



Remote Public Access to Electronic Court Records: A Cross-Jurisdictional Review for the D.C. Courts

Prepared by the Remote Access to Court Electronic Records (RACER) Committee of the Council for Court Excellence

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About the Council for Court Excellence

Formed in the District of Columbia in 1982, the Council for Court Excellence (CCE) is a nonprofit, nonpartisan civic organization that envisions a justice system in the District of Columbia that equitably serves its people and continues to be a model for creating stronger and more prosperous communities.

CCE's mission is to enhance the justice system in the District of Columbia to serve the public equitably. CCE identifies and proposes solutions by collaborating with diverse stakeholders to conduct research, advance policy, educate the public, and increase civic engagement.

Council for Court Excellence
1111 14th Street NW, Suite 500
Washington, D.C. 20005-5628
202-785-5917

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Richard B. Hoffman, Esq. | Committee Chair

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CCE Committee Staff

June B. Kress, D. Crim.	Executive Director
Benjamin L. Moser, MPA	Research & Policy Analyst

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Note from the Chair

This report was prepared in response to a request from the Honorable Eric T. Washington, who stepped down in March 2017 after 11 years' service as Chief Judge of the District of Columbia Court of Appeals. Chief Judge Washington requested the Council for Court Excellence's assistance in identifying best practices from across the nation concerning public access to electronic court case files. The timing of this request was propitious, since enhanced public access is being considered at the Court of Appeals, which has begun gradually implementing an electronic case filing system on a voluntary basis that will augment the operation of its automated case-flow management system.

This review, then, has been conducted by the Council for Court Excellence (CCE) at the most appropriate time for its findings of best practices to be useful to the Court of Appeals as the Court completes the implementation phase of its electronic filing system. We also hope the practices outlined in this report will prove helpful to the Superior Court of the District of Columbia which previously implemented electronic filing.

The Council brings to this project its experience both in analyzing operations of the District of Columbia Courts and its background in assessing court management systems and techniques nationally. In its previous study of D.C. criminal justice system resources, the Council examined the flow of cases through the entire justice process, from police initiation of proceedings through papering by prosecutors to pretrial interviewing, followed by trial, probation, and corrections phases. This work resulted in the reports, ***A Roadmap to a Better Criminal Justice System*** and ***Two Years Down the Road: A Status Report on A Roadmap to a Better DC Criminal Justice System***. Much was learned during those efforts about the existing and planned information systems of the D.C. Courts.

More recently, in 2015, CCE published a comprehensive review and analysis of local and federal jury service in D.C., using best practices from court systems nationwide to inform its work. Similarly, in 2016, CCE completed a yearlong review of the D.C. Office of Administrative Hearings on behalf of the Office of the D.C. Auditor and devoted substantial time and effort to capturing best practices of centralized hearing panels from jurisdictions around the country. These and other examples from CCE's 35 years of improving the District's justice system have lent themselves well to this current project that we hope will convey the current trends, most up-to-date schools of thought, and concrete strategies for expanding public access to electronic court records.

We acknowledge the cooperation received from the District of Columbia Court of Appeals, especially former Chief Judge Eric T. Washington, its Clerk of the Court, Julio Castillo, and its information systems staff. This project was supported by a grant from the State Justice Institute, in partnership with the National Center for State Courts (NCSC) that helped facilitate access to state court systems nationwide for CCE's survey research. NCSC is utilizing CCE's findings for their complementary, public access-related efforts. We are also grateful to the many court administrators, judges, and other personnel in state court systems who provided important information to this project.

Richard B. Hoffman, Chair
Council for Court Excellence
RACER Project Committee

Overview of Systems for Public Access to Electronic Court Records Across the United States

Electronic access to records is made possible by having court records in digital form. As courts go from being custodians of paper files to online publishers of legal information, the essential questions are: what records are now accessible, to whom, and how? D.C. court officials facing the same policy questions may benefit from knowing how courts elsewhere have been resolving these questions, including the public consultation and oversight methods other jurisdictions have found to be useful.

Before online access became possible, counsel needed to present a computer disk to accomplish filing, or court staff had to scan paper documents, still necessary for filings, submitted by self-represented litigants who lack the necessary technology. Now this is commonly accomplished by court rules requiring “e-filing.” Technology to connect filers with courts has spread widely, developed by court staffs and commercial vendors. The D.C. Superior Court first required e-filing (in select areas) in 2001; it is now generally mandatory. E-filing is voluntary in the D.C. Court of Appeals. Migration from paper files to an official electronic court record affects many aspects of the justice system, but most important for the present study, it expands possibilities for public access beyond the previous limitations imposed by the “practical obscurity” of paper files stored in courthouse record rooms.¹

The results of the mid-2016 Council for Court Excellence/National Center for State Courts survey of states show a broad movement towards online access to court records. Out of 28 responses, respondents in 21 states, some from varying levels of state court staffs and some from state court administrative offices, reported providing various forms of remote access to court records.² This is a marked increase from even a few years ago when only three states were reported as offering online access to court records beyond just the docket.³ All but four respondents answered the survey questions from the perspective of their state court system as a whole, including trial and appellate levels. The survey did not ask that each question be addressed separately by court level.

The docket, or chronology of events in a case, is still the most common type of case information accessible online, provided by 18 states, just as in the District of Columbia. . Records showing court case results, such as opinions, orders and judgments, are also commonly available, and were accessible online in about a dozen of the 21 states answering our survey.⁴ (In the District, opinions are partially available, for some Court of Appeals decisions). However, CCE’s survey found 16 states reported that party filings (such as complaint, briefs, etc. referred to

¹ For more on the term, see, e.g., Hannah Bergman, *Out of Sight, Out of Bounds*, THE NEWS MEDIA & THE LAW, 33, 2, (2009) at 11. “Practical obscurity... refers to the idea that even though some information may be public... the information is obscure because it is not easily accessible.”

² Details of the survey data, drawn from a national survey and follow-up interviews, are in the methodology section. An online survey developed by CCE and NCSC was sent to an official, selected in each state as knowledgeable based on their previous willingness to provide data. A total of 28 state officials responded. Seven said their states are not providing online access, though all reported planning to do so or considering it. Courthouse electronic access, such as by typing on a keyboard and viewing on a screen at courthouse kiosks or in a clerk’s office, is common. As this method affords little more access than viewing paper files at clerks’ offices, we do not report on such access here. The results to be discussed are, therefore, chiefly from the 21 jurisdictions which reported some form of online (remote) public access. This may be an undercount, to the extent other states are also providing online access. For example, New York has a highly developed system of online access, mentioned at several points below, but we lack full data as the state did not participate in an interview with CCE.

³ Greacen Associates, *Washington State Access to Court Information Project Survey*, 3 (2013), available at <https://tinyurl.com/hwmkqdl>. For this report, commissioned by the Washington State Supreme Court, 24 states were surveyed in fall 2013, but only drawn from those with elected court clerks and statewide-automated case management systems. Of 19 responding, 14 provided docket information online but only three offered any access to documents.

⁴ Respondents were not required to answer every question in the survey; therefore, the total number of respondents reported may vary throughout.

generally in the following pages as “documents”) are available online, and 10 states similarly reported that motions and discovery are available online.

The types of cases that are accessible online vary from state to state. Most states (20 of 21 responding) reported online access in civil cases, with slightly fewer permitting such access in criminal cases. Half or less than half of the responding states included probate or family cases. The survey data indicates that courts do not allow remote access to case records for adoptions, juvenile criminal cases, or domestic violence and child abuse cases, although some states permit public access to these types of cases at the courthouse.

Electronic access also tends to come with restrictions to the public: access may be limited to those who register. This barrier may be related to the collection of payments for access, or to deter misuse of the system. For more than 200 years, anyone, including but not limited to, the media, could request access to paper court files and normally have seen them without registration. Now, of the 20 states that described their electronic access policies, only five allowed access without registration, while eight said registration was mandatory for all users. Seven more had a mixed policy featuring unrestricted docket access but registration for further access. Some states allow only attorneys to see the full file, but in some cases attorneys are only granted complete, i.e., remote, access to their own cases.

Charging a fee also limits access. Six states reported imposing charges – chiefly those with systems operated by contractors; the majority, 15 of 21 respondents, said they did not charge.⁵

States reported using various approaches to prevent public viewing of sensitive information, although what constitutes sensitive information also varies by state. Social Security numbers and financial data constitute sensitive information in almost all states, while only some states consider birthdates and addresses to be sensitive information requiring protection. Employer Identification Numbers (EIN) used by businesses for tax purposes, driver’s license details, and names of minors and victims are also protected by courts in some states’ online public access programs.

Since most filers are attorneys who are obliged to follow court rules, the most common approach to protecting sensitive information is to require attorneys to file papers after “redacting,” or scrubbing, protected information. If details are needed by the court, complete, unredacted papers may be filed under seal.⁶ Some courts check filings to ensure compliance with privacy rules, while others do not. While forms and plain text could be manually

⁵ There is great variation among states that charge for access. Some charge a flat fee per month or for a year’s unrestricted access. Some charge such an initial fee, but with additional charges per page viewed, generally up to a per document cap. Some that charge per page offer an initial number of pages at no cost. The federal PACER system, which has a capped per page charge, does not charge for opinions and offers fee waivers to some users on request.

⁶ Redaction approaches, familiar since the attorney mandate in the earliest days of the federal PACER system, have been challenged, notably by Carl Malamud and Timothy Berners-Lee, as ineffective. Presumably, compliance issues at the state level are similar. In 2008, Malamud reported that he had found 1,600 unredacted Social Security numbers in a sample of 2.7 million PACER records. (Letter from Carl Malamud, Public.Resource.Org, to Hon. Lee Rosenthal, Chair, Judicial Conference of the U.S. Committee on Rules of Practice and Procedure, with statistical attachments, Oct. 24, 2008, available at <https://tinyurl.com/j97h47o>). His more recent request for a PACER fee waiver to study further the privacy glitches in filings was denied. In 2011, Berners-Lee reported another study that found hundreds of failed redactions, where the information could be recovered from beneath the area covered. Timothy B. Lee, “Studying the Frequency of Redaction Failures in PACER,” *Freedom to Tinker* blog, May 25, 2011, available at: <https://tinyurl.com/jvxj954>. Berners-Lee, one of the original developers of the World Wide Web, concluded, “Correct redaction is not difficult, but it does require both knowledge and care by those who are submitting the documents. The courts have several important roles they should play: educating attorneys about their redaction responsibilities, providing them with software tools that make it easy for them to comply, and monitoring submitted documents to verify that the rules are being followed.” These studies apparently precede the more recent developments in redaction software discussed above but which have not yet been implemented, and thus, have not yet generated similar studies or analyses.

searched via electronic means for prohibited details, none of the states responding to our survey indicated that they yet used more recently developed software products, which are reportedly impressive in their accuracy.⁷

In addition to categories of cases with sensitive personal information (child and adult abuse and neglect, guardianship or conservatorship, juvenile criminal, etc.) where records are often not available to the public, some kinds of cases or case details are removed for public policy reasons such as concerns about misuse. Nine states guard against some kinds of possible misuse by denying bulk access altogether, or allow bulk access only where users agree to special arrangements. Seven other states control the practice by releasing only certain data elements in bulk or requiring users to work through a contract intermediary that checks to assure users follow rules such as mandatory updating and audit.⁸

States differ in how they developed, staff, and fund their access features. Sixteen of 20 report operating their own system, though half of those engaged vendors during early stages of development. Nine of 21 states report reliance on the courts' regular budget (typically those operating their own access technology); twelve fund the system through fees (for filing or other court transactions, or for access to online records).

⁷ Information on automated redaction software can be found in Appendix B. *See also*, Thomas M. Clarke, et. al., *Best Practices for Court Privacy Policy Formulation* (NCSC, forthcoming 2017).

⁸ Examples of concern for misinterpretation include records of arrests where no prosecution (or a not-guilty verdict) resulted, harvested by firms providing background checks for employers; or records of eviction cases (regardless of outcome) harvested by tenant screening firms and furnished to landlords. *See, e.g., Use of Tenant Screening Reports and Blacklisting* (New York State Bar Association, 2013) (reporting on misuse of state housing court bulk data by hundreds of tenant information brokers and eventual state action to omit names from electronic files of eviction cases), available at: <http://tinyurl.com/jcqzdnx>. Our survey did not capture state access limits designed specifically to respond to concerns of potential harm from misuse of data.

Findings and Best Practices

The study results have been organized under six headings in the sections that follow, with findings and judgmentally selected best practices characterizing leading states.

Scope of Access	
Finding 1	The federal courts' PACER web-based system provides online fee-based public access to the electronic case file in trial, appellate and bankruptcy courts. State courts are increasingly providing remote online access, and some have PACER-like full file access (except to some case types such as family, juvenile, and housing – protected by statute or court order). Some states have only docket access online, or access to the full record at courthouse kiosks. Attorney access is common.
Best Practice(s)	Online public access to all non-confidential case records is the standard achieved in some states' practices and is in the plans of many more.
Bulk Data Availability	
Finding 2	Courts differ in whether and how to allow bulk access, and if so, how to limit it to electronic court case records.
Best Practice(s)	Tension exists between fears of potential misuse by commercial data miners, e.g., real estate data firms engaged by landlords and background check agencies, and desire in some states to realize income from bulk data with commercial value. One technique requires users to commit to constantly update their database with new releases periodically from the state to minimize the danger of litigants being victimized by outdated information.
Privacy	
Finding 3	States offering online access to case files commonly keep some sensitive case types offline, even if available at the courthouse. Court rules generally require filers to keep personally identifiable information out of pleadings. Fear of privacy-breaching misuse has led some states to decide against public access beyond the docket, restricting full access to attorneys only.
Best Practice(s)	Requiring redaction by filers is common but unreliable; enforcing compliance is an unsolved problem. Automated search and redaction may hold promise, but it is not yet in wide use and there has been little evaluation of the systems available. NCSC has invited states to be part of a nationwide trial that has promise of providing essential information.

Governance Structures	
Finding 4	For setting policy on public access to electronic case records, court systems have commonly created standing committees – sometimes just within the courts but sometimes with broad membership from those affected – that worked over long periods on difficult questions of access, system design, and implementation.
Best Practice(s)	Committee membership that includes representatives of major users such as judges and court staff, prosecution/defense, the bar generally, the media, and the public offer a better opportunity to consider all aspects of the public access issue.
Fees	
Finding 5	States operating their electronic data systems with court staff tended not to charge fees (some are even free by legislative order); those with systems operated by outside contractors commonly charge fees. Fee structures vary widely (e.g., unlimited access after initial sign-up fee; sign-up fee plus per-page charge; per-page charge only).
Best Practice(s)	If the jurisdiction can create and maintain its own electronic filing system, fees can usually be absorbed through appropriations. If a third-party vendor is involved, passing on the access fees to litigants through filing fees and costs has proven to be cost effective (though it may lessen actual public access).
Maintenance and Usability	
Finding 6	While implementing a remote public access system requires providing resources for maintenance, remote systems impose minimal maintenance costs, and do not typically require lengthy disruptions for maintenance.
Best Practice(s)	Building redundancies to the system to prevent extended system outages. Conduct maintenance on a frequent basis. Best practice suggests that maintenance should be conducted over weekends to avoid any disruptions during business hours. At the outset, determine whether maintenance will be conducted in-house, or will be contracted out to a vendor.

Finding #1: Scope of Access

Scope of Access	
Finding 1	The federal courts' PACER web-based system provides online fee-based public access to the electronic case file in trial, appellate and bankruptcy courts. State courts are increasingly providing remote online access, and some have PACER-like full file access (except to some case types such as family, juvenile, and housing – protected by statute or court order). Some states have only docket access online, or access to the full record at courthouse kiosks. Attorney access is common.
Best Practice(s)	Online public access to all non-confidential case records is the standard achieved in some states' practices and is in the plans of many more.

Public access

Survey responses indicated that the variation in the scope of public access from state to state ranges from open web-based access to all electronically-filed documents (except those made confidential by statute or court order) to public access limited to electronic documents accessible only through a kiosk located in the courthouse. Some court systems took a middle course, allowing public access only through a courthouse kiosk, while granting attorneys broader access – usually fee based – to all electronically-filed documents (again, aside from confidential materials, such as juvenile records, certain family law records, and material subject to protective order).

Web-based broad public access is feasible and provided by many court systems

The federal PACER system is an industry leader in public access to court documents and e-filing has long been mandatory in the federal system. PACER provides public access to all non-confidential e-filed materials, and millions of users are not deterred by the limited search capability, mandatory registration, and per-page fees that have drawn criticism from the outset.⁹ The PACER record demonstrates that a web-based public access system is not only feasible but also desirable. One commentator described the “non-controversial” conclusion that such a system has multiple benefits, including (1) helping to ensure judicial proceedings are perceived as fair; (2) providing the public with appropriate and, in some cases, constitutionally protected discussion and criticism of government; (3) fostering public education regarding the legal system; and (4) allowing for public oversight and monitoring of the legal system.¹⁰

New York's system for gaining electronic access is similarly broad in scope akin to PACER in assuming that all filings are accessible unless a category is specifically excepted. A more detailed discussion of New York is found under Finding 4, Governance Structures.

⁹ PACER fees over the last six years are the subject of a class action pending in the U.S. District Court here, *National Veterans Legal Services Program, et al., v. United States*, No. 2016-cv-745 (ESH). A class of about 2 million users' claims fees were set beyond the limit authorized by Congress (only those necessary to recover costs).

¹⁰ See Peter W. Martin, *Online Access to Court Records – From Documents to Data, Particulars and Patterns*, 53 VILLANOVA L. REV., Issue 5 (2008), at 857

The Superior Court for San Diego County, California, likewise provides web-based access to all non-confidential records of civil cases. The San Diego County system generally charges fees on a document-by-document basis. Similarly, the Circuit Court of Davidson County, Tennessee, the county where Nashville is located, has all civil filings available on a web-based, subscriber-focused system, unless the proceedings involve a juvenile or have been filed under seal or are subject to protective order. The Davidson County, Tennessee, system charges fees per subscription to the system, in a relatively nominal amount of \$25.¹¹

The Utah state court system similarly provides online public access to electronic records except those filed under seal and certain other documents designated as private or confidential. Utah law imposes a four-part classification for various degrees of confidentiality, including public (all persons have open electronic access), private (only the parties to the proceeding have access), protected (only agencies with legitimate right to access can see protected records), and sealed (no one, not even a judge, can open the records).

Vermont Courts Online (“VTCourtsOnline”) provides access to calendar information for all of Vermont's Criminal, Family, and Civil Divisions; as well as detailed case information for the Civil Divisions (civil and small claims cases) for all Units of the Vermont Superior Court. However, not all cases are available through VTCourtsOnline. Records not open to public inspection by statute or court rule are not contained on this website.¹²

These exemplar jurisdictions confirm that public access can be achieved with modest effort in any jurisdiction with an electronic file system. State court systems are, more and more frequently, providing PACER-like access to courthouse files.

Other court systems have web-based access limited to attorneys only

Massachusetts state courts provide public access to electronic court records only at kiosks in the courthouse. A Massachusetts state court judge, who was on the committee that considered public access to electronic court records, informed us that this topic was debated in his committee and that they decided to limit public access to the courthouse kiosks in order to protect people from companies that troll for information for commercial purposes at the expense of consumers. Lawyers in Massachusetts have access to full, non-confidential court filings through a web-based platform. The Massachusetts committee felt that providing lawyers with such access properly balanced the need for disclosure of public record proceedings with the goal of preventing certain actors from using the court system to exploit the most vulnerable.

Courts in Missouri must follow statewide rules that also limit public access online to docket information only, not the whole case file. Free public access to full case files is at courthouse terminals only. Like Massachusetts, however, lawyers have full online access to all case files. Pressure from the public, however, has led to a special committee reconsidering the rule, a process not yet complete. Similarly, in Oregon, the level of access differs depending on the user and the system. Public access to electronic files is available in court kiosks for any record that is not juvenile, adoption, civil commitment, or sealed. Web-based access for attorneys is broader, and extends to every public case and public document. In Maryland, where a new electronic docket system is only operating at present in Anne Arundel County, where the state capital of Annapolis is located, and some Eastern Shore

¹¹ The original amount of the subscriber fee was \$35, but was reduced to \$25 pursuant to Tennessee state law, which prohibits courts from turning a profit on such a system.

¹² Detailed case information about Criminal and Family Division cases is currently not accessible through VTCourtsOnline. This includes cases such as criminal, domestic, juvenile, etc. (Email correspondence with Teresa Scott, Chief of Trial Court Operations, Vermont Office of Court Administration, March 17, 2017).

counties,¹³ only attorneys of record in a case have direct online access to case dockets and documents; other attorneys and the public must obtain access at courthouse kiosks.

Some supreme courts, in establishing public access policies, permit lower courts to determine whether to provide electronic access at all, but if they do, the supreme court defines the degree of access afforded different categories of documents and to different groups of users.¹⁴ The situation is even more complicated in a number of states such as Arkansas, Arizona, Illinois, and Texas, where each county can determine what degree of access is provided, with policy determination often left to the county clerk, often because individual counties maintain their own case-flow management systems.

¹³ Maryland has scheduled gradual implementation of its electronic system over the next several years.

¹⁴ This is the policy in Illinois state courts. See Administrative Office of the Illinois Courts, Electronic Access Policy for Circuit Court Records of the Illinois Courts (rev. effective Apr. 1, 2004). This approach is also likely to be followed as Texas develops its rules. (Telephone conversations with Dan Mueller, Information Systems, Illinois Administrative Office of the Courts; and David Slayton, Director, Texas Administrative Office of the Courts).

Finding #2: Bulk Data Availability

Bulk Data Availability	
Finding 2	Courts differ in whether and how to allow bulk access, and if so, how to limit it to electronic court case records.
Best Practice(s)	Tension exists between fears of potential misuse by commercial data miners, e.g., real estate data firms engaged by landlords and background check agencies, and desire in some states to realize income from bulk data with commercial value. One technique requires users to commit to constantly update their database with new releases periodically from the state to minimize the danger of litigants being victimized by outdated information.

States responding to our survey offered very different responses to the demand for access to court records in bulk, for example, requesting a single electronic download of all cases of a certain party or judge. Only one state allows it without restriction; nine simply do not allow it at all; and the rest set limits such as only certain data elements, noncommercial users only, or only under contract with a vendor or the court directly.

The strongest advocates argue there is no principled distinction between allowing public access to one record or many. After all, one with a day or week to spend could go to the courthouse and read all files of a certain kind. Yet, as scholars, researchers, and press have long complained, the federal PACER system does not provide bulk access to its general file of federal case records. (Federal bankruptcy court files are available in bulk, seen as a service to the credit reporting industry.)

Hesitation about bulk access stems from evidence of misuse of records, gathered *en masse* from the courts by data-mining companies and resold on the Internet. To avoid a risky hire or lease, employers or landlords seeking background information on applicants are ready to draw questionable conclusions from an “arrest record” or “suit for eviction” – regardless of the result of either proceeding. Such “facts” gain spurious gravitas when packaged as “court records” though many criminal charges go nowhere, and many housing court cases are settled without adjudication. Advocates emphasizing the harsh collateral consequences of criminal charges or eviction have successfully demanded limits to bulk access systems through litigation and legislative action.

Safeguards can include requiring a contract, so each bulk user may be identified and accountable to specific terms. To help guard against endless recycling of old and fragmentary case histories, some states require any bulk user to replace stale data on a regular schedule and open their records for audit to assure the replacement rule is followed. Some states exclude resellers altogether by a rule prohibiting release of all records for any “commercial purpose.” Specific sets of court records where misuse is documented can be limited, for example, by removing names from all housing court records online or downloaded in bulk, or removing criminal cases of certain kinds.

Recognition of the lasting effects of mass incarceration has led to renewed interest in expanding statutory authority for expungement as a way, even for those with convictions, to escape the prison of their history that can doom jobs and housing for years. Some in law enforcement (police and prosecutors) have argued against expungement as “rewriting history” and the same can be said about limiting court record access. The success of advocacy campaigns – such as that of the New York State Bar discussed above to limit housing court data – suggests the harm of false generalizations from limited data is real and courts need to consider their response.

Respondents had little to say about limiting bulk access to avoid system overload. This apparently is regarded as a technical matter for information systems staff to resolve as with other system design needs.

Finding #3: Privacy

Privacy	
Finding 3	States offering online access to case files commonly keep some sensitive case types offline, even if available at the courthouse. Court rules generally require filers to keep personally identifiable information out of pleadings. Fear of privacy-breaching misuse has led some states to decide against public access beyond the docket, restricting full access to attorneys only.
Best Practice(s)	Requiring redaction by filers is common but unreliable; enforcing compliance is an unsolved problem. Automated search and redaction may hold promise, but it is not yet in wide use and there has been little evaluation of the systems available. NCSC has invited states to be part of a nationwide trial that has promise of providing essential information.

Legal background

Courts have made clear that quoting a court document is not considered an invasion of privacy.¹⁵ Once on file, it is there forever, for anyone to see. Only in Europe is the right recognized to have old facts forgotten, even if true.¹⁶ The approaches for courts were presented clearly 15 years ago: make documents hard to get, cover up the sensitive bits, or keep them out in the first place.¹⁷

“In the District of Columbia, you generally cannot be held liable for publishing truthful information gathered from government records that are open to public inspection. The D.C. Court of Appeals refused to impose liability on a defendant who published financial information gathered from "court files, tax ledgers, and agency records of this City and the federal government." The protection could apply to information obtained from other government records as well, both because of a potential constitutional privilege and because the information is already exposed to the public eye.”¹⁸

Privacy rules

Privacy methods have not always been regarded as entirely satisfactory: “Widespread public access to information in court records through the Internet, a subscription service, or third-party vendors presents unique risks

¹⁵ *Wolf v. Regardie*, 553 A.2d 1213, 1221 (D.C. 1989)

¹⁶ European data privacy regulations have been described as “enshrining the so-called right to be forgotten into European law, giving people in the region the right to ask that companies remove data about them that is no longer relevant or out of date.” Mark Scott, *Europe Approves Tough New Data Protection Rules*, *New York Times*, Dec. 15, 2015.

¹⁷ The Conference of Chief Justices/Conference of State Court Administrators (CCJ/COSCA) Public Access Guidelines of 2002 outlined three approaches for reducing the risks to privacy from disclosure: “The first is to reestablish practical obscurity by limiting public access to [visiting] the courthouse. The second is to redact information to produce a copy of the record for remote public access. The third is to prevent sensitive information from getting into the court record in the first place.” Alan Carlson, *Public Access to Court Records: Reducing the Risk of Disclosure of Personally Identifiable Information*, in National Center for State Courts, *FUTURE TRENDS IN STATE COURTS 2007* (2007).

¹⁸ Digital Media Law Project, *Publication of Private Facts in the District of Columbia*, at <http://www.dmlp.org/legal-guide/publication-private-facts-district-columbia>

compared to traditional public access at the courthouse. Several approaches have been developed to continue to provide general public access, yet minimize the risk of harm from disclosure of certain types of information. The specifics of each approach continue to evolve as courts and the public gain experience with the reality of electronic records.”¹⁹

The 2002 Public Access Guidelines had sought to enable public access to electronic court files while supporting the exclusion of what has been called Personal Identity Information (PII), such as Social Security numbers and birthdates, as well as categories of cases such as juvenile and family matters.²⁰ In effectuating these guidelines, concerns for privacy have played a major role in how courts and court systems have designed their individual rules.

Two general approaches to protecting privacy in public access

The survey conducted by CCE disclosed two basic forms (restrictive and non-restrictive) by which court rules regulate public access to electronic court files:

1. Under the federal courts’ PACER system described earlier, users must register and provide a credit card for the automated charges that accrue for each paged viewed. New York State’s courts have in essence followed PACER’s approach with respect to providing broad access but have instead made access completely free of cost. In essence, parties are responsible to screen out and redact contents of filings that should not be made public: Social Security number; date of birth; contact information, such as street addresses and telephone numbers; financial account numbers; and operator’s license number.
2. In contrast, many states have adopted more restrictive rules that limit full access to case filings. These are fully described under Scope of Access, above.

In 2012, long-time participant and analyst of public access to electronic court files, Robert Deyling, described the disparate situation prevailing with respect to different rules protecting privacy through limiting access in different ways:

Many questions remain unanswered, and no uniform approach has emerged. Case files that are, or eventually will be, completely open for remote electronic review in one state's court system may be completely closed to remote access in another. What has emerged is a patchwork quilt of court access rules and policies, where different approaches to implementing the same principles can lead to very different policy results. These variations in access policy suggest that wide policy divergence will persist for the immediate future.²¹

Making those seeking to view electronic court files come to the courthouse has been labeled “public obscurity” because while the documents are still available to be viewed, the procedures imposed on those trying to see them

¹⁹ Alan Carlson, *Public Access to Court Records: Reducing the Risk Of Disclosure of Personally Identifiable Information*, in National Center for State Courts, *FUTURE TRENDS IN STATE COURTS 2007* (2007), at 22, available at <http://docplayer.net/45345655-Future-trends-in-state-courts-a-nonprofit-organization-improving-justice-through-leadership-and-service-to-courts.html>

²⁰ Martha Wade Steketee and Alan Carlson, *Developing CCI/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts* (Nat’l Center for State Courts and Justice Management Institute, 2002), adopted by the Conference of Chief Justices and Conference of State Court Administrators, 2002, available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/210>

²¹ Robert P. Deyling, *Privacy and Public Access to the Courts in an Electronic World: Common Themes and Diverse Approaches to Policy Development*, 2 REYNOLDS CT. & MEDIA L.J. 5 (2012).

are designed to protect privacy by making access to them more difficult. Tom Clarke of the National Center for State Courts has expressed skepticism about use of this approach in developing policy on public access:

[Public obscurity]... is an extraordinarily unique interpretation of what it means to be a public document. In no other industry or government organization is there an example of a document being declared public but only accessible by certain artificially limited means. To the contrary, if it is public the organization does everything it can to make it easily and inexpensively available as possible. It is either public or not. The idea of sort of being public, but only to the right people for the right reasons, is an oxymoron. That is the definition of limited access.

A more appropriate policy response would be to simply make certain documents no longer public, including at the courthouse. Courts are loathe to do this because it then becomes obvious that they are restricting access to public documents, but is a more honest and consistent policy response. Access is qualitatively changed by online availability and, in this case, that requires a real policy change.²²

Two views of privacy

Thus, a dichotomy in the development of rules governing public access to electronic court files rests on two conflicting views of privacy:

1. One view has been described as “public is public” and recommends generally broad and unrestricted access to all court files—paper and electronic. This position usually recognizes the need for some information, such as Social Security numbers, birthdates, and juvenile and family matters, to be protected from exposure.
2. The contrasting approach aims to limit public access to electronic files both to parallel the way the public must use the paper files, by visiting the courthouse and using a computer terminal there (labeled “practical obscurity”) and by restricting certain major areas of court files, usually juvenile and family matters, and sometimes fields such as housing and criminal cases. In each instance of a protected area of jurisdiction, the intent is to make it difficult or impossible to obtain information that could be used adversely with respect to a litigant or person mentioned in court filings.

While these positions can be generally identified as the ones adopted, with regard to the broad public access approach, by the federal courts and New York, and with respect to the second, by numerous states, the actual pattern is less readily categorized. There are many individual differences among all of these jurisdictions.

²² Tom Clarke, *Court Records Privacy and Access: A Contrarian View of Two Key Issues*, OPENING COURTS TO THE PUBLIC (2016), at 55, available at <http://www.ncsc.org/~media/Microsites/Files/Trends%202016/Contrarian-View-Trends-2016.ashx>

The CCE survey of states indicated the variation regarding document types and state court systems in terms of public access:

Document types open to the public	
21 states	
Dockets	18 states
Party filings	16 states
Evidence or exhibits	4 states
Orders and judgments	15 states
Judicial opinions	13 states

Policy considerations

Underlying the two contrasting approaches to providing public access to electronic court files described in the previous narrative are two major opposing policy considerations:

1. Public access permits the citizenry to be aware of what the courts are doing. The common law right, and the presumption of public access to court records in particular, "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system."²³
2. The second "position assumes that unrestricted Internet access to court case files undoubtedly would compromise privacy at some level and could increase the risk of personal harm to litigants or others whose private information appears in the files. ... unlimited Internet access to court case files could lead to an increase in identify theft, risks to personal safety, loss of 'social forgiveness,' increased discrimination, secondary commercial uses of public information, destruction of reputations and a diminished willingness by individuals to use the courts."²⁴

One of the more trenchant expressions of the critical issues involved in determining the best approach to providing public access to electronic court files follows:

Legitimate concerns about potential harms posed by full transparency to those involved in litigation-both parties and witnesses-have historically led to limited restrictions on public access. Distinct categories of cases, such as family law matters, juvenile and mental health proceedings, and categories of individuals-notably children-have traditionally received special protection. In addition, judges have been granted broad discretion to shield specific material in otherwise public proceedings in order to protect privacy, proprietary or national security interests. Although online access to court proceedings and records raises the promise of dramatic benefits of many different kinds, it also increases the potential for harm. Constructing public arrangements that maximize the former while minimizing the latter is a challenge for which the federal PACER system and its scattered state analogs furnish suggestive, yet seriously

²³ *In re Continental Illinois Securities Litigation*, 732 F.2d 1303, 1308 (7th Cir. 1984).

²⁴ Deyling, *op.cit.*, n. 21, referring to Beth Givens, *Public Records on the Internet: The Privacy Dilemma*, THE PRIVACY RIGHTS CLEARINGHOUSE, (March 2006), available at <https://www.privacyrights.org/ar/onlinepubrecs.htm>.

incomplete, returns. Confounding both the challenge and available evidence is the large and rapidly growing redistribution of court data by private sector information services.²⁵

Many of these concerns may be soon addressed by developing technology: the problems raised and discussed above may be resolved by effective redaction software. Court staff and experts at a fall 2016 meeting at NCSC heard of six potential vendors; results of our effort to track down the state of their redaction capability and court users are outlined in Appendix B. One vendor said their system had beat others in a test sponsored by a state court system, but we know of no published results. NCSC has discussed sponsoring a national trial. No doubt, many states would welcome the results to guide key decisions.

²⁵ Peter W. Martin, *op.cit.*, n. 10 *supra*.

Finding #4: Governance Structures

Governance Structures	
Finding 4	For setting policy on public access to electronic case records, court systems have commonly created standing committees – sometimes just within the courts but sometimes with broad membership from those affected – that worked over long periods on difficult questions of access, system design, and implementation.
Best Practice(s)	Committee membership that includes representatives of major users such as judges and court staff, prosecution/defense, the bar generally, the media, and the public offer a better opportunity to consider all aspects of the public access issue.

With ever-growing existence of electronic court records signaling the end of the “practical obscurity” era of courthouse files, new and challenging issues are arising, including the obvious, discussed throughout this report – what should be open and to whom. When hard choices of costs and conflicting values are involved and stakeholders hold divergent interests, not only the policies themselves but also the way courts are reaching key decisions are of interest.

We interviewed court officials in about half of the states that responded to our survey to ask detailed questions about their experience with online public access, including how traditional court governance in their states has adapted to deal with new concerns accompanying dramatic expansion of the possibility of public access to the court record. Inquiries focused on how to fund electronic access and filing technology, and how to balance modern electronic access and privacy (how to assure personal data does not appear in accessible court filings, whether to limit access to some kinds of cases where third parties are known to misuse information, etc.).

Decision-making for courts in the District of Columbia differs from that in typical states where the two political branches of government have major roles in funding and oversight of the third branch, the judiciary. In D.C., the federal government funds and oversees the local courts, while home rule powers granted to the District legislative branch—the D.C. Council—explicitly exclude any authority over the local courts.²⁶

²⁶ In D.C., the courts’ budget is formulated independently by five-judge Joint Committee on Judicial Administration and – since 1997 – submitted to Congress without review or amendment by the D.C. Mayor or Council. The federal appropriation to support court operations and capital improvement was \$275 million in fiscal year 2016. The limitation of Council authority over the courts is in the Home Rule Act of 1973, Sec. 602, D.C. Code § 1-206(a)(4). Decisions large and small thus can take acts of Congress—from the 2002 reorganization of the entire family, child welfare, and juvenile delinquency parts of the court to this year’s increase in the limit of actions in small claims court from \$5,000 to \$10,000. D.C. trial and appellate judges are selected by a process involving an independent nominating commission, Presidential appointment, and Senate confirmation. The federal government provides other justice system elements directly (felony prosecutions by the U.S. Attorney, incarceration of long-term inmates by the Bureau of Prisons) or by appropriation to agencies that have local jurisdiction over the District but are a part of the federal government (pretrial services, indigent defense, probation and parole supervision). Congress has also set major revenue limits, prohibiting taxation of federal and embassy property now exempt, or taxing income earned in D.C. by nonresidents. Thus, there is little chance of locating sufficient local funds to replace the federal allocation and seek local direction of the courts and related activity. This was the conclusion of a CCE review in 2007, summarized in Peter R. Kolker, *Organization, Budgeting and Funding of the District of Columbia’s Local Courts*, 11 U.D. C. L. Rev., (2008) at 43. Prior to 1997, however, funding for the D.C. courts was included in the D.C. budget, which was submitted by the Mayor to the Council, and acted upon by the Council, followed by review by the Senate and House Appropriation Committees and both houses of Congress. The Revitalization Act of 1997 eliminated the courts from the D.C. budget, so that now the Mayor and Council play no role in the court budget and appropriation process. The D.C. Courts also lack the authority to direct any income that might be derived from fees for access to files to court use as Congress appropriates funds for the courts and any revenue may be transferred to the U.S. Treasury.

Even so, what ten states told us about their policy process may prove useful in the District since the public concerns are identical even if the context is not.

Most often, the state's highest court, with statutory superintendence authority over the state's other courts, appointed a committee to deal with the issues involved with digital court records in the 21st century—initially access for the court, attorneys, and litigants, and then access for the broader community of press, researchers, advocates, commercial users, and the public generally. California, which has county court systems as large as some states, has—in one county where we interviewed officials—done the same through appointment by the chief judge of a technology committee. Some committees often have designated seats for representatives of different interests and the public; some have public websites with meeting information and minutes. Many have worked for years.

As most courts elsewhere seem to have found such outreach useful, including attorney members and sometimes the public beyond the profession, it appears to qualify as a best practice. Enriching the policy process with such a governance move is open to officials here as much as anywhere and just as potentially fruitful, extending the courts' knowledge of public concerns and building support for chosen directions as public online access gets further consideration in D.C. courts.

Policy development in state court systems

Minnesota's high court convened an ad hoc advisory committee in 2004 that held hearings and proposed their rules of online public access (docket only).

Missouri has two bodies. First, the legislature in 1994 mandated that the Supreme Court establish a court automation committee (as a condition of granting a fee increase) that includes judges, court managers, a prosecutor, a defender, and members of the bar. It has overseen the initial case management system, then gradual adoption of e-filing statewide, now mandatory, and has lately engaged an ad hoc outside committee that has endorsed requests of the press for full online access as all attorneys have. Second, a state judicial records committee of 13 judges from all levels, also appointed by the high court, recommends state court rules on what cases are public and what data elements may be viewed on the statewide docket system and on courthouse terminals.

The Texas legislature in 1997 created a Judicial Policy Committee on Information Technology to be appointed by the chief justice from specified constituencies including the general public to develop statewide court technology. Members include judges and court staff, plus a legislator, private attorneys and a law firm technology head. It is chaired by a corporate general counsel (who has also been a state bar governor and visiting trial and appellate judge). The committee charge in the original statute predated today's technology and omits public access; aside from a reference to developing a website that does not indicate its content or purpose, the charge centers on technology-assisted improvements for court management. The state is three years into electronic filing. The committee's charge has been expanded, and some degree of public online access is expected later this year under parameters not yet set.

Utah's Judicial Council (judges plus one bar representative) appoints a technology committee of judges, court staff, state staff, and one bar representative, to recommend policy for the statewide electronic filing and record system and fee-based full-file access.

Supreme courts in Massachusetts, Illinois, and Maryland have also appointed similar policy advisory boards. Through the process there, Massachusetts heard strong advocacy for protecting against misuse of records and as

a result has declined to allow online public access. Illinois has a subcommittee exploring wider public access. Maryland's Court of Appeals chief judge appoints a technology oversight board (of judges and court staff only) and an electronic courts advisory committee (also court system employees only). E-filing remains at an early stage there.

Oregon's system convenes a committee of judges, staff and attorneys several times a year to review system functionality, including access to the limited information online from the statewide case management files.

In California, following the failure of a statewide comprehensive electronic system development project, each county is developing its own. In a large county (3.3 million residents, 9 courthouses, 150 judges), the presiding judge we interviewed had appointed an in-house technology committee (judges and staff) to address both policy and technical matters. Special groups are established for projects (for example, the transition from paper files to electronic case management in family law) to address IT needs and also seek public input from, and design outreach to, the bar and public when approaching adoption of new technology that affects access.

We reviewed the experience of New York from other sources, as the state has had a longstanding policy of openness. The state's approach, characterized by providing broad public access to electronic court files, was promulgated by the administrative governing body of the court system following recommendations of a special commission appointed in 2002 by the chief judge of the state. The state's courts did not continue the commission as a governing structure after it completed its report but delegated day-to-day operation to the clerks of court, supported by the information systems staff of the state Office of Court Administration (OCA). The Chief Administrative Judge, who heads the OCA, prepares and submits an annual report on e-filing, for which public comments are solicited on the system's e-filing website.

The original *Report to the Chief Judge* by the New York State Commission on Public Access to Court Records reflected the work of a broad-based group of judges, lawyers, court staff, and media representatives. They recommended the same information be available whether it is maintained in paper or electronic form. This commission did recommend specific methods of resolving privacy concerns regarding the data items commonly excluded from access:

Without leave of court, no public court case records, whether in paper or electronic form, should include the following information in full: (1) Social Security numbers, (2) financial account numbers, (3) names of minor children, and (4) full birth dates of any individual. To the extent that these identifiers are referenced in court filings, they should be shortened as follows: (1) Social Security numbers should be shortened to their last four digits, (2) financial account numbers should be shortened to their last four digits, (3) the names of minor children should be shortened to their initials and (4) birth dates should be shortened to include only the year of birth. The responsibility for ensuring compliance with these recommendations should lie with the filing attorneys or self-represented litigants. In addition, the UCS [Unified Court System] should determine how to protect at-risk individuals such as victims of domestic violence and stalking from being identified and located by use of their home and work phone numbers and addresses in public court records.²⁷

²⁷ Commission on Public Access to Court Records, *Report to the Chief Judge* 8-9 (February 2004), available at http://www.nycourts.gov/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf

This recommendation of the commission was adopted as Uniform Rule § 202.5(e), Omission or Redaction of Confidential Personal Information, by the Administrative Board of the New York State Courts, effective Jan. 1, 2015.²⁸ A required Redaction Cover Form adopted by the N.Y. courts is attached in Appendix D.

²⁸ The Administrative Board is the governing body of the New York State Unified Court System. It is comprised of the Chief Judge of the State of New York (who is the Chief Judge of the Court of Appeals), and the four Presiding Justices of the Appellate Divisions of the Supreme Court, the intermediate appellate level.

Finding #5: Fees

Fees	
Finding 5	States operating their electronic data systems with court staff tended not to charge fees (some are even free by legislative order); those with systems operated by outside contractors commonly charge fees. Fee structures vary widely (e.g., unlimited access after initial sign-up fee; sign-up fee plus per-page charge; per-page charge only).
Best Practice(s)	If the jurisdiction can create and maintain its own electronic filing system, fees can usually be absorbed through appropriations. If a third-party vendor is selected, passing the accessing fees on to litigants through filing fees and costs is cost effective.

While the overall landscape of fees for accessing and printing court records varies greatly from jurisdiction to jurisdiction; however, several common themes and identifiable best practices are discernable.

The states covered were split between those that have developed and maintained their own government-run e-filing system (6) and those that have retained a third-party vendor (5). For all five of the latter jurisdictions, the third-party vendor was Tyler Technologies, the dominant software provider in this market space. Of the government run systems, four did not charge for accessing court filings, including Illinois, New York, Utah, and Pennsylvania. The two government-run systems that have fees, Virginia and Tennessee, both are subscriber-based systems requiring an up-front fee that permits unlimited access to available records. Tennessee had initially charged a \$35 subscription fee, but had to reduce it to \$25 owing to the profitability of the program.

Of the five states that outsourced with Tyler, only one did not charge any fees for public access: Texas. Minnesota allows for remote access that is essentially free; however, as it passes the fee along in its civil filing costs, those litigating matters absorb this expense. Oregon charges a one-time set up fee of \$100, and then requires a \$35 per month subscription. While California does provide free access to the court's docket, it charges \$7.50 for the first 10 pages of each document up to a cap of \$40. Because Maryland's existing system only allows access to case dockets and not actual filings, it offers little guidance here. Thus far, no fees have been charged in the small number of counties that are on the electronic filing system now being implemented.

In sum, fees are primarily associated with the programs provided outside vendors. To assist with dealing with the costs associated with the installation and maintenance of these software programs, several states pass these costs on to filing fee impositions rather than charging individuals for access. Oregon is an example of a state that has identified a manner in which these costs can be absorbed. More information from Texas may identify if it is spreading these costs out among others as well. Oregon requires an investment of approximately \$135 to gain access to public records, but the amount is fixed. While California does not charge a "sign-up" or subscription fee, it could ultimately be the most expensive due to its price structure of charging \$7.50 for the first 10 pages and then seven cents for each additional page to a maximum of \$40 per document.

The survey conducted for Washington State completed in 2013 provides additional information as to the national trend for fee structures. However, only two of the states included in the article permitted online public access to electronic documents statewide: Nebraska and New York. Two other jurisdictions, Arizona and Arkansas, permit

public access to electronic documents, but only in the jurisdictions where electronic filing has been implemented (in Arkansas, that is only one county).

Nebraska created and maintains its own e-filing system and does not utilize vendor services. The fees are broken down into three stages based on an initial name search of the parties. An individual name search costs \$15 per search and permits the individual to view case details in up to 30 cases reported in the name search (no documents can be viewed.) A subscriber to the system is permitted free name searches and charged \$1 per case to view case details, including any electronic documents. The third fee arrangement is for bulk viewing, which allows unlimited access to case information and e-filing documents for \$300.

Arkansas's e-filing system, which was limited to one county, as of 2013, was provided by a vendor, but is operated by the state. A one-time \$100 registration fee is assessed to those participating in the e-filing system, and a \$20 access fee per case if a filing fee was required.

Arizona is also a county-by-county e-filing state and in those participating jurisdictions, it uses a vendor-provided and operated system and charges fees for filing and viewing. Filing fees for filing are \$6 per document (\$5 goes to the vendor and \$1 to the state court system). The document access fees are tiered: access to a document is \$10; \$80 for 20 documents; or bulk viewing at \$2 per document.

The study focused more on filing fees than accessing fees and concluded that states with vendor-operated systems charged higher filing fees than in state-operated jurisdictions. This conclusion is similar to findings with respect to higher costs for accessing fees from vendor-operated systems than those operated by the state.

Finding #6: Maintenance and Usability

Maintenance and Usability	
Finding 6	While implementing a remote public access system requires providing resources for maintenance, remote systems impose minimal maintenance costs, and do not typically require lengthy disruptions for maintenance.
Best Practice(s)	Building redundancies to the system to prevent extended system outages. Conduct maintenance on a frequent basis. Best practice suggests that maintenance should be conducted over weekends to avoid any disruptions during business hours. At the outset, determine whether maintenance will be conducted in-house, or will be contracted out to a vendor.

Providing the public with remote access to court records requires devoting information technology resources to ensure that the system is usable and reliable. Our findings suggest that, while properly maintaining these systems does impose some maintenance costs, the costs and disruptions of performing regular maintenance are minimal.

System maintenance imposes minimal disruptions

Routine maintenance of remote-access systems has not been disruptive; only minimal downtime is typically required. None of the states reported that they had major maintenance issues that resulted in extended system outages.²⁹ States indicated that they have built in redundancies that to help prevent extended system outages.³⁰

Regular maintenance does require bringing the system offline for some period of time. Several states indicated that their maintenance procedures required bringing the system offline for a period ranging from a few hours for smaller states to over a day or two for larger states.³¹ Oregon court administrators said they conduct their maintenance on weekends to avoid disrupting the courts during the week.³² Several states indicated that they are constantly improving their system through the installation of updates and enhancements, and that such upgrades may require brief system outages.³³

Maintenance costs for remote access are a small piece of IT costs

Maintenance for remote-access systems are a small percentage of the cost of states' entire electronic case management systems. States indicated that the remote access component of their overall electronic system required fewer electronic resources, and less maintenance. For example, Minnesota indicated that remote access only required two dedicated servers, while the overall electronic case management system (of which remote access is a component) used approximately 40 servers.³⁴

Most states indicated that they have the capabilities to handle maintenance issues in-house, although a large minority of states contract with their system vendor for maintenance purposes. However, it is unclear whether

²⁹ See, e.g., telephone interview with Utah AOC staff member, Dec. 1, 2016.

³⁰ Telephone interview with Pennsylvania AOC staff member, Dec. 16, 2016.

³¹ Telephone interview with Oregon AOC staff member, Dec. 2, 2016; Utah interview, *supra*.

³² Oregon interview, *supra*.

³³ Utah interview, *supra*.

³⁴ Telephone interview with Minnesota AOC staff member, Nov. 28, 2016.

the adoption of a remote access system would require hiring additional IT staff specifically for maintaining the remote access system. Forty-eight percent of survey respondents indicated that they had to hire additional staff to maintain their system, while 52 percent indicated that they did not need additional staff.

Additionally, additional funding was not required to maintain the system. Utah indicated that their annual budget for their statewide IT department was more than sufficient to handle the added maintenance associated with the remote access system.³⁵

Most systems require infrequent maintenance

Our findings suggest that remote access systems generally require maintenance on an infrequent basis. A majority of states responding to the survey indicated that maintenance is conducted as needed, and five states indicated that maintenance occurs on a monthly or quarterly basis. Only a few states indicated that their systems required maintenance on a daily or weekly basis.

³⁵ Utah interview, *supra*.

Research Methodology

After an initial meeting with then Chief Judge Eric T. Washington, CCE applied to the State Justice Institute (SJI) for a grant to conduct a survey regarding best practices among state court systems to provide public access to electronic court files. Upon receipt of the SJI grant award, CCE established a project committee to conduct the cross-jurisdictional review, and allocated staff resources to support the committee. Committee members were drawn from members of the CCE Board of Directors, including representatives from law firms, businesses, and community stakeholder groups. In addition to those members, the committee also consulted with representatives from the media and federal and local government agencies throughout the grant period. The committee collected information and data from surveys, interviews, and policy focus groups with various internal and external stakeholders and subject matter experts, along with published reports, academic and law journal articles, news reports, local and federal laws and regulations, and internal court policies.

In awarding CCE the research grant that made this project possible, SJI encouraged CCE to partner with NCSC, as that organization was working on a complementary project on greater public access to court records.

Survey

In the summer of 2016, the committee developed a survey for distribution to members of the Conference of State Court Administrators (COSCA), as well as other state court officials identified by NCSC staff as likely to be knowledgeable about this subject. The survey was designed to capture both qualitative and quantitative data in the following topic areas as these pertain to public access to electronic court records: type of system and start-up (system vendor, how the system was designed, etc.); financial considerations (how a court/court system funds its public access system); access to the system (levels of access, types of records available through the system, etc.); privacy protection; and system operation and maintenance.

The survey was developed through *ConfirmIt*, an online survey design and distribution software, and disseminated to the COSCA membership and others by NCSC. The officials who responded to this survey (“participants” or “respondents”) represented a broad cross-section of state court personnel, including, but not limited to, sitting judges, information technology (“IT”) professionals, and state court administrators and their staffs. However, participants were asked to identify their state and the court or court administrative office within that state they were representing, but were not asked to identify their role within the court. Furthermore, participants were not required to respond to each question, so some data in some areas may be representative of a smaller sample than the survey’s total respondents.³⁶

Respondents were given more than one month to complete their surveys. The data from the surveys were automatically aggregated by *ConfirmIt*, and were analyzed by staff at CCE and NCSC, as well as by CCE committee members. The states surveyed for this report are included in Appendix C.

Respondent Jurisdiction	State Supreme Court	Trial Level Court	State Court Administrative Office	Other ³⁷
28	4	4	19	1

³⁶ The data presented from the surveys developed and administered by CCE represent the opinions of *only* the respondents, and not necessarily those of the entire surveyed target populations.

³⁷ Represents a combined response for a state’s supreme court and trial courts.

Targeted interviews

Based on the responses to the survey, the project committee compiled a list of court personnel with whom committee members conducted in-depth interviews on the specifics of their public access system. The selected state courts were chosen for a variety of reasons, such as population or court volume similar to those of the District; court system structure similar to that of the District (e.g., absence of intermediate appellate court); and unique survey responses. Committee members conducted these interviews, which were then reviewed by the project committee along with the survey responses. The states interviewed for this report are included in Appendix C.

In advance of the interviews, CCE staff prepared informational packets on each state. The packets included brief overviews of the state's population, structure of their court system, public access vendor (if one existed), and the responses from the survey. In the interest of the interviewees' time, committee members used these information packets to focus interview questions on the areas that made each state's court system different.

Determination of findings and best practices

Once the interviews were finished, the project committee convened to determine the findings and best practices outlined in this report. The project committee considered "findings" to be the recurring themes coming out of the survey and interviews.

APPENDIX A

Summary: Five State Courts' Public Access Legal Framework

The following court rules and policies exemplify the range of structures for addressing issues pertinent to access to state court records:

Illinois

On September 19, 2002, the Supreme Court entered an Order implementing the Electronic Access Policy for Circuit Court Records of the Illinois Courts (EAP), effective January 1, 2003.³⁸ The Administrative Director of the Administrative Office of the Illinois Courts was authorized to amend the EAP where deemed necessary and appropriate through the Supreme Court's Order entered March 29, 2004. Subsequently, the EAP was revised effective April 1, 2004, adding the restriction to prohibit certain types of documents from being displayed over the Internet.

The EAP makes the distinction between the electronic and paper record by restricting access to electronic records and documents from indiscriminate disclosure while protecting the public's statutory right for inspection. The policy was developed "to provide electronic access to court records in a way that mutually benefits the public and the judiciary by making access to certain court records convenient for the public while protecting the privacy of identifiable interests."

Minnesota

The Minnesota Rules of Public Access³⁹ are an excellent example of the articulation of court access and privacy rules. Rule 2 states, in pertinent part: "Records of all courts and court administrators in the state of Minnesota are presumed to be open to any member of the public for inspection or copying at all times during the regular office hours of the custodian of the records." That Rule explains that some records are not generally accessible to the public. Subdivision 4 of Rule 1 explains that various court rules "place obligations on parties and participants filing documents with the court to correctly designate non-public documents when filing." The Rule also explains: "[f]ollowing these rules correctly is critical to ensuring appropriate public access to court records as court staff are not required to review every word of every document submitted to the court for filing to determine if it is appropriately accessible to the public."

Rules 4-6 identify the types of information and data that are not accessible to the public, e.g., records in domestic abuse or juvenile proceedings.⁴⁰ Rule 8 differentiates between access to original records ("on site") and remote access to electronic records. Rule 8(b) describes remote access and explains that some information items, like social security numbers, residential street addresses, and financial account numbers, are not accessible. That rule also creates some case-type exclusions from remote access, e.g., domestic abuse, harassment, and juvenile felony. Rule 9 prescribes a process by which the denial of access to court records may be appealed.

³⁸ Administrative Office of the Illinois Courts, Electronic Access Policy for Circuit Court Records of the Illinois Courts (rev. effective Apr. 1, 2004), at 1, *available at* <http://www.illinoiscourts.gov/SupremeCourt/Policies/Pdf/PubAccess.pdf>

³⁹ See Minnesota Judicial Branch, Minnesota Rules of Public Access to Records of the Judicial Branch (rev. effective Sept. 1, 2012), *available at* <http://mncourts.gov/SupremeCourt/Court-Rules.aspx>

⁴⁰ See Minnesota Judicial Branch *supra* 4-6.

Missouri

Rule 2.02 of the Missouri rules declares that the records of all courts “are presumed to be open to any member of the public for purposes of inspection or copying during the regular business hours of the court having custody of the records.”⁴¹ That policy “does not apply to records that are confidential pursuant to statute, court rules, or court order; judicial or judicial staff work product; internal electronic mail; memoranda or drafts; or appellate judicial case assignments.” Rule 2.02 prescribes that court records “shall be provided at a time and in a manner that does not interfere with the regular business of the courts.” Notably, the Rule places on the filing party the responsibility to assure that “personal information does not appear in the accessible record.” Thus, the clerk “will not review each document for compliance with this policy.”

Rule 2.04 identifies the information to which the public may obtain access, essentially -- electronic public indices, basic information about a case, docket entries, and judgments. Rule 2.05 authorizes the clerks to respond to public inquiries that request “personal information” (defined to include social security numbers, motor vehicle operator license numbers, victim or informant information, and financial account information) “only by access to the case files.” The clerks “shall not provide such information verbally or by facsimile, or e-mail.” Moreover, by court rule or order, a clerk may “redact personal information from the public copy of the court record,” or “raise the security level of the document in the case management system if the document cannot be adequately redacted to protect personal information.”

The Missouri rules describe the process for obtaining court records. Under Rule 2.08, “a custodian of records shall be named for each clerk’s office to approve or reject requests for records.” Rule 2.09 explains that a “state judicial records committee, upon receipt of a written request, may review any request for access to information that has been denied.”

Finally, Rule 2.10 explains that bulk distribution of court records “shall be made only upon approval of the state judicial records committee. Under no circumstances shall bulk distribution of court records be made for commercial gain.”

New York

See discussion of and references to New York rules governing public access at pages 19-20 above and accompanying notes.

Pennsylvania

The Electronic Case Record Public Access Policy of the Unified Judicial System of Pennsylvania governs access to electronic case records.⁴² Section 2.02(B) states that the public may inspect and obtain such records except as

⁴¹ See Mo. COR 2, *available at* <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/e2aa3309ef5c449186256be20060c329/dc2e80286afa4ad286256ca60051dee2?OpenDocument>

Rule 2.02 prohibits access “to any Missouri judicial website, including but not limited to Case.net, by a site data scraper or any similar software intended to discover and extract data from a website through automated, repetitive querying for the purpose of collecting such data.”

⁴² Unified Judicial System of Pennsylvania, Electronic Case Record Public Access Policy, *available at* <http://www.pacourts.us/assets/files/page-381/file-837.pdf>

prohibited by law or the policy. Section 3.0 excludes from public access various kinds of information, including social security numbers, victim and informant information, juror information, witness information, and financial institution account numbers. Section 3.10 permits requests for bulk distribution of electronic case records that are not excluded from public access and sets forth various requirements and limitations as to such access.

Section 4.00 provides that the respective court or office shall respond to a written request for access to an electronic case record within 10 business days of receipt. Section 5.00 states that “reasonable fees” may be imposed for providing public access to electronic case records pursuant to the Policy.⁴³

Vermont

Section 1 of the Vermont Rules for Public Access to Court Records explains that the Rules “govern access by the public to the records of all courts and administrative offices” of the state’s judicial branch, “whether the records are kept in paper or electronic form,” provide “a comprehensive policy on public access to Judicial Branch records,” and “shall be liberally construed in order to implement the policies therein.”⁴⁴

Section 4 states, that “[e]xcept as provided in these rules, all case and administrative records of the Judicial Branch shall be open to any member of the public for inspection or to obtain copies.” Section 6(a) explains that the public “shall have access to all case records, in accordance with the provisions of this rule, except as provided in subsection (b) of this section.” Section 6(b) excepts over 30 categories of information, including, *inter alia*, adoption records, grand jury proceedings, juvenile and mental health proceedings, and materials from civil discovery. Section 6(c) states that, to the extent possible, “physical case records that are not subject to public access under these rules shall be segregated from records to which the public has access,” and “[i]f a member of the public requests access to a case file, the record custodian shall remove from the file any record excepted from public access before access is provided to the file.” Section 6(d) explains that court records kept in electronic form “shall be designated as open for public access or closed from public access in whole or in part.”

Section 6(f) states that a record that is accessible to the public “may be inspected and copied at any time when the office of the clerk of the court is open for business,” that the record custodian “shall act on a request promptly” within specific time limits, and may impose specific fees. Under section 6(g) and (h), if a case record custodian denies a request for access to a physical or electronic case, the requester may appeal that decision to the presiding judge.

⁴³ There is a pending rulemaking initiative, which would govern access to trial and appellate court records, both in paper and via remote electronic access. The provisions contain considerably more detail on access issues than the current policy. The proposal was published in April 2015, available at <http://www.pabulletin.com/secure/data/vol45/45-6/222.html>

⁴⁴ The Rules can be accessed at http://www.michie.com/vermont_print/lpExt.dll/vtrules/a64/c51?fn=documentframe.htm&f=templates&

APPENDIX B

Automated redaction technology

Where court records become much more readily available, protection of privacy rests on two fundamentals: agreement on information in the records to be withheld from the public, and methods for doing so efficiently. Both have been under discussion in American courts from the earliest online access to court records.

With the court record now in digital form, the possibility is tantalizing that rules for partial redaction or complete restriction could be automated and carried out by software. An original is typically retained while public users have available the redacted version. States may set standards for both staff and vendors, for example, as in one Southern state that requires filers to identify any items in their filing from a list of protected information elements and then “clerks must employ redaction processes through human review, the use of redaction software or a combination of both. Clerks must audit the process adopted at least annually for quality assurance and must incorporate into their processes new legislation or court rules relating to protection of confidential information.” New York requires the filing of a redaction cover sheet.

The NCSC provided the names of six firms that have announced such a capability. From web information and some telephone contacts, this appendix reviews what we could find about them.

1. Teradact

This organization, based in Montana, has not yet applied its methods in courts. In an interview, Tom Trowbridge explained that the firm’s software finds and tags user-defined sensitive content, from simple to complex, in electronic records. Once tagged, items are routed according to user-defined rules for further action—limiting access or release, redacting the material, or requiring further review. Applications so far include segregating patient medical records into need-to-know segments for desk clerks, nurses, physicians, etc.; assuring undercover agent names are never in a record; processing records for release under federal FOI law; declassification review; screening organizational emails for illegal content such as insider trading, threats or harassment.

2. Computing System Innovations (CSI)

According to their website, Florida-based CSI “created Intellidact and processed America’s first successful automated redaction project in 2004. Intellidact continues to lead the industry, providing the most cost-effective, high volume, high accuracy solutions with the least amount of manual verification required.”

The company describes its software as follows: “users initially select sample sets of documents, and then tag the data items they wish the system to extract or redact. The software then trains on the tagged documents, producing an initial knowledge base used in production processing to locate and extract new occurrences of data. Continuous active learning gathers information from production processing and continuously updates the initial knowledge base, removing stale knowledge and adding new knowledge as appropriate to automatically maintain the system’s high accuracy.”

CSI’s website mentions 230 customers in 21 states. A release some years ago said courts in Arlington and Alexandria adopted it, as well as the Virginia Supreme Court. Arkansas state courts selected this product after officials there found it was the most accurate in a test of several competing vendors on a standardized task. The CSI website includes on-camera endorsements by clerks in two Florida county courts and the Florida Association of Court Clerks adopted the software. Tyler Technologies provides CSI redaction as part of its Odyssey court document handling software. Pioneer Technology Group includes it in its Benchmark case management software.

The firm also offers to do the review and redaction off-site at piece rates, with no investment required by the user.

3. Extract Systems

This Wisconsin-based firm offers “ID Shield Advanced Redaction” software and web materials discuss its ability to locate basic elements such as SSN, driver’s license numbers, financial account numbers, addresses and juvenile birthdates, whether “using magnetic ink character recognition to detect routing and bank account numbers on checks, intelligent character recognition for handwritten content, optical mark recognition for forms and surveys, or optical barcode recognition. Beyond OCR technology, ID Shield adds state-of-the-art data detection rules to find and redact ... virtually all types of personal information within structured and unstructured documents. This core competency is a proprietary formula that incorporates pattern recognition logic, phrase context proximity and keywords into the software based on the data that needs to be captured and secured.” Clients described on the firm website include many general government units—clerks and recorders of deeds--concerned to protect identity information in land records, Uniform Commercial Code filings, etc. Court users include counties of York and Allegheny in Pennsylvania; Fairfax in Virginia; and Washington in Arkansas.

4. Hyland OnBase

Ohio-based Hyland offers “enterprise content management” which means assisting clients with all their information in one system (in areas as diverse as facilities project management, compliance tracking, vendor management, contract management, HR onboarding, and incident resolution and fraud investigation). Court applications are not featured in the web materials and redaction is not mentioned.

5. Ephesoft

This California firm offers Transact, software to process forms and all kinds of documents by reading them, extracting information and handling it according to rules or referring for operator review. The website states that Transact “manages your entire document workflow, ensuring document types are classified, validated and stored in the correct repository...If there is sensitive material, only those with approved access may view the documents. Missing or misplaced documents are a thing of the past. Powerful and accurate scanning technology quickly captures the document type data, safely storing it the first time.” Other software offered analyzes information in unstructured documents. Applications mentioned include insurance claims, patient records and mortgage processing. Though use by courts is plausible (processing e-filings, for example), the web materials do not discuss that or mention existing court users.

6. Newgen

Newgen Software, of New Delhi, offers software for managing business processes, customer communications and documents. They suggest a “case management” product is applicable to law firm management as well as courts. The company has a global footprint of 1300+ installations in over 61 countries in banking, insurance, healthcare, telecom and government (in the U.S., for example, an electronic record system developed for the North Carolina prison system). Only a few court applications are shown on the firm site, all in India.

APPENDIX C

State courts which participated in CCE survey

State	Participating Court(s), Administrative Offices of the Court (AOC) ⁴⁵
1. Connecticut	Supreme Court
2. Delaware	Supreme Court, trial level court
3. Georgia	AOC
4. Guam ⁴⁶	N/A
5. Idaho	AOC
6. Illinois	AOC
7. Indiana	AOC
8. Kentucky	AOC
9. Maine	AOC
10. Maryland	AOC
11. Massachusetts	Trial level court
12. Michigan	AOC
13. Minnesota	AOC
14. Missouri	AOC
15. Montana	AOC
16. New Hampshire	Trial level court
17. New Mexico	AOC
18. New York	Trial level court

⁴⁵ Surveys were administered anonymously. However, respondents were asked to only indicate the state and jurisdiction they represented, and not their affiliation with the court. Therefore, respondents may represent a broad cross-section of state court personnel (e.g., IT staff, judges, state court administrators, etc.). Furthermore, while each state may have a different name for the administrative office that manages their court system, “Administrative Office of the Court (AOC)” has been chosen as a term to describe such offices in general.

⁴⁶ Guam, as a member of the NCSC COSCA listserv, received and responded to CCE’s survey. Given their territorial status, their responses were not included in the data analysis.

19. North Carolina	AOC
20. North Dakota	AOC
21. Oregon	AOC
22. Pennsylvania	AOC
23. South Carolina	AOC
24. Texas	AOC
25. Utah	AOC
26. Vermont	Supreme Court, trial level court
27. West Virginia	Supreme Court

State courts which participated in CCE interviews

State	Participating Court, AOC ⁴⁷
1. California	Superior Court of San Diego County
2. Illinois	AOC
3. Maryland	AOC, Anne Arundel County
4. Massachusetts	Superior Court of Suffolk County
5. Minnesota	AOC
6. Missouri	AOC
7. Oregon	AOC
8. Pennsylvania	AOC
9. Tennessee	Circuit Court of Davidson County
10. Texas	AOC
11. Utah	AOC
12. Vermont	AOC
13. Virginia	Supreme Court of Virginia

⁴⁷ Names and position titles are withheld from this list for participant privacy. Interviewees represented a broad cross-section of experienced state court personnel in each listed court/AOC.

APPENDIX D

New York Unified Court System – Redaction Cover Page⁴⁸

_____ COURT OF THE STATE OF NEW YORK
COUNTY OF _____

IndexNo. _____

Plaintiff(s),

(, J.)

against

Defendant(s).

REDACTION COVER PAGE

() The document filed contains no confidential personal information, as defined in **22 NYCRR 202.5(e)**.

() The document contains the following (*CHECK ANY THAT APPLY*):

() Social Security Number.

() Confidential Personal Information (CPI) that is **REDACTED** in accordance with **22 NYCRR 202.5(e)**.

() Confidential Personal Information (CPI) that is **UN-REDACTED** and seeks a remedy in accordance with **22 NYCRR 202.5(e)(2) OR (3)**.

() Confidential Personal Information (CPI) that is **UN-REDACTED** as required or permitted by a specific rule or law; Specify the rule or law _____.

() Confidential Personal Information (CPI) that is **UN-REDACTED** as directed by court order; and I hereby specify:

DATE of such court order: _____ & DATE filed: _____.

Other identifying information for such order: _____.

Does the court order direct that this **UN-REDACTED** document be **visible to all participating parties?** () yes / () no.

A court order is being filed with the document: ()yes / () no.

Signature of filer: _____

Print Name: _____

Counsel appearing for: _____ (name of party)

Filer is Unrepresented: yes no

Date: _____

Revised 01/2016

⁴⁸ A fillable PDF version of this form is available at http://www.nycourts.gov/FORMS/redaction/202_5e-redaction-fillable-form.pdf