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By Electronic Mail
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Conference of Chief Justices and
Conference of State Court Administrators
c/o Martha Wade Steketee
National Center for State Courts
2425 Wilson Boulevard, Suite 350
Arlington, VA 22201

Re: Comment on February 22, 2002 Draft Model Policy on Public Access to Court Records

Dear Ms. Steketee:

Trial Lawyers for Public Justice ("TLPJ") respectfully submits the following public comments on the draft, dated February 22, 2002, of a Model Policy on Public Access to Court Records ("Model Policy") that is posted on the Internet at http://www.courtaccess.org/modelpolicy. We believe the issues being addressed by the Model Policy are extremely important to the nation and truly appreciate both the work done to date and the opportunity to provide input.

TLPJ believes that recent strides in technology do not substantially alter the fundamental principles favoring public access to court records. TLPJ therefore supports the general approach taken in the draft Model Policy insofar as it recognizes that case files, regardless of whether they are in paper or electronic form, should be presumptively open to the public. However, for the reasons stated below, we urge the Conference of Chief Justices ("CCJ") and Conference of State Court Administrators ("COSCA") to make the Model Policy consistent with existing law by (1) requiring more than just a showing of "good cause" to overcome the presumption of public access to documents filed with a court in a civil proceeding; (2) making clear that a party seeking to prevent public access always bears the burden of proof, regardless of the procedural posture of the proceeding; and (3) substantially narrowing and/or deleting the categories of information that the Model Policy would automatically exempt from public access.

Interest of TLPJ

TLPJ is a national public interest law firm dedicated to using trial lawyers' skills and approaches to advance the public good. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, and protection of the poor and the powerless.

TLPJ is also dedicated to ensuring the proper working of the civil justice system and open access to our courts. For over a decade, we have had a special project – "Project ACCESS" – that opposes unnecessary court secrecy as a threat to public health and safety, the fair and efficient administration of justice, and our democratic system of government. As part of Project ACCESS, TLPJ has intervened in a wide variety of cases to fight for the public's right to know. For example, on behalf of a consumer advocacy group, TLPJ filed a motion to intervene and vacate or modify a protective order in Frankl v. Goodyear Tire & Rubber Co., a New Jersey state court case involving a pattern of tire tread separation. The protective order permitted Goodyear to unilaterally designate discovery documents as confidential, thereby barring public access to critical documents that contain information about the dangers of Goodyear's light truck tires, which have been linked to over 85 crashes leading to 18 deaths and 158 injuries. The court granted TLPJ's motion to intervene and held that Goodyear must prove that there is sufficient justification for keeping the documents sealed.

TLPJ does not handle criminal matters. Therefore, our comments address only the policy of public access as it pertains to civil case files.

Comment on Proposed Model Policy Governing Public Access to Court Records

The public has a well-established right to inspect and copy court records.[1] In fact, both the common law and the First Amendment of the United States Constitution give rise to a strong presumption in favor of public access to court records.[2] Open court records, like open court proceedings, serve to enhance the basic fairness of the proceedings and safeguard the integrity of the fact-finding process.[3] Indeed, not only

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[1] Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

[2] See, e.g., Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 659 (3d Cir. 1991) (stating that, in addition to the common law, the First Amendment protects the public's right of access to records of civil proceedings); In re Continental Illinois Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) (recognizing that the presumption in favor of public access to judicial records was of "constitutional magnitude").

[3] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

does the public's ability to monitor the functioning of our courts "diminish[ ] the possibilities for injustice, incompetence, perjury, and fraud," but it also improves the public's understanding of and confidence in the judicial system.[4] Even more fundamentally, the public's right of access to judicial records helps to reinforce democratic ideals, ensuring that the constitutionally-protected free discussion of governmental affairs is an informed one.[5]

Unnecessary secrecy in the court system, on the other hand, undermines our system of justice by hiding the truth, and subverts the democratic principles on which this country is based. Unnecessary court secrecy also takes a serious toll on public health and safety. Overly broad confidentiality orders hide from public view critical information regarding hazardous products or unscrupulous individuals and companies, preventing the public from being able to protect itself from otherwise avoidable risks.[6] Bridgestone and Firestone, for example, utilized court-sanctioned confidentiality orders in cases filed across the country to hide information about hundreds of injuries and deaths linked with a persistent tread separation problem with its tires. As a result, for nearly a decade, the public and government agencies were unaware of the extent of the problem, and unsuspecting consumers continued to buy, and rely on, the potentially deadly tires.[7] In addition, secrecy orders "give cover" to attorneys and their clients who try to engage in "stonewalling," or the withholding of relevant documents and information during discovery. In other words, the more secure a party is that the information at issue will not be revealed from other sources, the more emboldened the party will be in denying the existence of that information.[8]

TLPJ believes that the presumption of openness in our courts should continue to govern as the judiciary modernizes its case management systems and stores more and more of its case files in electronic form. Indeed, greater ease of access to court records due to technological innovations will bring case files to a wider audience and thereby promote the policy goals that justify our long tradition of open government and open courthouses. Accordingly, TLPJ takes the position that, in general, if records are

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[4] Westinghouse, 949 F.2d at 660 (citation and internal quotations omitted); see also Bank of America Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 345 (3d. Cir. 1986) (public access serves to promote public perception of fairness in the courts and as a check on the integrity of the judicial process).

[5] Publicker Indus., Inc. v. Cohen., 733 F.2d 1059, 1070 (3d Cir. 1984) (citing Globe Newspaper, 457 U.S. at 606).

[6] See Lloyd Doggett & Michael J. Mucchetti, Public Access to Public Courts: Discouraging Secrecy in the Public Interest, 69 TEX. L. REV. 643, 648-49 (1991).

[7] See Thomas A. Fogarty, Can Courts' Cloak of Secrecy Be Deadly?, USA TODAY, October 16, 2000, at 1B.

[8] See Doggett & Mucchetti, supra note 6, at 650.

available to the public in paper form, then they should be treated no differently when they are stored in electronic form. We believe that privacy concerns, even in this age of technology, generally can and should be addressed on a case-by-case basis, taking into consideration particularized showings of how public access will harm privacy interests. Sections 4.10 and 4.00 of the Model Policy contemplate that court records should generally be accessible to the public and that this access policy would not vary depending on the physical form of the court record. TLPJ supports this general approach to public access.

However, TLPJ has three primary objections to the Model Policy's approach with regard to how public access to court records may be limited. First, the Model Policy borrows the "good cause" standard used to justify secrecy in pretrial discovery and then improperly applies it to determine whether papers filed with a court – to which a strong presumption of access has attached – should be kept secret. Second, the Model Policy undermines the strong presumption of access by placing the burden of proof on the party seeking access where the status quo is secrecy. Third, the categories of information that are presumptively excluded from public access under the Model Rules are far too broad.

I. The Model Policy Contradicts Well-Established Law by Allowing Public Access to Be Barred on a Mere Showing of "Good Cause."

Given the strong presumption that court records should be accessible to the public, any restriction on public access requires special justification. Federal courts have repeatedly concluded that, once papers have been filed with a court, a party seeking to restrict access must satisfy a far more stringent test than the "good cause" standard applicable to pretrial discovery.[9] For example, the U.S. Court of Appeals for the Ninth Circuit has held that the strong presumption in favor of access that attaches to pretrial documents filed in civil cases may only be overcome by "sufficiently important," "compelling," countervailing interests in secrecy grounded in specific, articulable facts.[10] State courts and legislatures have generally adopted a similar – and, in some cases, even more stringent – approach.[11]

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[9] See e.g., Federal Trade Commission v. Standard Financial Management Corp., 830 F.2d 404, 410 (1st Cir. 1987) (finding that "only the most compelling reasons can justify non-disclosure of judicial records") (citation and internal quotations omitted).

[10] San Jose Mercury News, Inc. v. U.S. District Court, 187 F.3d 1096, 1102 (9th Cir. 1999); Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995).

[11] E.g., Cal. Rules of Court, Rule 243.1(d) (permitting the sealing of a court record only if (1) an overriding interest overcomes the right of public access to the record; (2) the overriding interest supports sealing the record; (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest); In re the Marriage of Johnson, 598 N.E.2d 406, 410 (Ill. App. 1992) (in

Section 4.60(a) of the Model Policy entirely ignores this precedent and instead permits a court to restrict public access to information in a court record based only "upon good cause shown." This lower "good cause" standard is typically used to determine whether a protective order should issue to restrict public access to discovery documents.[12] "Good cause" is an inappropriate standard, however, to determine whether pleadings, evidence, exhibits, briefs, orders, and settlement agreements filed in court records should be sealed from public view. As one court found, such documents are "public component[s] of a civil trial" and "are matters which the public has a right to know about and evaluate."[13] The Model Policy's use of a "good cause" standard for the sealing of court records plainly violates established law and dramatically weakens the presumption in favor of public access. TLPJ therefore urges the CCJ and COSCA to adopt a heightened standard of proof for restricting public access to pretrial documents and settlements filed with the court in civil proceedings. We express no opinion as to the proper standard for restricting access to other types of documents also defined as "court records" under Section 3.10 of the Model Policy, such as court administration records.

II. The Model Policy Contradicts Well-Established Law by Failing to Always Place the Burden of Proof on the Proponent of Secrecy.

In addition to employing the wrong standard of proof (see section I above), the Model Policy also improperly reverses the burden of proof in those cases in which public access is being sought. Under existing law, the proponent of seeking secrecy always bears the burden of proving that his or her interest in secrecy outweighs the public's interest in access, even if a secrecy order has already been entered and is the subject of a challenge.[14] Section 4.60 of the Model Policy, however, seems to place the burden of proving the need for public access on the opponent of secrecy when he or she is the moving party seeking public access. Section 4.60(b) states:

> A request to obtain access to information in a court record that is restricted or limited by this policy may be made by any member of the public. Based upon good cause shown, the

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order to overcome presumption in favor of access, party must demonstrate that a compelling governmental interest exists and that restrictions on access are narrowly tailored).

[12] See, e.g., Fed. R. Civ. P. 26(c); Cal. Code of Civil Procedure § 2031(f).

[13] Bank of America, 800 F.2d at 343-34.

[14] Id. at 341, 344 (after third parties to the litigation moved to unseal court records, party seeking maintain documents under seal still bore the burden to overcome the presumption of access); Westinghouse, 949 F.2d at 657, 662 (same).

> court may order public access if it finds that the public interest in [access] outweighs [interests in secrecy].

Although this language is vague as to who must show "good cause" where secrecy is the status quo, the provision seems to place the burden of proof on the party seeking access to restricted information, which is contrary to existing law and the presumption in favor of public access. To place the burden on the proponent of access rather than the proponent of secrecy would effectively turn the common law and First Amendment presumption of access on its head.[15] Accordingly, TLPJ urges the CCJ and COSCA to re-draft Section 4.60 to make clear that the burden of proof always remains with party seeking to overcome the presumption in favor of access to court records.

III. The Model Policy Contradicts Well-Established Law by Creating Extremely Broad Categories of Information That Would Be Automatically Exempt from Public Access.

The third basic problem with the Model Policy is that it contradicts established law by creating extremely broad categories of information that would automatically be exempt from public access in the absence of a specific challenge. This categorical approach is fundamentally flawed because it makes the information presumptively confidential in all contexts, even contexts in which public access would plainly be required. Moreover, while such an approach might be defensible if the categories of automatically-secret information were extremely narrow, the Model Policy makes these categories extraordinarily broad.

The categories of information automatically exempt from public access are listed in Section 4.30 of the Model Policy. These 10 categories of information would not be accessible to the public unless a member of the public specifically requested access to the information and prevailed in a motion to obtain access under Section 4.60. Public access to this information would, therefore, presumptively and automatically be denied, even in circumstances in which there was no legitimate basis for secrecy and/or the public's interest in access plainly outweighed any interest in secrecy. This problem would exist even for categories of information that might, at first blush, seem entirely appropriate to keep secret.

For example, some of the ingredients in pesticides constitute trade secrets; consumers cannot generally find out what they are. In a lawsuit involving one company stealing another company's pesticide formula, the allegedly-stolen list of ingredients for that pesticide ought to be kept secret. The calculus changes in favor of public access, however, in a lawsuit exposing that the pesticide contains arsenic and other chemicals

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[15] See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 101 F.R.D. 34, 44 (C.D. Cal. 1984) (reversing the burden would "impose a significant and perhaps overpowering impairment on the public access right").

deadly to humans when the pesticide company advertised the product as safe for human exposure. The current law deals with this problem by applying the presumption of public access to all information contained in most civil pleadings and court files – and allowing secrecy to be ordered only when the need for it has been proven. Because the Model Policy avoids this approach and automatically excludes all information in certain categories from the presumption of public access, the Model Policy improperly errs in favor of secrecy.

This categorical approach might be justifiable if the categories involved were very narrowly drawn. Most of the categories in Section 4.30, however, are extremely broad. Some of their defects are discussed briefly below:

A. **Subsection (d) & (j)** – Subsection (d) provides that "proprietary business information such as trade secrets, customer lists, financial information, or business tax returns" would automatically be removed from the public record. Similarly, subsection (j) provides that information that would "infringe on the government's proprietary interests" would also be removed. The term "proprietary business information," however, is exceptionally broad and could be used to keep secret all sorts of information that is routinely made public in the courts today. It could easily be interpreted to include virtually all non-public information revealed in discovery by a corporate (or governmental) litigant. For example, the civil lawsuits against Enron and Arthur Andersen might be entirely sealed on this basis. Subsections (d) and (j) should be deleted in their entirety. The courts should continue to make case-by-case determinations as to whether the need for secrecy has been justified to ensure that claims of confidentiality for this type of information do not improperly impair the public's right to know.

B. **Subsection (f)** – This subsection provides that information "relating to" proceedings to which the public does not have access would be excluded from the public court file. The phrase "relating to," however, is overly broad. For example, the language of Section 4.30(f) would automatically exclude from public court records the mere mention of the fact that a grand jury proceeding took place. This language should be substantially narrowed.

C. **Subsection (g), (h), & (i)** – Subsections (g) and (h) would exclude from public access the "work products" of judges, judges' staff, or court administrators. The commentary following the proposed rule states that the subsections are intended to exclude from public view only documents generated in the course of the decisional or deliberative process, and not final decisions, policies, or reports adopted by a court. However, the

language of the rule itself is not so clear. Even a final order of a judge is arguably "work product" of the judge. Subsection (i) uses the term "work product" in a similarly imprecise way. Therefore, the language of subsections (g), (h), and (i) should be clarified.

D. **Subsection (i)** – Among other things, subsection (i) would allow "information about pending litigation where the court is a party" to be automatically excluded from the public record. The quoted language would automatically exclude from public scrutiny all court filings in a case filed by or against the court. This, of course, would be absolutely contrary to the principle of open courthouses, and likely does not reflect the intention of the drafters. This language should be clarified.

Finally, Section 4.30 should require that the categories of information identified as presumptively secret should be removed from the public record by way of redaction only, and not by removing the entire document in which the information appears.

Conclusion

Presumptively open case files brings accountability to both the bench and the bar, helps demystify the court system, and promotes the free flow of information that is so cherished by our democratic society. As a matter of policy, therefore, secrecy in our courts should be the exception rather than the rule. As set forth above, TLPJ respectfully urges the CCJ and COSCA to revise the Model Rules so as to preserve and safeguard the presumption of public access to court files. Please direct any questions regarding these comments to TLPJ Staff Attorney Victoria W. Ni, who can be reached at (510) 622-8150, (510) 622-8155 (fax), or at vni@tlpj.org, and/or to TLPJ Executive Director Arthur H. Bryant, who can be reached at the same telephone and fax number, or at abryant@tlpj.org.

Thank you very much.

Respectfully submitted,

/s/

Arthur H. Bryant
Executive Director

/s/

Victoria W. Ni
Staff Attorney