

Rachel Matteo-Boehm
Holme Roberts & Owen LLP
560 Mission Street, 25th Floor
San Francisco, CA 94105
415-268-1996
415-268-1999 (fax)
rachel.matteo-boehm@hro.com

Courthouse News Service's Comments on the Petition (R-08-0039) to Amend Arizona Supreme Court Rule 123

On behalf of Courthouse News Service ("Courthouse News"), we are pleased to make this submission in response to the Supreme Court's invitation for written comments on the proposed amendments to Supreme Court Rule 123. In particular we are writing to suggest revisions to subsection (b)(1), which defines the term "bulk data," and/or subsection (j)(1)(B), which provides that "[a] custodian of bulk data may contract with a private company ... for the provision of bulk data and specialized reports of compiled data."

As a member of the news media, Courthouse News does not object to, and indeed welcomes, bulk dissemination of court records and data about court proceedings. However, Courthouse News is concerned that these provisions as currently drafted would allow outsourcing the state's entire electronic public access program when, in fact, we understand the intent of the rule is only to permit outsourcing one minor function involving the preparation of certain specialized reports. As further explained below, where a private vendor – which also may be engaged in news reporting about the court record – controls the dissemination of electronic court records and data to other media entities and the general public, the result is a system of discriminatory media access that raises serious First Amendment concerns.

About Courthouse News Service

Courthouse News is an 18-year-old, nationwide legal news service for lawyers and the news media. Courthouse News' daily e-mail reports to subscribers focus on new civil lawsuits and civil court proceedings, from the date of filing through the appellate level. Its subscribers include hundreds of law firms throughout the country, including many Arizona firms, as well as media organizations such as the *Los Angeles Times*, *The Dallas Morning News*, *The Boston Globe*, the Associated Press, and Fox News. Courthouse News' web site, www.courthousenews.com, also features news reports about civil cases and appeals.

Courthouse News' concerns about Rule 123 stem solely from its desire as a member of the news media to guard against the inequities in access to court records and information that can result when a private vendor maintains and/or controls access to such information. Courthouse News does not act as an electronic access vendor in any jurisdiction and has no plans to do so.

Revision to Rule 123

As currently drafted, subsection (b)(1) defines the term "bulk data" to mean "all, or a significant subset, of the non-confidential case information maintained in a court case management system,

either with or without modification or customized compilation.” Subsection (j)(1)(B), in turn, apparently permits courts to contract with private entities to disseminate both “specialized reports of compiled data” *and* “bulk data.”

Given the Rule 123’s broad definition “bulk data,” subsection (j)(1)(B) appears to permit the wholesale outsourcing to a private vendor of *all* dissemination of electronic court records and data including (1) docket information; (2) full-text documents; (3) compilations of case records and data from multiple cases; and (4) the “specialized reports” referenced in subsection (j)(1)(B). However, it is Courthouse News’ understanding that the intent of subsection (j)(1)(B) is to authorize contracts with private vendors *only* with respect to the fourth category of “specialized reports,” which we understand to refer narrowly to the programming of certain customized data reports (for example, report that lists sentencing ranges for hit and run accidents).

Courthouse News further understands that the courts plan to internally operate all other programs for the dissemination of electronic data, including programs offering access to docket information, full text documents, and compilations of case records and data, and that the revisions to Rule 123 are not intended to alter this practice. Accordingly, Courthouse News respectfully suggests that subsection (j)(1)(B) be revised to make clear that control over the dissemination of these types of data will remain exclusively with the state or the courts themselves, without the assistance or involvement of private vendors. For instance, subsection (j)(1)(B) could be revised to provide that:

A custodian of bulk data may not contract with any private entity for the provision of bulk data to recipients, except that a custodian of bulk data may contract with a private entity for the sole purpose of providing specialized reports of compiled data under this policy. Any private vendor that contracts with a custodian of bulk data pursuant to this subsection may not use or disseminate any information obtained under contract with the custodian of bulk data except as necessary to fulfill the purposes of the contract.

Absent this or a substantially similar revision, the Rule could easily be interpreted to allow a private vendor to control *all* dissemination of electronic court records and data to the public, a situation which not only creates serious disparities in media access to public information, but deprives the state of significant revenue-generating opportunities.

Disparities in Media Access

Whenever the dissemination of court records and data is controlled by a private party vendor that is also engaged in news reporting activities (including but not limited to alerts and/or summaries of new court filings, often referred to in this context as “value added services”), that vendor has both a cost and a timing advantage over all other members of the news media in reporting news about the courts. With respect to cost, other media members typically must either pay the vendor for access or gather the data by much more labor-intensive, and thereby costly means, such as compiling data from a review paper records or manually reviewing information on a computer screen. Meanwhile the vendor, because it is in charge of disseminating the data to others, typically has direct electronic access to the same data at no charge. With respect to timing, a vendor that controls access to court records by other media entities is by definition uniquely positioned to issue news reports and alerts based on those records before any other member of the media. Stated differently, the vendor will

always be able to scoop its competitors, who will always be a step behind the vendor in their ability to timely access newsworthy court information.

These concerns are not merely theoretical. Courthouse News is aware of at least three private vendors engaged in news reporting activities similar to those of Courthouse News who have partnered, or have sought to partner, with other state courts to provide electronic public access services. Although such arrangements are the minority model nationwide – most state courts that offer electronic public access to court documents or data administer these programs internally – in those states where such private vendor programs have been implemented, the result is a system of discriminatory access to court records.

Requiring one news agency to obtain information about public court records from another entity engaged in news reporting, as would be the case if Arizona were to allow any significant portion of its electronic access program to be outsourced, is no different than giving one television network (e.g., CBS) exclusive access to court proceedings while requiring all other networks to obtain that same information from their competitor. Such an arrangement is not only unfair, but raises serious constitutional concerns. *See Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1098-99, 1104 (C.D. Cal. 2003) (city violated First Amendment where it gave one television station exclusive access to an official city event while requiring competing stations to rely on a video feed); *accord, e.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (trial court “erred in granting access [to discovery materials] to one media entity and not the other”); *American Broadcasting Cos., Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (“once there is ... participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable”); *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (“All representatives of news organizations must not only be given equal access, but within reasonable limits, access with equal convenience to official news sources.”).

Revenue Considerations

Vendor-operated electronic public access programs are also to be avoided for another reason: they create a system whereby the vendor acts as a private toll collector interposed between the public and the courts, collecting fees for providing access to bulk data that could instead be captured by the cash-strapped courts themselves. Indeed, such considerations were a primary motivating factor behind the Colorado Judicial Department’s recently-announced plans to abandon its single-vendor electronic filing and electronic public access systems in favor of in-house programs.

In Colorado, a single private vendor currently provides not only e-filing services, but also operates a statewide program for providing public access to electronic court data, removing the entire court record and its revenue-generating possibilities from the court’s control. In late November 2008, however, the Colorado Judicial Department made public its plan (subject to legislative approval) to replace its vendor-controlled e-filing and public access programs with internally developed and administered programs, and the Colorado General Assembly recently approved the initial appropriation for the plan. Attached to this submission is a copy of the Colorado Judicial Department’s November 28, 2008 budget briefing to the Joint Budget Committee of the Colorado General Assembly, which, among other things, outlines the Department’s recommendation for

converting to state-operated e-filing and public access programs, together with financial and other considerations underlying that recommendation.

As detailed at pages 21-22 of the report, user fees collected by the Judicial Department for e-filing and public access are projected to both cover the initial costs of the internally-administered system and begin yielding net revenues for the judiciary soon after implementation. Although the Department's original revenue projections, as reflected on page 22 of the report, have been somewhat revised in the short term (stemming from recent economic trends), the most recent projections provided to Courthouse News still show the state turning a profit by fiscal year 2010-11, and generating net revenues of almost **\$8 million** by fiscal year 2013-14. At the same time, the system is expected to substantially reduce, by as much as 50 percent, the user fees charged by the current private vendor for e-filing and public access services. (Note that these figures are in line with other states that have kept their electronic access systems in house. For example, North Carolina, the State of Washington, and the Superior Court for the State of California, County of Los Angeles have all collected annual revenues in the millions of dollars by providing internally-administered electronic access services).

Other considerations played into Colorado's selection of an in-house system as well. As further detailed at pages 23-24 of the report, the National Center for State Courts (NCSC), which was asked by the Colorado Judicial Department to review its feasibility study and cost-benefit analysis, concluded that the Department's proposal to bring both its e-filing and public access system in-house was "clearly and completely" superior to continuing to contract with an outside vendor to operate both systems. Some of the NCSC's observations supporting this conclusion include the following:

- "Colorado is currently in a position of risk with respect to its relationship with [the private vendor]. The vendor's inability to develop applications and its lack of adequate safeguards for court documents must be addressed before a crisis occurs." (p. 23)
- "The two existing issues of excessive unscheduled downtime and the lack of disaster planning alone justify a change in direction." (p. 24)
- "The NCSC concludes that it supports the Department's recommendation that it begin immediately to bring both systems in-house. This conclusion 'seems clear, obvious, and difficult to dispute.'" (p. 24)

As the experience of Colorado illustrates, even setting aside the problems of discriminatory access to court records that would be created by outsourcing all or even most of its electronic access program, financial considerations strongly warrant a system whereby access is provided by the state or the courts themselves. Accordingly, Courthouse News respectfully suggests that subsection (j)(1)(B), and/or (b)(1), be revised as recommended above.

Courthouse News greatly appreciates your consideration of these comments. Should there be any questions, please do not hesitate to contact our offices.

Respectfully submitted,
Rachel Matteo-Boehm
Holme Roberts & Owen LLP