



March 31, 2015

Via First-Class Mail

Thomas G. Ambrosino, Executive Director
Supreme Judicial Court Administrative Office
One Pemberton Square
Boston, MA 02108

Re: Press and Public Access to Electronic Filings; Electronic Filing Working Group

Dear Mr. Ambrosino:

This firm is writing on behalf of the New England First Amendment Coalition, the New England Newspaper and Press Association, the Massachusetts Newspaper Publishers Association, the *Boston Globe*, and Courthouse News Service. All of these entities wish to express their interest and concern regarding the Massachusetts judiciary's development of electronic filing rules for the state trial courts – and, specifically, their desire to have a voice on the committee that is charged with drafting those rules.

First, some words of introduction:

- The New England First Amendment Coalition ("NEFAC") is a public interest group made up of journalists, educators, attorneys, historians, librarians and other individuals and groups devoted to open government. NEFAC works to advance the public's right to know in the six New England states. See www.nefirstamendment.org.
- The New England Newspaper and Press Association ("NENPA") is a professional trade organization representing approximately 450 New England newspapers. NENPA serves as an advocate for newspapers and helps them fulfill their mission to engage and inform the public. See www.nenpa.com.
- The Massachusetts Newspaper Publishers Association ("MNPA") is a non-profit association that represents the state's newspaper industry in legislative and legal matters pertaining to the profession of journalism and the business of publishing.
- Courthouse News Service ("CNS") is a nationwide news service. Its subscribers include most major law firms in Massachusetts, law schools such as Harvard and Boston College, and media outlets including the *Boston Globe*. Articles on its web site are read by an average of 1 million readers per month and linked to by a wide variety of publications. www.courthousenews.com.
- The *Boston Globe* needs no introduction. Its journalists report on filings in the Massachusetts courts on a routine basis.

It is our understanding that in anticipation of the statewide implementation of e-filing, a committee is in the process of drafting rules that will apply to documents filed electronically in the trial courts.¹ Given the impact that any such rules will have on access to e-filed documents, and for the reasons described in more detail below, our coalition respectfully requests that a representative from the media be appointed to that committee.

I. Draft rules. A version of Massachusetts' draft rules that was circulated in connection with a 2012 request for proposals for potential e-filing vendors provided that "prior to entry upon the docket, each document submitted through the ECF shall be reviewed by the Clerk for compliance with the Massachusetts Rules and Orders of Court governing the filing of documents generally. If accepted, the document shall be considered 'filed' with the court at the time the original submission to the ECF was complete." (Section C.2). The draft rules go on to state that – contrary to Civil Procedure Rule 5(e) – "A document submitted through the ECF is considered 'filed' for all purposes of the Massachusetts Rules and Orders of Court only if it has been accepted for filing by the Clerk." (Section C.3.)

We do not know whether this language is still being considered for inclusion in Massachusetts' e-filing rules. If it is, we are concerned that these draft rules may delay access to newly filed court records until a clerk manually reviews and "accepts" those records, however long that might take.

As explained below, such a policy would be contrary to the presumptive right of access to court records.

II. Timely Access to Electronically Filed Documents. Massachusetts has "long recognized a common law right of public access to judicial records," *Commonwealth v. Fujita*, 470 Mass. 484 (2015), quoting *Republican Co. v. Appeals Court*, 442 Mass. 218, 222 (2004). The presumptive right of access also has a constitutional basis.²

The right of access springs into being the moment a person "undertake[s] to utilize the judicial process." *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 344 (3d Cir. 1986). The fact that a litigant has requested judicial relief is an event that is properly open to public scrutiny. "By submitting pleadings and motions to the court for decision, one ... exposes oneself [to] public scrutiny." *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993).

Consistent with this notion, the public has rightly come to expect to be immediately informed of what goes on in our courts. See, e.g., Steve LeBlanc, "Boston Sues Gaming Commission Over Wynn Casino in Everett," Associated Press, Jan. 5, 2015 (reporting on Boston's civil suit against Gaming Commission on the day the lawsuit was filed); Peter Goonan, "Springfield Files Suit Over 2 Apartments After Claiming State Relocating Homeless Families to City," *The Republican*, Jan. 20, 2015 (reporting on housing court lawsuit filed by city on the day it was filed); Walter Bird, Jr., "Gov.

¹ While we are not sure of the name of the committee charged with drafting Massachusetts' e-filing rules, we have heard it referred to as the "IT Steering Committee." Alternatively, it may be called the "Electronic Filing Working Group."

² See, e.g., *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) ("This circuit, along with other circuits, has established a First Amendment right of access to records submitted in connection with criminal proceedings," because "without access to documents the public often would not have a 'full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system."), quoting *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984); *Courthouse News Service v. Planet*, 750 F.3d 776 (9th Cir. 2014) ("Though the Supreme Court originally recognized the First Amendment right of access in the context of criminal trials ... the federal courts of appeals have widely agreed that it extends to civil proceedings and associated records and documents.") (citing cases).

Hopeful Evan Falchuk Sues Over Exclusion from Worcester Debate," Worcester Magazine, October 22, 2014 (reporting on lawsuit filed earlier that day for right to participate in gubernatorial debate that was scheduled for five days later).

Currently, clerks perform little if any substantive review of paper court pleadings to ensure compliance with "the Massachusetts Rules and Orders of Court" before entering them on the docket. Rather, the courts place responsibility for compliance with such rules and orders squarely on the parties. (See, e.g., Interim Guidelines for the Protection of Personal Identifying Data in Publicly Accessible Court Documents, Guideline (e) ("The responsibility for redaction or omission of complete data elements from filings rests solely with the filer. The clerk should encourage compliance with these guidelines but need not review each filed document for compliance and should not reject for filing any non-compliant document.")). The onus should lie in the same place for e-filed documents, instead of creating a new step for already overburdened clerks to perform before the public can have access to filings that may have significant public interest.³

Logically, advances in information technology should enhance the public's ability to access court documents, not restrict it, but that is not always the case. For example, the Superior Court is implementing a new electronic case management system that provides for greater functionality and ease of use. However, the new system currently permits a login and password to be provided only to attorneys, a limitation that has blocked CNS and other members of the media from remote access to docket information which they traditionally could access on www.ma-trialcourts.org. The e-filing rules could have a similar impact, at least until review and acceptance of each e-filed document takes place.

The kind of review and acceptance contemplated in the draft rules need not take very long in and of itself, but in practice it may not occur until one or more days **after** any given document is filed with the court. While clerks' offices undoubtedly would process and accept e-filed documents as soon as their resources permit, "even a one to two day delay impermissibly burdens the First Amendment," *Pokaski*, 868 F.2d at 507, because it operates as a "total restraint on the public's first amendment right of access." *Associated Press v. U.S. Dist. Court for Cent. Dist. of California*, 705 F.2d 1143, 1147 (9th Cir. 1983). As the Seventh Circuit has observed, "[t]he newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994).

While these draft rules may have been intended to require only such "review" as is currently performed, we are concerned that as written, they could add significant delays in access to e-filed documents while at the same time tying the court's hands to deal with those delays. In many jurisdictions, timely access to newly e-filed documents is accomplished simply by making newly filed documents available for media review immediately on receipt by the court, at least at the courthouse itself, even if a clerk has not yet reviewed, processed, or "accepted" those documents.⁴ Accordingly,

³ That is where the responsibility lies in federal court. In the District of Massachusetts and in the majority of other federal district courts, electronically filed documents – for which the filers have represented by a check-box that they have made appropriate redactions – automatically flow online to PACER without any clerk review.

⁴ For example, in those federal courts where new filings do not flow online, provisions have been made to allow journalists to review new filings even before they are posted on PACER. Similar systems have been set up at the state court level, such as at the Eighth Judicial District Court in Las Vegas, Nevada. At that court, new e-filed complaints were not posted for viewing on public access terminals until after they had been manually "accepted" by a clerk, which delayed access by a day or more after filing. After the delays were brought to the court's attention, it implemented a "daily documents" feature whereby new civil filings can be seen at the public access terminals as soon as they are received by the court, and even before are assigned a case number.

to the extent the draft rules noted above are still being contemplated, we would respectfully submit that they should be amended in a manner to address these concerns and ensure the press has timely access to court records in the e-filing environment. There are many possible amendments that could accomplish this end, and we would welcome the opportunity to work with you toward this goal.

III. Media Involvement in E-Filing Rulemaking. Respectfully, timely press and public access to electronic filings can best be achieved if it is considered early in the e-filing planning process, and if the press and public are allowed to participate in the formulation of e-filing practices and policies in a meaningful manner. Our coalition is eager to lend its expertise to the committee working on Massachusetts' e-filing rules and help ensure that both the rules and the structure of e-filing in Massachusetts protects the right of the press or the public to access and review un-impounded electronic court documents, including complaints, in a timely manner. We thus respectfully request that a representative of the media be allowed to participate in the committee drafting e-filing rules.

We look forward to hearing your response to our request. In the interim, should you have any questions or need further information, please do not hesitate to contact me.

Sincerely yours,



Jeffrey J. Pyle

cc: New England First Amendment Coalition
New England Newspaper and Press Association
Massachusetts Newspaper Publishers Association
Courthouse News Service
Boston Globe