

**Meeting Minutes of the 13th
Judicial Information Systems Council (“JIFFY”)
Public Access Subcommittee (“PAS”)
Judicial Information Division (“JID”)
Tuesday, May 19, 2009
1:11-3:38 p.m.**

Voting Members present:

Judge Karen Mitchell, Chair
Judge Mark Basham
Judge Steve Lee
Robert Mead
Arthur Pepin
Dana Cox
Steve Prisoc
Paula Chacon
Kathy Gallegos

Visitors present:

Banyat Adipat (*NM Sentencing Commission*)
Kip Purcell
Tony Ortiz (*NM Sentencing Commission*)

Voting Members absent:

Judge Stephen Bell
Dennis Jontz

Minutes taken by: LaurieAnn Trujillo

I. Approval of Agenda. Judge Karen Mitchell called the meeting to order at 1:11 p.m. and established a quorum. She welcomed everyone to today’s meeting.

Robert Mead moved to approve today’s agenda. Judge Mark Basham seconded. No further discussion. No opposition noted. Motion carried.

II. Update on Subcommittee Activities since April. Judge Mitchell reported that there were no significant updates to report at this time.

III. Review of draft sealing rule from the Joint Sealing Rules Committee. Judge Mitchell referred to the draft sealing rule that she emailed to the PAS members. She spoke of the following points:

- The Joint Sealing Rules Committee (“JSRC”) did not meet last month.
- JSRC will meet on Thursday.
- JSRC would like the PAS’ input on the draft sealing rule.
- The draft rule is specifically for civil district court cases.
- JSRC anticipates developing a separate sealing rule for other court types.
- JSRC would like PAS’ input on an information sheet that would contain personal identifiers and it would not be a public document.

There was discussion on the following points:

- Section C(2) on page 2, add language “accepting the final order.”
- Section C(4) on page 2, should be removed as it relates to criminal proceedings.
- Section D(1) on page 2, redundant to note both social security number and taxpayer identification number.
- Section G(1) on page 4, the term “expressly” is too broad.
- Criminal case types.
- Children’s Code revisions were made this year. Tony Ortiz suggested that the PAS review those changes.
- Concerns with clerks maintaining separate cover sheets in addition to their other work duties, especially for the larger courts.
- Storage concerns.
- Federal Rule 5.1 does not include the last four digits of the driver’s license number (Section D(3) on page 2).
- Odyssey case management system.
- Notice to parties.
- Lodging court records.
- Section H(1) on page 5, create a document that a person can file with the court to request notice.
- The current process to unseal.
- Address the electronic filing issues.
- Section H(1) on page 5, adding language that provides segregated status that identifies the limited nature of the involvement in a case.
- Section H(1), line 20, on page 5, remove language “parties who were”.
- If there is a person who is not a party to a case and who is nevertheless interested in a sealing order, does that person receive notice when there is a motion to unseal.

Judge Mitchell and Mr. Mead will take the PAS’ concerns and suggestions to the JSRC on Thursday.

III. Public Access Subcommittee’s Document in Progress

Judge Mitchell referred to the draft PAS document that was distributed. She clarified the following from last month’s meeting: PAS, JIFFY and the Supreme Court do not pick the schedule for when cases are destroyed. Cases are destroyed according to the retention/destruction schedule. PAS is working to keep the actual record in the court in synch with the database that is available on the internet. PAS is not recommending that case files be destroyed.

There was discussion on the following points:

- Maintaining a skeleton record of those cases that are destroyed, per the retention/destruction schedule.
- Single repository.
- American Bar Association (“ABA”) recommendations.

- PAS' recommendation on page 18.

Mr. Mead read the following section from the draft PAS document, as follows:

IV. The U.S. Supreme Court's Reporters Committee Decision of 1989 and its Influence on Public Records and Privacy.

*In 1989, the United States Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989) examined whether a rap sheet compiled by the Federal Bureau of Investigations ("FBI") constituted a record subject to production under the Freedom of Information Act ("FOIA"). This landmark case first introduced the concept of "practical obscurity," which recognizes that records that have been made available in one form, such as a paper file, might have different privacy implications when compiled and then made available in another form. In the Reporters Committee case, the issue before the Supreme Court was "whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information." *Id.* at 1477. The Court opined that there was a "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." *Id.**

*The Court recognized that although much of the information in a rap sheet is a matter of public record, the rap sheet itself was not a document that was freely available, and therefore held that it was exempt from production under the law enforcement exemption to FOIA. *Id.* at 1484. The Court engaged in a balancing of the public interest in disclosure against the interest Congress intended to protect under that exemption. *Id.* at 1484. The Court held, as a categorical matter, that disclosure of the contents of an FBI rap sheet could reasonably be expected to constitute an unwarranted invasion of personal privacy within the meaning of the law enforcement exemption to FOIA and was therefore prohibited from production. *Id.* at 1485.*

Although the Reporters Committee decision was issued before the Internet became a medium for compiling and making information easily available electronically, the dicta clarifies the essential difference between paper records available at a courthouse and records that have been compiled and indexed. While this decision as an interpretation of the application of an exception to FOIA is not binding precedence on the task before the PAS of making recommendations on internet access to Court case files, its analysis is informative. The Court's dicta in Reporters Committee suggests that the practical obscurity of information accessible to the public only in paper records is categorically different than information available on the Internet, which can be anonymously searched, downloaded, repackaged, and redistributed in a fashion that violates individual privacy.

In evaluating the prudence in making court case file records available online, PAS engaged in a similar balancing under the "rule of reason" (discussed below) of the public policy in protecting the privacy interests of individuals versus the public's interest in disclosure and easy access to such records. PAS further engaged in a balancing on the issue of who should bear the burden of protecting those portions of a court case file that contain confidential, identifying and/or privacy

protected information. It was this balancing that formed the basis of PAS's recommendation that the litigants in both civil and criminal cases bear the responsibility for the redaction or sealing of such information, with the Court providing a second tier as possible.

There was discussion on the following:

- The purpose of section IV is to explain that PAS reviewed the *Reporters Committee* case as well as the issues of practical obscurity and the rule of reason.
- Third paragraph, sixth sentence: "...of making recommendations on internet access to Court case files..." change the word "it" to "its".
- Add language to the last paragraph relative to the Inspection of Public Records Act ("IPRA") rule of reason.
- References to the IPRA were taken from Arthur Pepin's memo.
- New Mexico Attorney General's Office will discuss with the PAS the changes to the IPRA.
- Some sections may need to be reordered.

Mr. Mead read the next section of the draft PAS document, as follows:

V. The Changing Trends in National Criminal Online Information.

With respect to national criminal online information, recently, there have been trends toward:

- A. Redacting, obscuring, or deleting information such as social security numbers, personal descriptors, driver's license numbers, dates of birth, and other "sensitive" information;*
- B. Not displaying non-conviction, arrest information on public websites;*
- C. Limiting access to, or even permanently expunging non-violent crimes from public websites when a defendant has avoided recidivism within a specific period of time;*
- D. Negative publicity of resellers of criminal history information;*
- E. Legislation that seeks to limit, obscure, or expunge criminal information in New Mexico and elsewhere; and,*
- F. Recommendations by state committees and commissions to limit the availability of records and/or redact sensitive identifiers.*

There was discussion on the following points:

- Bold letter "F".
- Incorporating footnotes with reference material.
- Reference the states that support points made.
- Adding a bullet point "G" that acknowledges there is more discussion relative to barriers of reentry into society following arrests/convictions.
- Ensure that deep controversies are reflected in the PAS document.
- Public policy decisions are ultimately made by the legislature, so PAS should follow what the legislature has done.

Mr. Mead read the next section of the draft PAS document, as follows:

VI. New Mexico Statutes and Rules Concerning Access to or Limits on Access to Court Records.

A. Inspection of Public Records Act.

The New Mexico Inspection of Public Records Act (“IPRA”) provides a mechanism by which individuals can have access to public records. A “public record” has been defined under IPRA to include any document, tape or other material, regardless of form, that is used, created, received, maintained, or held by or on behalf of a public body, and is related to public business. IPRA identifies twelve exceptions to the right to inspect public records, of which the last is “as otherwise provided by law.” There are many statutory provisions that eliminate or restrict the IPRA right to inspect public records. Although each of these statutory provisions merits consideration regarding public access to court records, PAS gave particular attention to the following provisions:

- 1. Prohibition on the use of state agency databases for commercial, political or solicitation purposes (NMSA 1978, § 14-3-15.1);*
- 2. Prohibition on the disclosure of social records concerning prisoners and persons on probation or parole (NMSA 1978, § 31-21-6);*
- 3. Prohibition on the disclosure of social records pertaining to a child (NMSA 1978, § 32A-2-32);*
- 4. Confidentiality and non-disclosure to the public of records in the possession of a court and concerning a family in need of court-ordered services (NMSA 1978, § 32A-3B-22); and,*
- 5. Confidentiality of the records of any alcoholic or drug-impaired person who voluntarily submits himself for treatment (NMSA 1978, § 43-2-11).*

PAS further recognized the limits on public access to lawyer and attorney disciplinary records, the impact of the Rules of Evidence on public access, and the IPRA rights may be limited by constitutional rights of crime victims to “fairness and respect for the victim’s dignity and privacy throughout the criminal justice process.” N.M. Const. Art. II, Section 24.

In addition to the statutory and constitutional limits on IPRA, PAS also recognized the importance of the common law exception to the public’s right to inspect public records as recognized by the New Mexico courts. Called the “rule of reason,” this exception prevents access to public records when there is a countervailing public policy against disclosure, where the harm to the public interest from allowing inspection outweighs the public’s right to know. The New Mexico Supreme Court has applied this exception to recognize “Executive Privilege” and has stated that other applications of the rule of reason exception must be made on case-by-case basis.

One possible application of this exception involves the practice of sealing court records. A few courts have local rules to govern the practice of sealing court records, but there is no statewide rule, so the practice varies among the courts. For those reasons, PAS recommendations,

regarding public access to court electronic records, include a recommendation on how electronic records should identify sealed cases.

However, nothing that PAS has proposed in this report is intended to alter IPRA. To the extent that a court record is not a public record or is otherwise excluded from publication or disclosure, it would not be made available to the public electronically. Furthermore, any additional limitations, which PAS recommends on the availability of documents and information online, will in no way restrict the ability of a person to request a copy of the original public record under IPRA.

B. Certain Juvenile Records Prohibited from Disclosure

1. Proceedings Regarding a Child Not To Be Disclosed On a Public Access Website. On July 1, 2007, a new law went into effect whereby information concerning the arrest or detention of a child, delinquency proceedings for a child, an adjudication of a child, an adult sentence imposed on a child (except information required to be disclosure pursuant to the Sex Offender Registration and Notification Act), or social records pertaining to a child as provided in NMSA 1978, § 32A-2-32 would not be disclosed on a public access website maintained by any state agency or political subdivision, including a school district.

2. Juvenile Delinquency Proceedings. Children's Court Rule 10-233 NMRA requires that all files and records be sealed in delinquency proceedings when there has been no adjudication of delinquency. Regardless, any person who has been the subject of a delinquency petition or the Court on its own motion may order that such legal and social files and records of the court be sealed in accordance with NMSA 1978, § 32A-2-26.

3. Children's Mental Health Children's Mental Health and Developmental Disabilities Act. The Act provides that no person, without the authorization of the child or other exceptions as provided in the Act, is allowed to "disclose or transmit any confidential information from which a person well-acquainted with the child might recognize the child." NMSA 1978, § 32A-6A-24(A). Information under section 32A-6A-24 cannot place "in files or computerized data banks accessible to any persons not otherwise authorized to obtain information under this section."

4. Child Support Enforcement Proceedings; Specific Identifying Information of a Party or Child. If the health, safety or liberty of a party or child to a child support enforcement proceeding would be jeopardized by the disclosure of specific identifying information, then that information shall be sealed as set forth in NMSA 1978, § 40-6A-312.

5. Child Support Obligation Guideline Worksheet. A child support obligation guideline worksheet may be attached to the child support order unless the court decrees that the worksheet be sealed or unless the obligor and obligee agree that it should be sealed as set forth in NMSA 1978, § 40-4-11.6.

6. Child Custody Proceedings. If a party to a child custody proceeding alleges under oath in an affidavit or a pleading that the health, safety or liberty of a party or

child would be jeopardized by the disclosure of identifying information, that information must be sealed and not disclosed as set forth in NMSA 1978, § 40-10A-209.

C. Victims of Domestic Violence.

Since July 1, 2007, a victim of domestic violence, who has good reason to believe that his or her safety is at risk, could apply to the secretary of state for the use of the secretary of state's office as a substitute address. Upon receiving such application, the secretary of state, "shall maintain a confidential record of applications for a substitute address and forward any mail received on behalf of victim of domestic abuse to the new mailing address provided on the application. Id.

More recently on July 1, 2008, a law went into effect that prohibited any state agency, court or municipality from making available any information on the internet that would reveal the "identity or location of...[a] party protected under an order of protection."

However, nothing in that law prohibited a state agency, court or political subdivision from sharing court-generated and law enforcement-generated information provided that it was contained in secure, government registries and was used for protection order enforcement purposes. Id.

D. Grand Jury Proceedings.

Criminal Rule 5-506 NMRA provides for the sealing of grand jury indictments until arrest. However, grand jury indictments are to be public when they are filed with the court as set forth Rule 5-506 NMRA. Through, upon request, the court may order an indictment sealed. Id. No-bills resulting from grand jury indictments are required to be sealed and filed with the district court clerk and only may be released by the court for good cause shown or upon the request of the target as set forth in NMSA 1978, § 31-6-5.

E. Protective Orders during Discovery.

The Civil and Criminal Rules of Procedure for the District Courts, as well as the Children's Court Rules, provide in Rule 1-026© NMRA, Rule 5-507(A) NMRA, and Rule 10-138(A) NMRA, respectively, that in response to a motion for protective order, among other options, a judge may order that a deposition be sealed, that specified documents or information be enclosed in sealed envelopes to be opened only as directed by the court, or that a trade secret or other confidential research, development of commercial information not be revealed or that it be revealed only in a designated way.

F. Disciplinary Proceedings of Attorneys and Judges.

Investigations or hearings conducted by disciplinary counsel are confidential and later only become public upon filing of certain pleadings per Rule 17-304 NMRA. However, the Disciplinary Board may place under seal certain matters, such as the physical or mental condition or treatment of the respondent, substance abuse by the respondent, or

matters pertaining to private discipline or dismissal. Id. Also, if an attorney enters into an agreement with the Disciplinary Board, that agreement may be sealed per Rule 17-211 NMRA.

As set forth in Article IV, Section 32 of the New Mexico Constitution, all papers filed with the Judicial Standards Commission or its masters, and proceedings before the commission or its masters, are confidential. In addition, the filing of papers and giving of testimony before the Judicial Standards commission or its masters is privileged.

G. Miscellaneous Proceedings/Matters That May Be Sealed.

1. AIDS Test on Offender. A victim of criminal sexual contact can petition the Court to have the offender tested for the human immunodeficiency virus or its antigen or antibody. The petition and all proceedings in connection therewith are required by NMSA 1978, §24-2B-5.1(B) to be under seal.

2. Reporting fo Contagious Diseases Cases. NMSA 1978, § 24-1-15 provides for sealing court proceedings when a person has contracted a contagious disease that poses a substantial threat to the public health and the petitioner seeks an order of the court to isolate the infected person.

3. Recordings of Wire Tapping. When someone has made a wire tap application to the court, the recordings from the wire tapping are required by NMSA 1978, § 30-12-7 to be made available to the judge and sealed under the judge's direction. The application and order regarding the sealing are also required to be sealed by the judge.

4. Name Changing Proceedings. If the court finds that publication of an applicant's name change will jeopardize the applicant's personal safety, the court shall not require publication and shall order that the records regarding the application be sealed as set forth in NMSA 1978, § 40-8-2.

H. Local Court Rules on Sealing.

Only the First, Second and Eighth Judicial District Courts in New Mexico provide for the general sealing of court files in their local rules. Under these rules, the litigants upon filing a motion or application can request that the court seal all or a portion of a court case file. In addition to the general provisions governing sealing files, in the First Judicial District Court search warrants and any accompanying affidavits are sealed per LR1-605. The Second Judicial District Court requires that exhibits sealed by the court may not be photocopied without court order per LR2-121 The Second also requires that court clinic records be sealed per LR2-Form T. The Third Judicial District Court provides that grand jury indictments may be sealed and that the identity of grand jurors shall remain secret unless otherwise ordered per LR3-401. The Fifth Judicial District Court does not allow sealed files to be copied per LR5-803.

There was discussion on the following:

- Section A, 4 on page 10: “*Confidentiality and non-disclosure to the public of records...*” remove the word “of”.
- Second paragraph on page 11: “*One possible application...For those reasons, PAS recommendations...*” change PAS to plural tense.
- Third paragraph on page 11, “*However, nothing that PAS...*” remove the word “however.”
- Section B, 2 on page 11: check to ensure that any modifications to the Children’s Code Rule 10-233 NMRA are included in this paragraph.
- Section B, 3 on page 12: “*Children’s Mental Health Children’s Mental Health...*” remove “Children’s Mental Health.”
- Section B, 5 on page 12: “*Child Support Obligation Guideline Worksheet...*” correct spelling of word “oblige”.
- Section C, first paragraph on page 12: Capitalize Secretary of State throughout this paragraph.
- Section F, second paragraph, last sentence on page 13: capitalize the word “commission”.
- Section G, 4 on page 14: change the term “Changing” in the heading to the term “Change”.
- Section H, fourth sentence, page 14: end sentence with a period.
- Section H, page 14: add language that the JSRC is working on a sealing rule. Include the JIFFY directive that arrest warrants that have not been served do not appear on the Judiciary’s public web site.
- Switch Section IV and Section V, and eliminate the last paragraph in Section IV.
- Name change cases.
- Including a disclaimer regarding electronic filing.

Action Item: Judge Mitchell will ask the JSRC when a name change case is sealed, would the case caption still exist. If it does still exist, could a judge order it not to be on the Judiciary’s public website?

Action Item: Judge Mitchell offered to provide Dana Cox with the JIFFY directive that arrest warrants that have not been served do not appear on the Judiciary’s public web site.

Action Item: Mr. Prisoc offered to draft the counter-argument position relative to: “In both civil and criminal cases, the responsibility for the content of pleadings and for ensuring that any confidential, identifying or other such sensitive or private information is protected should lie with the litigants who come before the court, with the courts serving as a secondary tier to remove or redact sensitive information, particularly if such records are to be made electronically available to the public via the Internet.”

Action Item: Mr. Prisoc offered to draft the in favor position relative to: “The Supreme Court should adopt the ABA’s policy that records of closed criminal cases be removed from the court Internet record where the charges were dismissed, nolle’d, acquitted, or vacated, but with the exception that records of dismissals subsequent to a deferred sentence not be removed from court Internet records.”

Action Item: Mr. Mead offered to draft the in favor position relative to: “PAS recommends that all misdemeanor cases be removed from court Internet records to which the public has access on the third anniversary after the final adjudication date, excluding those cases with outstanding warrants and/or fines or fees due and excluding domestic violence cases, DWI cases, and crimes explicitly mentioned in the Adam Walsh Protection and Safety Act of 2006.”

Action Item: Mr. Prisoc offered to conduct research on the risks of the identity theft problem.

V. Future Meetings. The next meeting will be held at the Judicial Information Division on Tuesday, June 16, 2009 at 1:00 p.m.

VI. Adjourn. Judge Mitchell adjourned today’s meeting at 3:38 p.m.

Final Minutes Approved by Judge Mitchell on June 10, 2009.