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December 24, 2010

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Re: Comments on 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:

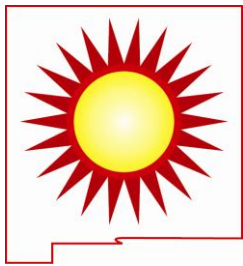
I write on behalf of the New Mexico Foundation for Open Government to thank you for the opportunity to comment on the proposed changes to New Mexico's court rules. We will focus our comments on the amendments to Rule 10-166, based on the understanding that the other public-access rules do not differ in material respects.

NM-FOG is gravely concerned that the proposed changes introduce new, overly restrictive limits on public access to court records – while failing to serve a countervailing public interest. We therefore urge the Court to reject these changes, and two provisions in particular.

1. Restricting future online access to entire court records because they contain personal identifiers is an overly restrictive solution to identity-theft concerns.

The proposed language in 10-166(D)(1) states that “[c]ourt records containing protected personal identifier information shall not be made available on publicly accessible court web sites.” This is contrary to the principle of least-restrictive means in the New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-9(A) (1993), which provides that exempt information shall be separated from nonexempt information and the latter made available for inspection. The proposed language seems to transfer the current problem, of the public being denied access to entire court records due to the presence of protected personal identifiers, into the online realm.

Furthermore, this provision seems to pre-empt a very important policy discussion on how to address identity-theft concerns if and when New Mexico e-filings become publicly



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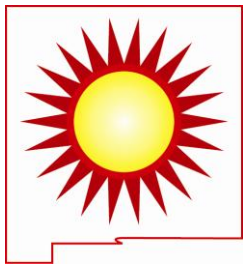
available online. The Court does not have to cross that bridge at the moment. Currently, only registers of action and dockets are available to the public online – and neither type of record contains protected personal identifiers. The pilot e-filing program in the 13th Judicial District already directs filers not to include protected personal identifiers in records and warns that information not otherwise protected may be available on the Internet. Thus, NM-FOG sees no reason to tackle the online-privacy issue broadly and hastily in this present rule change.

If the Court is determined to address the issue now, we propose the following alternative language for 10-166(D)(1). This language would clarify what information is prohibited from online posting:

“The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court’s judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, the court or that party (as the case may be) shall submit and file a redacted version for public inspection. A party’s decision to include protected personal identifier information in a court record is non-sanctionable if and only if the party submits and files a redacted version. Protected personal identifier information shall not be made available on publicly accessible court web sites; provided, however, that the court shall be entitled to assume that a court record contains no protected personal identifier information if it is unaccompanied by a redacted version. The court shall not publicly display protected personal identifier information in the courthouse.”

2. Requiring the public to provide a government-issued ID when requesting court records is an unacceptable and discriminatory restriction on public access.

This proposed requirement, in 10-166(D)(3), would abridge the fundamental freedom-of-information rights of any and all persons who lack government-issued ID. Numerous studies have found that young people, senior citizens, people of color and people with



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disabilities are less likely to possess such identification.¹ Even for people who do possess valid ID, the requirement would cast a severe chill over their requests for public court records. And toward what end? It is unclear how such a requirement protects court users from identity theft.

Under the New Mexico Inspection of Public Records Act, NMSA 1978, § 14-2-8(C) (2009), a written request to inspect public records “shall provide the name, address and telephone number of the person seeking access to the records.” NM-FOG sees no reason for the courts to adopt a far more restrictive requirement, particularly in the context of a rule that affirms the presumption of public access to court records.

The formulation of these public-access rules has been a long, reasoned and collaborative process, and NM-FOG appreciates the opportunity to participate. We also appreciate that there are practical challenges inherent in trying to balance public-access rights with the protection of court users’ personal information. However, the proposed amendments seem to abdicate responsibility for the protection of personal information while clamping down on certain aspects of public access – doing ill service to both causes. We urge the Court to seek a better solution.

Sincerely,

Sarah Welsh
Executive Director

¹ Overton, Spencer. "Voter Identification." *Michigan Law Review* 105.4 (2007): 631-81. *Michigan Law Review*. Web. 2 Dec. 2010. <<http://www.michiganlawreview.org/assets/pdfs/105/4/overton.pdf>>.