The kind of disclosure you see in a bankruptcy case is unlike anything I saw in my prior life as a big-case litigator. You can file a class action against the biggest company in America. You do not have to tell much of anybody much of anything about who you are. If you file an individual bankruptcy case, as 1.4 million consumers did last year, and you need to disclose your name, your address, your dependents by age, though not by name, where you work, where you used to work, how much you make, who you owe money to, what you own. I have seen debtors take this so literally as to itemize the things in their closets. It is a pretty intrusive process.

Access to this information is critical—access for courts, access for creditors, access for the trustees assigned in the case, access of the Office of the United States Trustee, part of the Department of Justice charged with the very important job of seeing if there is abuse of the bankruptcy system taking place. So you have broad disclosure by individuals. You have broad access to that information. And we put it all on the Internet. We have put it on the Internet because, as of 2003, in every single bankruptcy court, every single document, whether filed by a lawyer or filed pro se, winds up electronically accessible. This is, for many practitioners in the field, a volume practice.

I think and I assume—and I am generally gratified in this thought and assumption—that every lawyer who files a document with a federal court does it with the care and attention it requires and deserves. But it also happens from time to time that somebody has one too many cases to get filed that day, maybe in a bit of a hurry—it is a volume practice sometimes.

Of those 1.4 million consumer cases that were filed last year, a certain number of them, filed by counsel, may nevertheless not have received precisely the attention we would like to see, and, yes, occasionally a mistake does happen.

I have to tell you, I was extremely interested in seeing the numbers uncovered by the study—ten million documents. This is taking me back to my days as a litigator, when we did document review in big cases, antitrust clearance, things like that. I was both heartened and concerned to see the number of documents in which Social Security numbers still appear. I was not surprised to see that we in the bankruptcy world have a certain number of those on our watch—2244 of the 2899. I was struck to see that filing pro se is an exemption. When I see a pro se, I sometimes see someone who has already been victimized in one way and may well be victimized by not having a lawyer in a very complicated process, if the court process does not attend to the needs of that case.

So you take these competing factors that affect nearly every bankruptcy case—the need for disclosure, the need for access, the fact of electronic filing—and you get a bit of a perfect storm against which to apply a criterion that I think we universally understand should be as close to perfect compliance as we can get. Remember what comes along with an inadvertently included Social Security number: a name, a home address, a mailing address if it is different, employment, a record of every debt that person owes. This is a portfolio of information designed to facilitate identity theft. So you attach that also to a Social Security number, and you have your next perfect storm. Imagine the risks. Imagine the problems.

Now, you are going to say, is identity theft really such a problem for people who file bankruptcy? Is that the kind of identity people want to steal in the credit world? I am here to tell you, it happens. It happens. And it is a problem. Then you have again victimized somebody who has come to the court process for relief, relief for the honest but unfortunate debtor.

So what do we do in our court? First of all, I think we are grateful every time we see a properly redacted document. And they usually do come in that way. The statistics are consistent with our experience. I embrace this notion, mentioned in the prior panel, of informal, anecdotal, empirical research. I think that must be a professor's way to say, asking around, which is what I did. It sounds a lot better.

I will tell you that in our court we do not see a widespread problem. But it does not need to be a widespread problem in order to be a problem. When attorneys miss this, they create a potential issue; if it is not caught, it will live on that docket indefinitely. What we see anecdotally, as we follow up on these situations—when they are identified, for example, through the quality-control process that our wonderful Clerk's Office staff undertakes with every document filed electronically—it seems that most of the time this is a situation of staff in an attorney's office filing a document, with attorney supervision, but not at the level and with the guidance that we would like to see. And so a mistake happens.

How do we follow up with this? We have electronic filing training. We make it available to attorneys, but we invite staff to participate as well. We have a wide-open door to this training, and the more it is used, the better, from our perspective. Retraining is available too. These are complicated procedures, and if you do not use them every day, you should come back. We welcome that. We encourage it. We promote it, and not in a punitive way.

When we see it as a problem, it sometimes traces to staff. We immediately contact, through the Clerk's Office, the filing office and get a redacted document on the docket, and the unredacted document is taken down.

When you go into CM/ECF to file a document, as you have heard, you have to specifically check and click through a screen that acknowledges that you know you need to redact this information. Do we all check something and click through every time? I was recently away and clicked through to use a hotel's Internet access. Did I scroll down to the bottom and say, yes, I had seen the policy?

But I think it still serves a useful purpose. Every time filers log into CM/ECF, they are required to acknowledge that they are aware of this policy or they cannot go further in logging in and filing their documents.

We also try to remind people in other ways. We have an ECF newsletter. It is surprisingly interesting reading. I mean that. It is written in a short narrative way, kind of fun—how many documents have been filed? And we put reminders, again in a prose way—not just a policy, not just as a teaching thing, but reminders and information about the importance of complying with the requirement to redact Social Security numbers—not our court's policy, but a fundamental policy of the Judicial Conference.

Sometimes if we see a problem come up more than once with an attorney's office, the staff will really reach out to that office and try to get to the right staff people and invite them to come in. If they are having a problem or they have a question about our procedures, we want to hear from them, to make our procedures better.

Finally, it happens—and it is rare, I will say once or twice every two or three months—that we see a document in chambers or in court containing unredacted personal identifier information, often by a pro se, sometimes in the supporting documents filed with a proof of claim, which is what a creditor files, together with original documents that have been scanned, describing why they should get a payment in a bankruptcy case. If we see it in chambers, we are promptly responsive, either through our courtroom deputy in my own chambers, down to the Clerk's Office, to be sure that the problem is fixed. That is an informal procedure. It is a question that comes up rarely enough that that kind of direct intervention seems to be a practical solution, and a solution that gets the attorney's attention. Nothing like a call from the Clerk's Office or from the courtroom deputy to say, "We see something we are concerned about. Can you please fix this, and fix it promptly? Thank you so much."

It has worked. We have not yet established a system to impose a consequence or a penalty. I do not believe it has ever been the case that we have been required to take away someone's filing privileges, for example, and I expect it will not come to that. It would take an extraordinary amount of noncompliance, I think, for us to go to that level.

I will end with this. This reminds me a little bit of something I learned growing up in the San Francisco Bay Area, where we were never done painting the Golden Gate Bridge. You sanded it and painted it in one direction; and then you turned around and you started in the other direction. Once the decision is made, in whatever court, that information of this nature needs to be redacted from documents, but needs otherwise to be available to some participants in the process, just like the Golden Gate Bridge, you are never done reinforcing the need to comply. As a court, we should never consider ourselves done with the enterprise of making compliance as easy as possible, as plain as possible from a procedural standpoint, and as comprehensive as possible, because even one mistake, given the potential consequences, is a mistake we should not tolerate.

Thanks very much.

JUDGE LEIGHTON: Judge Stong, thank you very much.

Our next presenter is Jay Safer. Jay is a partner at Locke Lord Bissell & Liddell's New York office. He counsels clients on commercial matters, including protection and preventive measures, the creation of risk litigation plans, e-signature, e-discovery, e-readiness, and pre-litigation analysis.

Jay?

MR. SAFER: Thank you, Judge. I recently had the opportunity to participate on a committee, which helped draft a proposed rule for the state courts on how to deal with private, sensitive information about individuals. It has to be remembered what we all recognize—that never have so many documents been so available to the general public that are filed with courts electronically. The FTC identity theft page[12] estimates that nine million Americans have their identity stolen each year.[13] In the federal courts, you have Rule 5.2,[14] which has been discussed in part. I will get to that in a second.

But think about how you would write a rule and what you would put in it. What information would you deem to be appropriate to tell an attorney not to put in papers? How would you tell that attorney so that it was effective, in having the attorney understand and follow the rule? What should be the enforcement of that rule? Who should be checking the documents? Should it be a clerk of the court? Should it be the judge? What information should be precluded, and should the rule be mandatory?

The federal court Rule 5.2, as I said, has selected information. It has Social Security numbers, as you know. It has taxpayer-identification

12. *About Identity Theft*, FED. TRADE COMMISSION, http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html (last visited Sept. 23, 2010).

13. *Id.*

14. FED. R. CIV. P. 5.2.

numbers, birth date, the name of an individual known to be a minor, and financial-account numbers.[15] I want you to try to remember that.

Briefly in my time, I want you to compare what is now happening in the state courts with the federal rule. Keep in mind that in the state courts the general public has access now to almost all documents. First of all, while e-filing is not required in state courts specifically, once you get into the New York State Commercial Division, e-filing becomes, in effect, a presumption. A new proposed rule under legislation in New York State[16] will require e-filing in certain counties. Thus, any case involving commercial matters in New York County, Nassau County tort cases, and one other county and type of case to be selected, will be e-filed.

But even putting aside e-filing, what they are doing in the state courts is scanning all documents that are filed. You can imagine, with all the documents being filed, how much is going to be available to the general public. All you have to do as a member of the general public is go to various links to the court website; www.nycourts.gov is the main website. There is specifically a link that is the Supreme Court Records On-line Library.[17] It is called SCROLL.

What it does is make available to the general public all these documents. However, the state of New York, unlike the federal courts, has no statewide unifying court rule on how to deal with sensitive information. It has a scattering here, a scattering there. A statewide rule was proposed in 2006. It did not go forward.

So in sitting around looking at this, the first question was, how do you deal with what information? At the New York City Bar Association, I am Chair of the Council on Judicial Administration, and we had a subcommittee dealing with this, consisting of a wide range of people: Steve Kayman, who was a lawyer; Judge Silbermann, a former administrative judge; Karen Milton, who is the Circuit Executive of the Second Circuit, and others. We prepared a report proposing nine types of information that would require exclusion in their entirety: Social Security numbers, taxpayer ID numbers, bank and other financial-account numbers, passport numbers, driver's license numbers, government-issued ID numbers, other identification numbers which uniquely identify an individual, names of minor children, and dates of birth. The rule would be mandatory.

This report is named the *Report Recommending a New York State Court Rule Requiring that Sensitive Personal Information Be Omitted or Redacted from Documents Filed with Civil Courts*.[18] The report is available at www.nycbar.org, Reports of the Council on Judicial Administration.

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15. *Id.*

16. Act of Aug. 31, 2009, ch. 416, 2009 N.Y. Sess. Laws 1140–42 (McKinney).

17. *See Supreme Court Records On-Line Library*, THE COUNTY CLERK AND SUP. CT. OF N.Y. COUNTY, http://iapps.courts.state.ny.us/iscroll/index.jsp (last visited Sept. 23, 2010).

18. SUBCOMM. ON ELEC. COURT RECORDS, COUNCIL ON JUDICIAL ADMIN., REPORT RECOMMENDING A NEW YORK STATE COURT RULE REQUIRING THAT SENSITIVE PERSONAL INFORMATION BE OMITTED OR REDACTED FROM DOCUMENTS FILED WITH CIVIL COURT (2010), *available at* http://www.nycbar.org/pdf/report/uploads/20071821-ReportRegardingNeedtoProtectSensitiveInformationFromIdentityTheft.pdf.

In doing the report, we looked at other states. Fifteen other states have rules on access, based on what you file. But they are all different. Looking at these nine types of information, one issue we looked at was whether if, for good cause, you needed to use such information, certain portions of the numbers, such as the four last digits of Social Security, could be included. But in looking at this and trying to decide whether a clerk should have the responsibility to look at this issue, we said the clerks have so much to do that it should not be their responsibility. It should be the responsibility of the attorney.

Then the question came up, should this be an ethical violation? The feeling was that it was just too hard to have it as an ethical violation, and it should be set forth as a court rule.

Then the question was, do you have other types of information, like email addresses, which you should include in the rule? But it was felt that the nine types of information contained the most sensitive information.

I sent the report with a letter to Chief Judge Jonathan Lippman of the New York State Court of Appeals and Chief Administrative Judge Anne Pfau. It was then sent to the Civil Practice Law and Rules Advisory Committee, on which I am fortunate also to be a member.

The CPLR Advisory Committee has now sent to the Administrative Board of the State of New York a modified version of what we proposed at the City Bar. Interestingly, the Advisory Committee took a much stronger view. They said it is not enough information. There should be more information excluded.

They have recommended the following exclusions: Social Security numbers, telephone numbers, date of birth, driver's license numbers, non-driver photo identification card numbers, employee identification numbers, mothers' maiden names, insurance and financial account numbers, demand deposit account numbers, savings account numbers, credit card numbers, computer password information, electronic signature data or unique biometric data, such as a fingerprint, voiceprint, retinol image, iris image, medical procedure, diagnosis, or billing codes.

That is a lot. But the CPLR Advisory Committee said, "We want to protect sensitive information. And we want to make it mandatory." It said the courts should have the ultimate responsibility to determine whether something should be removed, and they have the ability to do that upon motion if this issue is contested. Matrimonial litigations were excluded.

One area that may need a modification is consumer debt cases. On a number of occasions, with sewer service, people buy debt, and they sue people. Those defendants, if you require certain information be excluded, will not have the ability to know whether they are really being sued for something they did. It has been requested in those cases that, for example, the last four digits of Social Security numbers be allowed.

Another point is that, when you are looking at this and you are realizing all the issues that come up, there are also certain people—fairly—who say, "Wait a minute. We have a First Amendment right to have access to

information. We want to have access and that there be as little restriction as possible."

So what is going to happen now, I think, we will know in the next few months, hopefully. Will the Administrative Board approve this? If they do, it will be the first time in New York State that there will be a statewide rule for which attorneys will be responsible for excluding certain sensitive information when filing their papers with the court.

Thank you.

JUDGE LEIGHTON: Jay, thank you.

Our next speaker comes from the U.S. District Court for the Eastern District of New York. Robert Heinemann is the Clerk of that court. He has held that position since 1983. Before that, he was a Chief Deputy Clerk and pro se staff attorney. He received his J.D. from Brooklyn Law School and his A.B. from Fordham University. He has received the Director's Award for Outstanding Leadership from the Administrative Office of United States Courts.

Mr. Heinemann.

MR. HEINEMANN: Thank you, and I want to thank Judge Raggi for inviting me to this discussion.

As a Clerk of Court, I have a more general perspective about this. First, I am very aware that I am a public information officer between the court and the public. At the same time, I am also aware that I have to be a gatekeeper, a temporary gatekeeper. I want to underline the word "temporary," in deference to the press, because I also am a public information officer who responds to press inquiries.

I think the Internet is really our helper here, although it has been a hard way to get there at times. I agree with what was said earlier in another panel—I think it was by Judge Morris—that scanned documents are problematic. I would much rather always have an electronic document. I think electronic documents are easier to seal temporarily or completely, if it is done appropriately, and limited to certain views by parties and by the court. It is also easy to unseal an electronic document.

The flip side of all of this—and I think courts do a very, very good job in the criminal area and sometimes a less good job in the civil area—is in unsealing documents. When people are indicted before they have been arrested or there is a safety or security issue, for a very brief period of time, that information or indictment is sealed. As soon as that person is arrested or the reason for sealing it is gone, almost immediately the court directs the clerk to unseal.

I think that happens less often in civil litigation, where there is more of a desire on the part of one or more of the parties to seal a settlement agreement or to seal some corporate information. I am not talking about patents or other matters that often may need to be sealed and stay sealed. I think courts can do better in terms of unsealing civil cases.

But there are a lot of practical issues. I will not go over what was put in my statement, except briefly.

We have to comply with the federal rules. In each district, it is important to have local rules of policy. The Eastern District of New York has them.

It should be transparent why a document is being sealed, and there should be an order of approval to seal it by the court. I think the form we have developed in Eastern New York is useful for that purpose.

It also is very important—and here is where the problem comes in—to always use that form or to always make it clear why a document needs to be sealed, however briefly, or if it is the rare case that may have to have a longer-term seal. That is where human error comes in. We have to do our best, as public servants and as members of other agencies of the government, to limit that human error, and as members of the bar.

A core question for this committee may be: who ultimately is responsible to be a backstop to seal or unseal, or for redaction? I certainly do not think it should be the Clerk's Office in the first instance, but maybe it should be the Clerk's Office in the last instance. Attorneys do get busy; attorneys will make errors. The U.S. Attorney's Office will make errors. The Clerk's Office will make errors. But at some point, since this area is so important in terms of privacy and, in criminal cases, protection and safety, someone has to be accountable as a backstop. That will not make human errors zero, but it will certainly make errors less likely because there is another pair of eyes looking at it.

That brings me to another point that I touched upon in the statement. I think we need more help with the software in terms of flagging potential areas where something should have been sealed that may have been missed. We do have quality-control deputies. That is a very important role now. The Clerk's Office has changed tremendously over the last ten years, going from a very paper-intensive office—we will always have paper, but where every item was paper—to now, where everything is potentially on the Internet that is filed by an attorney, very quickly. That is the beauty and I think it is a help, but it is also something that needs very careful control and monitoring.

To the extent that the Administrative Office can provide us with additional software tools—the Office does a great job right now, but if we can have some additional search that might be done to limit or to flag certain categories of docketing that we would look at more closely, since we have so many thousands of docket entries to look at in every situation—that would be very helpful.

Another obvious point is that courts can have local rules on a variety of matters, and they do—courts need to have them—and they can have local policy, but even with changed federal rules of procedure, I think it takes a good two to three years before the practicing bar really, in general, gets very familiar with those federal rules of procedure and starts to use them daily and uniformly and are aware of them. This means that Clerk's Offices have to do much more to be proactive, to put more on our website, to flag things in ways that make it available and right under the nose of counsel. If it takes two to three years for counsel, with all due respect, to get really familiar with the federal rule, imagine how much longer it takes counsel

and the Clerk's Office and other government agencies to get familiar with local rules of policy, or administrative orders, which often are the most effective and efficient way to do something quickly, but also may be the least well known or well understood. So we have to use our public websites to call attention to policy changes in a very proactive way, in a way that you see it immediately as to what is new on your website, as soon as that administrative order goes out there, or policy or procedure or form.

So those are some of the things that I think Clerk's Offices can do to help the court police these matters, which are only really policed in the short term and only in maybe one or two percent of filed matters, before they are once again, in most instances, open to the public.

Thank you.

JUDGE LEIGHTON: Thank you, Mr. Heinemann.

Our final speaker is Joe Goldstein. He is a freelance reporter and former courts reporter for *The New York Sun*. He is currently working on a project for ProPublica, a nonprofit investigative newsroom.

Mr. Goldstein.

MR. GOLDSTEIN: Hi. About the only thing I am qualified to talk about here is how reporters actually use electronically filed documents.

I used to have a desk in the U.S. courthouse in Brooklyn, when I was writing for *The New York Sun*. I figured that most of my stories would be based on courtroom events that I had actually witnessed—trials, arraignments, and sentencings. On occasion, the courthouse will have a good trial, and that will keep the reporters nourished for a couple of weeks. But I was struck that there is a lot less courtroom action than we might actually expect. Criminal prosecutions, even the good ones, generally end in plea deals, and none of the evidence that the prosecutors have amassed ever comes out in open court.

The point here is that a robust right of public access to the courts needs to encompass more than just the right to sit in on court when there is a judge on the bench. Reporters rely very heavily on PACER to figure out what is actually going on. A huge share of what we write about comes from documents filed electronically, attachments to those documents, and the like.

I am trying to think of an example to illustrate this. You may remember the name of Russell Defreitas, who was indicted on charges of trying to blow up part of JFK Airport.[19] The case broke in June 2007, and he has been in court a handful of times since then. Certainly the case is still going on, and very little has actually emerged in open court. But if you log on to PACER and run a docket search, you will see that, as of last night, there were 192 motions and letters that have been filed. You can bet that most of the reporters in the Eastern District have read every single word of that. It is really from that that they are able to follow one of the more important cases that is currently winding through that courthouse.

19. Cara Buckley & William K. Rashbaum, *4 Men Accused of Plot to Blow Up Kennedy Airport Terminals and Fuel Lines*, N.Y. TIMES, June 3, 2007, at 37.

I am unclear on what proposals, if any, are on the table to further redact court records, to seal additional court records. But I would like to say I am probably against it.

From this spectator's point of view, one of the main functions of courts is to pry sensitive, personal information from people. This is not an incidental function; this is what courts do. Much of what emerges in proceedings or in attachments filed on PACER does contain sensitive information, terribly private information, people's darkest secrets. The public has a right to know, and this information ought to very much be in the public domain.

At the sentencing of a murderer, for instance, a widow might talk about how this has traumatized her children. Just because the names of minors are disclosed, that does not mean that the transcript ought to be reflexively redacted or sealed. A defendant who does not want to go to prison for the rest of his life may tell the court a tale of woe about his ill health. He may provide medical records. He may provide psychological records. He may talk about abuse that he suffered as a child. Just because that is sensitive medical information does not mean that it should be reflexively sealed or kept private. It will factor into the sentence that the court makes, and the public ought to have a right to inspect the factual bases of that sentence.

There seems to be a concern that information filed electronically will be used for nefarious purposes. I believe that we have heard that there are instances of identity theft from bankruptcy proceedings. I am not very familiar with that, but I would like to know about instances in which we know that information filed on PACER or filed electronically has been used to do wrong. I want more than just sort of an undifferentiated fear.

I have read in the past about concerns that criminals will use electronic access to courts to access information about potential cooperators and coconspirators and use it for purposes of witness intimidation. I am not aware of any such cases. Maybe they do exist. But I think the courts should have a couple in hand before they act on that fear.

I do not want to be too provocative, but I will say that last year in Brooklyn an attorney was sentenced for trying to facilitate hits on a couple of witnesses. A defense attorney in New Jersey was indicted on a similar sort of thing just last year. My hunch—and I do not know for sure—is that defendants who want to use information that comes out in court to kill off those who might testify against them are generally getting their sources of information from discovery or from confidential information that never gets filed publicly. So I would caution against just being worried that the public has access to motions and the like that are filed electronically, and that that would suggest that some of this information might be used to intimidate witnesses and the like.

I would just like to close by saying that, especially in the civil context, a lot of documents are already filed under seal. Documents that could simply be redacted are instead just filed under seal. There has been talk about needing a backstop to make sure that Social Security numbers and other identifying information is not filed on PACER. The backstop that I am interested in seeing is a backstop of judges and court officials who make

sure that attorneys engaged in civil litigation are not just filing documents under seal because it is more convenient and they would rather litigate privately than let the public have access. My hunch is that a good portion of the documents that are filed under seal need not be.

I will close with that.

JUDGE LEIGHTON: Joe, thank you. Does anybody have a question?

Judge Stong talked about the need to search for perfection here because the stakes are so high for some folks, particularly in bankruptcy. Yet we have an exemption for pro se filers. I have been told that 40% of the cases in the Ninth Circuit have a pro se participant, twenty-five percent in the Western District of Washington, where I am from.

Should we be doing something for those folks? And if so, what?

JUDGE STONG: As a practitioner, I can assure you that none of my clients was ever pro se. But moving to my role and my perspective in a bankruptcy court, where both debtors and creditors and other parties of interest may file pro se, I do not see a reduced risk of harm to people who do not have a lawyer in their Social Security number being electronically accessible in the docket. However you give effect to that concern, I do not see a principled basis to make a distinction in the kind of harm you are trying to avoid.

It is a lot easier to have a framework to instruct lawyers and require lawyers, for example, who file electronically—unlike pro se litigants, who bring paper to the counter, which is scanned—to base your requirements on that system. I would not want to create administrative traps for uninformed people trying to navigate a sufficiently complex process already by somehow creating impediments to the ability to file a case.

But I think your concern is spot-on. There is no difference whatsoever—in fact, maybe even more harm could be done to self-represented people through the inadvertent inclusion of Social Security numbers on the documents they file in the case. I certainly make no distinction if I see a Social Security number in the docket, based on whether the debtor has an attorney. If I see it in something that is handed up in court, if I see it on a proof of claim, we attend to it the same way.

I have taken the spirit, if not the letter, of the Judicial Conference policy and the requirements that we implement through CM/ECF to be that this information should not be publicly available. How we do it is through the requirements we impose on lawyers, through CM/ECF and otherwise. Why we do it, I think, would make no difference whatsoever whether there is a lawyer or not.

So I think I am agreeing with you.

JUDGE LEIGHTON: Professor, last word.

PROF. FELTEN: I think there are some things that can be done technologically to help pro se filers avoid mistakes of this sort, to scan their filings and be a little more aggressive about pointing out possible problems. As well, if you can ask them to fill out up front a fairly simple form—that might depend on the type of case they have—in which they explicitly list

information—for example, in a bankruptcy case, information about their Social Security number and bank accounts—that could help to target a technological scan for information that ought to be redacted, which can then either be done for them or can be suggested.

JUDGE STONG: I will just note that the number is nine, nine Social Security numbers that were found in those documents that were reviewed in pro se papers. My speculation is that every single paper that comes in—and I do mean paper—at the Clerk's Office is reviewed for this purpose. That is the only way I can imagine that we are getting to a number like nine in the many pro se papers that are filed.

JUDGE LEIGHTON: My thanks to the panel.