COMMENTS ON PROPOSED RULES AND RULES OF PRACTICE GOVERNING ELECTRONIC FILING OF COURT DOCUMENTS

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These comments are submitted on behalf of ACCESS/RI, the American Civil Liberties Union of Rhode Island, Common Cause Rhode Island, the New England First Amendment Coalition, and the Rhode Island Press Association.

We appreciate the opportunity to offer comments on these proposed rules implementing the court's new electronic filing system. Particularly since we are very concerned about the impact that these rules will have on transparency in the judicial system, we hope the Court will give our comments thorough consideration.

The establishment of an electronic system of records should be encouraging greater access to records, not less. However unintended it may be, we believe these rules will invert the current default of openness in the judicial process to one that encourages and promotes secrecy. Some of our organizations, like the ACLU, are strong advocates of both individual privacy rights and the public's right to know. All of us recognize that sometimes those rights can be difficult to reconcile. In this instance, however, we all believe that the rules will inappropriately lead to withholding a good deal of court case information that should be public.

Before addressing the content of the proposed rules themselves, we would like to express concern with the short amount of time that members of the public have been given to comment on them. The public notice about these rules was issued on October 3,

with comments due by October 20, less than three weeks later. That is an extremely short time to respond to Rules of this sort, which are both very significant and quite complex.

We know that years have been spent working on an electronic filing system for the courts; public comment on how that system should be implemented should not be limited to two and a half weeks. We urge the Court to consider extending the time for the submission of comments, and for that reason to also delay the timeframe for implementing the new system so that some of the issues raised by these rules can be more carefully examined and addressed.

Our initial comments and concerns on both Proposed Article X and the proposed Rules of Practice follow below:

A. ARTICLE X. RULES GOVERNING ELECTRONIC FILING

1. Rule 1 – General

a. We believe that two of the definitions contained in subsection (c) of Rule 1 are problematic, and point to broader concerns about the ambiguous way in which the rules deal with "confidential" information. They also highlight some of the difficulties that attorneys seeking to comply with these rules may face, and the way in which the rules tip the scales in favor of secrecy rather than openness.

The two definitions are those for "Confidential Document" [(c)(3)] and "Personal Identifying Information" [(c)(10)]. They are defined as follows:

> (3) Confidential Document. A document that contains personal identifying information or information that is designated as confidential by federal or state law, court rule, court order or case law but which is required to be filed with a court and made available to opposing parties in the case.

> (10) Personal Identifying Information. Information of a confidential nature which can be used to identify an individual, including but not limited to, full social security numbers, taxpayer identification numbers, full dates of birth, license numbers, street addresses and credit card, bank or other financial account numbers and medical account identifiers.

First, a "confidential document," by being defined as a "document that contains personal identifying information," promotes confusion, since both this Rule and the Rules of Practice sometimes appear to refer interchangeably to both "confidential documents" and what we would call "documents with confidential information." Although the Rules of Practice seem to indicate that a "confidential document" is meant to refer to a document that is confidential in totality, while a document with "personal identifying information" ("PII") is one that can and should be publicly available in redacted form, these definitions are very unclear in that regard. Rather, by referring to a "confidential document" as one that "contains personal identifying information," the definition appears to conflate these two concepts, which is extremely significant in terms of the public's right to know. If an entire document can be deemed confidential merely because it happens to contain "personal identifying information," a 20-page filing can be kept from public view if it contains one piece of PII.

As a result of this lack of clarity, attorneys may have broad discretion to designate a wide variety of documents as confidential and prevent public access. Indeed, an attorney wishing to keep an entire document confidential need only ensure that one reference to PII is included in the document to potentially serve that goal, depending on how these rules are interpreted, implemented and enforced.

In the same vein, neither these rules nor the Rules of Practice adequately address the need for what we would call a "least restrictive approach"; i.e., that attorneys must, to

the extent feasible, redact relevant portions of a document rather than declare the entire document confidential.

Further, attorneys are left, to a large extent, to guess for themselves as to what constitutes a confidential document, or one with PII. "Personal identifying information," the inclusion of which makes a "confidential document," is broadly defined as "information of a confidential nature which can be used to identify an individual." In other words, a confidential document is defined as a document containing confidential information. The definition of PII goes on to list some particular items – such as full dates of birth – that are confidential, but it also makes clear this is a non-exhaustive list ("including, but not limited to…")

The difficulties the definitions provide for attorneys is perhaps best exemplified by one of the listed PII items – a person's street address. While a street address can certainly be used to identify an individual, in many contexts (e.g., for voting purposes), it is not considered "information of a confidential nature" at all. Attorneys are thus left with complicated decisions to make as to what information in a court document should or should not be considered confidential.

The additional problems with this ambiguity are addressed further in our comments that follow on the proposed Rules of Practice.

b. Section (f) of Rule 1 provides in pertinent part:

> Civil Case Cover Sheet. A civil case cover sheet shall be filed with any Case Initiating Document(s) and first responsive pleading. The document shall capture identifying information regarding the parties in a case to ensure proper identification within the Judiciary's CMS. Once the information is entered into the CMS by the court, the document shall be sealed by the court and it shall not be available to the parties or the public due to the identifying information contained therein…

According to this rule, something as simple and innocuous as the civil case cover sheet, which has always been publicly available, would become confidential. The cover sheet provides basic information about the nature of the case, and we can think of no compelling reason to exclude it from the public domain. The rule does not explain the basis for this change, other than offering a vague reference that the cover sheet will now "capture identifying information regarding the parties."

But exactly what this "identifying information" consists of is nowhere defined, and why it should be confidential is not elucidated. Even assuming it is something that should be kept confidential, it is difficult to understand why it must be placed on the cover sheet so as to bar that document's general availability.

2. *Rule 2 – Official Court Record*

a. Section (b) of this rule allows for the discretionary conversion of hard copy active case files into electronic format. However, it does not provide any guidance on whether or how determinations will be made to either redact or declare "confidential" documents that have been a formal part of the public record. Thus, the possibility exists that some documents that are presently part of a public case file could "disappear" once converted to electronic format.

b. Section (d) of this rule provides that paper copies of electronic documents "will be available on demand for a fee in the respective clerk's offices." We offer two comments about this provision. First, we urge that the rules set an "actual cost" fee, not to exceed fifteen cents a page, for the copying of records. This is the standard contained in

the Access to Public Records Act, and one that we believe is appropriate for the promotion of public access to public documents. Copying public documents should be seen as a basic mission of government agencies, including the judiciary – not a money-making, or even money recoupment, venture.

Perhaps more importantly, we are struck by the fact that the rules do not make any mention of allowing the public to obtain copies of records electronically from the clerks' office while the Public Access Portal is not available. The electronic filing of records makes sharing those records much easier. It therefore seems counterproductive not to offer the public the opportunity to obtain them electronically if they so request. We urge that this option be included.

3. *Rule 8 – Confidentiality*

This section bars parties from submitting filings containing confidential information. Our concerns about this section relate to the ambiguities that we have raised earlier and that we also address in commenting on the Rules of Practice. These particular provisions commendably seem to favor a "redaction" approach to filing, but it is somewhat in tension with the definitions and other provisions that we have cited.

This section also appears to establish a universal demand that all PII be redacted from documents, even if the parties wish to voluntarily have the information public, or even where the information is a key part of a case (e.g., the street address of a property at issue in a zoning dispute). Its literal implementation could therefore be problematic in a number of instances.

B. RULES OF PRACTICE GOVERNING PUBLIC ACCESS TO ELECTRONIC CASE INFORMATION

1. *Section 3 – Definitions*

Subsection (h) defines a "public document" as "An Electronic Document filed in the EFS that does not contain any confidential information." We believe that this definition is unintentionally ambiguous in at least two respects. First, it could be interpreted as declaring that any document that contains "confidential information," even if redacted, is not "public," and secondly, that any document that knowingly and voluntarily included unredacted "confidential information" is not a public document. We recommend that this term be clarified.

2. *Section 4 – Confidentiality*

Subsections (a), (b) and (c) provide, respectively, that certain case types, case documents, and information within documents are to be deemed confidential. We have a number of concerns about the provisions of this section.

Regarding (a), case types that "are required by federal or state law, court rule, court order, or case law to be kept confidential," there are fourteen categories of cases listed. However, subsection (a) declares that confidential case types "are not limited to" those that are listed. We do not believe additions to this category should be left up in the air. Keeping an entire case, and case file, confidential is a weighty matter for a judicial system that is based on transparency of decision-making. If there are any additional case types that fall into this extreme category, we believe they should be specified.

Subsections (b) and (c) also contain non-exhaustive lists. While the decision not to name every type of document or piece of information that might be confidential is understandable, little guidance is provided the practitioner as to what, other than those already listed, they might be. Because the attorney is given direct responsibility for ensuring that any and all "confidential" information is not electronically filed – a responsibility that, if violated, can lead to sanctions under Article X – these provisions create an unhealthy incentive for attorneys to err on the side of keeping information confidential rather than disclosing it. We believe this is the wrong default to be building into an electronic filing system.

Another critical concern we have about this section is its reliance on the Access to Public Records Act (APRA), R.I.G.L. 38-2-2 *et seq*., to determine that certain case types, documents and information are confidential. APRA is simply not an appropriate or meaningful standard to use for this purpose. First, APRA explicitly excludes court records from its definition of "public record." R.I.G.L. 38-2-2(4)(T). It is therefore somewhat strange to rely on that statute to determine what court records will or will not be public. There is yet another layer of circularity in relying on APRA since that law, somewhat redundantly, also exempts records "required to be kept confidential by…rule of court." R.I.G.L. 38-2-2(4)(S).

Secondly, as this Court has previously determined, the exemptions in APRA are discretionary. ("[T]he APRA exemptions, similar to those under the FOIA, allow public agencies to withhold documents, but do not require withholding." *In re New England Gas Company*, 842 A.2d 545, 551 (R.I. 2004). Thus, records that may be exempt under APRA may nonetheless be disclosed by the custodian. As a result, APRA does not provide a

good model for the judiciary to use in determining what information should be deemed confidential for purposes of judicial transparency.

The problem with relying on APRA is perhaps best exemplified by this Section's reference on more than one occasion to the statute's so-called "personnel" exemption, R.I.G.L. 38-2-2(4)(A)(1)(b). This is a broadly written exemption for any "personal individually-identifiable records…the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to [the Freedom of Information Act]."

However, the decision to pursue litigation will often mean the disclosure, by either the plaintiff or defendant, of very private information, either to pursue or defend against a legal claim. To allow parties – indeed, to mandate parties – to withhold from the public any documents or information that they deem "a clearly unwarranted invasion of privacy" can only lead to a variety of scenarios, none of them healthy from the perspective of the public's right to know. Likely responses to this mandate could include an inclination by parties, in either good or bad faith, to withhold important information from public scrutiny based on this standard; an obligation on parties to spend the time to research whether the disclosure of certain types of personal information might constitute a "clearly unwarranted invasion of privacy" under FOIA case law; or a general trend by parties of looking to other APRA exemptions to decide whether case information should be kept confidential, such as APRA-exempted "correspondence of or to elected officials in their official capacities," R.I.G.L. 38-2-2(4)(M); "[p]reliminary drafts, notes … [or] memoranda," R.I.G.L. 38-2-3(4)(K), even though relied upon by a government agency in defending a suit; and "all records relating to… a doctor/patient relationship" (not just health care communications records). R.I.G.L. 38-2-2(4)(A)(I)(a). The Rules even rely on

the (A)(1)(b) exemption to declare that "identifying information pertaining to crime victims" is to be kept confidential. Section 4(c)(2).

These concerns about overreach by parties in keeping information confidential are not fanciful. As the Rules of Practice emphasize in Section 4(c):

> **It is the filing party's responsibility to ensure that personal or otherwise confidential information is redacted and/or submitted confidentially to the court in accordance with Article X, Rule 8 of the Supreme Court Rules Governing Electronic Filing.**

Considering that Article X specifies that sanctions may be imposed against attorneys who fail to abide by that responsibility, these provisions are almost certain to leave many attorneys erring on redacting more information than necessary and over-classifying documents as confidential, all to the detriment of the public's right to know.

3. *Section 5 – Access to Case Information*

Subsection (d)(2) deems all exhibits filed in a court case confidential for purposes of remote access by the public. While members of the public will be able to view the exhibits by going to the courthouse, this restriction on remote access runs counter to what should be one of the main points of an electronic filing system – increasing ease of access to court records. Exhibits in a court case can be extremely important documents to understanding a court case. Indeed, in the context of a bare-bones complaint, they can be the most critical documents in terms of explaining the basis for a lawsuit and the evidence behind it, as well as the evidence against it. To create an electronic access filing system and then deny the public the ability to make full use of it is a tremendous waste, and throws into question the purpose for having such a system in the first place.

We recognize we have raised a number of substantial concerns, and even they are not meant to be all-inclusive. Due to the time constraints imposed by the public comment period, we have not been able to examine the rules in more depth. Further, in order to focus on what we perceive to be the biggest concern, we have not addressed other aspects of the rules that we have questions about.

The short period of time given to review these rules has also left us unable to provide a comparative analysis of related procedures in other states that use electronic filing systems, or to offer more detailed alternatives based on such an analysis. However, we certainly can point to PACER, the federal judiciary's electronic filing system, as a model to emulate. That system has been around for a while, generally seems to work very well, and has rules governing redaction of information that are carefully and narrowly crafted. The protocols in place for PACER would seem to provide an excellent resource for examining and addressing the issues that we have raised in our comments.

Once again, we appreciate the opportunity to comment on these rules, In light of the importance of the transparency issues we have raised, we hope these comments will be given very careful and favorable consideration. Thank you.

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