Report of the Ohio Judicial Conference Ad Hoc Committee on Public Records, Privacy and the Internet

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The Ad Hoc Committee on Public Records, Privacy and the Internet was established to examine and to make its report to the Executive Committee concerning internet publication by clerks of courts of materials filed for record with their offices, as well as the privacy concerns that practice has created and the proposed legislative response to those concerns. We were also asked to determine what other judicial committees have done or may do with respect to the questions involved.

Over the past several years clerks of the courts of common pleas in a number of larger and mid-size counties have established internet web sites on which they publish materials filed in their courts in all civil and criminal proceedings. These materials include pleadings, motions, and evidentiary materials attached to them. In some instances, the text of depositions and other transcripts are also published. These materials are "downloaded" to the web site through the use of scanners, automatically when the materials are filed.

Clerks are not mandated by law to publish materials filed with them in this way. Their efforts are wholly voluntary. The advocates of the practice rely on the force of the Public Records Act, R.C. 149.43, which requires a public record to be made available in the medium in which it is kept or any other medium which is readily available in the clerk's office. When a web site is established it becomes an available medium, and so materials filed with the clerk are then published on the web site.

The records of proceedings which the clerks are charged by law to keep are and always have been public records that are open and available for public inspection. (The major exception is records of juvenile proceedings.) However, and even though records are open for inspection, the "inertia factor" has inhibited the curious from coming to the courthouse to examine them. The inertia factor has been wiped away by the clerks' adoption and use of internet web sites. Now, anyone with a computer may sit at home and anonymously call up the information at any hour of the day or night. Though a great many apparently do, the Supreme Court Advisory Committee looking into this matter has yet to find widespread abuse and misuse of the information currently published over the internet.

The ready availability of information in this way has raised concerns about privacy as well as potential misuse of the information concerned. While generalizations are problematic, it can be said that many if not most of the filings in certain kinds of actions, domestic relations cases most notably, contain personal information of a sensitive nature. These include financial data

concerning the parties, the identities and whereabouts of their minor children, as well as alleged and possibly untrue conduct of the parties that cast them in an unfavorable light. The last of those also appears in requests for civil protection orders on claims of domestic violence. Probate filings, especially those involving decedent's estates, likewise contain extensive financial details. Applications for guardianships can contain sensitive information about a ward's mental or emotional health.

People who depend on the courts to adjudicate actions of this kind are uncomfortable that information about them and their families is automatically published world wide for their neighbors as well as total strangers to see and use without recourse and with anonymity. Adverse consequences can easily result. Rep. Bill Seitz, one of the sponsors of H.B. No. 438, which is discussed below, tells of a constituent who lost her job when her employer learned of information she had filed in a petition for a civil protection order. That kind of result may be sporadic and infrequent, but it has a compelling force in the eyes of the public and their legislative representatives, the anecdotal nature of the event notwithstanding.

A more acute concern arises over the potential misuse of information culled from the clerks' web sites. These may include social security numbers, credit card numbers, and other data that can be used to commit an "identify theft" or other criminal acts. Experience tells us that such hard data usually isn't required in a pleading, though it may appear in separation agreements and resulting orders. However, if it's filed, the information automatically appears on the clerk's web site because everything that's filed is published.

S.Ct.Sup.R. 27(A) addresses electronic filings. The rule states that its purpose is to provide "a process for establishing uniform, minimum standards for the use of electronic documents and records in the courts of Ohio." It authorizes courts to adopt local rules to that end. It also establishes a Supreme Court Advisory Committee on Technology and the Courts to do a number of things, including adoption of rules and uniform standards "relating to the creation, distribution, filing, and storage of and access to electronic documents." (Emphasis supplied). The Committee is also charged to review any proposed local rule of practice governing those matters.

Judges John P. Bessey and Paulette Lilly are members of the Supreme Court Advisory Committee on Technology and the Courts. They report that the Committee's work is yet in progress, though it may propose certain regulations within a month or two. The Committee, which is largely composed of lay persons, tends to place a premium on openness. However, its members also favor extensive sealing of certain kinds of information or data in court records. Such distinctions are "data-driven" that is, they require an

identification of certain data which is made by some authority, presumably the clerk, who would be charged to seal that data from public inspection.

The Supreme Court's charge to its Technology Committee in S.Ct.Sup.R. 27 is made against the background of the court's own decisions concerning the authority of the courts to seal records. The Supreme Court has held that courts have an inherent power to seal the records of their proceedings upon certain narrow findings. *State ex rel. The Repository v. Unger* (1986), 28 Ohio St.3d 418. However, the Supreme Court has also since held that the court's order is trumped by the Public Records Act, R.C. 149.43, so that an order is superseded by a valid Public Records Act request. *State ex rel. WBNS, TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497. Even so, the nature of the material in the record may exempt it from disclosure because it fits within a specific statutory exemption or because another state or federal "law" authorizes the court to seal the record from public inspection. *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581.

The legislative response to the privacy concerns discussed above and the Supreme Court's holdings appears in House Bill 438. The bill would exempt records a court has sealed from the definition of a public record. However, it also provides that specified financial information must automatically be "filed under seal," including identifying bank or credit card account numbers and personal identification numbers used by financial institutions. The bill authorizes motions to unseal records, which the court may grant after balancing matters the bill identifies as "interests promoted by affording maximum public access."

The Ad Hoc Committee has three primary concerns with H.B. No. 438 and the controls it would impose.

First of all, Article I, Section 16 of the Ohio Constitution provides that "[a]ll courts shall be open . . ." This applies not only to access to the courts to enforce a right or remedy: it also encompasses the public's access to the records of the court's proceedings on those matters. Categorical sealing of the certain records or the information in them runs counter to that value, as well as to the Free Speech and Free Press protections of the Federal and Ohio Constitutions. See *State ex rel Scripps-Howard Broadcasting Co. v. Court of Common Pleas* (1995), 73 Ohio St.3d 19. Also, while the legislative power may reasonably be employed to require the courts to open their records, through the Public Records Act, that power may not likewise apply to require the records of the courts to be closed by legislative fiat. The force of Article I, Section 16 runs counter to that.

Second, legislative controls of court records runs counter to the charge of Article IV, Section 5(B), of the Ohio Constitution that "[t]he supreme court may make rules to require uniform record-

keeping for all courts of the state." That provision is permissive, and does not preclude legislative action. However, the constitutional provision implicitly recognizes and puts a premium on the particular competence of the courts to know what is in their own records and how those records should be maintained in order to preserve the value of public access. As against that, the largely anecdotal and/or conjectural events that have prompted the General Assembly to move into the area have much less force.

Third, House Bill 438 wholly loses sight of the phenomenon that has produced it: the voluntary action by the clerks, on their own undertaking, to publish materials on their internet web sites. If that's the problem, then the answer isn't to seal all records or data of certain kinds from public access by removing them from the public record entirely. Rather, the solution must be to impose controls which limit the clerk's internet publication of certain kinds of information. There is ample authority to do that. Article IV, Section 5(B) authorizes rules of practice and procedure that might do that. R.C. 2303.26 goes further to provide that the clerk's of the courts of common pleas shall perform their work under the direction of the courts.

Recommendation

The internet offers very positive and productive uses for the legal community by permitting off-site review of filings at all hours. The Supreme Court should encourage internet use and development to permit greater access to the judiciary. The implementation of appropriate rules to protect privacy and theft should not interfere with this general goal.

Despite the importance of the internet, the Ad Hoc Committee is concerned that the legislative controls of the kinds proposed in House Bill 438 are not appropriate. Instead, controls should be imposed by way of the Rules of Superintendence. We understand that the Supreme Court Advisory Subcommittee on Privacy has been reviewing the kind of data that should not be published over the internet. We anticipate a fairly exhaustive list of that data and we believe that list may assist the Supreme Court in drafting its rules of Superintendence on this subject. We also understand that the technology exists to redact this information from the internet without being labor intensive or subjective. Specifically, the provisions of S.Ct.Sup.R. 27 concerning the "distribution" and "access to" electronic records should be made specific to adopt these and other controls that are desired. The Committee recommends that the Judicial Conference urge the Supreme Court to do that.

The Committee also recommends that any measures adopted should focus on internet publication of material filed with the clerks of courts, and that it limit that practice in appropriate ways instead

of by sealing the information involved from public scrutiny altogether. A right of ready access must be preserved. Otherwise, a very important element of the courts' accountability will be compromised, to the long-term detriment of the courts.

The Committee further believes that the mechanisms to adopt these controls should not put the clerks in the position of deciding what should or should not be sealed or published on their internet web sites. Instead, forms similar to the Standard Probate Forms might be developed to which specified information in domestic relations cases and other selected cases may be restricted. The forms would be a part of the open record, but clerks may be directed to not publish those documents on their websites. The Supreme Court may give other, more specific directions to its Technology Committee toward those ends.

We do not make these recommendations in a vacuum, without an understanding of the realities involved. The strongest supporter of internet publication in this instance is most likely the communications media, which likes internet access because it's an easier and cheaper way of getting information. However, the communications media has little real interest in the kind of sensitive personal and financial data that have prompted privacy concerns. The communications media has been generally responsible and discreet with sensitive information, whereas others now receiving this information are not as discreet. When the communications media needs access to sensitive information, it would merely require going to the courthouse to get the information desired. Also, the communications media should strongly oppose the categorical sealing of information or diminution of the Public Records Act, which House Bill 438 does. In the end, it is internet publication that must be better managed, and it is the responsibility of the Supreme Court to take the lead in doing that.

Respectfully submitted,

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