

**Meeting Minutes of the 15th
Judicial Information Systems Council (“JIFFY”)
Public Access Subcommittee (“PAS”)
Judicial Information Division (“JID”)
Tuesday, August 18, 2009
1:19-3:55 p.m.**

Voting Members present:

Judge Karen Mitchell, Chair
Judge Steve Lee
Judge Mark Basham
Robert Mead
Dennis Jontz
Dana Cox
Arthur Pepin
Steve Prisoc
Paula Chacon (*via telephone*)

Voting Members absent:

Judge Stephen Bell
Kathy Gallegos

Minutes taken by: LaurieAnn Trujillo

I. Approval of Agenda. Judge Karen Mitchell called the meeting to order at 1:19 p.m. and established a quorum. She thanked everyone for attending today. She especially thanked Robert Mead and Dana Cox for their work on the draft PAS document.

Judge Mark Basham moved approval of today’s meeting agenda. Judge Steve Lee seconded. No further discussion. No opposition noted. Motion carried.

II. Update on Subcommittee Activities Since June. Judge Mitchell reported the following:

- The Joint Sealing Rules Committee (“JSRC”) met twice since the PAS last met in June. They are addressing the general sealing rule, and it is progressing well.
- On Friday, she and Judge Lee attended the Limited Court Jurisdiction Rules Committee (“LCJRC”) where they expressed concerns and recommendations relative to personal identifiers listed in traffic citations.
- Joey Moya attended the Criminal Rules Committee (“CRC”) meeting. There was discussion about the cover sheet. From a criminal standpoint, the LCJRC and the CRC are suggesting to the JRSC that the Judiciary do away with the cover sheet for criminal cases because the courts and other government agencies rely on personal identifiers. However, the cover sheet could prove helpful in civil cases. The JSRC meets again this Thursday to go over the suggestions received from the various rules committees.

There was discussion on the following points:

- Personal identifiers listed on traffic citations.
- Sealing rules
- Inside and outside Judiciary web sites.
- Bench warrants and the need for personal identifiers.
- Private criminal history consolidators.
- State of New Mexico selling Motor Vehicle Department (“MVD”) data for commercial purposes.
- The Judiciary is against selling data because it eliminates the concept of expungement.
- State Bar of New Mexico’s position on open access.
- Dennis Jontz shared an example of his involvement in a congressional subcommittee.
- PACER was mined by open access advocates. It is now only available to registered users.

III. Public Access Subcommittee’s Document in Progress

Mr. Mead read the following section:

VII. PAS’S RECOMMENDATIONS.

A. *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.*

1. *Argument in Favor of Protection of Confidential Personal Identifiers or other such Sensitive or Private Information by the Litigants and Secondarily by the Courts.*

With regard to the categories of personal and financial information, whether that information should be protected is clear. Identity theft is a crime that takes an incredible “financial and emotional toll” on its victims and places a “severe burden on the economy.”¹ The astounding increase in the frequency and prevalence of this crime is no doubt one of the factors that prompted the establishment on May 10, 2006 of the President’s Task Force on Identity Theft to facilitate a “coordinated approach among government agencies to combat this crime.”² [STEVE PRISOC/ROB MEAD TO BOLSTER ARGUMENT WITH MORE/SPECIFIC EXAMPLES OF IDENTITY THEFT; HOW EASY IT IS TO DE-CODE SS NUMBERS ETC. RM THIS STILL NEEDS TO BE BEEFED UP AS OF 8/13]

PAS has determined that if information in a court case file is sealed or redacted by the Judge or the parties to the case, then any electronic access to such information should likewise be sealed or redacted. It is not the intent of PAS to expand the scope of information available electronically beyond that which is publicly available in a court case file.

PAS considered and rejected a “do nothing” approach to the problem of protecting personal

¹ President’s Task Force on Identity Theft at <http://www.idtheft.gov/about.html>.

² Id.

identifiers. Because of the harm caused by identify theft, PAS believes that it would be irresponsible for the New Mexico courts to adopt measures designed to protect information within court records.

The following are the types of confidential, personal identifying information, which PAS recommends should be redacted from public disclosure in electronic court case files:

- a. Complete Social Security numbers – Social Security numbers should be shortened to the last four digits;
- b. Complete financial account numbers – financial account numbers should be shortened to the last four digits;
- c. Full dates of birth – birth dates should be shortened to include only the year of birth;
- d. Names of minor children – the names of minor children should be shortened to their initials; and
- e. In criminal cases, the home address of any victim or material witness should not be included.³

It is this information, which the litigants who come before the Court and their attorneys should take steps to protect.

The United States District Court for the District of New Mexico has issued a “Notice of Electronic Availability of Case File Information” (as amended to comply with the August 2, 2004 Amendment to the E-Government Act of 2002). This Notice admonishes litigants that documents filed with the court in civil and criminal cases are available to the public electronically over the Internet via PACER and that they should not include any sensitive information in any document filed with the court unless the information is necessary and relevant to the case. The Notice further requires litigants to redact the same personal identifiers set forth in paragraphs (a.) through (e.) above.⁴ As with the Federal Courts, whenever electronic filing is employed by the State Courts, PAS recommends that a similar notice and admonishment be used in the state courts.

PAS recommends that the primary responsibility for the content of pleadings should fall to the litigants and their counsel, as they are the ones creating the pleadings. To the extent that public resources permit, the Courts should serve as a second tier in this process by acquiring – subject to available funding – and utilizing redaction software to the extent that such information is to be made available electronically on a publicly accessible website.⁵ However, the responsibility for ensuring compliance with these recommendations should lie with attorneys or self-

³ The numbered list, a-d above, is from the New York State Commission Report.

⁴ D.N.M. LR-Cr. 57.5; Fed. R. Crim. P. 49.1(a).

⁵ The Foundation for Open Government has expressed opposition to the Court’s application of redaction software on pleadings, and instead favored placing the burden on litigants as to the content of pleadings.

represented litigants and only secondarily with courts due to the volume of such identifiers and the impossibility of redacting all instances.

2. Argument in Opposition to Protection of Confidential Personal Identifiers or other such Sensitive or Private Information Primarily by the Litigants and Secondarily by the Courts; and which Proposes that the Primary Responsibility Lies with the Courts.

While litigants and attorneys should take care not to include sensitive personal identifiers in court case filings and/or filed documents, the primary responsibility for ensuring that such identifiers are not published on public websites lies with the courts. As a public entity, the New Mexico Judiciary is the custodian of millions of the documents that potentially contain information that should not be disclosed on a public website. It is unlikely that the legislature or the public will tolerate the courts' abdication of responsibility for non-disclosure of sensitive information on judicial websites.

Many court databases and documents contain personal information that is not filed by members of the public and their attorneys. Court filings that include personal identifiers are accepted by the courts from state and local government agencies on traffic citations, non-traffic criminal filings, child support filings, custody filings, and much more. All of these documents will be stored in a case file, which may in the future, be scanned and digitized for possible inclusion on court websites for public consumption.

It is not in the Judiciary's best interest to mandate that public agencies not include personal identifiers in filings and data transfers, since the courts use those same identifiers to verify identities of defendants, produce statistical reports that count unique case parties, and issue legal documents, such as subpoenas, warrants, notices, and jury summonses.

Filers in federal court are at this time, solely responsible for redaction of personal identifiers in court documents they file because filed documents, except for certain protected case types, will be posted to PACER. Filers are instructed to avoid inclusion of identifiers such as social security numbers, account numbers, and other identifiers that could conceivably increase litigants' exposure to identity theft or other harm. Previous to the implementation of the rule, filers in federal courts were not responsible for personal identifier redaction, and neither were the courts. 6

A February 12, 2009, New York Times article revealed problems with PACER data that results, at least in part, from the U.S. Administrative Office of the Courts' assignment of responsibility to litigants to redact sensitive, personal identifiers from filed documents. The article described two unintended consequences of the Administrative Office's policies:

1. The PACER practice, now discontinued, of providing free access to court documents through law libraries resulted in downloads of "enormous chunks of the database" by open-

⁶ New Privacy Rules and Judicial Conference Privacy Policy, accessed June 15, 2009, at http://www.uscourts.gov/rules/Privacy_Memo.pdf

government activists, who then simply gave the documents away, “to the great annoyance of the government.”

2. Many of the documents downloaded through law library accounts contained sensitive, personal identifiers. “[T]housands of documents” were found “in which the lawyers and courts had not properly redacted personal information like Social Security numbers, a violation of the courts’ own rules. There was data on children in Washington, names of Secret Service agents, members of pension funds and more.”⁷

In an apparent reaction to disclosures in the New York Times and similar media disclosures regarding PACER, Senator Joseph Liebermann, Chair of the Senate’s Committee for Homeland Security and Governmental Affairs, wrote to the Federal Judicial Conference on February 27, 2009, to express his concern that “[N]ot enough has been done to protect personal information contained in publicly available court filings....” He noted that the investigation reported by the New York Times revealed “numerous examples of personal data not being redacted in these records.”⁸

As a result of the negative press, Senator Liebermann’s letter, and other similar complaints, the Federal Judicial Conference and its rules committees are now rethinking their approach to relying upon litigants to redact sensitive identifiers. In a reply to Senator Liebermann, the Federal Judicial Conference Chair of the Standing Committee on Rules of Practice and Procedure, the Honorable Lee H. Rosenthal, wrote that “the Judiciary is taking immediate steps to address the redaction problem.” He further noted that “some cases involve hundreds, or even thousands of pages of administrative or state-court paper records that cannot be electronically searched.”⁹ However, Judge Rosenthal is misinformed regarding the impossibility of electronically searching thousands of pages. Such electronic searching and redaction is now commercially available and highly effective.

Courts in many states have begun using electronic redaction software, which upon scanning a document, uses pattern matching algorithms to redact identifiers such as Social Security numbers. For example, redaction software might recognize the pattern of a Social Security number by looking for “###-##-####.” This type of search will find all Social Security numbers that have been typed correctly in the original document, but additional logic, which examines the

⁷ See, John Schwartz, *An Effort to Upgrade a Court Archive System to Free and Easy*, N. Y. TIMES (February 12, 2009), online at http://www.nytimes.com/2009/02/13/us/13records.html?_r=3

⁸ See Security Privacy and the Law, *Lieberman Pacer News Release*, at <http://www.securityprivacyandthelaw.com/uploads/file/LiebermanPacerNewsRelease.pdf>

⁹ See Security Privacy and the Law, *Judicial Conference Response to Lieberman* at [http://www.securityprivacyandthelaw.com/uploads/file/Judicial%20Conference%20Response%20to%20Lieberman\(1\).pdf](http://www.securityprivacyandthelaw.com/uploads/file/Judicial%20Conference%20Response%20to%20Lieberman(1).pdf)

number to ensure that it complies with the Social Security Administration's formula for constructing Social Security numbers, provides additional assurance that a flagged number is an authentic Social Security number that should be redacted.

To avoid controversial press and inconvenience similar to that which was experienced by the federal courts, the New Mexico Judiciary should carefully consider how it will deal with sensitive identifiers before putting documents and/or databases online, and it should not depend on litigants to remove sensitive information. The Judiciary should assume a primary role in assuring that sensitive identifiers are not published on court websites since the Judiciary will be most embarrassed and inconvenienced by a failure to properly remove sensitive information from court documents. In the event of a New Mexico controversy over inappropriate disclosure of personal identifiers by the Judiciary, it is difficult to imagine that citizens and legislators would easily accept the explanation that litigants and their attorneys bear primary responsibility for ensuring that sensitive identifiers do not appear on court websites.

Subcommittee member discussion. The following points were discussed:

- Change language of subheadings throughout document to: “Argument in Support (or Argument in Opposition) of Recommendation...”
- 3rd paragraph, last sentence, add “not” between words “to” and “adopt”.
- Mr. Mead will reword the language of item 2 (*Argument in Opposition to Projection of Confidential Personal Identifiers or other such Sensitive or Private Information Primarily by the Litigants and Secondarily by the Courts; and which Proposes that the Primary Responsibility Lies with the Courts.*)
- Incorporating Steve Prisoc's document entitled *Identity Theft Facilitated by Government Websites (DRAFT), Steve Prisoc, August 18, 2009* into the background information rather than including it in the argument.
- Removing terms “primary” and “secondarily” so it is clear that the responsibility of removing sensitive information lies with both the litigant and the court.
- Mr. Mead will rewrite the second position *Argument in Opposition to Protection of Confidential Personal Identifiers or other such Sensitive or Private Information Primarily by the Litigants and Secondarily by the Courts; and which Proposes that the Primary Responsibility Lies with the Courts*, so the language is clear that liability does not lie with the courts.
- Reporters Committee's position of no redaction of personal identifiers.
- Inserting reference to the Reporters Committee's position in the third sentence.
- Concern with the term “sensitive” being too broad a term.
- Redaction software and storage.
- PAS minutes serve to document the process.

Mr. Jontz moved to amend the PAS recommendation 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 litigants who come before the court, with the courts' policy to further remove or redact

personal identifiers as feasible, particularly if such records are to be made electronically available to the public via the Internet.” Mr. Mead seconded. No further discussion. No opposition noted. Motion carried.

Audience comments. There were no public attendees present at today’s meeting.

Mr. Mead continued reading section B, as follows:

B. The Supreme Court should adopt the 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.

I. Argument in Support of the Removal of the Electronic Records of Certain Closed Criminal Cases.

PAS recommends that court case records on criminal defendants, who were acquitted of all charges not be displayed on the Judiciary’s Internet Case Lookup application. A limitation on Internet publishing of non-conviction records will help protect individuals whose charges were dismissed or adjudicated “not guilty” from undue employment discrimination, housing discrimination and social stigma, without compromising the quality of information available to law enforcement, prosecution or the courts. Of course, employers, landlords, the press and members of the public will be able to continue to access records pertaining to non-conviction criminal cases at the state court where the case was original tried. PAS does not recommend that the official paper record be limited or obscured in any manner, except for cases that are sealed by order of the court, rule, regulation or statute. The only change in practice would be to remove non-conviction cases, excepting deferrals, from the Case Lookup website.

Implementation of the recommendation to limit online availability of non-conviction records would not inhibit the ability of law enforcement and justice agency employees to access the records. These individuals would continue to have online access to non-conviction cases through the password-secured New Mexico Consolidated Offender Query (“COQ”) Website, which contains information on non-conviction and conviction cases. The COQ now has more than 4000 subscribers who have an ongoing need to access criminal case information as a part of their official duties, and the information contained in the COQ is more complete than that which is now provided by Case Lookup. In addition to court dispositions, the COQ website contains defendant mugshots, as well as parole, probation, and imprisonment information.

This approach to limiting access to records is consistent with the United States Supreme Court’s ruling in the Reporters Committee case, which balances a citizen’s right to privacy with the public’s right to know. The federal Freedom of Information Act was held to be inapplicable to information in the Federal Bureau of Investigation’s database, partially because the consolidated information in the database was still otherwise available to the public in the paper files kept in various courts. The Supreme Court recognized the importance of the “practical obscurity” of limiting the public’s access to information about particular individuals to the

physical court record. The Court noted that this limitation protects individual privacy, but does not completely inhibit the public's ability to monitor the workings of government or unduly limit the right to know. 10

In 2007, the American Bar Association's Commission on Effective Criminal Sanctions, developed policy recommendations designed to "remove legal barriers to offender reentry that drive high rates of recidivism." The Commission's recommendations were endorsed by the National District Attorneys Association, the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers. 11

The Commission urged jurisdictions to "develop policies that limit access to and use of criminal history records for non-law enforcement purposes, which balance the public's right of access to information against the government's interest in encouraging successful offender reentry and reintegration." Specifically, the Commission recommended limiting access to "closed criminal cases in which charges were dismissed, nolle'd, or otherwise not pursued; cases that resulted in acquittal; cases in which the judgment of conviction was reversed or vacated; or cases in which a guilty plea was set aside..."¹² However, the Commission's recommendations were withdrawn from the ABA House of Delegates prior to the August 2007 meeting, and as such were never formally adopted by the ABA.

The PAS recommendation is consistent the Commission's recommendation on limiting access to non-conviction records; however, PAS's members agreed that dismissals that occurred subsequent to the satisfaction of conditions for a deferred sentence should continue to be displayed on Case Lookup as deferred cases involve an admission of guilt on the part of the defendant. While cases with deferred sentences are technically classified as dismissals, the admission of guilt on the part of the defendant puts such cases in a different class than cases where the defendant maintained his or her innocence throughout the court process and was ultimately acquitted.

The assumption underpinning the PAS's recommendation is that a criminal history of any kind has potential to stigmatize individuals and limit their housing and job prospects. This notion has been disputed by some who argue that studies demonstrating employer preference for individuals who do not possess any type of criminal history are inevitably flawed due to the impossibility of separating the isolated affect of possessing a criminal record from intrinsic, negative characteristics, such as poor interpersonal skills, drug abuse, alcohol abuse, and behavioral problems, which are generally recognized as more common among those who

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Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989)

¹¹ American Bar Association, *Commission on Effective Criminal Sanctions, Criminal Justice Section, Report to the House of Delegates*, 2007, online at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/SealRescleanRC6507alfsasFINAL.pdf>

¹² *Id.*

possess criminal backgrounds.

Recent studies have eliminated such methodological problems by using matched subject pairs to pose as job applicants for gathering data on employer bias. One such study was performed in Milwaukee in 2001. The study recruited four non-criminal subjects, who were matched for personal characteristics, to apply for 350 entry level jobs in Milwaukee. For one set of job applications, two of the subjects would pose as non-criminal applicants and the other two would act as applicants with criminal backgrounds. For the next set of job applications, the subjects would reverse roles, with the two who previously acted as non-criminal applicants taking on roles as applicants with criminal backgrounds. This further reduced the possibility that the personal characteristics possessed by the subjects influenced the results of the study.¹³

The study indicates that a purported criminal background significantly reduced the chances of a call-back from an employer after an initial contact, for both the white pairs and for the African-American pairs. For the white pairs of job applicants, thirty-four percent of the subjects who declared no criminal history received call-backs from potential employers, but only seventeen percent of the pairs, who admitted to a criminal background, received call-backs. For the African-American pairs, the affect was more pronounced: only fourteen percent of the pairs, who denied having a criminal history, received call-backs, while a mere five percent of those, who admitted a criminal background, received call-backs. This particular study indicates that an employer-perceived criminal background has a dramatic effect on an individual's job prospects.¹⁴

PAS, at its meetings, has heard comments from representatives of the business community, the State Bar, and from freedom of information advocates. One of the recurring comments is that the public has an absolute right to access public information; but apparently, members of the public do not necessarily agree with this premise.

In 2001, the United States Department of Justice, Bureau of Justice Statistics conducted a study entitled "Public Attitudes Toward Uses of Criminal History Information." The study documents the findings of a telephone survey administered to 1,030 adults living in private households within the boundaries of the continental United States. The study's purpose was to measure public attitudes toward use of criminal history information for non-criminal justice purposes by potential employers, landlords and other interested parties. The study was administered by

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See Devah Pager, The Mark of a Criminal Record, September, 2002, Northwestern University online at <http://www.northwestern.edu/ipr/publications/papers/pageraudit.pdf>

¹⁴

Id.

Opinion Research Corporation International.15

Only twelve percent of the survey's respondents agreed with the concept of completely open arrest and conviction records. A huge majority, ninety percent, indicated that they preferred that "State agencies not use the Internet to post criminal history information that is already a matter of public record." If the study is representative of the public at large, it indicates that most members of the public do not agree with the concept of posting any criminal history information, at all, to the Internet.16

Dr. Pager's matched pair employment discrimination study appears to support the concept that a criminal history record of any kind has potential to stigmatize individuals and limit their job prospects. If the studies on criminal records and recidivism cited by the ABA Commission are valid, then a limitation on publishing non-conviction criminal history information on the Internet may positively impact the overall recidivism rate.

The Bureau of Justice Statistics's study on attitudes towards uses of criminal history information supports the idea that limitation of non-conviction criminal history records on the Internet will not be seen by the public as a great inconvenience or unfair limitation. Therefore, due to perceived benefits and minimal detriments, PAS's recommendation to limit publishing non-conviction court dispositions to the Judiciary's Case Lookup website appears consistent with sound judicial and public policy.

2. Argument in Opposition to the Removal of the Electronic Records of Certain Closed Criminal Cases.

The recommendations proposed by the American Bar Association's Commission on Effective Criminal Sanctions were never adopted and were instead withdrawn from consideration by the ABA House of Delegates. Those recommendations also should not be considered for adoption by the Supreme Court. The ABA Commission's recommended policy was an outgrowth of the post-911 security concerns that prompted more and more employers and landlords to conduct criminal background checks of potential employees and tenants. The Commission determined that if Internet records of criminal cases that were vacated or resulted in dismissal, acquittal, or nolle prosequi were kept on federal, state and local government websites such would perpetuate the ABA Commission's perceived obstacle to employment and housing facing individuals who were arrested or charged, but not convicted of a crime. However, contrary to the assessment of the ABA Commission, the removal

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See Office of Justice Programs, Privacy, Technology and Criminal Justice Information: Public Attitudes Toward Uses of Criminal History Information, July 2001, Office of Justice Programs online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pauchi.pdf>

¹⁶ Id.

of this information can also serve to perpetuate the alleged “stigma of a conviction.”

Although the Courts are not the official keeper of criminal history records in New Mexico, their web-based Case Lookup is often used as an expedient source of criminal case information for employers, landlords, business owners, bankers, mortgage lenders, members of the media, judges, law enforcement, and litigants. For example, often when a Court receives a request for information under IPRA on a closed criminal case, the Court will often respond by referring the party making the request to the Court’s website and also to DPS as the official criminal repository for the State of New Mexico. However, because DPS’s resources are somewhat limited and its information is not available online, more often individuals will gather the information that they require from the Court’s Case Lookup. On a number of occasions, defendants, whose cases ended in an acquittal or dismissal, etc., were quite pleased to discover that the existence of that dismissal or acquittal could be easily printed from the Court’s website and then promptly provided to a prospective landlord or employer.

Members of the public and the media also have appreciated the ready access that the Court’s Case Lookup system provides. Many lenders, employers, landlords, and small business owners lack the resources to hire private investigators or purchase costly background checks of potential borrowers, employees, tenants, or contractors. By using the publicly available Case Lookup system, they can easily identify any cases in which an individual has been involved.

Now, the ABA Commission had recommended that, because criminal case information can be “difficult to read and misleading” as the public is often unfamiliar, for example, with the legal meanings of words such as “acquittal” or “nolle prosequi,” such information should be removed from Internet records. In this way, when the Commission recommended this policy to the ABA House of Delegates in its report, it apparently hoped to avoid misperceptions when the public presumably failed to understand that, for example, a criminal charge did not result in a conviction. However, rather than use the potential for misunderstanding as a basis for removing certain criminal case information from Court and other government websites, the better approach would be simply to educate the public. A glossary of key legal terms with definitions taken directly from Black’s Legal Dictionary or some other legitimate, understandable legal source can be easily included on any website.

By providing a glossary of key terms, members of the public and the media will have all of the tools necessary to discern, for example, that an “acquittal” means that the person was found not to be guilty of the crime for which he or she was charged. It is not for the Courts to decide that members of the public or the media are incapable of fully appreciating or understanding the meaning of legal terms such as “nolle prosequi” or the legal consequence of events such as a “dismissal.” Removal of this information from public websites is tantamount to a judicial censure of information and is contrary to the foundation of open government upon which this country is based.

If this information were to be removed from Court and government websites, then a ready source of information pertinent not only to the public, the media, the judiciary and law enforcement, but also to the defendants themselves who are seeking to overcome any perceived stigma of having been charged with a crime, is prevented. For example, many times a defendant’s initial charge will have

been captured by an employer or landlord from a newspaper, website, or other media source. If the dismissal or acquittal of that initial charge is removed from the publicly accessible Case Lookup, then the defendant is left without the ability to quickly demonstrate that the case was dismissed or resulted in an acquittal. In the time it would take to write a letter to DPS and receive a response, the apartment or job would most likely be filled by someone not facing those same legal challenges. As a result, a charge – even without a conviction – can follow a person for the rest of his or her life.

In addition, judges and court staff, as well as district attorney and public defender offices also rely upon the publicly accessible Case Lookup for information on the status of a case. While arguably, the Courts could establish privileged access to one another's internal, non-publicly accessible, data-bases for the purpose of sharing this information, the public and members of the media would still be deprived of this information. In light of the foregoing, it is critical that the members of the public, the media, the judiciary, and law enforcement have continued access to this type of criminal case information; and, it should not be removed from Case Lookup.

Subcommittee member discussion. The following points were discussed:

- District attorneys and public defenders do not have access to the inside Judiciary web site; however, they do have access to the Consolidated Query, which provides more information than the Judiciary's Case Lookup application.
- The argument in support relates to a case by case basis rather than on a court by count basis.
- 3rd paragraph: concerns that reference to the *Reporters Committee* case may not be accurate.
- 6th paragraph: "The PAS recommendation is consistent (insert 'with') the Commission's..."
- 7th and 9th paragraphs: change the word "affect" to "effect".
- 11th paragraph: add a period after the second sentence.
- Subheading 2, 1st paragraph, 2nd sentence: "Those recommendations also should not be considered for adoption (insert 'in New Mexico') by the Supreme Court."
- Subheading 2, 2nd paragraph, 1st sentence: "Although the Courts are not the official keeper of criminal history records in New Mexico, (remove 'their web-based')..." 2nd sentence: "...the court will (remove "often") respond." 3rd sentence: "...more often individuals will gather the information that they require from the (remove 'Court's') Case Lookup..."
- Subheading 2, 3rd paragraph, 1st sentence: "...appreciated the ready access that the (remove 'Court's') Case Lookup..."
- Subheading 2, 5th paragraph, 2nd sentence: "It is not for the (lowercase 'Courts')..."
- Subheading 2, 7th paragraph, 1st sentence: "In addition, (remove 'judges and court staff, as well as') district attorney and..."
- Judge Mitchell commended LaurieAnn Trujillo for her hard work on the minutes and for capturing the changes that need to be made to the draft PAS document.

Action Item: *Mr. Mead offered to check the exact holding and dicta analysis of the "Reporters Committee" case to verify that the information noted in the third paragraph of this section is accurate.*

Ms. Cox read section C, as follows:

C. PAS recommends that Case Lookup not include public access to misdemeanor cases that have had their physical court records destroyed pursuant to a Retention and Disposition Schedule , 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 Child Protection and Safety Act of 2006.¹⁷

1. Argument in Support of Limiting Public Access to the Electronic Record of Older Criminal Misdemeanor Cases that No Longer Have Physical Court Records.

Misdemeanors are crimes that are designated by law to have a sentence of less than one year.¹⁸ By definition, they are less egregious than felonies and are thus punished less harshly. Nevertheless, society views criminal conviction as undesirable, making it more difficult for prisoners to reenter society and become productive, law-abiding, citizens. Technology has amplified the impact of prior conviction on the lives of prisoners reentering society. The ABA’s Commission on Effective Criminal Sanctions recognized that “Records that 20 years ago would have been practically unavailable, either because they were sealed from public view in central repositories or stored in inconvenient locations, are now immediately available for a small fee on the internet.”¹⁹

The Commission explained the impact of increased public access to conviction information in noting that “Background checks indisputably increase the likelihood that a person with a record will on that account be denied jobs, licenses, housing, education, and a host of other benefits and opportunities that are essential to successful reintegration into the community.”²⁰ Unsuccessful reintegration makes society more dangerous and steals from society a potentially productive citizen.

PAS considered the impact of providing free access to conviction information on the Internet. PAS heard testimony from both the business community and representatives of the press in opposition to any restriction of access to criminal history information on the Judiciary’s website. PAS also recognized that the report of the Commission on Effective Criminal Sanctions to the American Bar Association’s House of Delegates was withdrawn prior to delivery in 2007 due to vocal opposition from many interest groups. The importance of access to criminal history information to both employers and landlords is clearly recognized by PAS. Nonetheless, the use

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The Adam Walsh Act, 42 U.S.C. § 16901 et.seq.

¹⁸ NMSA 1978, § 31-19-1(1984).

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American Bar Association Commission on Effective Criminal Sanctions, Report to the House of Delegates (2007), 5.

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Id.

of the Judiciary's Case Lookup system as the de facto criminal history background check search engine is problematic at a number of levels.

The public access version of Case Lookup is both under-inclusive and over-broad for use as a reliable background check search engine. The public access version of Case Lookup does not include criminal cases that are sealed or that otherwise have access restricted as a matter of law, such as domestic violence cases. As a matter of policy the public access version of Case Lookup does not include information regarding juvenile criminal cases. Case Lookup does not contain cases prior to XXXXXXX. Furthermore, using the name search function, Case Lookup is limited to displaying the first 200 hits of a name. For individuals with common names, such as John Smith or Juan Martinez, the results list may not include a specific criminal case. Even more troubling, there is ample opportunity for individuals with the same name to be confused with one another. Because of concerns over identity theft, social security numbers cannot be used as unique identifiers in the public access version of Case Lookup. The database is over-broad in that it can include charges that were dismissed, thus giving an individual a functional "criminal record" in the eyes of the public despite the fact that they were not found to be guilty of a crime.

This imprecision is exacerbated by the fact that misdemeanor records of criminal convictions do not have a permanent retention period in the Judiciary's Records Retention and Destruction Schedule. If an individual contends that the criminal conviction information found in Case Lookup is incorrect, there may well be no way for them to prove it if the file has been purged pursuant to the Retention and Destruction Schedule. For example, the Bernalillo County Metropolitan Court is a court of record for "criminal actions involving driving while under the influence of intoxicating liquors or drugs or involving domestic violence,"²¹ but not a court of record for other criminal actions. Whereas, Magistrate Courts are not courts of record on any matter.²²

The functional effect of this is that the Bernalillo County Metropolitan Court's criminal records are only permanently retained if they involve domestic violence or driving under the influence of liquor or drugs.²³ They are retained for three years if the crime carries the potential for an enhancement of judgment and one year if it does not.²⁴ Magistrate Court records are only retained for "one year after case dismissed, entry of judgment or final order, provided audit report has been released, and provided all conditions of judgment have been met."²⁵ Conversely, in District Courts, criminal case files are permanently retained in paper or via

²¹ NMSA 1978, § 34-8A-6©.

²² NMSA 1978, § 35-1-1.

²³ NMAC §1.17.244.121(D)(1).

²⁴ NMAC §1.17.244.121(D)(2)&(3).

²⁵ NMAC §1.17.218.121(D).

microphotography, even if they involve misdemeanors.²⁶ The retention periods for the various types of courts are designed to provide an efficient records management system for the Judiciary. The retention periods are vetted by both the Judicial Records Retention Committee as well as the State's Commission of Public Records. For courts that are not courts of record, it makes little sense to permanently retain misdemeanor information for more than three years after the final disposition of the case. Retaining this information is inefficient for the courts. More importantly, retaining this information is generally more harmful to the convicted defendant than it is helpful to society at large. For specific issues, such as drunk driving, domestic violence, and child protection and safety, the Legislature has deemed it important to track prior convictions. For other misdemeanors,

PAS recommends that all misdemeanor cases be removed from the public access portion of Case Lookup at the time the physical court record is destroyed pursuant to the Retention and Disposition Schedule applicable to the court, excluding those cases with outstanding warrants, 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. Felonies should not be removed from the public access version of Case Lookup due to the seriousness of felony crime. DWI, domestic violence, and the crimes detailed in the Adam Walsh Protection and Safety Act should also not be removed due to the likelihood of repetition and the public's interest in preventing victimization. The case file retention period for the Magistrate and Metropolitan Courts should be increased to three years to allow individuals access to the paper records to correct any inaccuracies in Case Lookup. PAS believes that a three-year display period for misdemeanors is sufficient to satisfy the public's interest in knowing an individual's background while still short enough to allow a former prisoner to avoid unnecessary societal condemnation for old convictions.

2. Argument in Opposition to the Removal of the Electronic Record of these Older Criminal Misdemeanor Cases.

The Judicial Records Retention Committee ("JRRC") was created to "establish a records management program for the application of efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of official records."²⁷ The JRCC also established "records disposal schedules for the orderly retirement of records."²⁸ The time periods established by the JRCC for the Bernalillo County Metropolitan Court, as the only misdemeanor court of record in the state, for retention of its criminal case files are set forth in NMAC § 1.17.244.121. Specifically, criminal case files involving domestic violence or driving under the influence of liquor or drugs are to be kept permanently.²⁹ Case files with a potential for

²⁶ NMAC § 1.17.230.201(D).

²⁷ NMAC § 1.17.244.3(B).

²⁸ *Id.*

²⁹ *Id.*

*enhancement of a judgment are to be kept for three years after the date on which the case is closed; whereas, case files with no potential for enhancement are to be kept for only one year after the case is closed.*³⁰ *Because the State Records Center and Archives is ever-facing space limitation issues in its records storage facilities and in this economic climate, budgetary concerns, presumably were taken into consideration by the JRRC when it prescribed its records destruction schedules of these criminal misdemeanor records.*

*PAS has determined that, because paper files of certain misdemeanor criminal records are not retained more than three years, the publicly accessible online system references to those files also should not be retained. However, there is a recognized common law right to inspect and copy judicial records.*³¹ *The purpose behind this right is to aid in preserving the integrity of the judicial process.*³² *Although there are exceptions to this right such as when competing interests outweigh the need for access to court files, the standard policy of allowing public access to court files should be preserved.*³³

*DPS is the official repository for criminal case histories. DPS is also charged with maintaining arrest information on felonies, misdemeanors and petty misdemeanors.*³⁴ *However, DPS's criminal arrest history information cannot be made available online as it is subject to certain statutory limitations and restrictions on access as set forth in the Arrest Record Information Act.*³⁵ *As a consequence, because criminal information is not easily obtainable from DPS, the public and members of the media, as well as judges and members of law enforcement have come to depend upon Case Lookup for information concerning criminal cases that have been filed in the Courts and the outcome of the same. PAS heard testimony from open government advocates that Case Lookup is much simpler to use than either the DPS criminal history request system or a formal request under IPRA.*

While the State Records Center and Archives may have space limitation issues necessitating the routine destruction of paper Court case files, this does not abrogate the right of the public and the media to have access to such information. Also, many lenders, employers, landlords, and small business owners lack the resources to hire private investigators or purchase costly background checks of potential borrowers, employees, tenants, business partners, or contractors. By using the publicly available Case Lookup system, they can easily identify any cases in which an individual has been involved and whether those cases resulted in a conviction and incarceration, acquittal, or some other outcome.

³⁰ *Id.*

³¹ *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985).

³² *Id.* at 708.

³³ *Thomas v. Thomas*, 128 N.M. 177, 185, 991 P.2d 7, 15 (Ct. App. 1999).

³⁴ NMSA 1978, § 29-10-3; 1975 Op. Att'y Gen. No. 75-37.

³⁵ NMSA 1978, § 29-10-1 et seq.

Furthermore, there are violent misdemeanors, which arise in neither DV nor DWI cases, such as aggravated battery, simple assault, negligent arson, negligent use of a deadly weapon, resisting arrest, and stalking. Each of the foregoing misdemeanors has been identified as being sufficiently violent that a victim is afforded certain rights under the Victims of Crime Act.³⁶ If the law affords victims additional protections from defendants who have committed those crimes, then it follows that, business owners, employers, landlords, lenders, and other members of the public and the media also may want to have access to information that a prospective contractor or business partner, employee, tenant, borrower, or individual has been convicted of or even incarcerated for such a crime. If this information is removed from Case Lookup, then the public and the media will be denied the opportunity to have access to this information. It is not for the Courts to mandate social policy by censoring such information from public availability. The public and the media should have access to this information and then decide what, if any, weight it is to be afforded. In the same way that the Courts can take into account a defendant's youthful indiscretions so too can the public or the media accord this information the weight that it is due.

Whether or not the paper case file continues to exist, this information is important both to the public and the Courts and should continue to be accessible on a publicly available Internet website. It matters not that space limitations control the volume of paper records that can be retained, in an electronic age, the electronic record no doubt ultimately will supplant paper files altogether as State Courts move toward the Federal Courts' electronic filing model. It is impractical to assert that simply because there may be a slight margin of error in the electronic records, that they should be destroyed when the paper files are destroyed. In short, unless the Courts continue to maintain this information, it is unavailable to the public, the media, and the litigants in light of the inaccessibility of DPS's records. Lastly, removing such information from Case Lookup does not eradicate the record of the misdemeanor event, in an age of blogs, websites, newspapers, magazines, and other media; the information will always be out there, it just would not be as easily accessed by members of the public.

Subcommittee member discussion. The following points were discussed:

- Judge Mitchell pointed out that the language of this recommendation was rewritten from the original position that the PAS adopted on November 18, 2008, as follows: "*JID Staff be directed to remove all misdemeanor cases from court online systems on the third anniversary after the final adjudication date, excluding those cases with outstanding warrants and/or fines/fees due and excluding domestic violence cases, DWI cases, and crimes explicitly mentioned in the Adam Walsh Act.*"
- Support for the three year requirement to make it easier for JID Staff to program the system to remove those cases from Case Lookup.
- Problems with clerks marking a case file for destruction in the case management system. When this occurs, the physical case file is destroyed but the Judiciary's Case Lookup application shows the case.
- Cite Supreme Court Order that the magistrate courts retain DWI and domestic violence case files.

³⁶ NMSA 1978, § 31-26-1 et seq.

- Recommendation to retain case files indefinitely if they involve crimes that can carry enhancements.
- The Consolidated Query shows all cases.
- Suggestion to modify the destruction schedule to take into effect DWI cases, domestic violence cases, and cases that involve crimes that can enhance a sentence.
- Position C: "...pursuant to a Retention and Disposition Schedule (remove space before comma)."
- 1st paragraph, capitalize "Internet."
- 2nd paragraph, 1st sentence, lowercase "Background".
- 6th paragraph, 3rd sentence: "Magistrate Court records are only retained for one year after (insert 'the')..." Last sentence is incomplete.
- 7th paragraph, 3rd sentence: "DWI, domestic violence, and crimes detailed in the Adam Walsh Protection and Safety Act (insert 'also') should (remove 'also')..."

Arthur Pepin moved to amend the recommendation that Case Lookup should mirror the retention schedule for physical files. Judge Basham seconded. Ms. Cox opposed the motion. No further discussion. Motion carried.

Judge Mitchell suggested that the PAS table discussion on Section D to provide Mr. Jontz with an opportunity to obtain feedback from the State Bar on his position. Mr. Jontz distributed his document entitled *Public Access Subcommittee, Position on Access to Court Data*. He quickly explained his position, as follows:

- He will obtain additional input from a particular committee of the State Bar because there is a possibility that the Supreme Court policy needs to be reviewed due to electronic filing and the objection to the presumption against providing bulk data to resellers.
- His position proposes switching the emphasis to providing bulk support and possibly charging for it.
- He spoke of his service as chairman to a technology committee for the State Bar that obtained access to MVD records, UCC filings, Corporation Commission filings, bankruptcy court filings, etc.

Action Item: Mr. Jontz will email his position paper to Ms. Cox so she can incorporate it into the draft PAS document.

IV. Future Meetings. The next meeting will be held at the Judicial Information Division on Tuesday, September 15, 2009 at 1:00 p.m.

V. Adjourn. Judge Mitchell adjourned today's meeting at 3:55 p.m.

Final Minutes Approved by Judge Mitchell on September 4, 2009.