

**Meeting Minutes of the 14th
Judicial Information Systems Council (“JIFFY”)
Public Access Subcommittee (“PAS”)
Judicial Information Division (“JID”)
Tuesday, June 16, 2009
1:14-4:03 p.m.**

Voting Members present:

Judge Karen Mitchell, Chair
Judge Steve Lee
Robert Mead
Dennis Jontz (*via phone*)
Dana Cox (*via video*)
Steve Prisoc
Paula Chacon
Kathy Gallegos

Visitors present:

Matthew Hoyt (*NMFOG*)

Voting Members absent:

Judge Mark Basham
Judge Stephen Bell
Arthur Pepin
Dennis Jontz

Minutes taken by: LaurieAnn Trujillo

I. Approval of Agenda. Judge Karen Mitchell called the meeting to order at 1:14 p.m. and established a quorum. She welcomed those in attendance. She recognized Dana Cox, Steve Prisoc and Robert Mead for their hard work in drafting the PAS document.

II. Update on Subcommittee Activities Since May. Judge Mitchell reported that she and Mr. Mead attended the Joint Sealing Rules Committee (“JSRC”) meeting, and they expressed the PAS concerns relative to the draft sealing rule.

III. Public Access Subcommittee Document in Progress

Mr. Mead read section IVV on page 17, as follows:

VII. PAS’ Recommendations

A. In both civil and criminal cases, the responsibility of the content of pleadings and for ensuring that any confidential, identifying or other such sensitive or private information is protected should lie with the litigants who come before the court, with the courts serving as a secondary tier to remove or redact sensitive information, particularly if such records are to be made electronically available to the public via the Internet.

1. Argument in Favor of Protection of Confidential Personal Identifiers or other such sensitive or private information by the Litigants and Secondarily by the Court.

With regard to the categories of personal and financial information, whether that information should be protected is clear. Identity theft is a crime that takes an incredible “financial and emotional toll” on its victims and places a “severe burden on the economy.” The astounding increase in the frequency and prevalence of this crime is no doubt one of the factors that prompted the establishment on May 10, 2006 of the President’s Task Force on Identity Theft to facilitate a “coordinated approach among government agencies to combat this crime.” Id.

PAS has determined that if information in a court file is sealed or redacted by the Judge or the parties to the case, then any electronic access to such information should likewise be sealed or redacted. It is not the intent of PAS to expand the scope of information available electronically beyond that which is publically available in a court case file.

The following are the types of confidential, personal identifying information, which PAS recommends should be redacted from public disclosure in electronic court case files:

- a. Complete Social Security numbers - Social Security numbers should be shortened to the last four digits;*
- b. Complete financial account numbers - financial account numbers should be shortened to the last four digits;*
- c. Full dates of birth - birth dates should be shortened to include only the year of birth; and*
- d. Names of minor children - the names of minor children should be shortened to their initials.*

It is this information, which the litigants who come before the Court and their attorneys should take steps to protect.

The United States District Court for the District of New Mexico has issued a “Notice of Electronic Availability of Case File Information” (as amended to comply with the August 2, 2004 Amendment to the E-Government Act of 2002). This Notice admonishes litigants that documents filed with the court in civil and criminal cases are available to the public electronically over the Internet via PACER and that they should not include any sensitive information in any document filed with the court unless the information is necessary and relevant to the case. The Notice further requires litigants to redact the same personal identifiers set forth in paragraphs (a.) through (d.) above. In addition, the Notice requires that the home address of any individual (e.g. victims) be omitted from any pleading filed in a criminal case. As with the Federal Courts, PAS plans to prepare a similar notice and admonishment for possible use in the state courts.

While PAS recommends that the primary responsibility for the content of pleadings should fall to the litigants and their counsel as they are the ones creating the pleadings, to the extent that

public resources permit, the courts should serve as a second tier in this process to the extent that such information is to be made available electronically. However, the responsibility for ensuring compliance with these recommendations should lie with attorneys of self-represented litigants and only secondarily with courts due to the volume of such identifiers and the impossibility of redacting all instances.

Subcommittee member discussion. PAS members discussed the following points:

- Page 17, remove apostrophe in heading VII. *PAS' Recommendations*.
- Page 18, last paragraph, separate the first sentence into two sentences.
- Page 18, adding item "e" to include home addresses of any victim or material witness.
- Page 18, separate the first two sentences in first last paragraph.

Audience comments. Matthew Hoyt from the New Mexico Foundation for Open Government ("NMFOG") commented that Federal Civil Rule 5.2.A did not include addresses for witnesses or parties as part of the required redacted filing. The civil rule is different from the criminal rule in that the issue of witness/victim intimidation is not present in a civil case. Mr. Hoyt expressed appreciation to the PAS for allowing the NMFOG members to participate in the meetings and to provide input on the draft document. He spoke of his professional background.

There was discussion on the following points:

- Civil versus criminal rules.
- Limiting witness addresses in criminal cases.
- Not having separate sections in the document for civil and for criminal.
- Page 18, adding item "e" but noting that it applies to criminal cases only.

Mr. Mead read section two beginning on page 19, as follows:

2. *Argument in Opposition to Protection of Confidential Personal Identifiers or other such sensitive or private information by the Litigants and Secondarily by the Court.*

Argument: *It is this information, which the litigants who come before the Court and their attorneys should take steps to protect. To the extent that public resources permit, the Court should serve as a second tier in this process to the extent that such information is to be made available electronically. However, the responsibility for ensuring compliance with these recommendations should lie with attorneys or self-represented litigants and only secondarily with courts due to the volume of such identifiers and the impossibility of redacting all instances.*

Counter Argument: *While litigants and attorneys should take care not to include sensitive personal identifiers in court case filings and/or filed documents, the primary responsibility for ensuring that such identifiers are not published on public web sites is with the courts. As a public entity, the New Mexico Judiciary is the custodian of millions of the documents that potentially contain information that should not be disclosed on a public website. It is unlikely that the legislature or the public will tolerate abdication of responsibility for non-disclosure of sensitive information on judicial websites.*

Many court databases and documents contain information are not filed by members of the public and their attorneys. Court filings that include personal identifiers are accepted by the courts from state and local government agencies on traffic citations, non-traffic criminal filings, child support filings, custody filings, and much more. All of these documents will be stored in a case file, which may in the future, be scanned and digitized for possible inclusion on court websites for public consumption.

It is not in the Judiciary's best interest to mandate that public agencies not include personal identifiers in filings and data transfers, since the courts use those same identifiers to verify identities of defendants, produce statistical reports that count unique case parties, and issue legal documents, such as subpoenas, warrants, notices, and jury summonses.

Filers in federal court are at this time, solely responsible for redaction of personal identifiers in court documents they file since filed documents, except for certain protected case types, will that will be posted to Public Access to Court Electronic Records (PACER), an online system for federal court data and documents. Filers are instructed to avoid inclusion of identifiers such as social security numbers, account numbers, and other identifiers that could conceivably increase litigants' exposure to identity theft or other harm. Previous to the implementation of the rule, filers in federal courts were not responsible for personal identifier redaction, and neither were the courts.

A February 12, 2009, New York Times article revealed problems with PACER data that results, at least in part, from the U.S. Administrative Office of the Courts' assignment of responsibility to litigants redaction of sensitive personal identifiers from filed documents. The article described two unintended consequences of the Administrative Office's policies.

- 1. The PACER practice, now discontinued, of providing free access to court documents through law libraries resulted in downloads of "enormous chunks of the database" by open-government activists, who then simply gave the documents away, "to the great annoyance of the government."*
- 2. Many of the documents downloaded through law library accounts contained sensitive personal identifiers. "[T]housands of documents" were found "in which the lawyers and courts had not properly redacted personal information like Social Security numbers, a violation of the courts' own rules. There was data on children in Washington, names of Secret Service agents, members of pension funds and more."*

In apparent reaction to The New York Times, disclosures and similar media disclosures regarding PACER, Senator Joseph Lieberman, and Chair of the Senate Committee for Homeland Security and Governmental Affairs, wrote to the federal Judicial Conference on February 27, 2009, to express his concern that "[N]ot enough has been done to protect personal information contained in publicly available court filings..." He noted that the investigation

reported by the New York Times revealed “numerous examples of personal data not being redacted in these records.”

As a result of the negative press, Senator Lieberman’s letter, and other similar complaints, the federal Judicial Conference and its rules committees are now rethinking their approach on relying upon litigants to redact sensitive identifiers. In a reply to Senator Lieberman, the federal Judicial Conference Chair of the Standing Committee on Rules of Practice and Procedure, the Honorable Lee H. Rosenthal, wrote that “the Judiciary is taking immediate steps to address the redaction problem.” He further noted that “some cases involve hundreds, or even thousands of pages of administrative or state court paper records that cannot be electronically searched.” Fortunately, Judge Rosenthal is misinformed regarding the impossibility of electronically searching thousands of pages. Such electronic searching and redaction is now commercially available and highly effective.

Courts in many states have begun using electronic redaction software, which upon scanning a document, uses pattern matching algorithms to redact identifiers such as Social Security numbers. For example, redaction software might recognize the pattern of a Social Security number by looking for “###-##-####.” This type of search will find all Social Security numbers that have been typed correctly in the original document, but additional logic, which examines the number to ensure that it complies with the Social Security Administration’s formula for construction Social Security numbers, provides additional assurance that a flagged number is an authentic Social Security number that should be redacted.

To avoid controversial press and inconvenience similar to that which was experienced by the federal courts, the New Mexico Judiciary should carefully consider how it will deal with sensitive identifiers before putting documents and/or databases online, and it should not depend on litigants to remove sensitive information. The Judiciary should assume a primary role in assuring that sensitive identifiers are not published on court websites since the Judiciary will be most embarrassed and inconvenienced by a failure to properly remove sensitive information from court documents. In the event of a New Mexico controversy, over inappropriate disclosure of personal identifiers by the Judiciary, it is difficult to imagine that citizens and legislators would easily accept the explanation that litigants and their attorneys bear primary responsibility for ensuring that sensitive identifiers do not appear on court websites.

Subcommittee member discussion. PAS members discussed the following points:

- Page 18, expand language to clarify what PAS means by second tier.
- Page 19, include disclaimer that PAS is not advocating a “do nothing” approach.

Audience comments. Mr. Hoyt commented that NMFOG would be concerned that an automatic requirement that redaction software be employed for every filing in the state court level as it might slow down public access to electronic documents. He suggested the PAS consider elaborating on the issues of identity theft.

There was discussion on the following points:

- Latest automated redaction software is very fast and will not slow down processes.
- Most identity theft is not reported to law enforcement.

Mr. Mead continued reading on page 21, as follows:

B. The Supreme Court should adopt the policy that records of closed criminal cases by removed from court Internet records where the charges were dismissed, nolle'd, acquitted, or vacated, but with the exception that records of dismissals subsequent to a deferred sentence not be removed from court Internet records.

The Public Access Committee (PAS) recommends that court case records on criminal defendants who were acquitted of all charges not be displayed on the Judiciary's Internet Case Lookup application (Case Lookup). A limitation on Internet publishing of non-conviction records will help protect individuals whose charges were dismissed or adjudicated "not guilty" from undue employment discrimination, housing discrimination and social stigma, without compromising the quality of information available to law enforcement, prosecution or the courts. Of course, employers, landlords, the press and members of the public will be able to continue to access records pertaining to non-conviction criminal cases at the state court where the case was original tied. PAS does not recommend that the official paper record be limited or obscured in any manner, except for cases that are sealed by rule, regulation or statute. The only change in practice would be to remove non-conviction cases, excepting deferrals, from the Case Lookup Website.

Implementation of the recommendation to limit online availability of non-conviction records would not inhibit the ability of law enforcement and justice agency employees to access the records. These individuals would continue to have online access to non-conviction cases through password-secured New Mexico Consolidated Offender Query (COQ) Website, which contains information on non-conviction and conviction cases. The COQ now has more than 4000 subscribers who have an ongoing need to access criminal case information as part of their official duties and the information contained in the COQ is more complete than that which is now provided by Case Lookup. In addition to court dispositions, the COQ website contains defendant mugshots, as well as parole, probation and imprisonment information.

This approach to limiting access to records is completely consistent with the U.S. Supreme Court's ruling on CF. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, in which the balancing of a citizen's right to privacy with the public's right to know since the limitation of the actual rap sheet is counterbalanced by the availability of the same information through the original case file at the court in which the case was adjudicated. The Supreme Court called this type of criminal record limitation "practical obscurity," and deemed it an important method for protecting privacy, while not completely inhibiting the public's ability to monitor the workings of government or limiting the right to know.

In 2007, the American Bar Association's Commission on Effective Criminal Sanctions, developed policy recommendations designed to "remove legal barriers to offender reentry that

drive high rates of recidivism.” The Commission’s recommendations were endorsed by the National District Attorneys Association, the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers.

The Commission urged jurisdictions to “develop policies that limit access to and use of criminal history records for non-law enforcement purposes, which balance the public’s right of access to information against the government’s interest in encouraging successful offender reentry and reintegration.” Specifically, the Commission recommended limiting access to “closed criminal cases in which charges were dismissed, nol prossed, or otherwise not pursued; cases that resulted in acquittal; cases in which the judgment of conviction was reversed or vacated; or cases in which a guilty plea was set aside...”

The PAS recommendation is consistent the Commission’s recommendation on limiting access to non-conviction records; however, Committee members agreed that dismissals that occurred subsequent to the satisfaction of conditions for a deferred sentence continue to be displayed on Case Lookup since deferred cases involve an admission of guilt on the part of the defendant. While cases with deferred sentences are technically classified as dismissals, the admission of guilt on the part of the defendant puts such cases in a different class than cases where the defendant maintained his or her innocence throughout the court process and was ultimately acquitted.

The assumption underpinning the PAS recommendation is that a criminal history of any kind has potential to stigmatize individuals and limit their housing and job prospects. This notion has been disputed by some who argue that studies demonstrating employer preference for individuals who do not possess any type of criminal history are inevitably flawed due to the impossibility of separating the isolated effect of possessing a criminal record from intrinsic negative characteristics, such as poor interpersonal skills, drug abuse, alcohol abuse, and behavioral problems, which are generally recognized as more common among those who possess criminal backgrounds.

Recent studies have eliminated such methodological problems by using matched subject pairs to pose as job applicants for gathering data on employer bias. One such study was performed in Milwaukee in 2001. The study recruited four non-criminal subjects, who were matched for personal characteristics, to apply for 350 entry level jobs in Milwaukee. For one set of job applications, two of the subjects would pose as non-criminal applicants and the other two would act as applicants with criminal backgrounds. For the next set of job applications the subjects would reverse roles, with the two who previously acted as non-criminal applicants taking on roles as applicants with criminal backgrounds. This further reduced the possibility that personal characteristics possessed by the subjects influenced the results of the study.

The study indicates that purported criminal background significantly reduce the changes likelihood of a call-back from an employer after an initial contact, for both the white pairs and the African-American pairs. For the white pairs, 34 percent of the subjects who declared no

criminal history received call-backs from potential employers, but only 17 percent of the pairs who admitted to a criminal background received call-backs. For the African-American pairs, the effect was more pronounced: only 14 percent of the pairs who denied having a criminal history received call-backs, but a mere 5 percent of those who admitted a criminal background received call-backs. This particular study, which was designed to neutralize the effect of subjects' personal characteristics, indicates that an employer-perceived criminal background has a dramatic effect on an individual's job prospects.

The PAS, at its meetings, has heard comments from representatives of the business community, the Bar, and from freedom of information advocates. One of the recurring comments is that the public has an absolute right to access public information, but apparently, members of the public do not necessarily agree with this premise.

In 2001, the U.S. Department of Justice, Bureau of Justice Statistics conducted a study entitled Public Attitudes Toward Uses of Criminal History Information. The study documents the findings of a telephone survey administered to 1,030 adults living in private households within the boundaries of the continental U.S. The study's purpose was to measure public attitudes toward use of criminal history information for non-criminal justice purposes by potential employers, landlords and other interested parties. The study was administered by Opinion Research Corporation International.

Only twelve percent of the survey's respondents agreed with the concept of completely open arrest and conviction records. A huge majority, ninety percent, indicated that they prefer that "State agencies not use the Internet to post criminal history information that is already a matter of public record." If the study is representative of the public at large, it indicates that most members of the public do not agree with the concept of posting any criminal history information, at all, to the Internet.

Dr. Pager's matched pair employment discrimination study appears to support the concept that a criminal history record of any kind has potential to stigmatize individuals and limit their job prospects. If the studies on criminal records and recidivism cited by the ABA Commission are valid, then a limitation on publishing non-conviction criminal history information on the Internet may positively impact the overall recidivism rate.

The Bureau of Justice Statistics study on attitudes towards uses of criminal history information supports the idea that limitation of non-conviction criminal history records on the Internet will not be seen by the public as a great inconvenience or unfair limitation. Therefore, due to perceived benefits and minimal detriments, the PAS recommendation to limit publishing non-conviction court dispositions to the Judiciary's Case Lookup Website appears consistent with sound judicial and public policy.

Subcommittee member discussion. The following points were discussed:

- Page 21, first paragraph, first sentence, change *Pubic Access Committee* to *Public Access Subcommittee*.
- Page 22, first paragraph, break up the second to the last sentence by adding a period after *duties*; striking the word *and*, and capitalizing the word *the*.
- Page 22, last paragraph, insert the word *with* between the words *consistent* and *the*.
- Page 23, the second to the last paragraph, first sentence, remove the word *chances*.
- Page 23, the second to the last paragraph, last sentence, remove the language *which was designed to neutralize the effect of the subjects' personal characteristics*.

Audience comments. There were no comments offered.

Mr. Mead continued reading on page 24, as follows:

2. *Argument in Opposition to the Removal of the Electronic Records of Certain Closed Criminal Cases.*

The ABA's recommended policy was an outgrowth of the post-911 security concerns that prompted more and more employers and landlords to conduct criminal background checks of potential employees and tenants. The ABA determined that if internet records of criminal cases that were vacated or resulted in dismissal, acquittal, or nolle prosequi were kept on federal, state and local government websites such would perpetuate the ABA's perceived obstacle to employment and housing facing individuals who were arrested or charged, but not convicted of a crime. However, contrary to the assessment of the ABA, the removal of this information can also serve to perpetuate the alleged "stigma of a conviction."

Although the Courts are not the official keeper of criminal history records in New Mexico, their web-based Case Look Up is often used as an expedient source of criminal case information for employers, landlords, business owners, bankers, mortgage lenders, members of the media, judges, law enforcement, and litigants. For example, often when a Court receives a request for information under IPRA on a closed criminal case, the Court will respond by referring the party making the request to the Court's website and also to DPS as the official criminal repository for the State of New Mexico. However, because DPS's resources are somewhat limited and its information is not available online, more often individuals will gather the information that they require from the Court's Case Look Up. On a number of occasions, defendants, whose cases ended in an acquittal or dismissal, etc., were quite pleased to discover that the existence of that dismissal or acquittal could be easily printed from the Court's website and then promptly provided to a prospective landlord or employer.

Members of the public and the media also have appreciated the ready access that the Court's Case Look Up system provides. Many lenders, employers, landlords, and small business owners lack the resources to hire private investigators or purchase costly background checks of potential borrowers, employees, tenants, or contractors. By using the publicly available Case Look Up system, they can easily identify any cases in which an individual has been involved.

Now, the ABA recommends that because criminal case information can be “difficult to read and misleading” as the public is often unfamiliar, for example, with the legal meanings of words such as “acquittal” or “nolle prosequi,” such information should be removed from internet records. In this way, those who recommended this policy to the ABA hoped to avoid misperceptions when the public fails to understand that the criminal charge did not result in a conviction. However, rather than use the potential for misunderstanding as a basis for removing certain criminal case information from Court and other government websites, the better approach would be to simply educate the public. A glossary of key legal terms with definitions taken directly from Black’s Legal Dictionary or some other legitimate, understandable legal source can be easily included on any website.

By providing a glossary of key terms, members of the public and the media will have all of the tools necessary to discern, for example, that an “acquittal” means that the person was found not to be guilty of the crime for which he or she was charged. It is not for the Courts to decide that members of the public or the media are incapable of fully appreciating or understanding the meaning of legal terms such as “nolle prosequi” or the legal consequence of events such as a “dismissal.” Removal of this information from public websites is tantamount to a judicial censure of information and is contrary to the foundation of open government upon which this country is based.

If this information were to be removed from Court and government websites, then a ready source of information pertinent not only to the public, the media, the judiciary and law enforcement, but also to the defendants themselves who are seeking to overcome any perceived stigma of having been charged with a crime, is prevented. For example, many times a defendant’s initial charge will have been captured by an employer or landlord from a newspaper, website, or other media source. If the dismissal or acquittal of that initial charge is removed from the publicly accessible Case Look Up, then the defendant is left without the ability to quickly demonstrate that the case was dismissed or resulted in an acquittal. In the time it would take to write a letter to DPS and receive a response, the apartment or job would most likely be filled by someone not facing those same legal challenges. As a result, a charge – even without a conviction – can follow a person for the rest of his or her life.

In addition, judges and court staff, as well as district attorneys’ and public defenders’ offices also rely upon the publicly accessible Case Look Up for information on the status of a case. While arguably, the Courts could establish privileged access to one another’s internal, non-publicly accessible, data-bases for the purpose of sharing this information, the public and members of the media would still be deprived of this information. In light of the foregoing, it is critical that the members of the public, the media, the judiciary, and law enforcement have continued access to this type of criminal case information; and, it should not be removed from Case Look Up.

Subcommittee member discussion: The following points were discussed:

- Include a footnote explaining that the ABA’s Commission on Effective Criminal Sanctions’

recommendations did not make it to the House of Delegates floor but were withdrawn due to protests from the press and others.

Audience comments. Mr. Hoyt commented that the PAS consider language to clarify that reference to the ABA Commission on Effective Criminal Sanctions' recommendations did not include the entire ABA. NCIC has not been reliable in his experience, so he suggested that the PAS consider inserting another example on page 25 where a defendant could verify case dispositions in the State of New Mexico.

There was discussion on the following points:

- Point one preserves the innocent until proven guilty premise.
- Expungement
- NCIC database

Mr. Mead continued reading on page 26, as follows:

C. PAS recommends that all misdemeanor cases be removed from court Internet records to which the public has access on the third anniversary after the final adjudication date, excluding those cases with outstanding warrants and/or fines or fees due and excluding domestic violence cases, DWI cases, and crimes explicitly mentioned in the Adam Walsh Child Protection and Safety Act of 2006.

1. Argument in Support of the Removal of the Electronic Record of these Older Criminal Misdemeanor Cases.

Misdemeanors are crimes that are designated by law to have a sentence of less than one year. NMSA 1978, § 31-19-1(1984). By definition, they are less egregious than felonies and are thus punished less harshly. Nevertheless, society views criminal conviction as undesirable, making it more difficult for prisoners to reenter society and become productive, law-abiding, citizens. Technology has amplified the impact of prior conviction on the lives of prisoners reentering society. The American Bar Association's Commission on Effective Criminal Sanctions recognized that "Records that 20 years ago would have been practically unavailable, either because they were sealed from public view in central repositories or stored in inconvenient locations, are now immediately available for a small fee on the internet." The Commission explains the impact of this increased public access to conviction information in noting that "Background checks indisputably increase the likelihood that a person with a record will on that account be denied jobs, licenses, housing, education, and a host of other benefits and opportunities that are essential to successful reintegration into the community. These, and other, concerns lead the Commission to call for governments to limit access to "records of misdemeanor and felony convictions after the passage of a specific period of law-abiding conduct, which may vary depending upon the seriousness of the offense, unless the conviction involves substantial violence, large scale drug trafficking, or conduct of equivalent gravity." Unsuccessful reintegration makes society more dangerous and steals from society a potentially productive citizen.

The Public Access Subcommittee (PAS) considered the impact of providing free access to conviction information on the Internet. We heard testimony from both the business community and representatives of the press in opposition to any restriction of access to criminal history information on the Judiciary's web site. The Public Access Subcommittee also recognizes that the report of the Commission on Effective Criminal Sanctions to the American Bar Association's House of Delegates was withdrawn prior to delivery in 2007 due to vocal opposition from many interest groups. The importance of access to criminal history information to both employers and landlords is clearly recognized by PAS. Nonetheless, the use of the Judiciary's Case Lookup system as the de facto criminal history background check search engine is problematic at a number of levels.

The public access version of Case Lookup is both under-inclusive and over-broad for use as a reliable background check search engine. The public access version of Case Lookup does not include criminal cases that are sealed or that otherwise have access restricted as a matter of law, such as domestic violence cases which are restricted pursuant to the XXXXXXXX. As a matter of policy the public access version of Case Lookup does not include information regarding juvenile criminal cases. Case Lookup does not contain cases prior to XXXXXXXX. Furthermore, using the name search function, Case Lookup is limited to displaying the first 200 hits of a name. For individuals with common names, such as John Smith or Juan Martinez, the results list may not include a specific criminal case. Even more troubling, there is ample opportunity for individuals with the same name to be confused with one another. Because of concerns over identity theft, social security numbers cannot be used as unique identifiers in the public access version of Case Lookup. The database is over-broad in that it can include charges that were dismissed, thus giving an individual a functional "criminal record" in the eyes of the public despite the fact that they were not found to be guilty of a crime.

The imprecision of the public access version of Case Lookup is exacerbated by the fact that misdemeanor records of criminal convictions do not have a permanent retention period in the Judiciary's Records Retention and Destruction Schedule. If an individual contends that the criminal conviction information found in Case Lookup is incorrect, there may well be no way for them to prove it if the file has been purged pursuant to the Retention and Destruction Schedule. For example, Metropolitan Court in Bernalillo County is a court of record for "criminal actions involving driving while under the influence of intoxicating liquors or drugs or involving domestic violence" but not a court of record for other criminal actions. NMSA 1978, § 34-8A-6 (1993). Magistrate Courts are not court of record. NMSA 1978, § 35-1-1 (1968). The functional effect of this is that Metropolitan Court criminal records are only permanently retained if they involve domestic violence or driving under the influence of liquor or drugs. They are retained for three years if the crime carries the potential for an enhancement of judgment and one year if it does not. 1.17.244.121 NMAC (7/13/98 as amended through 7/22/2002). Magistrate Court records are only retained for "one year after case dismissed, entry of judgment or final order, provided audit report has been released, and provided all conditions of judgment have been met." 1.17.218.121 (D) NMAC (6/5/76 as amended through 7/3/2004). Conversely, in District Courts, criminal case files are permanently retained in paper or via

microphotography, even if they involve misdemeanors. 1.17.230.201(E) NMAC (2/18/2003). While retention schedules are just administrative rules subject to amendment, it makes little sense to retain the records for similar crimes for different lengths of time merely because of which court heard the case.

PAS recommends that all misdemeanor cases be removed from court Internet records to which the public has access on the third anniversary after the final adjudication date, excluding those cases with outstanding warrants and/or fines or fees due and excluding domestic violence cases, DWI cases, and crimes explicitly mentioned in the Adam Walsh Protection and Safety Act of 2006. Felonies should not be removed from the public access version of Case Lookup due to the seriousness of felony crime. DWI, domestic violence, and the crimes detailed in the Adam Walsh Protection and Safety Act should also not be removed due to the likelihood of repetition and the public's interest in preventing victimization. All other misdemeanors from all levels of court should be removed from the public access version of Case Lookup three years after the end of the case. The case file retention period for the Magistrate and Metropolitan Courts should be increased to three years to allow individuals access to the paper records to correct any inaccuracies in Case Lookup. PAS believes that a three year display period for misdemeanors is sufficient to satisfy the public's interest in knowing an individual's background while still short enough to allow a former prisoner to avoid unnecessary societal condemnation for old convictions.

2. Argument in Opposition to the Removal of the Electronic Record of these Older Criminal Misdemeanor Cases.

The Judicial Records Retention Committee ("JRRC") was created to "establish a records management program for the application of efficient and economical management methods to the creation, utilization, maintenance, retention, preservation and disposal of official records. The JRCC also established "records disposal schedules for the orderly retirement of records." *Id.* The time periods established by the JRCC for the Bernalillo County Metropolitan Court, as the only misdemeanor court of record in the state, for retention of its criminal case files are set forth in NMAC § 1.17.244.121. Specifically, criminal case files involving domestic violence or driving under the influence of liquor or drugs are to be kept permanently. *Id.* Case files with a potential for enhancement of a judgment are to be kept for three years after the date on which the case is closed; whereas, case files with no potential for enhancement are to be kept for only one year after the case is closed. *Id.* Because the State Records Center and Archives is ever-facing space limitation issues in its records storage facilities and in this economic climate, budgetary concerns, presumably these issues were taken into consideration by the JRRC when it prescribed its records destruction schedules of these criminal misdemeanor records.

PAS has determined that, because paper files of certain misdemeanor criminal records are not retained more than three years, the publicly accessible online system references to those files also should not be retained. However, there is a recognized common law right to inspect and copy judicial records. The purpose behind this right is to aid in preserving the integrity of the judicial process. Although there are exceptions to this right such as when competing interests

outweigh the need for access to court files, the standard policy of allowing public access to court files should be preserved.

DPS is the official repository for criminal case histories. DPS is also charged with maintaining arrest information on felonies, misdemeanors and petty misdemeanors. However, DPS's criminal arrest history information cannot be made available online as it is subject to certain statutory limitations and restrictions on access as set forth in the Arrest Record Information Act. As a consequence, because criminal information is not easily obtainable from DPS, the public and members of the media, as well as judges and members of law enforcement have come to depend upon Case Look Up for information concerning criminal cases that have been filed in the Courts and the outcome of the same.

While the State Records Center and Archives may have space limitation issues necessitating the routine destruction of paper Court case files, this does not abrogate the right of the public and the media to have access to such information. Also, many lenders, employers, landlords, and small business owners lack the resources to hire private investigators or purchase costly background checks of potential borrowers, employees, tenants, business partners, or contractors. By using the publicly available Case Look Up system, they can easily identify any cases in which an individual has been involved and whether those cases resulted in a conviction and incarceration, acquittal, or some other outcome.

Furthermore, there are violent misdemeanors, which arise in neither DV nor DWI cases, such as aggravated battery, simple assault, negligent arson, negligent use of a deadly weapon, resisting arrest, and stalking. Each of the foregoing misdemeanors has been identified as being sufficiently violent that a victim is afforded certain rights under the Victims of Crime Act. If the law affords victims additional protections from defendants who have committed those crimes, then it follows that, business owners, employers, landlords, lenders, and other members of the public and the media also may want to have access to information that a prospective contractor or business partner, employee, tenant, borrower, or individual has been convicted of or even incarcerated for such a crime. If this information is removed from Case Look Up, then the public and the media will be denied the opportunity to have access to this information. It is not for the Courts to mandate social policy by censoring such information from public availability. The public and the media should have access to this information and then decide what, if any, weight it is to be afforded. In the same way that the Courts can take into account a defendant's youthful indiscretions so too can the public or the media accord this information the weight that it is due.

Whether or not the paper case file continues to exist, this information is important both to the public and the Courts and should continue to be accessible on a publicly available internet website. It matters not that space limitations control the volume of paper records that can be retained, in an electronic age, the electronic record no doubt ultimately will supplant paper files altogether as State Courts move toward the Federal Courts' electronic filing model. It is impractical to assert that simply because there may be a slight margin of error in the electronic

records, that they should be destroyed when the paper files are destroyed. In short, unless the Courts continue to maintain this information, it is unavailable to the public, the media, and the litigants in light of the inaccessibility of DPS's records. Lastly, removing such information from Case Look Up does not eradicate the record of the misdemeanor event, in an age of blogs, websites, newspapers, magazines, and other media; the information will always be out there, it just would not be as easily accessed by members of the public.

Subcommittee member discussion. The following points were discussed:

- Page 27, last paragraph, reword first sentence to: *This imprecision is exacerbated*; and then list the two things that are imprecise (common names and dismissed charges).
- Page 30, last paragraph, first sentence, change the word *assessable* to *accessible*.
- Concerns were expressed that the wording of this position does not capture the intent of the PAS.
- How to handle cases where a defendant commits another crime within three years.
- Retention/destruction schedule.
- NCIC
- PAS concerned with matching Case Lookup with the paper record.
- Previous PAS discussion of when a case is closed, the judgment and sentence is held in a repository.
- Rewriting the PAS recommendation.

Audience comments. Mr. Hoyt commended PAS for reconsidering this position and raising many of the same issues that the NMFOG have with this position. On page 27, third paragraph, he suggested that PAS consider whether the public Case Lookup needed to be changed to provide some personal identifying information to accommodate those with common names. On page 28, he asked PAS to consider whether the record retention and disposition schedule is the problem rather than Case Lookup. On page 29, he commented that the third paragraph mention the ease of use with Case Lookup versus the difficulty of doing a formal written Inspection of Public Records Act ("IPRA") request to the Department of Public Safety.

Mr. Mead moved to reconsider this recommendation at the next PAS meeting. Judge Steve Lee seconded. There was discussion on documenting the PAS process. **No further discussion. No opposition noted. Motion carried.**

Action Item: *PAS members who are drafting the document will meet and incorporate the changes that have been accepted.*

IV. Future Meetings. The next meeting will be held at the Judicial Information Division on Tuesday, July 14, 2009 at 1:00 p.m.

V. Adjourn. Judge Mitchell adjourned today's meeting at 4:03 p.m.

Final Minutes Approved by Judge Mitchell on July 7, 2009.