

**Testimony of  
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**Before the  
New York State Commission  
On Public Access to Court Records**

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The work you are undertaking is both complex and important. As we confront the realities of a digital age, it is essential that the institutions of American government at all levels strive to interact with citizens at a level appropriate to their expectations. And the expectation of an increasing share of our informed citizenry is that information will be available digitally and, generally, over the Internet.

Just as the invention of radio and television changed the way our politicians interact with their constituents – with the advent, first, of Franklin D. Roosevelt’s fireside chats and then, later, John F. Kennedy’s mastery of the televised press conference – so today must government reflect the reality of interactive communication by computer.

Courts have traditionally been slower than the other branches of government to engage openly with citizens, and for even rather proudly shielding the courts’ work from public view. For example, a relatively small share of judges in this state allow cameras into their courtrooms absent a specific statutory requirement that they do so, although cameras have been an essential tool of communication for a century. And there has seemed to be an ethic in many courts that the dignity of the bench and the public’s respect for its work will be maintained only if court proceedings and documents are shrouded from the prying eyes of citizens.

Fortunately, this commission’s charter was set by a remarkable judge with a refreshingly different perspective. Chief Judge Judith S. Kaye is clearly committed to examining the tough issues of public access to both courtrooms and the records of the courts, with an eye to opening as much as possible to public view. It is a commendable objective, and one that I’m sure most journalists cheer. Of course, we expect no less from a jurist who started her career as one of us.

Oddly, perhaps, my industry might be presumed to have a commercial interest in maintaining the status quo – that is, in avoiding electronic access to court records. Reporters are more likely than average citizens to find the offices of court clerks and figure out how to retrieve ostensibly public information that is now available only on paper in court files. If we hope to preserve our role as the gatekeepers of public

information, perhaps we should recognize that Internet access to court records would take at least some of that power out of our hands. Why, you might ask, should citizens buy a newspaper to learn about what's going on if they can find it for themselves online?

But the great democratizing value of open access to court records far outweighs any financial incentive that newspapers might have to argue for what we have now, which is, in fact, a system of limited access that serves journalists better than it does our readers.

We recognize that some of those who testify before this commission will raise concerns about privacy. Those are real concerns, although the instances of harmful intrusions into ordinary citizens' private lives are really far less numerous than a lot of public policy worry-warts would have us believe. I am convinced that these concerns can be addressed by the regulations you propose. Essential privacy can be maintained while still offering Internet access to court files. That fear must not take precedence over the cleansing value of the light that electronic access would shed on the courts.

Fundamentally, we in the media would argue unanimously, I'm sure, that nothing in this commission's work should lead to a diminution of public access to the court records now available. That argues against a sort of two-tiered system that some would advance, in which certain categories of citizens would have more ready access to the files than others. To this non-lawyer, that sounds unconstitutional, anyway.

There is nothing to suggest that these privacy concerns can't be addressed by the litigants in a case themselves. That is, regulations could lay out categories of information that ought not to be disclosed online – such as Social Security and credit card numbers and other quite personal information – and the burden of preserving the confidentiality of that information could rest on the litigants. Most of the court documents that include information that rightly should remain confidential are not now available for public release, anyway. Litigants ought to be able to redact such confidential information from documents that would be filed, which then, presumably, would be scanned and made available electronically. It should not be the responsibility of the state to engage in such costly redaction. But this commission would need to make very clear that redaction could only apply to those limited categories it would establish. And, again, I would urge you not to remove from public access information that now is available in paper documents.

Nor does the concern about privacy mean that a system can't be established that might effectively discourage those who some imagine to be lurking, ready to snatch electronic court records for some nefarious purpose. Just as a Freedom of Information request provides a means of identifying who is drawing information from the files of the executive branch, an online registration could leave for the courts an identifying trail that would discourage those who some worry would be going after the records to commit a crime or disrupt someone's life. In addition, the system could be structured so that catch-as-catch-can searches wouldn't be possible, perhaps by limiting search terms to the names of litigants, the names of attorneys and index numbers, rather than full text.

Permit me, then, to describe some typical scenarios under which Internet access would be beneficial:

- A reporter hears in the late afternoon about a lawsuit filed in state Supreme Court involving a public official. Plaintiff's counsel is unavailable, and the official, as the defendant, offers what must be viewed as a self-serving "spin" on the situation. Since it's too late for the reporter to reach the courthouse and pull the case file, readers could learn about the allegations only if the reporter can call up the file on his office computer.
- A reader learns from a newspaper article about a class action lawsuit in which she thinks she may qualify as a member of the class. By going online to check the case files, she can find out firsthand about the case.
- At night arraignments in a city courtroom, a reporter is tipped that a defendant has a significant prior criminal record. A check of the court's electronic files reveals that, contrary to the tip, the defendant had been arrested but never convicted of a crime. An inaccurate and perhaps libelous article is thus averted.

Beyond these scenarios, of course, this commission's work offers a chance to enhance the role of the press in monitoring the court system. The press would gain a new tool toward meeting that responsibility with the electronic access that might make such review more aggressive and meaningful.

That might sound like an arrogant role for a bunch of journalists, mostly non-lawyers. But the watchdog role of the media is well established in our society, and it can be performed effectively only when responsible journalists gain access to the institutions of government. Your work can help make that possible.

We will be grateful for your efforts in that regard, and for all that you are pursuing on this agenda, as I am for your attention to this testimony. Thank you.

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*The Times Union, which is read by almost a quarter-million people daily, is the dominant information source in New York's Capital Region. It is one of a dozen newspapers owned by the New York-based Hearst Corporation, one of the world's largest diversified communication companies.*