PretiFlaherty

Portland, ME
Augusta, ME
Concord, NH
Boston, MA
Washington, DC

Sigmund D. Schutz
sschutz@preti.com
207.791.3247

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VIA EMAIL ONLY (lawcourt.clerk@courts.maine.gov)

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04101

RE: Comments on Proposed Amendments to the Maine Rules of Probate Procedure by New England First Amendment Coalition and Maine Freedom of Information Coalition

Dear Mr. Pollack:

Please consider these comments on behalf of New England First Amendment Coalition[1] and Maine Freedom of Information Coalition[2] objecting to many of the proposed amendments to the Maine Rules of Probate Procedure regarding electronic filing and public access to electronic court records.

Maine probate courts operate in the daylight. Except for certain narrow types of proceedings identified as confidential in the Probate Code, the Legislature has not directed that probate records or proceedings be closed to the public. While we appreciate the importance of protecting information in court records when justified by compelling interests and where confidentiality is narrowly tailored to serve those interests, the proposed rules would create a cloud of secrecy around many now-public probate court proceedings and records. They will diminish accountability, public trust, and unduly interfere with the public's access court records. Some aspects of the rules also conflict with the First Amendment right to access court records.

Introduction

The public interest served by an open and transparent judicial system can hardly be overstated. Public scrutiny of what goes on in court "enhances the quality and safeguards the integrity of the factfinding process . . . ." *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982). Public access "fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Id*. The public serves as a "check upon the judicial

[1] The New England First Amendment Coalition is the region's leading defender of First Amendment freedoms and government transparency—the foundation of a healthy democracy. *See* https://www.nefac.org/.

[2] Maine Freedom of Information Coalition aims to broaden knowledge and awareness of the First Amendment and state laws aimed at assuring public access to government proceedings and government records. *See* https://mainefoic.org/.

process – an essential component of our structure of self-government." *Id*. *See also Carey v. Maine Bd. of Overseers of Bar*, 2018 ME 73, ¶ 12, 186 A.3d 848 (stating that "public confidence in the judicial process is vitally important"). There are two presumptions of public access to judicial proceedings and records: a common-law right of access to judicial documents, and a First Amendment right of access to civil and criminal proceedings and materials submitted therein. *See Doe v. Smith*, No. 2:23-CV-00423-JAW, 2024 WL 2109731, at *4 (D. Me. May 8, 2024). "As a general matter and as a function of both common and constitutional law, the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Carey*, 2018 ME 73, ¶ 11, 186 A.3d 848 (quotation marks omitted). "[D]ocuments which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies." *In re Bos. Herald, Inc.*, 321 F.3d 174, 194 n.9 (1st Cir. 2003) (quotation marks omitted).

In reaching the conclusion that the "public has a legitimate interest and right of general access" to probate court records, a California court observed that "[i]f public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism." *Estate of Hearst*, 67 Cal. App. 3d 777, 784 (1977). The court went on to say that "traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals." *Id*. When parties "perceive advantages in obtaining continuing court supervision over their affairs" they must "take the good with the bad, knowing that with public protection comes public knowledge of the activities, assets, and beneficiaries" involved. *Id*.

"[T]here can be no doubt that court records are public records" and that probate court records generally "will be open to public inspection." *Id.* at 782-784; *see also Copley Press, Inc. v. Superior Ct.*, 63 Cal. App. 4th 367, 376 (1998) ("[p]robate proceedings . . . are not closed proceedings"); *Burkle v. Burkle*, 37 Cal. Rptr. 3d 805, 817 (2006) (referring to probate proceedings as "presumptively open"); *Estate of Engelhardt*, 127 Ohio Misc.2d 12, 15 (2004) (probate court "case file and its contents are public records"); *State ex rel Kernells v. Ezell*, 291 Ala. 440, 442-43 (1973) (holding that records of the office of the probate judge are "public writings" and are "free for examination [by] all persons, whether interested in the same or not"); *In re. Estate of Zimmer*, 151 Wis.2d 122, 131 (Wis.Ct.App. 1989) (recognizing "the presumption that the public has a right to inspect" probate records, and "that any exceptions to the rule of disclosure must be narrowly construed, and that denial of access to the agreement is contrary to the public interest and will be tolerated only in the 'exceptional case'"); *In re Estate of Campbell*, 106 P.3d 1096, 1106 (Haw. 2005) ("probate court records are 'public records'"). The reasons for public access to

civil judicial records generally "are equally compelling" in the context of "probate proceedings." *Estate of Campbell* , 106 P.3d at 1105.[3]

The current rules governing access to probate records adhere to these principles by making public access to probate court records the default principle. The term "Public records" is defined in current rule 92.12(b) to mean "any record or document (electronic or nonelectronic) filed with the Probate Court which is not a Private Record and which is not otherwise restricted by the Probate Court." The advisory committee note explains:

> The term "Private Records" is narrowly defined to include Certificates of Value (Probate Form DE-401A) and all filings related to adoption proceedings, including Consents and Surrender and Releases. All other documents are considered Public Records. Private Information is defined to include Social Security numbers of living individuals and account numbers, including bank accounts, investment accounts and brokerage accounts.

M.R. Prob. P. 92.12 advisory committee's notes to 2011 amend., Nov. 2011.[4] Current rule 92.10(b) also makes clear that "Members of the general public and Registered Filers not affiliated with a matter shall have remote access to all Public Records in any matter, subject to the redaction of Private Information on Public Records pursuant to Rule 92.12."

The proposed rules, on the other hand, make the default rule one of secrecy in too many instances. We urge a broad re-review of the proposed rules with the above principles in mind. We are concerned that the proposed rules are written without adequate consideration having been given to the very strong public interests served by transparency, and that the rules in some respects appear to violate First Amendment rights to access court records.

Of particular concern are the following proposed rules:

Proposed Rule 92.1(b)(2)

This rule states the following principle: **"**Persons who use the courts have a legitimate expectation of privacy." As discussed above, judicial documents are presumptively public and generalized expectations of privacy are never enough to seal court records.[5] When parties "perceive advantages in obtaining continuing court

[3] Public access to information held by Maine probate courts was fully briefed before the Law Court in *Conservatorship of Emma*, 2017 ME 1, 153 A.3d 102, though the Court declined to answer the reported question before it in that case.
[4] Available at: http://www.cleaves.org/2012Me.Rules9.pdf.
[5] *Associated Press v. State*, 153 N.H. 120, 137 (2005) (finding that "a generalized concern for personal privacy" was "insufficient" to demonstrate "the existence of a sufficiently compelling reason to prevent public access" to court records); *Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App.

supervision over their affairs" they must "take the good with the bad, knowing that with public protection comes public knowledge of the activities, assets, and beneficiaries" involved. *Estate of Hearst*, 67 Cal. App. 3d 777, 784 (1977). The proposed rule fails to adhere to longstanding precedent that non-specific privacy expectations are insufficient to seal court records or proceedings.

Proposed Rule 92.3(e)

This rule states that "Whenever the accessibility of a court record changes under these rules, or by court order, the court staff will either remove or grant electronic access within a reasonable time."

The time period "within a reasonable time" is out of step with cases that hold that access to court records must be provided to the public as soon as the record is filed with the court. *See Courthouse News Service v. Planet*, 947 F.3d 581, 585 (9th Cir. 2020); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006) (noting "the importance of immediate access where a right to access is found"); *Grove Fresh Distribs. Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 867 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous."); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (48-hour delay in unsealing judicial records improper because the effect of the delay acts as a "total restraint on the public's first amendment right of access" during that time); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989) ("even a one or two day delay impermissibly burdens the First Amendment"). For news media in particular, timely access to court records is vital. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) ("The peculiar value of news is the spreading of it while it is fresh . . . ."); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("As a practical matter . . . the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."). Indeed, Courthouse News has established precedent in many jurisdictions that the right of public access to court records attaches upon filing and that access must be immediate; delayed access to public court records violates the First Amendment.

Although special circumstances may require limited delay on a case-by-case basis, an across-the-board "reasonable time" standard does not comport with common law and First Amendment principles.

2001) ("A claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file."); *Doe v. New York Univ.*, 786 N.Y.S.2d 892, 902 (N.Y.Sup. 2004) ("embarrassment, damage to reputation and the general desire for privacy do not constitute good cause to seal court records").

Proposed Rule 92.4(b)

Under this rule "Court records related to adoptions, termination of parental rights, guardianships or conservatorships of minors, and name changes for minors are nonpublic." Privacy interests of minors can generally be protected by redacting personally identifying information, with the remaining records made public. A motion to seal specific information would be a better approach than blanket confidentiality in every case. Seals should be no broader than strictly necessary. *See In re Providence Journal Co.*, 293 F.3d 1, 15 (1st Cir. 2002) ("Courts have an obligation to consider all reasonable alternatives to foreclosing the constitutional right of access. Redaction constitutes a time-tested means of minimizing any intrusion on that right.").

Proposed Rule 92.4(d)

This rule makes 17 broad categories of information nonpublic in their entirety. With the exception of rule 92.4(d)(4) ("Images of minors and of persons of any age subject to guardianship, conservatorship or other protective proceedings under Title 18-C") and rule 92.4(d)(5) ("Images depicting nudity or of a sexual nature, including sexual acts, sexual contact, or sexual touching"), categorical secrecy goes too far. A better approach would be to require redaction. *See In re Providence Journal Co.,* 293 F.3d at 15 ("[T]he First Amendment requires consideration of the feasibility of redaction on a document-by-document basis."); *Associated Press v. State*, 153 N.H. 120, 130 (2005) ("[E]ven where a sufficiently compelling interest is demonstrated, a court record may not be kept sealed unless no reasonable alternative to nondisclosure exists and the least restrictive means available is utilized to serve the interest that compels nondisclosure.") (quotation marks omitted).

In a particularly alarming example, rule 92.4(d)(8) makes nonpublic at the outset any "Exhibits, affidavits, and other materials that are filed that contain otherwise confidential information as set out in these rules." The rule will make large swaths of records entirely confidential whenever a record contains a single bit of confidential information. The rule should instead require redaction so to protect the public's right to access the non-confidential portions of exhibits, affidavits, and other materials filed with the court.

The list of confidential "personally identifying information" in rule 92.4(d)(2) is overly broad. A better approach would be to follow Fed. R. Civ. P. 5.2(a). An individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number may be redacted, but the following should remain public: (1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number. Fed. R. Civ. P. 5.2. The rule will likely create confusion in the courtroom. An attorney should be able to identify an

account (by its last four digits), and a witness should be able to answer questions in open court in a way that allows all interested parties and the public to follow the proceedings. An overbroad definition of personally identifying information unduly interferes with the public's right to know; it also creates practical problems at trial.

Proposed Rule 92.4(e)(1)

This rule provides that records related to a guardianship, conservatorship, or other protective arrangement instead of guardianship or conservatorship for an adult can be sealed upon request where the petition for guardianship or conservatorship is dismissed; the guardianship or conservatorship is terminated; or any act authorized by the order granting the protective arrangement has been completed.

A "request" is not the test for sealing judicial documents; the rule should make clear that a request alone is insufficient to order a seal. "Although under appropriate circumstances a court may impound records when publication would impede the administration of justice, the power of impoundment should be exercised with extreme care and only upon the clearest showing of necessity." *Maine Auto Dealers Assn. v. Tierney*, 425 A.2d 187, 189 n.3 (Me. 1981) (citation omitted). The Law Court made clear that the relatively secrecy-tolerant "good cause" standard for imposing a protective order on materials exchanged *in discovery* in a civil case does not apply to records admitted into evidence in civil trials. *Bailey v. Sears, Roebuck & Co.*, 651 A.2d 840, 843-44 (Me. 1994). Instead, the Court cited with approval the First Circuit's holding in *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 553 (1st Cir. 1993), that "non-disclosure of judicial records could be justified only by the most compelling reasons." *Bailey*, 651 A.2d at 844.

Under the First Amendment, a party requesting a seal must show that confidentiality is narrowly tailored to serve a compelling interest. *See Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606-07 (1982) ("to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest"); *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984) ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to serve higher values and is narrowly tailored to serve that interest.").

Proposed Rule 92.4(e)(2)

This rule provides that a person "for good cause" may petition the court for access to court records of the guardianship, conservatorship, or other protective arrangement instead of guardianship or conservatorship, including annual reports or plans. This reverses the presumption of access. Under the common law and First Amendment, the burden falls on the party asking to seal public court records to make the showing necessary to do so.

Proposed Rule 92.6(a)

This rule provides that motions to seal and attachments thereto "shall be labeled 'NONPUBLIC' when filed," and "Upon acceptance by court staff of a motion to seal or impound, neither the motion nor any related documents will be accessible by the public, pending the court's ruling on the motion." The rule fails to distinguish between the motion to seal itself—a filing that is typically public—and the attachments sought to be sealed. The latter category of materials—attachments filed with a motion to seal—are properly maintained under seal upon filing, pending a court ruling on whether to grant a seal.

But motions to seal and court orders on such motions are almost always public. Because motions to seal implicate the public's right of access to court records, it is particularly important for the public and the press to be able to review them, and to understand why certain information is being hidden from the public. *See Cheng v. Wilson*, No. 1:22-CV-10706 (LTS), 2023 WL 7710966, *3 (S.D.N.Y. Oct. 2, 2023) (A "motion to redact certain information" is a judicial document that is "entitled to a strong presumption of public access."); *Doe v. City of New York*, No. 1:22-CV-7910 (LTS), 2022 WL 15153410, *4 (S.D.N.Y. Oct. 26, 2022) ("Courts within [the Second] Circuit have tended to treat a motion to seal as a judicial document that is entitled to a strong presumption of public access."); *Allegiant Travel Co. v. Kinzer*, No. 221CV01649JADNJK, 2022 WL 2819734, *3 (D. Nev. July 19, 2022) ("A motion to seal itself should not generally require sealing or redaction because litigants should be able to address the applicable standard without specific reference to confidential information."); *Vineyard Vines LLC v. MacBeth Collection, L.L.C.*, No. 3:14-CV-1096, 2019 WL 12024583, at *6 n.6 (D. Conn. Apr. 1, 2019) (finding that a "motion to seal itself should be filed on the public docket and **not** under seal") (emphasis in original); *McGill v. Univ. of Rochester*, No. 10-CV-6697-CJS-JWF, 2013 WL 5951930, at *11 (W.D.N.Y. Nov. 6, 2013) ("Turning to the motions to seal, the Court determines they are 'judicial documents' as that term is defined by case law, and, therefore, a common law presumption of access attaches.").

Proposed Rule 92.7(e)(1)

This rule provides that "A motion for access to previously sealed or impounded cases or court records may be granted only if the court finds that the previous court order impounding or sealing the case or court record must be amended because new information about the need for public access to the case or court record convinces the court that the need for public access now substantially outweighs a party's reasonable expectation of privacy." Again, the rule fails to recognize that the First Amendment and common law principles create a presumption is *in favor* of public access. The rule sets out a test that conflicts with the public's constitutional right to access court records and reverses centuries of common law. *See Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606-07 (1982) ("to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental

interest, and is narrowly tailored to serve that interest"); *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984). The burden falls on the person seeking to impose or maintain a seal to show that the seal serves compelling interests and is narrowly tailored.

Proposed Rule 92.7(e)(2)

This rule provides "A motion for access to nonpublic cases or court records will be considered only if the motion includes explicit legal authority for public or limited nonparty access to those cases or court records. If there is no explicit standard for review, then access will be granted only upon a showing of extraordinary circumstances that require the cases or court records to be made available."

As explained above, the rule conflicts with common law and First Amendment standards. There is no basis for this heightened standard or the requirement to cite explicit legal authority. Moreover, the First Circuit has rejected the "extraordinary circumstances" standard. *See Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 791 (1st Cir. 1988) ("While we need not decide the matter definitively, we reject the 'extraordinary circumstances' standard."). This rule conflicts with the First Amendment.

Proposed Rule 92.7(g)

Under this rule, "A motion to allow access, the response to such a motion, and the order ruling on such a motion must be written in a manner that does not disclose information from sealed or impounded cases or court records. Motions and responses are sealed or impounded until the court orders otherwise." The first portion of the rule makes sense—public litigation over whether certain records should be sealed should not disclose the information a party seeks to seal before the court has had a chance to rule. But motions and responses in connection with litigation over public access should not be made presumptively secret. As explained above (and consistent with the precedent cited above), the public has particular interest in understanding arguments involving access to public court records and proceedings and the basis for resulting court orders.

There is no basis to require that motions and responses be sealed "until the court orders otherwise," especially where the rule already requires that motions be written in a manner that does not disclose information in sealed records.

Proposed Rule 92.7(i)

This rule requires a 3-day waiting period after a court has granted a motion for access. As explained above, delay impermissibly burdens the First Amendment-protected access rights. A party can always move to stay a court order. A categorical 3-day waiting period in all circumstances does not comport with the right to immediate and contemporaneous access to judicial records.

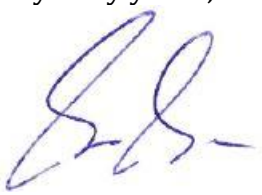
Proposed Rule 92.10

The current probate court records system appears to work reasonably well; unofficial and watermarked documents are available for public viewing at no charge online. This should not change.

Conclusion

Thank you for the opportunity to provide these comments on behalf of New England First Amendment Coalition[6] and Maine Freedom of Information Coalition. We would be pleased to meet with Committee working on these rules to constructively discuss our concerns.

Very truly yours,



Sigmund D. Schutz, Bar No. 8549
Alexandra A. Harriman, Bar No. 6172
Preti Flaherty, LLP
P.O. Box 9546
Portland, ME 04112-9546
207.791.3000

SDS:aah

cc: New England First Amendment Coalition
111 Milk Street
Westborough, MA 01581
508.983.6006

Maine Freedom of Information Coalition
64 Lisbon St., Suite 201
Lewiston, ME 04240
207.784.5411

[6] The New England First Amendment Coalition is the region's leading defender of First Amendment freedoms and government transparency—the foundation of a healthy democracy. *See* https://www.nefac.org/.