

New Mexico Foundation for Open Government

November 19, 2009

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New Mexico Supreme Court
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Santa Fe, New Mexico 87504-0848

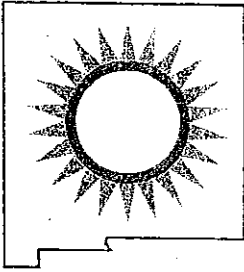
Re: Comment for Proposed Public Access Rules 10-166, 12-314, 1-079, 2-112, 3-112, 5-123, 6-114, 7-113 and 8-112.

Dear Ms. Gibson and Justices of the Supreme Court:

I write on behalf of the New Mexico Foundation for Open Government to thank you for the opportunity to comment on the proposed changes to New Mexico's court rules. Chuck Peifer has shared the amendments proposed by the Joint Committee with several members of FOG's Board of Directors and received comments back from them. He asked them to focus on the amendments to Rule 1-079 based on the understanding that the other rules do not differ in material respects. The Board members with whom Mr. Peifer spoke appreciate the work done by the Committee in providing a clear framework for confirming the presumption that court records are public and delineating the steps that must be taken to seal records. We think that, overall, the rule amendments are a substantial improvement over the current rules.

Nonetheless, the Foundation is gravely concerned about the breadth and scope of the amendments insofar as they relate to "personal identifying information." Under the proposed amendments, litigants and their attorneys would be required to redact from all court filings all social security numbers, taxpayer-identification numbers, financial account numbers, all but the year of a person's date of birth, and all but the last four digits of a driver's license number. If these redactions are not made then, according to the Committee Commentary, "the court may consider sanctions as appropriate under Paragraph J of the rule."

We are concerned that the scope of the information required to be redacted goes beyond what is necessary to address legitimate concerns about identity theft. It is not necessary, for example, to redact a person's entire social security number and all digits of taxpayer identification and financial account numbers. The 2007 amendments to the federal rules of civil procedure, for example, require only the redaction of the first five digits of a social security number and all but the last four digits of taxpayer identification and financial account numbers. *See* Fed. R. Civ. P. 5.2(a). These rules reflect a balancing between the need to protect privacy and the need to permit users of public



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records to distinguish between persons and entities having identical or similar names. We see no reason that the state court rules need to be more restrictive than their federal counterparts.

We note also that the proposed amendments do not incorporate a provision similar to Fed. R. Civ. P. 5.2(h) which permits a litigant to waive the protection for the person's own information by filing it without redaction and not under seal. We think such a rule will prove practical and useful; it emphasizes that the purpose of the rule is to protect an individual's privacy, that the individual at all times maintains control of the information, and that a person who files his or her own personal identifying information should not be at risk for sanctions by filing his or her own information in the court record. The waiver rule also acknowledges that a person may want to waive the protection for personal identifying information if the person determines that the "costs of redaction outweigh the benefits to privacy." *See* Fed. R. Civ. P. 5.2, advisory committee note.

Finally, we are concerned that the sanctions available for violation of the court rule be limited to "parties and court employees" in order to avoid creating tension and possible conflict with First Amendment rights. Without such a limitation, the Rule could have a significant chilling effect on the media's ability to publish information in the public interest. Specifically, we suggest that Rule 1-079(J) and its counterparts be amended to provide, in the first sentence, that "Any party or court employee who knowingly discloses . . ." We believe the limitation reflects that courts can only issue orders affecting parties before them and that the limitation is important in order to emphasize that the Rule should not be read to permit the Court to sanction the publication of information that may happen to be lodged with the Court or filed under seal. We recommend that the commentary also contain a clear statement that the Court's power to sanction violations of the rule is to be interpreted in a way not to create an unconstitutional prior restraint on First Amendment freedoms or to conflict with other First Amendment principles.

We would be happy to discuss these recommendations at your convenience.

Respectfully yours,

Sarah Welsh
Executive Director

Cc: Charles Peifer, NM-FOG Board of Directors Executive Committee

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