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<td>The Ralph Carr Story</td>
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Chief Justice Nancy E. Rice

Chief Justice Rice was appointed to the Colorado Supreme Court on August 5, 1998, and was appointed Chief Justice of the Colorado Supreme Court on January 8, 2014. Prior to her appointment to the Colorado Supreme Court, Chief Justice Rice served as a Denver District Court Judge from 1987 to 1998; an Assistant U.S. Attorney from 1977 to 1987; Deputy Chief of the Civil Division of the U.S. Attorney’s Office from 1985 to 1987; and a Deputy State Public Defender in the Appellate Division from 1976 to 1977. She received her Bachelor of Arts degree from Tufts University and her law degree from the University Of Utah College of Law.

In addition to her duties on the bench, Chief Justice Rice is the administrative head of the State of Colorado Judicial System along with chairing the Chief Justice’s Commission on Professional Development and serving on several other committees. She gives presentations for bar associations and civic programs. Chief Justice Rice has taught at both of the Colorado law schools (University of Denver Sturm College of Law and currently at the University of Colorado Law School) and acts as a judge in high school mock trial competitions. She has written articles published in law journals, and is dedicated to educating the public about the state judicial system.

Chief Justice Rice has one adult daughter and is an avid musician and golfer.
Chief Judge Alan M. Loeb was appointed to the Colorado Court of Appeals in July 2003 and became the chief judge of that court on October 1, 2013, upon the retirement of former Chief Judge Janice Davidson. Born and raised in Denver, Colorado, Chief Judge Loeb graduated with distinction from Stanford University (B.A., 1968). He graduated *cum laude* and Order of the Coif from the University of Michigan Law School (J.D., 1971), where he served as editor in chief of the *Michigan Law Review* from 1970 to 1971.

Prior to his appointment to the court of appeals, Chief Judge Loeb practiced with Davis Graham & Stubbs, LLP from 1971 to 2003 (partner from January 1, 1977). His practice focused on complex civil litigation and appeals, with an emphasis on securities and corporate litigation and counseling.

Chief Judge Loeb is a frequent speaker on appellate advocacy and procedure at continuing legal education programs. He is the Managing Editor of the Colorado Appellate Handbook, and from 2009-2013, he was the contributing author of Chapters 4 and 5 of that publication. He currently serves as the chairperson of the Colorado Supreme Court Standing Committee on Appellate Rules. He is also a member of the Colorado Supreme Court Committees on the Rules of Civil Procedure and the Rules of Evidence. From 2004-2013, he served as the editor of the “Judges’ Corner” department of *The Colorado Lawyer*. He is also an active member and past president of the Thompson Marsh Inn of Court. He is a Past President of the Rotary Club of Denver Southeast, and also served as District Governor of Rotary International District 5450 (2000-2001).
The Ralph Carr Story

Sunday, July 31, 2016 | 2:45 pm - 4:00 pm
Adam Schrager is an Investigative producer and reporter with WISC-TV, the CBS affiliate in Madison, Wisconsin. He has covered politics for more than 20 years, most recently at Wisconsin Public Television and at KUSA-TV in Denver. Previously, he worked at commercial television stations in La Crosse, Madison and Milwaukee in the 1990's.

Mr. Schrager’s first book was “The Principled Politician,” a biography of former Colorado Gov. Ralph Carr (R-Colorado) whose stand on behalf of Japanese Americans after Pearl Harbor would cost him his political career. The book led state lawmakers to name the new state justice center after the former Colorado chief executive.

His most recent book, “The Sixteenth Rail: The Evidence, The Scientist and The Lindbergh Kidnapping” was named by NPR’s Science Friday as one of its best books of 2013. The story profiles Arthur Koehler, a mild-mannered government scientist who traced the wood in the ladder used to kidnap Charles A. Lindbergh, Jr. to Bruno Hauptmann’s attic. He would be called “The Sherlock Holmes in the Witness Box” and be the final prosecution witness in the trial of the century.

Mr. Schrager co-authored a book with Rob Witwer entitled “The Blueprint: How the Democrats Won Colorado (and Why Republicans Everywhere Should Care), which has been lauded by The Wall Street Journal, The Washington Post and political figures on both sides of the political spectrum. He recently finished “Tall Paul,” a biography of former Arizona governor and senator Paul Fannin.

In his journalism career, Schrager has won numerous accolades, including more than 25 Emmy awards. He taught journalism at the University of Denver and at Marquette University for a number of years and has conducted dozens of seminars on the impact of the media on politics. Schrager has an undergraduate degree in history from the University of Michigan and a graduate degree in broadcast journalism from Northwestern University.
The Principled Politician
The Ralph Carr Story

Adam Schrager
Amid stories of conflict, controversy and consternation, the state Capitol will celebrate a true moment of congeniality Friday. With World War II veterans and other Japanese-Americans in attendance, the General Assembly will name a stretch of state Highway 285 after a former Colorado governor who has been largely forgotten by his state and was never known by his country.
The joint resolution to create the Ralph Carr Memorial Highway speaks of a 1940s political figure who was “selfless in his devotion to the principles of equality and freedom for all.” However, it will be in the faces of those of Japanese descent where the true meaning of Ralph L. Carr’s story can be understood.

On Feb. 19, 1942, then-Gov. Carr was fuming. He yelled at his staff even though they were not the object of his scorn, but since he did not have direct access to the White House and President Franklin Delano Roosevelt, they’d have to do.

Clutching Executive Order 9066 in his hand, he paced and shouted, “What kind of a man would put this out?” The president’s order allowed for the de facto declaration of martial law on the West Coast with one not-so-veiled purpose: to remove anyone of Japanese descent.

It was soon after Japan’s attack on Pearl Harbor, which killed thousands of Americans. The Japanese were called “yellow devils” on the front page of papers like The Denver Post. People clamored for them to be locked up, sent to work camps, or — in the words of one Colorado farmer — “just killed.”

No one distinguished between non-citizen and citizen. No one talked about constitutional rights. No one except for Ralph Carr.

“Now, that’s wrong,” Carr told his staff. “Some of these Japanese are citizens of the United States. They’re American citizens.”

And yet, nearly 120,000 people of Japanese descent, many of them American citizens, would spend the war years in internment camps, including Camp Amache, located near Granada in southeast Colorado. Barbed wire lined their boundaries and military police guarded their exits.

Carr would share his message with Colorado. He said we must protect the Constitution’s principles for “every man or we shall not have it to protect any man.” Further, he said, if we imprison American citizens without evidence or trial, what’s to say six months from now, we wouldn’t follow them into that same prison without evidence or trial?

The Constitution, he said, starts with, ” ‘We the people of the United States.’ It doesn’t say, ‘We the people, who are descendants of the English or the Scandinavians or the French.’”

His peers weren’t nearly as magnanimous. Kansas Gov. Payne Ratner said, “Japs are not wanted and not welcome in Kansas,” and that he’d call up his National Guard to ensure they wouldn’t cross his border.
Wyoming Gov. Nels Smith said if anyone of Japanese descent came to his state, they would be “hanging from every pine tree.”
Even Earl Warren, the man who would later go on to become arguably the greatest advocate for civil rights on the U.S. Supreme Court, called Japanese-Americans a “menace.”
For a governor of a land-locked state, Carr quickly found himself on a political island. Colorado revolted, threatening his life and impeachment.
Tens of thousands called, wrote and cabled their concerns. One homemaker from Boulder wrote, “May God of Heaven speak to your soul. No one wants Japanese here to see our bodies ravished and raped by the very devil himself.”
He had been mentioned in the New York papers as a possible presidential candidate and had turned down a chance in 1940 to run for vice president on a ticket with Wendell Willkie. His political star was rising at breakneck speed — and then came Pearl Harbor and his position that Colorado would not test a man’s “devotion to his country by the birthplace of his grandfathers.”
As a result, you’ve likely never heard of him. Carr has become a footnote in a time period celebrated by tomes.
Rep. Rob Witwer, R-Evergreen, Sen. Josh Penry, R-Grand Junction, and dozens of their colleagues, including leadership from both parties, are hoping to change that. The sign they hope to erect near Kenosha Pass describing Carr’s legacy will speak of a time for which America has since apologized. It will articulate a period when fear superseded reason and one governor, described at his death as “a friend to man,” stood up when everyone else sat down.
They’re hoping you come to the Capitol Friday, not to hear them speak about a man whose stand against ignorance and bigotry cost him his career, but to look at the faces of those who Ralph Carr defended.
After all, that’s what he would have wanted.

Making Great Projects Happen

Monday, August 1, 2016 | 8:30 am – 9:30 am
Scott Berkun


Born and raised in Queens, NYC, he studied philosophy, computer science and design at Carnegie Mellon University, was a manager at Microsoft (’94-’03) and WordPress.com (’10-’12), taught creativity at the University of Washington, was a co-host of CNBC’s The Business of Innovation TV show, is named on 5 U.S. patents, blogs for Harvard Business and BusinessWeek, and has appeared as an expert on various subjects on CNN, CNBC, NPR and MSNBC. He has worked with Google, Amazon, Yale University, Massachusetts Institute of Technology, Fidelity Investments, and The New York Times, among others.
How To Convince Your Boss To Try New Things

Posted on March 25, 2014 in Business, Management, Year Without Pants

No matter what organization you are in, people in management roles tend to want to change as little as possible out of fear of losing their power. Despite their rhetoric about progress and change, many bosses are hard to convince to try new things (such as working remotely or changing culture).

It’s natural for people to hold tightly to the traditions they learned early in their careers, but if the goal is progress, new traditions need to be developed. Many of us read books, take courses and go to events hoping to learn new ideas to bring back to your organization, but yet it can be very hard to get anyone, especially managers, to even try something new.
Here’s a quick guide for how to convince your boss:

1. **Have a great reputation.** The best leverage you have with any boss is your performance. They are far more likely to consider suggestions from the highest performing person on the team than the lowest. Before you launch into tirades about the grand revolutions you want them to lead, make sure you’re in good standing. Be patient. Match the size of your suggestion to the quality of your reputation.

2. **Consider what problems your boss needs to solve.** Don’t start with your problems or what things you want to try. Instead think about the world from the perspective of your boss. What are their goals? What do they need to do to succeed? What achievements are they striving for? What will get them promoted?

3. **Match what you want to try to their goals.** Frame anything you want to try in terms of how it might help your boss. Will it have a chance of helping reach their sales quota? Will it help them get
better clients? Will it save them budget? At minimum, think about your own productivity and morale: why should your boss care about improving these things? Consider that and make it part of your pitch. You may discover that there are far better things to suggest than the idea you originally had.

4. **Get support from respected coworkers.** If your idea is interesting and possibly beneficial, it shouldn’t be hard to get a coworker or two to also want to try the new thing. Provided the boss respects their opinion, their interest in participating helps support your arguments. In some cases it might even be better if someone other than you makes the pitch. If you have a good relationship with the peers of your boss, especially peers they respect, consider trying to get them involved.

5. **Look for books and respected organizations that support the thing.** Try to find companies your boss respects that already use the practice you have in mind. There are often books and papers that can help support your case. Of course getting your boss
to read them is another matter, but your consumption of them will better inform you of answers to questions your boss is likely to have, and most importantly, refine your own thinking about the realities of the thing you want to try. Maybe it’s not such a good idea. Or perhaps there is a different way of thinking about the problem that’s more useful.

6. **Plan for a trial.** Minimize their sense of risk by suggesting you try the new thing on a trial basis: a week or a month. Also propose a list of criteria for how to evaluate if the new thing was successful after the trial is over. If you’ve never pitched your boss on anything before, pick the smallest simplest version of the thing you want to try to minimize the risks and earn some trust for the next time you have something you want them to try. Pick a safe and small project that has the fewest risks, or that is only of moderate importance.

7. **Make the pitch.** Remember that most people in power respond differently to pitches when they are in front of a group vs. when they are by themselves.
Find a situation that provides the best opportunity, based on when your boss is most responsive to suggestions (email? in your performance discussions? at coffee?) Define the problem (in terms the boss relates to), offer the solution, define the (trial) terms, and reference what other companies already participate. Observe how other people pitch your boss and what tactics work best (See: How To Pitch An Idea).

8. **Work very hard to make the trial work.** Your future reputation is on the line in the trial. If the trial goes well, and they agree to the change, you’ll be in higher standing for the next recommendation you make and convincing them again will be far easier. If you fail, and fail badly, it will be harder to earn their trust next time. Do everything in your power to make sure that failing all else some useful lessons are learned, enabling the argument that doing trials, even if they fail, have minimal risk and provide new lessons for the organization. Including the discovery of new trials to do that might have better results.
In the end, it shouldn’t be all that hard to convince a smart, wise, progressive boss to try new things on a trial basis. If you realize that your boss is impossible to convince, the thing you might need to try is looking for a new boss to work for.

Related:

- [How To Change a Company](#)
- [How To Pitch An Idea](#)
- [How To Fix A Team](#)

7 Comments below — Add yours
The Simple Plan for People That Want To Solve Big Problems

Posted on May 11, 2016 in Management, Myths of Innovation

[This is an excerpt from chapter 12, of the bestseller, The Myths of Innovation]

The Simple Plan

If you want to make progress happen, or be someone who brings good ideas into the world, this is for you. It’s the simplest, easiest, most straightforward way to convert your ambition into action. When I’m asked to give advice about managing creativity or how to make an organization “innovative” this is what I share.

1. Pick a project and start doing something. It almost does not matter what it is. You will need many

Scott Berkun is the author of five popular books on creativity, leadership, philosophy and speaking. You can hire him to speak, ask him a question or follow him on Twitter and Facebook.

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experiences in trying to develop ideas into things before you’ll be good at it, especially if you are working with other people. Don’t wait around. Go make a website. Write a draft. Draw a sketch. Make a prototype. Have a small ambition you can manifest quickly so the stakes are low, and the pace is fast. Until you start working on something, you won’t truly start learning. The temptation is to have a grand sounding universal plan, don’t give in to it. That can come later. Think of these early attempts as scouting for ideas. Before you can build a city, you must thoughtfully scout and map the landscape. Having a thing, even a napkin drawing, to look at improves the quality of conversations about the possible ideas. And if you can’t find a way to start a project at work, do it on weekends – history is full of creative heroes who never had approval from anyone to do it. There is always a way to start, just pick something small enough you can do yourself in an afternoon, or with a friend, and get to work.
2. Forget the word innovation: focus on solving a problem. Most products out in the world are not very good. You rarely need a breakthrough to improve things, to beat the competition, or to help people suffering from a problem. If you carefully study the problem you’re trying to solve, you will discover many clear ways, some forgotten or executed poorly, to make it better. That’s the best place to start. If you solve a problem for a customer than makes them happy and earns you money, do you really think they will care if it’s “innovative” or a “breakthrough”? They just want their problems solved. If you cured cancer conventionally, would the patients refuse, saying “but it’s not innovative.” Of course not. Often it’s the combination of many conventional solutions, the combination obscuring how old some of the ideas were, that is called an innovation afterwards by people ignorant of the history of those ideas. So don’t worry. Sometimes small ideas, applied well, matter more than big ideas. Try to use workmanlike language: problem, prototype,
experiment, customer, design, and solution, instead of the jargon of breakthrough, radical, game-changing and innovative. This keeps you low to the ground, and prevents your ego from distracting you away from simply making good things.

3. **If you work with others, you need leadership and trust.** There’s no point worrying about which creativity or management method you’re using, or how much budget you’re going to spend, if people don’t trust each other. It’s the leader’s job to create an environment of trust so ideas move freely and can grow. Developing new ideas is scary and demands vulnerability and if people don’t trust each other their talents will never be revealed. It’s also the leader’s role to use their superior power to take risks, and protect the team from the dangers of those risks. This sounds obvious, but look around. It’s rare. Many people do not trust their teams, nor work for leaders who are willing to stake their reputations on the risks of a new idea. It’s uncommon to find someone in power who is willing to
take the blame for problems, but also willing to give credit to subordinates as rewards for their efforts. If you’re a leader, the burden is on you. If you’re not, and you don’t work for someone who creates trust and is willing to take risks, good work will not happen where you are. Either move, find the courage to take a bet and force the issue, or accept the status quo.

4. If you work with others, and things are not going well, make the team smaller. There is a reason great things often happen in small organizations. With fewer people, there are fewer cooks and fewer egos. In many large organizations there are too many people involved for anything interesting to happen. The first advice I give teams when things are not going well is to make the team smaller. If you’re the boss, and the politics are too complex, volunteer yourself to leave. Do whatever is necessary to reduce the number of people involved in developing ideas, and/or making decisions. The dynamic of getting 3 people to agree to take a risk together is much simpler than getting 30 people to
do the same. Three people can achieve an intellectual intimacy faster, and be fully invested and passionate about a decision in ways thirty people can’t be. Another solution is to pick one creative leader, and give them more power. A film director is the singular creative leader on a movie. Yet most corporate or academic projects divide up leadership across committees, diffusing authority, which always makes decisions more conservative, the opposite of what you want.

5. **Be happy about interesting ‘mistakes’**.
If you are doing something new, it can not go well on the first, second, or possibly 50th time. This is OK. Your mindset has to be, “This did not go how I expected, but I expected that! What can I learn so the next attempt improves? (or teaches more interesting lessons)” The more interesting the lesson, the better. It’s the mind of an experimenter (see Chapter 3) that you want to cultivate, asking questions about everything you make, and using the answers to those questions to fuel the next attempt and the next. Many
people quit on their 2nd or 3rd try at something, for reasons that have nothing to do with the history of innovation. There was not a story in this book where any of the brilliant minds mentioned succeeded on such a small number of tries. Perseverance, as simple a concept as it is, is rare. The more ambitious the problem you’re trying to solve, the more experiments and attempts you will need to get it right.

It’s easy to discount these 5 basic notions as they seem so simple, but that’s the trap. I’m convinced ones that don’t overlook these have the highest odds of producing good work, in a healthy culture, with results the team and the customers are proud of. The challenge is commitment as it’s natural to dream of an easier way, and hope for a trick or formula or magical method to avoid the work and the risks. You will find many consultants and experts who promise you things that do not exist based on stories not supported by history. But I hope that the true stories you read earlier in this book will anchor your confidence, defend you against the many myths, and help this simple view stay with you.
Related:

- How To Have A Career Solving Big World Problems

[This is an excerpt from chapter 12, of The Myths of Innovation]

7 Comments below — Add yours
Colorado Learning Center Project

Monday, August 1, 2016 | 9:45 am – 11:15 am
Chief Justice Nancy E. Rice

Chief Justice Rice was appointed to the Colorado Supreme Court on August 5, 1998, and was appointed Chief Justice of the Colorado Supreme Court on January 8, 2014. Prior to her appointment to the Colorado Supreme Court, Chief Justice Rice served as a Denver District Court Judge from 1987 to 1998; an Assistant U.S. Attorney from 1977 to 1987; Deputy Chief of the Civil Division of the U.S. Attorney’s Office from 1985 to 1987; and a Deputy State Public Defender in the Appellate Division from 1976 to 1977. She received her Bachelor of Arts degree from Tufts University and her law degree from the University Of Utah College of Law.

In addition to her duties on the bench, Chief Justice Rice is the administrative head of the State of Colorado Judicial System along with chairing the Chief Justice’s Commission on Professional Development and serving on several other committees. She gives presentations for bar associations and civic programs. Chief Justice Rice has taught at both of the Colorado law schools (University of Denver Sturm College of Law and currently at the University of Colorado Law School) and acts as a judge in high school mock trial competitions. She has written articles published in law journals, and is dedicated to educating the public about the state judicial system.

Chief Justice Rice has one adult daughter and is an avid musician and golfer.
Justice Monica M. Márquez

Monica M. Márquez was sworn in as Justice of the Colorado Supreme Court on December 10, 2010. She was appointed by Governor Bill Ritter, Jr. Before joining the Court, Justice Márquez served as Deputy Attorney General at the Colorado Attorney General’s Office, where she led the State Services section in representing several state executive branch agencies and Colorado’s statewide elected public officials, including the Governor, Treasurer, Secretary of State, and the Attorney General. During her tenure at the Attorney General’s Office, Justice Márquez also served as Assistant Solicitor General and as Assistant Attorney General in both the Public Officials Unit and the Criminal Appellate Section. Prior to joining the Attorney General’s Office, Justice Márquez practiced general commercial litigation and employment law at Holme Roberts & Owen, LLP.

Justice Márquez was born in Austin, TX. She grew up in Grand Junction, CO, where she graduated from Grand Junction High School. She earned her bachelor’s degree from Stanford University, then served in the Jesuit Volunteer Corps as a volunteer inner-city school teacher and community organizer in Camden, NJ, and Philadelphia, PA. She graduated from Yale Law School, where she served as Editor of the Yale Law Journal, Articles Editor of the Yale Law & Policy Review, and co-coordinator of the Latino Law Students Association. Upon graduation, she clerked for Judge Michael A. Ponsor of the United States District Court for the District of Massachusetts in Springfield, MA, and for Judge David M. Ebel of the United States Court of Appeals for the Tenth Circuit in Denver, CO.

Justice Márquez is a member of the Colorado and Denver Bar Associations, the Colorado Women’s Bar Association, and the Minoru Yasui Inn of Court. Prior to joining the Court, Justice Márquez served on the boards of the Colorado Hispanic Bar Association, the Colorado GLBT Bar Association, and the Latina Initiative, and as Chair of the Denver Mayor’s GLBT Commission.

Justice Márquez has received honors and awards including the Colorado GLBT Bar Association’s 2009 Outstanding GLBT Attorney Award, the 2009 Richard Marden Davis Award (given to a Denver attorney who combines excellence as a lawyer with creative civic cultural, educational and charitable leadership), the 2011 Yale Latino Law Student Associations Public Service Award and the 2014 Latinas First Foundation’s Trailblazer Award.
Christopher T. Ryan

Christopher T. Ryan was appointed clerk of the Colorado Supreme Court on May 23, 2011. He has also been the Clerk of the Colorado Court of Appeals since December 3, 2007. Ryan has worked in several positions for the Colorado Judicial Branch beginning as a Bailiff in the Denver District court in 1990. Immediately prior to his appointment as Clerk of the Court of Appeals, Ryan served as a Senior Budget Analyst with the Colorado State Court Administrator’s Office. Additionally, he was employed by the National Center for State Courts from 2001-2005 as a Senior Court Management Consultant. His work focused on the assessment of operations and caseflow management in the courts and the development and maintenance of workload assessment models for judges and court staff. Ryan holds a bachelor’s degree in political science from the University of Colorado.
Colorado Judicial Learning Center

Housed in the new Ralph L. Carr Colorado Judicial Complex, the Colorado Judicial Learning Center is an innovative and engaging learning environment designed to inspire visitors, young and old, to achieve a better understanding of the laws and freedoms that govern our citizens, states, and country.

The 3,800-square-foot Learning Center provides an interactive educational experience for youth and adults to build awareness, understanding, and appreciation for the rule of law and the role of the Judicial Branch in our society. Visitors can learn about the American justice system, including the Federal and Colorado courts and U.S. and Colorado Constitutions.

The Learning Center is open Monday - Friday, 8:00am - 5:00pm.

Admission to the Center is free.
COLORADO JUDICIAL LEARNING CENTER: EXHIBIT SUMMARY

Intro Film
This fast-paced, fun-filled introductory film uses pop culture movie clips, animation, 3D graphics and a savvy narrator to show Jade, a teenage girl, the difference between the Rule of Man and the Rule of Law. Put another way, what would society look like without an impartial Judiciary? **Duration:** Five minutes.

Assembling the Rule of Law
The goal of this artful three-level game is for the visitor to visualize and increase their understanding of the Rule of Law by connecting the correct principles together, forming the four Pillars of the Rule of Law. Visitors may work alone or collaborate with other visitors to connect the appropriate Rule of Law to corresponding Pillars. Players match descriptive images to color-coded columns, or discard untrue legal statements. **Duration:** Three to ten minutes.

The Constitution
The Constitution animated wall continues the experience of the Assembling the Rule of Law interactive. It shows how key ideas and concepts behind the Rule of Law were incorporated into the writing of the Constitution. Large headings announce the key concepts from the Rule of Law, which are joined by words found in the United States Constitution. A third layer of contemporary language appears below the original language, helping to explain the meaning of the Constitution. **Duration:** Seven minutes.

Hear from a Judge
In this exhibit, the visitor listens to the personal stories of Colorado judges. Visitors can choose from twelve different justices and judges from a variety of locations around the state. Each judge tells a unique story broken into smaller topics. Generally, the interactive covers four themes: Community and Challenges, Becoming a Judge, The Rule of Law, and Children and Education. **Duration:** Two to three minutes per video (12 videos total).

Our Colorado Map
Visitors learn the key information about Colorado court districts by exploring an interactive map of Colorado on a simple and intuitive touch screen interface. The map of Colorado is divided into the following jurisdictions: Counties, Districts, Water Divisions, and Tribal lands. **Duration:** Two to five minutes per county (64 counties total).

Path of Resolution
Visitors learn how cases travel through the court system by selecting from a variety of case types. Each case allows the visitor to drag a case icon forward along a path that leads up through the court system. At each step on the path, the sculpture of the corresponding court lights up and written and spoken narrative explains the function of that court within the context of the selected case. Once the case has been completed, visitors may also drag the icon backwards to review steps or select another case icon to explore a different path through the courts. **Duration:** Two minutes per case (nine cases total).
Find the Law That Applies
Visitors learn about four different sources of law (U.S. Constitution, Colorado Statutes, Previous Case Rulings, and Court Rules) through one of three cases. Each case is introduced with an animation describing the case and the ultimate decision to be made based on the results of consulting the law. Three specific questions relating to each different source of law are presented to the visitor, and a tablet representing the appropriate source of law comes to life for the visitor to select from three potentially relevant passages. Once the visitor has found the passage relevant to each question, he/she makes a decision based on the information gathered. Each case concludes with an animation that reveals the correct answer to the question and explains the details of the law that support that answer. **Duration:** Two to four minutes per case (three cases total).

Judicial Milestones
Interactive touch screen stations allow visitors to explore in detail the judicial milestones present on the adjacent exhibit wall. The layout of the interactive menu mimics the physical wall, so that visitors can easily access more information about any of the 25 judicial milestones presented on the wall. In total, the interactive interprets 91 historical events into 12 searchable categories. **Duration:** One to three minutes per milestone.

Make the Case
Visitors take on the roles of the prosecutor, the defense counsel, and the jury in a criminal court case. The case follows the process from the lawyers’ opening statements through the verdict as Ms. Hand is accused of stealing gloves from Ski Outlet. Each lawyer has the opportunity to ask questions of Mr. Green, the owner of Ski Outlet, and Ms. Hand herself while the jury listens to testimony and evaluates the evidence. Lawyers can object to any question and customize their closing arguments to try to sway the jurors whom ultimately hold the power to reach a verdict. **Duration:** Ten to fifteen minutes.

You Be the Judge
In this exhibit the visitor assumes the role of an appellate judge in a court case and learns the intricacies of a judge’s responsibilities and decisions. The interactive contains four different court cases; two involving discretion within the law, and two involving interpretation of the law. Originally shot video footage of a real Colorado judge provides an introduction to each court case, and graphic animations of key case details guide the visitor through the case. The visitor is ultimately prompted to make a decision as the judge of the case, after being provided the many factors that judges must consider to make their decisions. Once a decision has been made, visitors see the rulings of other visitors and have the option to email the results of the case. **Duration:** Five to seven minutes per case (four cases total).
Ralph Carr Judicial Learning Center

Architect: Fentress Architects
Developer: Trammel Crow Company
General Contractor: Mortenson Construction
Exhibition Designer: Gallagher & Associates
Media Producers: Cortina Productions
Exhibit Fabrication: Design & Production Inc.

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Joseph Turnage

Judicial Milestone Content Development Team

Thomas Andrews
William Convery
Elizabeth Escobedo
Mark Fiege
Ernest House, Jr.
Jared Orsi
Managing Pro Se Appeals

Monday, August 1, 2016 | 1:00 pm – 2:00 pm
JOHN TARLTON OLIVIER received his undergraduate degree in Business Administration and his Juris Doctor degree from Loyola University School of Law. He is admitted to the Louisiana State Bar and to practice in the Eastern and Western Districts of the United States District Court for the State of Louisiana and in the United States Supreme Court.

Mr. Olivier entered the private practice of law with the firm of Olivier & Brinkhaus in 1979. In 1982 he moved to New Orleans and worked for the Board of Commissioners for the Port of New Orleans. In 1985 he was appointed by the Louisiana Supreme Court as Deputy Clerk and on March 1, 1996, was sworn in as The Clerk of Court.

Mr. Olivier completed the National Center for State Court's Institute for Court Management Executive Development Program and in 1991 was recognized as a Fellow of the Institute during ceremonies at the United States Supreme Court, presided over by Chief Justice Warren Burger. Since 1991, Mr. Olivier has been a member of the Conference of State Court Administrators (COSCA)/National Center for State Courts (NCSC) Court Statistics Project Advisory Committee which guides and directs staff in the content, design, collection, compilation, and analysis of State court caseload statistics for the nation. He has also served on the COSCA/NACM Joint Technology Committee. Mr. Olivier is currently a member of the Supreme Court of Louisiana Historical Society (formerly on the Board of Directors), National Conference of Appellate Court Clerks (NCACC) (currently Immediate Past President), National Association for Court Management (NACM), American Bar Association (ABA) (2009-2012 served on the Executive Committee of the Counsel of Appellate Staff Attorneys (CASA)), and Louisiana State Bar Association (LSBA).

In his spare time, Mr. Olivier enjoys sailing with his family and friends.
Betsy Shumaker

Betsy Shumaker has been the Clerk of Court for the Tenth Circuit since January of 2006. She joined the court staff in January of 1990 and since that time has served in various capacities including staff attorney, chief deputy clerk, counsel to the chief judge and circuit executive. Prior to coming to the court Betsy was in private practice where she focused on various types of civil defense work. She is a graduate of the University of Wisconsin and Suffolk University Law School.
Sean Slagle, J.D.

Sean Slagle is the Appellate Coordinator for Colorado's Self-Represented Litigant Program. In this position, she has developed forms, instructions, and sample materials to help pro se parties navigate the appellate process. Sean has worked for Colorado Courts for over six years and is a recent graduate from the University of Wyoming College of Law.
Managing the Pro Se (Appeal)

NCACC 2016
Denver CO
Panel

Betsy Shumaker
Clerk of Court
U. S. Court of Appeals for the Tenth Circuit

Sean Slagle
Self-Represented Litigant Coordinator
Colorado Appellate Court

John Tarlton Olivier
Clerk of Court
Louisiana Supreme Court
<table>
<thead>
<tr>
<th></th>
<th>Pro se</th>
<th>Total</th>
<th>% pro se</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filings (Appeals/proceedings)</td>
<td>975</td>
<td>1988</td>
<td>49.0%</td>
</tr>
<tr>
<td>Terminations (Appeals/proceedings)</td>
<td>937</td>
<td>1954</td>
<td>48.0%</td>
</tr>
</tbody>
</table>
# Colorado Appellate Courts

**Self Represented Litigant 2015 Averages**

<table>
<thead>
<tr>
<th>Court of Appeals</th>
<th>Supreme Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>180 New Cases per Month</td>
<td>91 New Cert Petitions per Month</td>
</tr>
<tr>
<td>16% Civil SRL Filings</td>
<td>15% SRL Filings</td>
</tr>
</tbody>
</table>
Montana Supreme Court

SELF REPRESENTED LITIGANT CASELOAD REPORT
2015 January - December

• **SELF REPRESENTED LITIGANT (SRL) CASES:**
  – 1. Appeals: 149
    • a. Civil: 115
    • b. Criminal: 34
  – 2. Disciplinary Matters: 4
  – 3. Original Proceedings: 115

• **TOTAL SRL FILINGS: 268**

Percentage of Total
• SRL as a percentage of Total Caseload: **33.25%**
  (268 divided by 806)
1. Lily is recently divorced and looking to appeal her permanent orders decision. However, she is confused about the appellate process. She wants to know what services and resources the court has to help her with her appeal.
SCENARIO 1

1. What resources are available in your jurisdiction for pro se parties?

A. Written Materials (Instructions, samples or pro se practice guides)?

B. Human Resources (dedicated court staff)?

C. Attorney Resources?

D. All or a combination of the above?

E. None of the above?
1. What resources are available in your jurisdiction for pro se parties?

A. Written Materials (Instructions, samples or pro se practice guides)?
B. Human Resources (dedicated court staff)?
C. Attorney Resources?
D. All or a combination of the above?
E. None of the above?
2. Lily decides that the appellate process may be above her capabilities, but she doesn’t have money for an attorney. Which attorney services are available to her:

A. The local bar association’s pro-bono appellate program?

B. The regularly held appellate aid clinic?

C. A directory of attorneys that offer alternative fee structures?

D. All of the above?  OR  E. None of the Above?
SCENARIO 1

2. Which low/no cost attorney services are available in your jurisdiction:

A. Full pro-bono representation?
B. An appellate legal aid clinic?
C. Alternative fees attorney directory?
D. All of the above?
E. None of the Above?
SCENARIO 2

More and more courts are taking advantage of electronic access to allow pro se litigants to file and serve appellate pleadings.

In your court do you:
SCENARIO 2

A. Allow pro se litigants to file electronically as a matter of course and without prior permission?

B. Allow pro se litigants to file electronically, but only after they receive specific and independent authorization from the court?

C. Not allow pro se litigants to file electronically even though attorneys file electronically?

D. Not allow pro se litigants to file electronically because the court does not have electronic filing available generally?
Efileng by Self Represented?

SCENARIO 2

A. Allow pro se litigants to file electronically as a matter of course and without prior permission?

B. Allow pro se litigants to file electronically, but only after they receive specific and independent authorization from the court?

C. Not allow pro se litigants to file electronically even though attorneys file electronically?

D. Not allow pro se litigants to file electronically because the court does not have electronic filing available generally?

A. B. C. D. 0% 0% 0% 0%
SCENARIO 3

Mr. Martin submits an application on a paper bag. Deputy clerk attempts to contact Mr. Martin, but the number he provided is not in working order.

1. Do you:

A. Return the submittal to Mr. Martin advising that his filing does not comply the rules?
B. File the submittal and then return it allowing time for resubmitting in compliance with the rules?
C. File the submittal and send it to the Justices/Judges for consideration?
1. Do you:

A. Return the submittal to Mr. Martin advising that his filing does not comply the rules?
B. File the submittal and then return it allowing time for resubmitting in compliance with the rules?
C. File the submittal and send it to the Justices/Judges for consideration?

A. B. C. 0% 0% 0%

55
SCENARIO 3

2. Assuming you file the submittal and send it to the Justices/Judges. Should the Court:

A. Allow Mr. Martin to supplement his filing?

B. Deny the submittal on the showing made?
2. Should the Court:

A. Allow Mr. Martin to supplement his filing?
B. Deny the submittal on the showing made?
SCENARIO 4

Inmate has appointed counsel for his appeal. Six months pass and he has not heard anything from his attorney. Inmate gets an “Inmate Counsel Substitute” (ICS) to check on his case. The ICS learns that the Court of Appeal rendered its decision a couple of months earlier. The deadline for filing a writ application is 30 days from the mailing of the Court of Appeal decision. The ICS contacts the appointed counsel and is told that his job was finished after he filed the appeal brief. You are contacted by ICS asking how he can assist his “client”.
SCENARIO 4

1. How do you advise the ICS:

A. Sorry, Inmate can file a malpractice suit against his appointed counsel.

B. Contact the Court of Appeal to see what they can do since appointed counsel failed to notify Inmate of their action.

C. Gather all evidence of the failure of appointed counsel to notify Inmate and file with the Supreme Court.

D. All of the above.
1. How do you advise the ICS:

A. Sorry, Inmate can file a malpractice suit against his appointed counsel.

B. Contact the Court of Appeal to see what they can do since appointed counsel failed to notify Inmate of their action.

C. Gather all evidence of the failure of appointed counsel to notify Inmate and file with the Supreme Court.

D. All of the above.
2. Assuming Inmate files with the Supreme Court does the Court:

A. Reject the filing as untimely?

B. Consider the application?

C. Rule appointed counsel in to show cause why he did not advise Inmate of the Court of Appeal decision?

D. Both A & C

E. Both B & C
2. Does the Court:

A. Reject the filing as untimely?
B. Consider the application?
C. Rule appointed counsel in to show cause why he did not advise Inmate of the Court of Appeal decision?
D. Both A & C
E. Both B & C
3. Assuming the Supreme Court rejects the application as untimely. Inmate then files in Federal Court. Does the Federal Court:

A. Reject Inmate’s filing for failing to exhaust state court remedies?

B. Accept the filing?

C. Other?
3. Does the Federal Court:  SCENARIO 4

A. Reject Inmate’s filing for failing to exhaust state court remedies?
B. Accept the filing?
C. Other?
Attorney/Appellant represented herself in a case before the Disciplinary Board, which recommended that she be suspended for a year and a day.

The allegations against her were numerous, but fell into three categories: (1) improper ex parte communications; (2) dissemination of false and misleading information; and (3) conduct prejudicial to the administration of justice.
SCENARIO 5

Her defense was that she believed her First Amendment rights allowed her to say whatever she wanted, to whomever she wanted, in whatever form she wanted. This included ex parte communications with the judges involved in the cases; requesting that the public contact the courts and demand that they rule in a particular manner; and divulging confidential material regarding minors in a custody (alleged abuse) case.
SCENARIO 5

1. On appeal the Court, rather than affirming the year and a day suspension, disbarred the attorney. Attorney filed an Application for Rehearing on the last possible day, thus delaying the finality of the disbarment ruling. However, the filing fee for Attorney’s Application for Rehearing was drawn from her Client Trust Account and was returned for insufficient funds.
SCENARIO 5

1. The Court should:
   A. Dismiss the application for non-payment of fees.
   B. Deny the application for non-payment of fees.
   C. Address the merits of the application, then further sanction Attorney.
   D. Order Attorney to show cause why she should not be held in contempt of court.
   E. Refer the matter to Disciplinary Counsel for further action. (Disbarred attorneys can petition for reinstatement after five years.)
1. The Court should:

A. Dismiss the application for non-payment of fees.
B. Deny the application for non-payment of fees.
C. Address the merits of the application, then further sanction Attorney.
D. Order Attorney to show cause why she should not be held in contempt of court.
E. Refer the matter to Disciplinary Counsel for further action. (Disbarred attorneys can petition for reinstatement after five years.)
2. Assume the Court decided to simply deny the Application for Rehearing. However, on the very day Attorney’s Application was denied, she filed a shell application for writs for a client, signing and mailing it on that day (which was the last day to file) and then on the next day (Saturday) mailing the rest of the application. The application was received on Monday.
SCENARIO 5

2. Should the Court:

A. Reject the client’s application because it was filed by a disbarred attorney?

B. Accept the client’s application, but refer Attorney’s actions to the District Attorney and Disciplinary Board for practicing law without a license?

C. Accept the client’s application, but order Attorney removed from the case and permit extensions for client to obtain new attorney?
2. The Court should:

A. Reject the client’s application because it was filed by a disbarred attorney?

B. Accept the client’s application, but refer Attorney’s actions to the District Attorney and Disciplinary Board for practicing law without a license?

C. Accept the client’s application, but order Attorney removed from the case and permit extensions for client to obtain new attorney?
1. John is incarcerated in a state facility which does not have consistent computer access for prisoners. He has filed a civil rights (conditions of confinement) action, and is seeking to appeal the trial court’s grant of summary judgment in favor of the state. He is in an intermediate court or federal court where appeal is as of right. John writes to the court and advises prison officials have confiscated his paper work and legal records, and that he cannot proceed unless the clerk’s office forwards to him a printed copy of the docket and hard copies of all of the materials in the record.
1. Do you:

A. Print a copy of the docket or direct the trial court to print a copy, and mail it to John at his facility?

B. Respond via letter and advise John the clerk’s office does not have the resources to make copies, but that he can use court-created forms to file his brief and any other pleadings required (and forwarding the appropriate forms to him with the letter)?

C. Calculate the cost, per the court’s fee schedule, of making the copies and advise John you will forward the materials if he pays X?

D. Some combination of the above.
1. Do you:

A. Print a copy of the docket or direct the trial court to print a copy, and mail it to John at his facility?

B. Respond via letter and advise John the clerk’s office does not have the resources to make copies, but that he can use court-created forms to file his brief and any other pleadings required (and forwarding the appropriate forms to him with the letter)?

C. Calculate the cost, per the court’s fee schedule, of making the copies and advise John you will forward the materials if he pays X?

D. Some combination of the above.
2. John writes back after receiving the court’s correspondence, and includes a motion to appoint counsel, noting he does not believe he can proceed without the assistance of an attorney. Because this is a civil case, it is not one where counsel can be appointed.
2. Do you:

A. Advise John counsel is not available through the court but refer him to a bar association group or law school clinic?

B. Submit the request to a court-grown pro bono program or pro bono coordinator to evaluate whether John meets the requirements for securing an attorney?

C. Simply deny the request via order or letter?

D. Parts of more than one of these options?
2. Do you:

A. Advise John counsel is not available through the court but refer him to a bar association group or law school clinic?

B. Submit the request to a court-grown pro bono program or pro bono coordinator to evaluate whether John meets the requirements for securing an attorney?

C. Simply deny the request via order or letter?

D. Parts of more than one of these options?
3. Pro bono counsel is not appointed or secured for John. He proceeds pro se and mails in his brief using the court form provided, and also sends a letter stating he does not have sufficient monies in his prison account to make copies to serve the defendants/appellees, and therefore cannot comply with the court’s service requirements.

How does the court address a pro se litigant’s failure to follow or inability to follow court rules?
3. Do you:

A. Issue an order or other notice advising John he must serve the brief on the others parties and advising him he must comply with that rule or risk dismissal?

B. Waive the service requirement because, in light of electronic filing and the court’s automatic scanning and docketing of pro se pleadings, the appellees will receive the brief anyway (that is, via the court’s notice to counsel)?

C. Accept the brief for filing (and then set the appellees’ brief deadline) but advise John he must serve the brief on the appellees within some time-certain?
3. Do you:

A. Issue an order or other notice advising John he must serve the brief on the others parties and advising him he must comply with that rule or risk dismissal?

B. Waive the service requirement because, in light of electronic filing and the court’s automatic scanning and docketing of pro se pleadings, the appellees will receive the brief anyway (that is, via the court’s notice to counsel)?

C. Accept the brief for filing (and then set the appellees’ brief deadline) but advise John he must serve the brief on the appellees within some time-certain?
4. John calls the clerk’s office after the court renders its decision, which is not favorable to him. He wants to know how he can seek reconsideration and “appeal” to a higher court. He asks if there is any case law or other legal information available that would help him make his case.
4. Do you:

A. Give him basic information, such as the address for the Supreme Court, but otherwise let him know you can’t give him legal advice?

B. Talk through with him the specific appellate rules that would allow him to file a petition for rehearing or a petition for certiorari?

C. Refer him to a lawyer or other legal aid to get him additional information?
4. Do you:

A. Give him basic information, such as the address for the Supreme Court, but otherwise let him know you can’t give him legal advice?

B. Talk through with him the specific appellate rules that would allow him to file a petition for rehearing or a petition for certiorari?

C. Refer him to a lawyer or other legal aid to get him additional information?
Questions?
Would you like to have “Clickers” used in future presentations?

A. Yes.
B. No.
Thank you for your attention and participation.
THE END
This list is specific for appellate resources for self-represented litigants; it does not include trial court resources, which are more common. The appellate resources available in each jurisdiction range from simple written summaries of the appellate process, to detailed step-by-step written guides, with or without electronic links, to interactive websites with accessible guides and forms. Given the range of formats, the resources vary in usefulness. For an overview of the types of self-help resources available, see Access Brief (Nov. 2012) from the Center on Court Access to Justice for All at http://www.ncsc.org/atj (under “Access Briefs,” click on “Self-Help Services”). A national clearinghouse of information on self representation (appellate and otherwise) can be found at: http://www.selfhelpsupport.org/.

STATE COURT RESOURCES

Alabama: http://eforms.alacourt.gov/Appellate%20Forms/Forms/AllItems.aspx (electronic links to appellate e-forms; no guidance)

Alaska: http://www.courts.alaska.gov/shc/appeals/appeals.htm (interactive website)


Arkansas: http://www.arlegalservices.org/arkansassupremecourt (interactive website sponsored by Arkansas Legal Services Partnership)


Colorado: https://www.courts.state.co.us/Forms/SubCategory.cfm?Category=Appeals (interactive website - forms) & https://www.courts.state.co.us/Self_Help/courtofappeals/ (interactive website - information)


Florida:  [http://prose.flabarappellate.org/default.asp](http://prose.flabarappellate.org/default.asp) (scanned handbooks sponsored by FBA)


Hawai‘i:  [http://www.courts.state.hi.us/self-help/courts/forms/oahu/appellate_forms.html](http://www.courts.state.hi.us/self-help/courts/forms/oahu/appellate_forms.html) (links to limited appellate forms; no guidance);  [http://www.hawaiiappellatesection.org/resources/](http://www.hawaiiappellatesection.org/resources/) (interactive website sponsored by the state bar)


Indiana:  [http://www.in.gov/judiciary/probono/2335.htm](http://www.in.gov/judiciary/probono/2335.htm) (court website with link to Indiana Appellate Pro Bono Project and additional links to forms and other resources)


Maryland:  http://www.mdcourts.gov/cosappeals/pdfs/cosaguideselfrepresentation.pdf (scanned handbook with sample forms and sample brief);  
http://www.courts.state.md.us/coappeals/filinginstructions.html (interactive website with links to instructions) & http://www.peoples-law.info/appeal-or-enforce-decision (interactive website from state law library)


Michigan: http://courts.mi.gov/Courts/COA/clerksoffice/Pages/ProPer.aspx (electronic manuals for appellants and appellees) & http://courts.mi.gov/Administration/SCAO/Forms/Pages/Appeals.aspx (court forms)


Mississippi: https://courts.ms.gov/faqs/clerks_faqs.pdf#zoom=75 (scanned FAQ from Clerk’s Office)

Missouri: http://www.courts.mo.gov/page.jsp?id=842 (on-line general guide)


http://nvcourts.gov/Supreme/Appellate_PRACTICE_Forms/ (practice forms)


New Jersey: http://www.judiciary.state.nj.us/prose/index.html#appellate (interactive website)

New Mexico: http://www.nmcourts.com/cgi/prose_lib/ (scanned handbook - click on “appeals” for English or “apelaciones” for Spanish) & http://www.12thdistrict.net/docs (various forms, including appeals forms)

North Dakota:  http://www.ndcourts.gov/ndlshc/OtherForms/Appeal/Appeals.aspx (interactive website with links to a guide and sample forms)


Oklahoma:  http://www.oscn.net/static/forms/start.asp (forms includes civil and criminal appeals)

Oregon:  http://courts.oregon.gov/OJD/OSCA/acs/records/pages/index.aspx (interactive website with links to forms, sample briefs, fee scales, etc.)

Pennsylvania:  http://www.pacourts.us/assets/files/setting-3218/file-2861.pdf?cb=0ca2bc (scanned handbook for filing in the Supreme Court only, with links to rules and other resources)

South Carolina:  http://www.judicial.state.sc.us/appeals/faq.cfm (interactive website for intermediate Court of Appeals only) & http://www.sccourts.org/forms/ (forms includes appeals)

Tennessee:  http://www.tsc.state.tn.us/sites/default/files/docs/prosefilingguide3-31-10.pdf (scanned handbook)

Texas:  http://tyla.org/tyla/assets/File/Pro%20Se%20Litigant%20Guide.pdf (scanned handbook with interactive links, sponsored by the Texas Young Lawyers Association); http://www.tex-app.org/ (interactive website with links through “Pro Bono” tab to resources at the Supreme Court and some of the intermediate appellate courts, sponsored by the Texas State Bar Association’s appellate section) & http://www.txcourts.gov/supreme/practice-before-the-court/forms.aspx (Word doc instructions for appeals to TX Supreme Court)

Utah:  http://www.utcourts.gov/howto/appeals/ (interactive website with links to pro se guide and forms)

Vermont:  https://www.vermontjudiciary.org/GTC/Supreme/filingappeal.aspx (the Supreme Court website has a disclaimer for self-represented litigants, but has links to FAQs and standard appeal forms)

Virginia:  http://www.courts.state.va.us/forms/home.html (forms includes appeals)
Washington:  
http://www.courts.wa.gov/appellate_trial_courts/div1/caseproc/?fa=atc_div1_caseproc.display&display_id=CaseProc_guide (interactive website) &  
http://www.courts.wa.gov/forms/?fa=forms.static&staticID=22 (appellate forms)

West Virginia:  
http://www.courtswv.gov/legal-community/court-rules.html (interactive website with link to  

Wisconsin:  
http://www.wicourts.gov/services/public/selfhelp/appeal.htm (interactive website) &  
http://www.wicourts.gov/publications/guides/docs/proseappealsguide.pdf (scanned handbook with electronic links to other resources) &  
http://wilawlibrary.gov/topics/justice/appeals.php (interactive website from state law library)

FEDERAL COURT RESOURCES

There is a surprising lack of standardization in the federal appellate court websites. As with the state sites, some are more user friendly than others.

Supreme Court:  
http://www.supremecourt.gov/casehand/guideforifpcases2014.pdf (scanned guide, including sample forms)

Federal Circuit:  

District of Columbia Circuit:  
http://www.cadc.uscourts.gov/internet/home.nsf/Content/Pro+Se+Information (interactive website) &  

First Circuit:  
http://www.ca1.uscourts.gov/forms-instructions (forms)

Second Circuit:  
http://www.ca2.uscourts.gov/clerk/case_filing/appealing_a_case/pro_se/how_to_appeal_as_a_pro_se_party.html (online instructions)

Third Circuit:  
http://www.ca3.uscourts.gov/pro-se-litigant-information-28-usc-%2C%7A7-2244-0 (interactive website)

Fourth Circuit:  
http://www.ca4.uscourts.gov/pro-se-parties (interactive website)
Fifth Circuit: http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/documents/practitionersguide.pdf (on-line practitioner’s guide); brief guidance and samples also available under the “forms, fees and guides” tab


Tenth Circuit: http://www.ca10.uscourts.gov/clerk/filing-your-appeal/pro-se (interactive website including forms, FAQs, and links to materials)

Tenth Circuit: http://www.ca10.uscourts.gov/clerk/downloads/pro-se-frequently-asked-questions (answers to frequently asked questions for pro se litigants)

Eleventh Circuit:
http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormProSeHandbookDEC15.pdf (comprehensive on-line pro se guide with forms included)
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.

United States Court of Appeals, Tenth Circuit.


No. 10–1198.

Jan. 12, 2011.

[1] Habeas Corpus

Habeas Corpus

Federal prisoner's challenge to his conviction and sentence, alleging prosecutorial misconduct and actual innocence as well as “judicial coverup,” was not proper in petition for § 2241 habeas corpus relief in district in which he was incarcerated, and instead prisoner had adequate and effective remedy under § 2255 as a motion to vacate, set aside, or correct sentence in district in which he was convicted. 28 U.S.C.A. §§ 2241, 2255.

Cases that cite this headnote

[2] Injunction

Restrictions on litigation and filings

Federal prisoner's repeated use of § 2241 habeas petition to bring pro se challenge to his conviction and sentence, despite court's warnings that such petitions and appeals therefrom were frivolous, warranted imposition of filing restrictions requiring prisoner to be represented by licensed attorney or to seek permission prior to bringing any further pro se motions. 28 U.S.C.A. §§ 1651(a), 2241.

Cases that cite this headnote

ORDER AND JUDGMENT

PER CURIAM.

Andre J. Twitty, a federal prisoner proceeding pro se, appeals the denial of his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Having jurisdiction under 28 U.S.C. § 1291, we AFFIRM. Because of Twitty's pattern of pervasive and abusive litigation, we also impose restrictions on his future filings.

I. Background
In 1999, following a jury trial in the Northern District of Georgia, Twitty was convicted of wilfully communicating a bomb threat via telephone and threatening federal law enforcement officers and their immediate family members. He was sentenced to 180 months' imprisonment and three years of supervised release.


Since then, Twitty has filed eleven petitions challenging his conviction and sentence in the District of Colorado, including the instant claim. He has pursued many of these petitions on appeal. Each petition has been unsuccessful.

The district court dismissed the petition at issue here on the grounds that § 2241 is not a means of challenging the validity of a judgment. The court explained that “a petition under § 2241 attacks the execution of a sentence rather than its validity,” and that “[t]he exclusive remedy for testing the validity of a judgment and sentence” is a § 2255 petition filed in the district where the sentence was imposed. R. Vol. 1 at 27 (quotations omitted). The district court also denied Twitty's motion to reconsider and his motion to appeal in forma pauperis.

II. Discussion

A. The District Court's Denial

We review de novo the district court's denial of a § 2241 petition. Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir.1996).

[1] After careful review of Twitty's brief on appeal, his habeas petition, and the disposition below, we affirm the dismissal for substantially the same reasons articulated by the district court. On appeal Twitty attacks his conviction and sentence on the grounds of prosecutorial misconduct and actual innocence. He further alleges the Eleventh Circuit engaged in a “judicial coverup.” As a challenge to the validity of his conviction and sentence, his petition is not properly made under § 2241. If Twitty wishes to pursue these claims, he has an adequate and effective remedy under § 2255 in the United States District Court for the Northern District of Georgia.

B. Filing Restrictions

[2] This is not the first time in Twitty's extensive litigation history that he has inappropriately raised some version of these claims in a § 2241 petition. See Twitty v. Wiley, 336 Fed.Appx. 768, 769 (10th Cir.2009) (“Although Twitty's opening brief purports to seek relief under § 2241, the district court correctly noted that [in] the instant action Twitty once again attacks his conviction and sentence.”) (quotations omitted). In a recent appeal, we cautioned Twitty that if he persisted in filing frivolous appeals or reasserting issues ruled upon in prior litigation, his access to this court would be restricted. Twitty v. Wiley, 332 Fed.Appx. 523, 525 n. 2 (10th Cir.2009). Since then, Twitty has filed five similar suits, each attacking his conviction and sentence.

**2 Because we find this appeal frivolous and Twitty's pattern of litigation activity manifestly abusive, we conclude filing restrictions are necessary. “The right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious.” Winslow v. Hunter (In re Winslow), 17 F.3d 314, 315 (10th Cir.1994) (per curiam) (quotation and alteration omitted). “[W]here, as here, a party has engaged in a pattern of litigation activity which is manifestly abusive, restrictions are appropriate.” Id. (quotation omitted). Therefore, subject to Twitty's opportunity to object, as described below, we impose the following reasonable restrictions on his future filings in this court “commensurate with our inherent power to enter orders ‘necessary or appropriate’ in aid of our jurisdiction.” Id. (quoting 28 U.S.C. § 1651(a)).

Twitty is ENJOINED from proceeding as a petitioner in an original proceeding or as an appellant in this court unless he is represented by a licensed attorney admitted to practice in this court or unless he first obtains permission to proceed pro se.

To obtain permission to proceed pro se, Twitty must take the following steps:
1. File a petition with the clerk of this court requesting leave to file a pro se action;

2. Include in the petition the following information:

   A. A list of all lawsuits currently pending or filed previously with this court, including the name, number, and citation, if applicable, of each case, and the current status or disposition of the appeal or original proceeding; and

   B. A list apprising this court of all outstanding injunctions or orders limiting Twitty's access to federal court, including orders and injunctions requiring him to seek leave to file matters pro se or requiring him to be represented by an attorney, including the name, number, and citation, if applicable, of all such orders or injunctions; and

3. File with the clerk a notarized affidavit, in proper legal form, which recites the issues Twitty seeks to present, including a short discussion of the legal basis for these claims, and describes with particularity the order *113 being challenged. The affidavit also must certify, to the best of Twitty's knowledge, that (1) the legal arguments being raised are not frivolous or made in bad faith and that they are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) the appeal or other proceeding is not interposed for any improper purpose such as delay or to needlessly increase the cost of litigation; and (3) Twitty will comply with all appellate and local rules of this court.

These documents shall be submitted to the clerk of the court, who shall forward them to the Chief Judge or her designee for review to determine whether to allow the appeal to proceed on a pro se basis. If the Chief Judge or her designee does not approve the appeal, the matter will be dismissed. If the Chief Judge or her designee approves the filing, an order will be entered indicating the appeal shall proceed in accordance with the Federal Rules of Appellate Procedure and the Tenth Circuit Rules.

**3 Twitty shall have ten days from the date of this order to file written objections to these proposed sanctions. See Winslow, 17 F.3d at 316. The response shall be limited to ten pages. If Twitty does not file objections, the restrictions shall take effect twenty days from the date of this order, and they shall apply to any matter filed after that time. See id. at 316–17. If Twitty does file timely objections, these sanctions shall not take effect until this court has ruled on those objections.

III. Conclusion

Accordingly, we AFFIRM the district court's denial of Twitty's habeas petition. We also DENY Twitty's request for leave to proceed on appeal in forma pauperis, as his opening brief does not make a reasoned non-frivolous argument in support of his claim.

All Citations
412 Fed.Appx. 110, 2011 WL 94738
I have filed a notice of appeal but I can’t afford to pay the filing fee. What should I do?
An indigent pro se appellant may be excused from paying the filing fee by filing a motion for leave to proceed in forma pauperis in the district court. Contact the district court to obtain the proper form for this type of motion. If the district court denies or does not act in a timely manner on the motion, the pro se appellant will be required to file a renewed motion with this court.

How many copies of my documents do I need to send to the court?
The court will accept a single copy of filings from pro se litigants. A copy of all filings must be sent to all counsel for the parties involved in the appeal, and all documents must include a certificate of service which states when, what, and who was served.

What are the size limitations for my brief?
An opening brief and any response brief may not exceed 30 pages unless there is a certification of the number of words and that the brief contains less than 14,000 words. A reply brief cannot exceed 15 pages unless the certification states that the word count is less than 7,000 words.

I need more time to file my brief. How can I get an extension of time?
A party can generally get one 30-day extension of time beyond the initial due date without much question, but must file a motion in writing to do so. Obtaining extensions of time beyond an initial 30 days is more difficult. Litigants should plan on getting their briefs finished and filed promptly, as extensions of time to file briefs are disfavored.

Do I need to provide the court with documents/evidence supporting my appeal?
When the appellant is pro se, the district court will assemble a record of documents filed in that court and transmit them to this court as the record on appeal. The pro se appellant need not provide an appendix or copies of district court documents. This court will not consider additional evidence nor will this court consider arguments that were not raised in the district court proceedings.

How do I obtain copies of my pleadings?
Filers should always retain copies of pleadings they file in this court for their records. To receive a file-stamped copy of a document returned to you, you should include an additional copy of the pleading as well as a self-addressed stamped envelope. Any other requests for pleadings (including copies of the court’s docket) should be in writing, and include prepayment for copies at the rate of $.50 per page. For questions regarding copy requests, you can contact the court at (303) 844-3157. Alternatively, you can register for a PACER account (the court’s electronic public access service) through www.pacer.gov, and obtain copies that way. Copies obtained through PACER are charged at $.08 per page retrieved.

I’ve filed all my documents. What happens next? When will my appeal be decided?
After all the briefs have been filed, a panel of judges will be assigned to decide the appeal. The court’s decision will be in writing and will be transmitted to the parties. There is no requirement that the court issue its decision within any particular time frame.

I have questions that aren’t answered here. How can I contact the court?

- Contact the Clerk’s office by phone at (303) 844-3157. The Clerk’s office is open from 8:00 am to 5:00 pm Mountain Time, Monday through Friday except for legal holidays.
- All written correspondence should be mailed to: United States Court of Appeals for the 10th Circuit, The Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO, 80257.
How an appeal proceeds in the 10th Circuit Court of Appeals

Notice of Appeal filed in District Court

District Court:
- Transmits preliminary record to this court
- Sends a letter and necessary forms to parties

Court of Appeals
- Assigns a case number
- Sends a letter to all parties with deadlines and instructions

Entry of appearance due:
- 30 days for pro se parties
- 14 days for attorneys

Either $505.00 fee or motion for leave to proceed in forma pauperis due:
- 30 days

Once fees are addressed in the district court, this court sends a letter to all parties with instructions about the Record, Briefing, and Fees including deadlines

Record
District Court record on appeal due in this court:
- 40 days

Briefing
Appellant’s brief due:
- 40 days

Appellee’s brief due:
- 30 days from service of Appellant’s brief

Appellant’s reply brief (optional) due:
- 14 days from service of Appellee’s brief

Fees
IFP is granted by the District Court or fee is paid:
- Nothing further required regarding fees

District court denies IFP:
- Motion for IFP due:
  - 40 days (corresponds with brief deadline)

Motions for IFP filed in this court are decided by when the decision on the appeal is entered.

The court issues a decision (Opinion, Order and Judgment, or Order)

Petition for rehearing or rehearing en banc must be filed within
- 14 days
- 45 days if US is a party

Either party may file a petition for writ of certiorari with the Supreme Court (see www.supremecourt.gov for instructions and deadlines)
Appellate Section Proposes Pro Bono Pilot Program for Pro Se Litigants in the Supreme Court of Texas, 70 Tex. B.J. 883 (2007)


Cynthia Gray, Reach out or Overreaching: Judicial Ethics and Self-Represented Litigants, 27 J. Nat’l Ass’n Admin. L. Judiciary Iss. 1 (2007)


Change the Culture
Change the System

Monday, August 1, 2016 | 2:15 pm – 3:30 pm
Brittany Kauffman

Brittany Kauffman is the Director of the Rule One Initiative at IAALS, the Institute for the Advancement of the American Legal System. Kauffman provides legal and empirical research and analysis, works with committees and jurisdictions around the country, assists in developing and disseminating recommendations, and undertakes national outreach and advocacy—all toward the goal of improving the civil justice process in state and federal courts. Kauffman has served as a staff member to the Conference of Chief Justice’s Civil Justice Improvements Committee, and previously worked with the American College of Trial Lawyer’s Task Force on Discovery and Civil Justice. Kauffman joined IAALS in the Spring of 2012 after having practiced for eight years with Arnold & Porter, LLP. She also served as a law clerk to the Honorable Judge Paul J. Kelly, Jr., of the United States Court of Appeals for the Tenth Circuit.
Change the Culture

Change the System

Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow
Change the Culture, Change the System

Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow

Brittany K.T. Kauffman
Director, Rule One Initiative

October 2015

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IAALS—Institute for the Advancement of the American Legal System

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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative solutions to problems in our system in collaboration with the best minds in the country. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

Rebecca Love Kourlis Executive Director, IAALS
Brittany K.T. Kauffman Director, Rule One Initiative
Janet L. Drobinske Legal Assistant, Rule One Initiative

Rule One is an initiative of IAALS dedicated to advancing empirically informed models to promote greater accessibility, efficiency, and accountability in the civil justice system. Through comprehensive analysis of existing practices and the collaborative development of recommended models, the Rule One Initiative empowers, encourages, and enables continuous improvement in the civil justice process.
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Every change identified in this publication is important. But, before we get to the trees, I want to talk about the forest.

In order for change to be successful, each of us, as judges and lawyers, must recommit ourselves to the spirit of our work—the reason why we chose the law: the pursuit of justice. In this effort, we are talking about a system of justice in civil disputes, not the result in particular cases. We must rebuild the system such that it inspires pride and respect, not just for those of us who live in it, but most importantly, for those who observe, utilize, and, indeed, depend upon it.

It is easy to hide behind cynicism and defeatism. The system is huge; the problems are pervasive. However, the stakes are even bigger. For our society to prosper, we must have a system of civil justice that is accessible, fair, trustworthy, and respected. We at IAALS believe that over the course of modern history, the integrity, honesty, and predictability of the American legal system has distinguished our country from nearly all of the rest of the world, and has contributed substantially to the prosperity we have enjoyed.

Yet, our research, and the research of others over the last nearly ten years, leads us to the conclusion that there is a widespread belief that our present civil justice system fails to deliver on its first promise: “…the just, speedy, and inexpensive determination of every action and proceeding,” Rule 1 of the Federal Rules of Civil Procedure—and the consequence is that the preeminence of the American civil justice system is in serious jeopardy. In America, law protects freedom. That freedom is not realized when people feel abandoned by the court system or forced to abandon justice. And when presented with the choice, people would rather flee our system for alternatives. Our goal at IAALS is to reestablish the preeminence of the American civil justice system. This goal is so important that none of us can stand mute. We must act.

Over the course of recent generations, the practice of law has moved from a selfless profession to a business. Many lawyers still think of themselves as professionals, but we must face the fact that an increasing number see the practice of law more from the entrepreneurial perspective than the professional. Thus, it is too easy to line up on either side of the “v.” We too often fall into thinking that a change that might be good for defendants would never be acceptable to plaintiffs; or vice versa. No change could be good for both. What agenda is hidden beneath the changes? What unseen troll lurks under the bridge? Or, why not parlay new changes into new procedural gamesmanship? That is how lawyers are trained—to harness the process for the benefit of their clients.

Judges are not without responsibility for this predicament. Especially at the trial court level, crushing caseloads mean that moving the docket can become the top priority, yet, as always, judges are the only ones who can neutralize the brinksmanship, control the cost, and deliver the outcome in a speedy manner.

So, what about justice? What about the system? What about the level of confidence our citizenry has in the law’s protection of their freedoms? Bit by bit, we have allowed it to be eroded into gamesmanship. We let that happen. And now we can reverse course.

Being a lawyer or a judge is a calling of sorts. Many of us chose it because we wanted to change something in society. Many of us chose it because we wanted to be part of something bigger, something important. We were in search of a place to do good and do well: a place where our heads and our hearts would be engaged. There is reason for pride in our profession, which we must reclaim: a basis for joy, pride, and optimism. But there is also a responsibility to deliver on our promise of a just, speedy, and inexpensive resolution of every case. To achieve that, we must truly elevate our sights and focus on the preeminent goals of access, fairness, the search for the truth, and trustworthiness.

For this new reform movement to have traction, each of us must participate: on a case by case level, doing our best to achieve fairness; and on a systemic level, being part of the “change team.”

If we stand shoulder to shoulder, united in our common vision, proud to be lawyers and judges, and committed to achieving a great system, we will succeed.

Rebecca hole-Kouliis
Preface

Almost ten years ago, in January 2006, IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, opened its doors with a mission to improve the civil justice system. The goal was to provide original empirical research to identify the issues, develop solutions in partnership with some of the brightest minds in the country, and then support implementation and change. Ten years later, momentum toward change has built in our civil justice system at both the state and federal level. We are on the cusp of rule amendments to the Federal Rules of Civil Procedure, focused on proportionality, case management, and cooperation. Recommendations are also forthcoming at the state level from a committee appointed by the Conference of Chief Justices, intended to increase access at the state court level, where we see the vast majority of cases in the United States.

It took much hard work to get this far, but achieving the full impact of these recommendations and reforms ultimately comes down to implementation. How do we ensure that the positive changes intended by the reforms come to fruition? How do we tap into this momentum to create the just, speedy, and inexpensive courts of tomorrow? The answer to this question is as important as the recommendations themselves, for without positive implementation, the efforts thus far will be wasted.

We have posed these questions to many over the last year in order to gain input from judges, court administrators, and lawyers on both sides of the “v.” We have conducted focus groups with lawyers, general counsel, and plaintiffs’ counsel, and we have had individual conversations with an equally diverse group. There has been a consistent theme across these discussions—the agreement that culture change is an essential component of civil justice reform. Rules alone are not enough. And while case management is critical as well, we cannot rest this effort on the shoulders of the courts and our judges alone.

The top ten cultural shifts enumerated in this article represent a compilation of the themes across all of our discussions.1 It is our intention that by having these conversations, and then identifying these themes, we will bring the elusive concept of “culture change” into focus so that we can move from dialogue to action.

Introduction

In 2014, Merriam-Webster declared the word culture the “Word of the Year.” Merriam-Webster noted that “[t]his year, the use of the word culture to define ideas in this way has moved from the classroom syllabus to the conversation at large, appearing in headlines and analyses across a wide swath of topics.” As Peter Sokolowski, Editor at Large for Merriam-Webster, explained, “Culture is a word that we seem to be relying on more and more. It allows us to identify and isolate an idea, issue, or group with seriousness. And it’s efficient: we talk about the ‘culture’ of a group rather than saying ‘the typical habits, attitudes, and behaviors’ of that group.”

The concept of culture was originally used by anthropologists to describe the formal and informal customs, beliefs, rules, and rituals of a particular society. The concept has since been adopted by many other disciplines. In particular, organizational researchers and managers have used it over the past several decades to describe the norms and practices of organizations. The legal community extends beyond organizations and comprises a greater legal macroculture. While legal culture can be broken down into many different and overlapping subcategories—lawyers, judges, courts, court staff, state bars—there is nevertheless an overall legal culture to which these subcategories all belong. Thus, for the same reasons noted by Merriam-Webster, the term culture provides an efficient way for us to speak with a common language about the habits, attitudes, and behaviors of the lawyers and judges in the United States.

Thomas Church, an early researcher in the area of “legal culture,” defines legal culture broadly as the set of “expectations, practices, and informal rules of behavior” of judges and lawyers. The idea of “local legal culture” has its genesis in the attempts in the 1970s to explain civil case delay. At the time, the overwhelming majority of efforts to improve civil case disposition time had either “failed completely, achieved only short-term benefits or produced marginal results.” To further understand the causes of civil case delay, Church undertook an ambitious project that looked at trial court delay and its causes. He found that the courts with the highest caseloads were not the courts with the slowest disposition times, nor were the relatively underworked courts speedier. Thus, the fundamental causes of delay were not the typical factors suggested by scholars, such as overworked courts with high trial rates, or a large proportion of serious or complex cases. Rather, case processing time was most strongly related to the informal attitudes, expectations, and practices of the legal community. Church concluded that “both speed and backlog are the result of a stable set of expectations, practices, and informal rules of behavior which is termed ‘local legal culture.’”

Another important observation from early research on courts as organizations suggests that “it is the interaction among the workgroup members, more than the formal rules of procedure, which determines the outcome. Potential reforms . . . must confront the organizational realities of a court. Reforms which do not alter the organizationally induced incentives will not result in real reform, but merely in compensating adjustment by workgroup members.” Thus, “local legal culture’ is not an explanation as much as it is a convenient restatement of the problem. It merely applies...
a label to what is generally accepted: that the practices and attitudes toward court processing of lawyers and court personnel play a significant role in determining the pace of litigation in a particular court.\textsuperscript{11}

An important take-away from these studies is that legal culture—defined broadly as the shared norms and values that define the behavior of judges and lawyers, beyond the more formal rules and structure of our legal system—is pivotal to the administration of justice in our country and should be recognized as an important factor in civil justice reform. Church recognized that it is these established expectations and practices that result in considerable resistance to change.\textsuperscript{12}

Perhaps the most intriguing aspect of culture as a concept is that it points us to phenomena that are below the surface, that are powerful in their impact but invisible and to a considerable degree unconscious. . . . In another sense, culture is to a group what personality or character is to an individual. We can see the behavior that results, but we often cannot see the forces underneath that cause certain kinds of behavior. Yet, just as our personality and character guide and constrain our behavior, so does culture guide and constrain the behavior of members of a group through the shared norms that are held in that group.\textsuperscript{13}

Thus, in order to make significant changes to the system, we must make changes in the pervasive legal culture.\textsuperscript{14}

\begin{itemize}
\item \textsuperscript{11} Id. at 112.
\item \textsuperscript{12} See generally Church et al., supra note 5, at 15.
\item \textsuperscript{13} See Schein, supra note 4, at 14.
\item \textsuperscript{14} Thomas Church, Jr., Alan Carlson, Jo-Lynne Lee & Teresa Tann, National Center for State Courts, Justice Delayed: The Pace of Litigation in Urban Trial Courts 81 (1978) (concluding that "the most important and most difficult change to be made is in the long-term expectations and practices of the individual judges and attorneys practicing in the court").
\end{itemize}
The purpose of our system is to resolve the disputes in litigation that the parties were not able to resolve outside of litigation. The object of litigation should be to define as efficiently as possible the issues in the case for resolution, and then to resolve them. Discovery should be there to find information to assist in settling the case or resolving the case through trial. The costs of discovery shouldn’t be so large that it distorts this process for either side. This is the optimal system.”

Hon. John Koeltl
District Judge, U.S. District Court,
Southern District of New York

The Case for Change

IAALS and others have catalogued and documented the case for civil justice reform over the past ten years, and as part of that effort, have set out to gather empirical data, nationwide in scope, to better understand the civil justice system and ways to improve it. Corina Gerety, Director of Research at IAALS, has summarized the results of multiple nationwide surveys of different individuals, conducted by different organizations, finding broad areas of substantial agreement among the diverse respondents: cost is too high and it affects court access; delay increases cost; and discovery is responsible for much of the unnecessary cost and delay.

Together, these studies suggest a plausible theory: cost inefficiencies in the civil justice process reduce court access, delay contributes to unnecessary cost, and discovery procedure is a key factor with respect to both cost and delay. The survey results provide a starting point for further research on such a theory and on how the process might be improved without affecting fairness. As stewards of the American civil justice system, legal professionals should support a consistent effort to better understand it, appropriately evolve it, and ultimately protect it.
The challenge in addressing these issues lies not only in crafting solutions—it is also overcoming lawyers’ and judges’ strong and well-documented resistance to change. Efforts to reduce cost and delay face inertia and attachment to the status quo. In addition, anecdotal evidence clearly establishes that “a strong cultural bias limits the ability of individuals to look at an old problem in a new way.”

Thus, “culture change” is a shorthand way of identifying what needs to happen. The term also resonates with extensive research on the topic of culture change as part of the larger study of organizational management conducted over the last several decades. Past studies recognize that the impetus for culture change is often external challenges exerting pressure on the organization. In a business context, those challenges are largely economic: “Powerful macroeconomic forces are at work here, and these forces may grow even stronger over the next few decades. As a result, more and more organizations will be pushed to reduce costs, improve the quality of products and services, locate new opportunities for growth, and increase productivity.”

The legal system is certainly not immune from these forces. Civil caseloads are falling as people choose alternative means of resolving disputes, including new online dispute resolution methods. From a business perspective, courts are losing their market share. Court budgets are being cut; civil jury trials are almost non-existent; access to the civil courts is more and more expensive, and thus not feasible for a significant portion of the public; and, relatedly, public trust and confidence in the civil justice system are waning. Certainly, if not already upon us, a crisis is brewing.

However, change is never easy, and the legal system represents a long-established and mature organization, which makes it even more difficult to change. For such mature organizations, many basic assumptions are strongly held, despite the fact that such assumptions can be increasingly out of line with the actual assumptions by which they operate. Even where such assumptions are challenged, the legal community will want to hold on to the assumptions because they may justify the past and are a source of pride and self-esteem. It is the strength of the culture itself, and the illusion that these values define how the system operates, that makes culture change so difficult. For mature organizations, “[m] ost executives will say that nothing short of a ‘burning platform,’ some major crisis, will motivate a real assessment and change process.”

When such a crisis occurs, basic assumptions are brought to the surface, and the organization is faced with a choice between some type of “turnaround” or destruction of the organization and its culture through total reorganization. Many have argued the civil justice system is the verge of such a crisis. The question becomes whether we can achieve a turnaround before complete destruction and rebirth, and if so, whether that turnaround can be managed in a way that leads to positive change.

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19 Sherwood & Clarke, supra note 6, at 214.
21 Schein, supra note 4, at 289.
22 Id. at 290.
23 Id.
24 Id. at 291.
25 Id.
26 Id. at 293.
27 See, e.g., Chief Justice John T. Broderick, Jr., Remarks to the National Association of Court Management, The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management 2 (March 10, 2009), available at http://www.courts.state.nh.us/press/2009/CJ-Brodericks-March-10-2009-speech-to-NACM.pdf (“In my view, it is imperative that we redouble our efforts, judges and court managers alike, to sustain and creatively adapt our state justice system to meet the real world needs of the 21st Century. Change will come even if we do nothing but it will not be the change we want. Time and current economic realities do not make our task easier, but they certainly provide powerful incentives for change. Change we create and manage.”).
To achieve such positive success, we need to keep in mind the following eight important steps from John Kotter, a well-known thought leader on change:28

- **Establish a Sense of Urgency**  
  Transformations will fail where complacency is high

- **Create a Guiding Coalition**  
  It is essential that the head of the organization be an active supporter, but also that the effort go far beyond a single leader

- **Develop a Vision and Strategy**  
  It must direct, align, and inspire action

- **Communicate the Change Vision**  
  Communication is an essential step to create buy-in

- **Empower Broad-Based Action**

- **Generate Short-Term Wins**  
  Real transformation takes time, which makes short-term goals and wins all the more important

- **Consolidate Gains to Produce Additional Change**

- **Anchor New Approaches in the Culture**  
  Change needs to sink in over time to become “the way we do things around here”

In short form, we need to first establish urgency and motivation to change, then develop a vision and communicate it. Next, we must empower action. And, to achieve long term culture change, it is critical to anchor these changes by incorporating the new approach into our concept and identity as a legal culture: a reason to be proud of the new direction and a way to trace it to our roots as a system.29 We must also be realistic about resistance to change. Behavior that has become dysfunctional may nevertheless be difficult to give up because it still serves other positive functions.30

One leading expert on culture change has posited a core belief that “[e]ither you will manage your culture, or it will manage you.”31 In our efforts to create the just speedy, and inexpensive courts of tomorrow, we cannot ignore the important role of legal culture in our system.

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28 Kotter, *supra* note 20, at 3-17.
29 Schein, *supra* note 4, at 300.
30 Id. at 301.
31 Roger Connors & Tom Smith, *Change the Culture, Change the Game* 1 (2011).
Change the Culture, Change the System: A Top 10

The research on culture change, and legal culture in particular, suggests that culture change for the legal system is an uphill battle. While we have a clear challenge ahead, that does not mean that it is impossible. We propose the following ten culture shifts for the purpose of promoting that national dialogue. We recognize some commentators may push back on this list as merely aspirational, impossible, or even a bit controversial. Yet we are of the view that the time for bold action has come.

1. Back to Our Professional Roots

Law needs to be a collegial and civil profession first and foremost.

Lawyers and judges are portrayed in many different ways in the media, in movies, on television, and in literature. We all have different visions of what a lawyer or judge represents in our society. That said, most lawyers cherish a vision of themselves as dedicated to fighting for a just and fair legal system for the benefit of their clients and of society more broadly. As a profession, we take pride in our work and believe that it is both essential to our democratic system and personally rewarding. The societal vision of the lawyer and judge in the mid-20th century reflected this role—the counselor, the statesman, the revered judge. Unfortunately, the vision of lawyer and judge in mainstream America has changed, and today it is just as likely that we think of Judge Judy or Lionel Hutz from The Simpsons.

It is clear there has been a turn for the worse in the perception of our judges, our system, and our profession.32 If we still believe in past ideals of the profession and its place in society,33 then we need to rethink this vision and the role of the profession in the modern world. How do we define the legal profession in America? While the formation of competent and committed professionals is an essential part of law school curriculum,34 we also need to focus on the maintenance of this professional identity over the course of our careers.

33 For those who would argue that lawyers have always been a butt of societal disparagement, and who would cite Shakespeare for that thesis, remember that what Shakespeare actually meant was that the first step on the road to anarchy is to get rid of all of the lawyers.
Legal periodicals, business journals, and the internet are filled with articles discussing the “business of law.” Law firms around the country are focused on how to make the business of law profitable. Partners are defined by it, and associates feel the pressure more than ever to bring in clients to make the case for their value to the firm. This is particularly challenging for mid-career lawyers who are striving to define themselves. At a time that is critical to their professional development, they are shifting away from involvement in the legal profession through bar associations, Inns of Court, and law firm collegiality to maximizing the number of billable hours to prove their worth.

The impact of this shift in focus is made all the more pronounced given changes in the practice of law and in technology. We have seen a dramatic decline in the number of jury trials.\textsuperscript{35} We also have seen a significant decline in the time that most lawyers spend in the courthouse, and the time that judges spend on the bench.\textsuperscript{36} New lawyers have taken the brunt of this change, with fewer and fewer opportunities for court appearances, leading to a significantly different legal career. At the same time, technology has resulted in an increase in the amount of information that is produced, thereby dramatically increasing the time and energy spent on discovery in civil litigation. Technology has also provided alternate means of communication, such that many lawyers can communicate with opposing counsel entirely by electronic means, without picking up the phone or meeting in person. The law has become a lone, time-intensive profession.

When lawyers regularly met in person—be it at the courthouse, across the table, or at a bar event—the result was a level of accountability and collegiality. The same is true for lawyers who regularly appeared before a particular judge or judges, and for judges who regularly appeared before lawyers. Repeat in-person interactions are important for relationship building and in creating a climate of cooperation. The term “cooperation” has received much attention over the last ten years, in large part because of The Sedona Conference®’s Cooperation Proclamation.\textsuperscript{*} There has been debate about the extent to which cooperation is consistent with the adversarial nature of our system. If we step back from the recent focus on the term, however, and think about our profession 25 years ago, when lawyers would call opposing counsel as a matter of habit to resolve or clarify issues, or would chat with one another at the court house, cooperation was not a matter of debate, but rather a critical component of representing a client well.

Judge Paul M. Warner, a U.S. magistrate judge in the District of Utah, recently wrote Ten Tips on Civility and Professionalism.\textsuperscript{37} He notes “It’s a long road without a turn in it. Put another way, what goes around, comes around. This is the best reason for civility.” He also suggests that incivility almost always results in wasted resources, in terms of both time and money—for lawyers, clients, and the court. Warner proposes a new Golden Rule of Civility:

\begin{quote}
“Be courteous to everyone, even to those who are rude. Not because they are ladies or gentleman, but because you are one.” It’s not about an eye for an eye, a tooth for a tooth. It’s not even about you. It is about doing what’s best for your client. In conclusion, civility is the mark of a real professional and a true lawyer. It is not about quid pro quo. It is about having self-respect, respect for others, and the self-confidence to not respond in kind, and in the process, continuing to build your own character, credibility, and reputation.\textsuperscript{38}
\end{quote}

It is also about building the character, credibility, and reputation of the legal profession as a whole.

The nature of our practice has changed, and there is no way to put the genie back in the bottle. Lawyers do not get the same opportunities to meet each other in person and work across the aisle. But it is important that we do not lose our professional identity in the process. We are professionals, we are dedicated to the rule of law and to a fair system, and we must work together not only on a case-by-case basis, but also more broadly to achieve the common goal of a just, speedy, and inexpensive determination in every action.

\begin{footnotesize}
38 Id.
\end{footnotesize}
2. Guided by Justice

The focus should be on justice, not on winning.

Along the same lines, we need to get away from trial by combat, and return to a focus on the needs of the clients and the case. Lawyers tend to elevate winning over achieving a just outcome. This affects the entire process, but can be seen most prevalently in the area of discovery, where lawyers talk about “winning at discovery.” For many, litigation has become about getting absolutely every document that exists and winning every discovery dispute. Referring back to Judge Paul Warner’s Ten Tips, he notes that “[j]ust because the other side wants it, doesn’t mean your automatic response should be to oppose it.” There is such a thing as a win-win, and lawyers should not be so concerned with winning the battle that they lose the war. What gets lost in the process is the vision of our system as a whole.

The issue with the word “adversarial” is that for some lawyers it serves as an invitation to battle, rather than an invitation to implement a procedurally fair, measured system. As lawyers and officers of the court, we have an obligation to use the system in order to find the truth, seek justice, and achieve fair and efficient outcomes for our clients. Focusing on achieving justice, rather than “winning,” can shift the representation and the goals to a positive effort that is more professional, more objective, and more consistent with the longer term good for the system. We need to train lawyers to be counselors to their clients, and problem solvers, first and foremost.

Achieving procedural fairness for clients is an essential component of this shift. Procedural fairness has been called “the organizing theory for which the 21st-century court reform has been waiting.” This theory is based on research illustrating that “how disputes are handled has an important influence on people's evaluation of their experiences in the court system.” In fact, researchers have shown that public attitudes regarding our justice system are driven more by how litigants are treated in the process rather than by the outcome. While this seems like a simple concept, lawyers do not incorporate it into their strategy and objectives. To the contrary, lawyers may employ every procedural device they can

39 Id.
40 Id.
42 Id.
to stall the case, or to run up the costs; they may seek every document, every deposition whether or not they will be seminal to the case. Clients may, in fact, encourage these approaches: win by any means may be the marching orders the client gives. But, the clients and the system are ill-served by lawyers who act on those marching orders. Costs become exorbitant and may have little relationship to good outcomes. Lawyers may blame the system, the rules, the judge, and the court staff for unfairness, expense, and delay. Judges blame the rules, the lawyers, and the lack of staffing. That effort to shift blame is itself an indication of an unwillingness to take responsibility for making the system work in a cost-effective, procedurally fair way.

How the system functions is the result of how the actors within a particular case comport themselves. Those who are engaged in finger pointing are seldom visionary, innovative, and proactive. Both lawyers and judges need to remember that the system serves the litigants, who care little about the rules or case management principles; rather, they care about procedural fairness and cost-effectiveness. Lawyers and judges need to recognize the importance of procedural fairness for litigants and make it a guiding star throughout the process.

“\[All this goes back to how we think about the law. We are trained to be advocates and not problem solvers, within a particularly rule-bound system. If someone is coming to a lawyer with a life problem, what they are looking for is help with their life problems.\]”

Hon. Jeremy Fogel
Federal Judicial Center

“A major change happened when winning became more important than justice. If it is only about winning, the cost to the system will be great. We need to focus on training lawyers about the difference.”

John Barkett
Shook, Hardy, & Bacon LLP
In order to achieve justice for clients, lawyers need to understand the issues in their case and work with opposing counsel and the judge to tailor the process in a way that is designed to identify and resolve the real issues. Litigation has become something like the game of “gossip”: litigants start with one idea and it morphs over the course of the process into something quite different. The complaint and the answer serve as just the first version of the case. With the continued growth of discovery, lawyers have gotten into the habit of seeking broad discovery that is neither tailored nor focused. Instead, lawyers ask for everything they can think of, putting off the difficult questions and analysis of the issues for later in the case. Lawyers also ask for more time than necessary to complete discovery because they haven’t considered what is actually needed, or the time that it will take to complete the necessary discovery in the individual case. With regard to motions practice, lawyers file motions, including motions for summary judgment, without questioning whether to file the motion or to do so in a more tailored way. The result is increased expense for clients and wasted resources for courts.

Thus, it is often the norm that lawyers are unprepared at the initial stages of a case. For many lawyers, such an approach is purposeful: they are balancing numerous cases and need to focus on those that demand attention; early preparation comes at a cost to the client, which needs to be explained and justified; the reality is that many cases settle; and, doing the same thing in every case seems more efficient than reinventing the wheel. While these are all legitimate considerations, lawyers also need to recognize that to serve their clients, they need to stop and think about the issues in the case and the needs of the client.

In addition, the legal world is changing—for many reasons, including significant rule changes and technology. Doing things the “same old way” is not good enough. Just like judges, lawyers need to work smarter, not harder.43 Showing up unprepared to a Rule 26(f) conference will result in a conference that falls far short of its intended purpose. When both sides are unprepared and neither is engaged, the result is what is often called a “drive-by conference.” The consequence is cost and delay down the road. The same is true at the initial pretrial conference. Where the parties haven’t focused on the needs of their specific case, the initial

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A pretrial conference likewise will not be as effective. The result is that lawyers often only get a handle on their case after discovery, when much time and money has already been expended. This can occur even when discovery has not unearthed anything new or revelatory, simply because lawyers have not prioritized crystallizing or simplifying the case at an earlier point in time.

Lawyers must focus on the case at the very beginning, identifying the issues in the case and then developing a pretrial plan focused on those specific issues. When this approach is employed, lawyers can determine the extent to which it would be more efficient to phase discovery, dispense with depositions or motions practice, or otherwise proceed in a way that gets to resolution for their clients. Understanding the case as much as possible as early in the process as possible allows a lawyer to design the process in a way that best serves the client and the system.
Discovery has taken on a much different role in civil litigation than it held 30 years ago. Today, the discovery phase of litigation can actually be the “end game.” Cases are won and lost in discovery; it embraces procedural objectives beyond merely the search for the truth; and it has become grossly expensive for clients—and very profitable for lawyers. This presents challenges for change, because it goes against the economic incentives for lawyers and requires hard decisions about what is really needed. That said, an essential component of changing the system is changing the way we view discovery.

Technology has contributed to the expansion of discovery; there are more documents, more data, and more information to discover now than ever before. At the same time that the amount of information has grown, so too has our approach to discovery. There was a time when lawyers took a look at their case, took a few depositions, talked with opposing counsel, and then either settled or took the case to trial. The standard today is to spend time gathering broad information, and to turn over every stone. It has become an important part of our culture—a constant quest for the “smoking gun,” for perfection in the search, and for complete risk assessment prior to settlement or trial. Technology is allowing us to see more and more the extent to which discovery is not perfect. And as risk-averse people, we want to perfectly quantify the risk at trial before we get there. Discovery helps both sides figure out how to proceed, but it comes at a cost. The whole approach has become so engrained in our system that we don’t even consider alternative approaches.

We need to change this “discovery until the ends of the earth” mentality. It is costly for clients, it is costly for the system, and it has bloated our civil justice system in the United States to the point where many are simply not able to access the system at all. Surveyed lawyers have quoted $100,000 as the threshold amount in controversy below which it is not economically feasible for them to provide representation. Anecdotal reports suggest that this threshold continues to rise. This is in large part a result of the cost of discovery in our system today. We need to get away from the notion that every stone must be turned over because of the possibility that something might be unknown and

44 See Am. Bar Ass’n, ABA Litigation Survey, supra note 15, at 172-73; Hamburg & Koski, NELA Survey, supra note 15, at 45 (considering only those who work in a private law firm environment); Kirsten Barrett et al., ACTL Fellows Survey, supra note 15, at 83.

“It comes down to how much money we are willing to spend to have an adversarial system. Can we continue to have a system where we aggressively pursue discovery and aggressively defend production? . . . As long as there is discovery out there to be ‘won,’ things won’t change.”

Daniel Girard
Girard Gibbs LLP
unquantified. The problem with casting a broad net over everything potentially relevant is the mass of documents that are swept into this net, and the resulting time and expense for all parties. This goes back to the need for lawyers to understand their case at an early point in the process and design discovery tactically to get the information they need.

There is a culture that supports objecting to everything, and turning over nothing. The culture supports deposing everyone without a hard look at whether the deposition is necessary or even helpful versus harmful. In addition, many take the approach to discovery of making the other side “earn it.” This is particularly true with initial disclosures, where there is a culture of failing to provide initial disclosures, even if they are mandated. Counsel do not take the time to compile and review initial disclosures, but rather take refuge behind the assumption that if the other side really needs the information, they will ask for it. We need to get away from using litigation as a punishment in and of itself—a way of beating one’s opponent over the brow through sheer process. Scorched earth litigation needs to be a thing of the past.

Instead, we need to shift to focused, efficient, “laser” discovery rather than flood light discovery. Lawyers need to use the rules in a creative way and think about how best to approach the case before them (rather than taking a rote approach in every case). We need to work toward trial—changing the orientation of the effort and focusing it back on the issues—even if most cases do not go to, or are not intended to be resolved by, trial. Instead of asking “What do I need to discover generally?” lawyers should be asking “What do I need to discover in order to prove my case?” Rather than beginning with a template set of interrogatories and requests for production, how about beginning with the jury instructions that specify what will be needed to prove the case—and work backward from there?

An important aspect of this culture change is that lawyers need to recognize and to apply appropriate limits in their own cases, and not just in the abstract. Lawyers often agree that limits on “discovery until the ends of the earth” are necessary, but then they push back vehemently when those limits are applied in their case. Moreover, to the extent clients call on lawyers to do everything possible up to the absolute limits of the rules, we need to remind them of our role as counselors.

We live in a very complex world, which makes change both challenging and increasingly important. We need a system where counsel and clients work through the fundamental issues early in the case, and then tailor discovery accordingly. As one lawyer puts it, we need to move from a smorgasbord of “all you can eat” to a menu where you get what you need.45 This requires judgment, and for that reason it is challenging for those who are inexperienced. In addition, the lack of technical competence poses real challenges to lawyers facing rapidly evolving technology. Every case should represent an opportunity for innovative, case-specific application of the rules in way that is best designed to discover the facts and prepare the case for trial—or settlement on the merits.

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“Zealous advocacy doesn’t mean you have to turn over every stone. We need more professional judgment in the practice of law. For example, good doctors know which test to use. They don’t recommend that we try every test. I would like to convince lawyers that more isn’t always better.”

Prof. Linda Simard  
Suffolk University Law School

“Our American tradition of zealous advocacy needs to be balanced against the imperative of reasonableness when it comes to discovery. Proportional discovery offers one way to solve this dilemma.”

Hon. Jeffrey Sutton  
Judge, U.S. Court of Appeals, Sixth Circuit

“There is an economic case for reducing the burden. Cooperation and early disclosures help reduce that burden. Discovery should be exchanged and then the parties can argue the merits of the case.”

William Butterfield  
Hausfeld LLP
5. Engaged Judges

Judges need to be engaged, accessible, and guided by service.

Judges play a critical role in achieving change, as they are in a unique position to help recognize system-wide ideals and tip the scales in favor of those ideals.

Just as lawyers need to own their cases, ask the hard questions, and engage with their clients, so too do judges need to be accessible and available to hear and resolve disputes.46 They need to be accountable for timely and efficient resolution. They need to pose the difficult questions to lawyers—particularly at the beginning of cases—and be available to resolve disputes knowledgeable. Lawyers do not necessarily behave in a manner that prioritizes the incentives or objectives of the system. For that reason, leaving ultimate responsibility for progress of the case to the lawyers often leads to cost and delay. In order to ensure that cases are managed efficiently and effectively, judges must take on the role of managing cases toward resolution.

Judges have a fierce allegiance to independence, and just as with lawyers, there is deep resistance to change. But just as technology has changed litigation for lawyers, so too has it changed litigation for our judges. More than ever, it is important for judges to understand the issues in the case and work with the parties to develop a proportional discovery plan for the case. In order to do this, judges need to engage with the parties on the issues in the case and the technical aspects of discovery. If the amount of proposed discovery is disproportionate to the case, the judge needs to recognize that fact early so as to prevent it from getting out of control. Judges need to be sufficiently engaged to see the problem and then take action to correct it.

Some judges have resisted these changes on the grounds that hands-on management is making their jobs more managerial. But, in fact, these changes go to the heart of judicial function: applying the law, serving the litigants, and ensuring justice. Judges also play a critical role in fostering and setting the tone for civility and cooperation. They are the stewards of our system, and the key in achieving culture change.

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Beyond individual judges, the courts as a whole play an equally important role in our civil justice system. As the system becomes more complex—including all the possible efficiencies and inefficiencies that can come with technology—it is critical that the courts are managed to be accessible, relevant, available to serve, and responsible for the cases that come before the court. This is different than individual judicial management, at the case level. This is about management by the court of the entire docket so as to ensure that the court itself is maximizing access and effectiveness.

Courts must recognize that cases are “public property” in the sense that they consume public resources and showcase the public dispute resolution system. It is in the system's best interest to move the case along, monitor expenditures, and work toward procedural fairness.

In addition, the make-up of the court's constituency is changing. Today, there are more self-represented litigants than ever before. And, society has become accustomed to technology and information. Society expects more from the court system than ever before, and it is clear litigants are willing to take their business elsewhere if the court cannot meet expectations.
7. Efficiency Up the Court Ladder

We need to utilize everyone within the court structure more effectively and efficiently.

A critical way in which courts can make a difference in the provision of court services is to rethink the court structure so as to utilize everyone in the most efficient and effective way. With the advent of electronic filing and electronic case management systems, there are different staff needs in our courthouses today than there were 20 years ago. The modern court must be staffed in a way that employs each person in the most efficient way possible.

Moreover, we need to rethink how we utilize the entire court infrastructure. Starting with judges, we need to recognize when a task requires a judge's deliberative function and when the task can be done by someone else. Judges have the most experience and education. They should be doing the work that requires that experience and education, and other tasks should be more efficiently allocated to others who can provide support for the judges—be it law clerks, staff lawyers, etc. Certain aspects of case processing can clearly be undertaken by non-judicial or quasi-judicial personnel. It is critical that everyone work as a team, recognizing the valuable roles that everyone plays at all levels. We should not be cabined by the traditional positions or responsibilities of court staff. We need to rethink how best to allocate the work of the court in this modern age. Just as law firms are being moved in this direction by the market, so too must courts adjust to the needs of modern society. We need to think with openness about the best way to do what court systems do.

“There needs to be a change in mindset about jobs and roles within the court system.”

Hon. Thomas Balmer
Chief Justice, Oregon Supreme Court
8. Smart Use of Technology

We need to use technology for efficiency, effectiveness, and clarity—in the courts, in law practice, and in ensuring the legal system is accessible for non-lawyers.

Building on the use of people in the most efficient way possible, we also need to utilize technology to increase efficiency, effectiveness, and clarity. This is true for our courts, but it is equally true for law firms. The entire system needs to harness technology so as to create a system that is relevant in the 21st Century.

For much of the 20th Century, our role as lawyers was to provide information, counsel our clients, and guide them through the civil justice system toward resolution of their disputes. Lawyers still fill these roles, but it is also important to note that information is much more freely available and the number of companies that are delivering legal services is growing exponentially. LegalZoom, an online legal technology company, provides online legal document preparation services nationwide and was named by Forbes as “One of the 10 best digital tools for entrepreneurs in 2012.” There is also RocketLawyer, providing online legal services for individuals and small- to medium-sized businesses; Avvo, an online legal services marketplace whose tagline is “Legal. Easier;” and Axiom, which provides tech-enabled legal services and asks consumers to “[f]orget everything you thought you knew about legal services.” The market for such legal services will only grow.

Even within more traditional lawyer roles, technology is having a profound impact. Electronically stored information is everywhere, and it is now a part of every case. The California State Bar recently issued a final opinion weighing in on the question of a lawyer’s ethical duties in handling the discovery of electronically stored information.47 This opinion highlights the instrumental and evolving role that technology now plays in our profession:

An attorney’s obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues related to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney’s duty of confidentiality.\(^{48}\)

The impact of technology is just as real for judges. Judicial competence in the area of electronically stored information is critical, particularly as judges take a more active role in working with the parties to ensure a fair and proportionate discovery process. And as technology influences our world more and more, it will likewise influence the law. Neither judges nor lawyers want to admit what they do not know. But in a world where technology will only become more important, not less, it is critical for judges and lawyers to remain relevant—and that requires in depth knowledge of technology.

Just as importantly, this cultural shift requires utilization of technology. Lawyers, judges, and the courts need to harness technology to better meet the needs of a “just, speedy, and inexpensive” determination in every case. We must not use technology just to paper over outdated systems, or just to pave the cow paths. We actually need to think about how the system could be better and then utilize technology to get there. With the rising numbers of self-represented litigants, we also need to think about how best to utilize technology to meet their needs and ensure that the legal system is accessible to all.

\(^{48}\) Id.
9. Valuing Our System

We need to value our court system, our judges, and our juries.

Courts all over the country have struggled over the last five years with budget cuts. This has created many challenges, as courts are forced to justify their budgets while struggling to provide more with less. While budget constraints can force efficiencies, they also come at a cost. It is essential that we have courts with open doors and available judges so that divorces are handled promptly in the best interests of the families, so that businesses can enter into contracts knowing that there is a system of civil justice in place to provide protections if there are issues, and so that individuals are ensured basic protections and fairness in the face of potentially devastating events in their lives or claims against them. Moreover, for our system of civil justice to remain relevant in the 21st Century, it is critical that funding be available to facilitate the use of technology and innovation, and support our courts through the transition.

While funding is critical, the issue is deeper than adequacy of funding for our civil justice system. It goes to the extent to which we value our court system and our judges. We need to recognize the important role that courts, judges, and juries play in our society and value them accordingly. As Chief Justice John Roberts stated in his 2006 Year-End Report on the Federal Judiciary, “Inadequate compensation directly threatens the viability of life tenure, and if tenure in office is made uncertain, the strength and independence judges need to uphold the rule of law—even when it is unpopular to do so—will be seriously eroded.” He noted that some associates, fresh out of law school, earn more in their first year than the most experienced federal district court judges before whom they hope to practice. We need to compensate our judges with a salary that recognizes them as the executives they are.

The same is true for our courts—funding is essential for the courts to move into the 21st Century and meet the challenges of growing docket pressures, the needs of self-represented litigants, the competition from external dispute resolution services, and what will be a growing expectation that courts utilize technology to meet litigant needs. And, we cannot forget the jurors. We need to value them, and think of their needs when incorporating technology into the system and scheduling trials.

Much of this comes down to a lack of civic knowledge in our society, and a corresponding lack of understanding and value for our civil justice system and all of its components. The more society appreciates the important role our civil justice system plays, and the more individuals connect the system’s value to their lives, the more likely it is that we will invest in that system and view it as essential.
10. Realign Incentives

We need to focus on the incentives driving lawyers and work to align them with our goals for improvement of the system as a whole.

There is a tension in our system between the adversarial model in which the parties are pursuing their own interests/client interests in individual cases and the good of the system as a whole. While there can be tension between individual and system interests, the two are not mutually exclusive, and good lawyers and judges recognize this is true. The more we can create a system that fosters and values these overlapping interests, the better. For example, in a small legal community where everyone knows each other and sees the same judges and colleagues case after case, it is in the interest of the lawyers and their clients to act cooperatively. They recognize that familiarity breeds accountability. There are many jurisdictions around the country where this is not the case, though. Most lawyers no longer practice in small legal communities—their practices are national and varied. We need to recognize the benefits of accountability and collegiality and work to recreate these climates for all lawyers, wherever they may practice.

In addition, we need to recognize that current economic incentives do not line up with the goals of our system. The current economic incentives tend to work against, rather than for, many of the changes discussed above. Instead, we need to align incentives at the individual case level with the overarching goals of system. We need to consider the actual incentives that motivate people to comply with change when changes are being adopted. This is an important take away from past research on local legal cultures, and it must be a central consideration in future reform efforts.49

49 Grossman et al., supra note 10, at 93 (“[S]uccessful reform efforts must be based, in substantial part, on creating different kinds of incentives for the main actors in the system.”).
Realizing Change

So how do we achieve these cultural shifts? It is particularly challenging given that, even within the legal culture, there are cultural variations across the country. With these variations in culture come challenges that are unique to each jurisdiction. And while we recognize that we need to value our system, including by assuring additional funding, the reality is that many of our courts around the country have a lack of resources and funding.

Rules changes provide an important avenue for change. Rules changes can change the “rules of the road” and can allow the process to evolve over time to meet the present day needs of our civil justice system, even reflecting empirical research and best practices. Rule changes create a window of opportunity where judges and lawyers are more receptive to education and culture change.

At the same time, for the culture to change as we propose, rule changes alone are inadequate. As Judge Craig Shaffer has said, without more, lawyers and judges can just overlay old behavior over the new rules, leading to few actual changes. This is because change cannot be imposed from above—an important reality that is true at the state and federal level.

In David R. Sherwood and Mark A. Clarke’s article Toward an Understanding of Local Legal Culture, the authors employ the example of an ordinary household thermostat to illustrate the challenges of change. When the weather outside changes, the thermostat’s internal system kicks on and regulates the house back to the original temperature setting. No matter how radical the changes outside, the internal system self-regulates back to the original setting. This is the “bias” of the system, and any initial impact as a result of external temperature change is merely first order change with no long-term effects. What is needed is for the individuals who live in the house to deactivate the automatic controls, resulting in a change to the “bias” of the system and second order change. According to Sherwood and Clarke, “[t]his is a much more fundamental change than first order change because the bias in the system itself has been altered.”

So how do we change the temperature in our civil justice system? It cannot be based on imposed external change alone, or the system will simply readjust. We need to utilize the empirical research and experiences around the country to inform our aspirations. We need to

50 Sherwood & Clarke, supra note 6, at 200.
51 Id. at 212; see also Grossman et al., supra note 10, at 92 (“Reforms which do not alter the organizationally induced incentives will not result in real reform, but merely in compensating adjustment by workgroup members.”).
utilize advanced technology. And fundamentally, we need to change the bias in the system—we need meaningful change from within.

While such change cannot be solely from the top down, nevertheless, change does require champions. Such champions need to be highly regarded persons who can lead and manage the change from within, rather than forced from outside. Judges are in a natural position to be leaders and champions, because they set the tone in the cases before them. That said, the job cannot be left entirely to judges. For lawyers, while change needs to start in law school, we cannot focus solely on new lawyers. We need to focus on lawyers at every level.

As previously noted, we first need to establish urgency and motivation to change, develop a vision, and communicate it to those who are able and inspired to join and lead the effort. As lawyers and judges, we are trained to focus on the evidence. For this reason, empirical research and experience are important in making the case for change. Pilot projects can provide both, and they have been instrumental in recent civil justice reform efforts at the state and federal levels. We also need to walk in each other’s shoes—as lawyers, clients, and judges. While that is often not possible, engaged dialogue between these stakeholders provides an important opportunity for sharing perspectives.

Finally, we must empower action. We need to support a strong and engaged local and national legal community, as this supports the positive changes proposed above. Whether it be through Inns of Court, bar associations, pro bono programs, or formal and informal mentors, the more that lawyers and judges engage in their community, the better. In Utah, for example, all judges are engaged in the greater work of the court through involvement in a committee or other activity. The judges are part of a community and aware of their role in the overall system. To the extent we can achieve the same involvement for every lawyer and judge in states across the country, we might just change the culture, and the system, such that we can all be proud of the system itself and of the role we play in it.

“Heretofore we haven’t challenged judges and lawyers to use the rules in a creative way. We have simply overlaid the past mindset over the new rules. Nothing will change if we continue to do this. We need to encourage all to use these rules in a creative way. Use these new rules as opportunities for culture change.”

Hon. Craig Shaffer
Magistrate Judge, U.S. District Court, District of Colorado

“Changing litigation norms for judges and lawyers alike is not easy. Rule changes offer one method for changing civil litigation. No less importantly, however, education and pilot projects provide an important supplement to those efforts.”

Hon. Jeffrey Sutton
Judge, U.S. Court of Appeals, Sixth Circuit
Conclusion

In 1981, Sherwood and Clarke summed up the challenges of reform:

To talk about how slow civil cases move, about the need to change the situation, about how difficult it is to effect change, to recount the long list of workshops, symposia and crash programs that have not produced permanent change—these become comfortable topics of conversation in much the same way that the weather provides a focus for empty discussion. Like the weather, everyone talks about civil case delay, but no one does anything about it. To produce any real change, the system itself has to change. People’s attitudes toward discovery, settlement, continuances, etc., have to change. More importantly, the behavior of individuals would also have to change dramatically. These changes in behavior would be fairly profound; they would appear impolite, rash or irrational and would cause a great deal of discomfort to those affected. It is far easier merely to talk about the need for change.52

The same can be said about civil justice reform today. It is far easier merely to talk about the need for change than actually to change. Enough talk. Now is the time for each of us to take responsibility for changing our own approach and biases, and to join in a common mission to achieve a truly just, speedy, and inexpensive dispute resolution system.

52 Sherwood & Clarke, supra note 6, at 213-14 (emphasis added).
Courts and the Culture of Change

Brittany K.T. Kauffman
Director, *Rule One Initiative*, IAALS
National Conference of Appellate Court Clerks – August 1, 2016
Culture is the way you think, act, and interact.
ATTORNEY REPRESENTATION IN STATE COURTS

- Plaintiff
- Defendant
- Both

<table>
<thead>
<tr>
<th>Category</th>
<th>Plaintiff (%)</th>
<th>Defendant (%)</th>
<th>Both (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tort</td>
<td>96%</td>
<td>67%</td>
<td>64%</td>
</tr>
<tr>
<td>Real Property</td>
<td>95%</td>
<td>45%</td>
<td>39%</td>
</tr>
<tr>
<td>Other</td>
<td>78%</td>
<td>36%</td>
<td>25%</td>
</tr>
<tr>
<td>Contract</td>
<td>95%</td>
<td>23%</td>
<td>20%</td>
</tr>
<tr>
<td>Small Claims</td>
<td>76%</td>
<td>13%</td>
<td>13%</td>
</tr>
</tbody>
</table>

Paula Hannaford-Agor et al., NCSC, Landscape of Civil Litigation in State Courts (2015)

© 2016 IAALS – Institute for the Advancement of the American Legal System.
DISPOSITION OF CASES IN STATE COURTS

Summary judgment 1%
Other disposition 1%
Adjudicated disposition 4%
Unknown disposition 4%
Settlement 10%
Default judgment 20%
Judgment (unspecified) 26%
Dismissed 35%

PAULA HANNAFORD-AGOR ET AL., NCSC, LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015)
IN FIVE YEARS, WE WOULD LIKE TO SEE:

- Litigation that is cost effective
- Courts that are accessible and affordable
- Technology that serves litigants
- Judges who are engaged and attentive
- Lawyers who are cooperative and innovative
ELEMENTS OF REFORM

1. Rule Changes
2. Case Management
3. Culture Change
The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—the 'just, speedy, and inexpensive determination of every action and proceeding'—only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change.

~ Chief Justice John Roberts
Change the Culture
Change the System

Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow
Back to Our Professional Roots
Guided by Justice
Dig Deeper, Earlier
A New Approach to Discovery
Engaged Judges
Courts Taking Ownership
Efficiency Up the Court Ladder
8

Smart Use of Technology
Valuing Our System
Realign Incentives
CHANGE THE CULTURE, CHANGE THE SYSTEM

- Establish a Sense of Urgency
- Create a Guiding Coalition
- Develop a Vision and Strategy
- Communicate the Change Vision
- Empower Broad-Based Action
- Generate Short-Term Wins
- Consolidate Gains to Produce Additional Change
- Anchor New Approaches in the Culture
Change is coming. You can be ahead of the curve or behind it. If we make the changes ourselves, we have more control over the outcomes.

~ Chief Justice Thomas Balmer
Appellate Innovations
Project Update

Monday, August 1, 2016 | 3:30 pm - 4:30 pm
John Doerner was awarded a BA degree in Business Administration by the College of St. Francis (Joliet, Illinois) in 1975, an MBA degree from the University of Colorado in 1987 and is also licensed as a Certified Public Accountant by the State of Colorado. He joined the Colorado Judicial Branch in 1982 as an Internal Auditor, eventually being named as Manager of Internal Audit and Operations Support. John served as Clerk of the Colorado Court of Appeals from 1999 to 2007, during which time he became active in the NCACC. He joined the National Center for State Courts in 2007 and provides organizational and management consulting services to all levels of courts, including many appellate courts, across the country.
Appellate Court Innovations Survey
Summary of Responses
Courts of Last Resort

This survey was circulated to members of CCJ, NCACC and COSCA in late July 2015. Collection of responses was closed on September 25, 2015.

**RESPONDENTS**

Responses were received from 25 courts. Circulation of the survey went to a total of 58 courts of last resort (the 50 states plus 2 in TX and OK, the District of Columbia, Commonwealths of Puerto Rico and the Northern Mariana Islands, and the territories of Guam, the US Virgin Islands and American Samoa).

**Response Rate: 25 / 58 = 43%**

Of the respondents, 17 indicated that there is an intermediate appellate court in their jurisdiction and 8 indicated that there is not.

Respondents with an IAC: 17 / 25 = 68%
Respondents without and IAC: 8 / 25 = 32%

**TECHNOLOGICAL APPLICATIONS**

<table>
<thead>
<tr>
<th>Are the following technological applications deployed by the Court? (check all that apply)</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electronic filing</td>
<td>60%</td>
<td>15</td>
</tr>
<tr>
<td>Electronic Records</td>
<td>68%</td>
<td>17</td>
</tr>
<tr>
<td>Electronic Transcripts</td>
<td>56%</td>
<td>14</td>
</tr>
<tr>
<td>Document Management System</td>
<td>72%</td>
<td>18</td>
</tr>
<tr>
<td>Other (please describe) (see below)</td>
<td>64%</td>
<td>16</td>
</tr>
</tbody>
</table>

**Total Responses** 25

<table>
<thead>
<tr>
<th>Does the use of these technologies help to achieve or enhance any efficiencies in the Court’s disposition of appellate cases?</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>88%</td>
<td>22</td>
</tr>
<tr>
<td>No</td>
<td>12%</td>
<td>3</td>
</tr>
</tbody>
</table>

**Total Responses** 25
Is the Court planning implementation of any additional technological applications?

<table>
<thead>
<tr>
<th></th>
<th>Response</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Percent</td>
<td>Count</td>
</tr>
<tr>
<td>Yes</td>
<td>80.0%</td>
<td>20</td>
</tr>
<tr>
<td>No</td>
<td>20.0%</td>
<td>5</td>
</tr>
</tbody>
</table>

**Total Responses**  25

Observations:

- Looking through the three related comments sections, many COLRs indicated that they were moving toward implementation of the following technological applications:
  - **Upgrade the Case Management System:** Alaska, Florida & Kentucky
  - **Electronic Filing:** Alaska, Indiana, Maryland, Massachusetts, Montana, New Hampshire, Rhode Island, Tennessee, Utah, Washington, West Virginia, Vermont. (15 COLRs responded that they use e-filing now; 12 indicated that they are working to implement. That totals 27, 2 more than the number of total respondents so there is some overlap. Several indicated that e-filing is in early stages and may help explain the overlap)
  - **Electronic Records & Transcripts:** Georgia, Indiana, Pennsylvania, Wyoming
  - **Electronic Circulation of Draft Opinions:** TX (has application but not currently used), Utah, West Virginia
  - **Electronic Voting:** Alaska, Texas, Utah, West Virginia
  - **Electronic Signatures:** Minnesota
  - **Paperless Court:** Michigan
  - **Web-based Transcription Request:** New Hampshire, Utah

Other Technology Based Innovations:

- Michigan Supreme Court: proposed a pilot project (patterned after 2 federal district courts in Illinois) to install a digital sender in a prison to allow inmates to submit electronic documents. Florida indicated a similar effort.
- Texas Supreme Court: considering an iPad app developed by the 5th Circuit which allows justices to download all case files to the tablet.
- Kentucky Supreme Court: uses video recording of trial court proceedings as the trial court record. The court reported that “records are available from the trial court almost immediately.”

**RESPONDENT COURTS TIME TO DISPOSITION:**

<table>
<thead>
<tr>
<th>In recent years (5 – 10), has the court given consideration to the usual length of time it takes to resolve appellate cases and what actions would be necessary to reduce that time?</th>
<th>Response</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Percent</td>
<td>Count</td>
</tr>
<tr>
<td>Yes</td>
<td>96%</td>
<td>24</td>
</tr>
<tr>
<td>No</td>
<td>4%</td>
<td>1</td>
</tr>
</tbody>
</table>

**Total Responses**  25
Does the court as a whole consider the usual length of time that it takes to resolve appellate cases, measured from the initial filing to disposition, as:

<table>
<thead>
<tr>
<th>Response</th>
<th>Percent</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALWAYS EXPEDITIOUS</td>
<td>8%</td>
<td>2</td>
</tr>
<tr>
<td>GENERALLY TIMELY</td>
<td>40%</td>
<td>10</td>
</tr>
<tr>
<td>THERE IS ROOM FOR IMPROVEMENT</td>
<td>48%</td>
<td>12</td>
</tr>
<tr>
<td>LONGER THAN WE WOULD LIKE</td>
<td>4%</td>
<td>1</td>
</tr>
<tr>
<td>USUALLY TOO LONG</td>
<td>0%</td>
<td>0</td>
</tr>
</tbody>
</table>

Total Responses 25

Has the court established time standards by which to measure time to disposition?

<table>
<thead>
<tr>
<th>Response</th>
<th>Percent</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>YES – Explicit time standards</td>
<td>32%</td>
<td>8</td>
</tr>
<tr>
<td>YES – Implicit time standards or guidelines</td>
<td>56%</td>
<td>14</td>
</tr>
<tr>
<td>NO</td>
<td>12%</td>
<td>3</td>
</tr>
</tbody>
</table>

Total Responses 25

Observations:

- Almost all of the respondent COLRs have considered the usual length of time it takes to resolve appellate cases and what actions would be necessary to reduce it.
- Among the respondent COLRs, 52% report that the typical time to disposition, measured from filing to disposition, is either ‘longer than we would like’ or ‘there is room for improvement.’ 48% report that time to disposition is ‘generally timely’ or ‘always expeditious.’
ASSESSMENT OF THE 4 STAGES OF AN APPEAL

There are typically 4 distinct stages of an appeal; establishing the record, briefing, case assignment/scheduling oral argument, and preparing opinion/decision. With respect to these typical stages of an appeal, is the listed stage likely to contribute to unreasonable delays in resolving cases?

<table>
<thead>
<tr>
<th>ESTABLISHING THE RECORD</th>
<th>Response</th>
<th>Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>28%</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>72%</td>
<td>18</td>
<td></td>
</tr>
</tbody>
</table>

Answered question 25

<table>
<thead>
<tr>
<th>BRIEFING</th>
<th>Response</th>
<th>Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>48%</td>
<td>12</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>52%</td>
<td>13</td>
<td></td>
</tr>
</tbody>
</table>

Answered question 25

<table>
<thead>
<tr>
<th>CASE ASSIGNMENT/SCHEDULING ORAL ARGUMENT</th>
<th>Response</th>
<th>Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>28%</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>72%</td>
<td>18</td>
<td></td>
</tr>
</tbody>
</table>

Answered question 25

<table>
<thead>
<tr>
<th>PREPARING OPINION/DECISION</th>
<th>Response</th>
<th>Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>28%</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>72%</td>
<td>18</td>
<td></td>
</tr>
</tbody>
</table>

Answered question 25

- Briefing is the stage considered most likely to contribute to delay in resolving cases with a 48% yes response. Particular issues reported occur primarily in criminal cases, particularly where appellate defenders and attorney general offices are perceived to be short-staffed, appointed counsel need additional time to become familiar with a case, or self-represented appellants may be unaware of timelines or are intimidated by the appellate process.

- The stages of Establishing the Record, Case Assignment/Scheduling Oral Argument and Preparing Opinion/Decision were generally not perceived to contribute to delay in most reporting courts; only 7 of 25 (28%) responded yes. However, regarding the stage of Establishing the Record, a clear division is observed between those COLRs in states that have an intermediate appellate court and those that do not. Of the seven yes responses, five were from states without an IAC. Of those that responded no, capital cases filed directly with the COLR were cited as problematic.

- Policies and practices designed to control delay include:

  - Establishing the Record
  - Instituting an open, continuous solicitation for transcribers across the country that that meet court deadlines. (AK)
• Web-based Transcript Management System (NH)
• Statewide video recording of trials and trial court proceedings (KY)

Briefing
• Most respondents referred to an established briefing schedule and court control of requests for extensions to minimize impact of delay.
• Two respondents reported that oral argument schedules are used to control briefing extensions – if the case is needed to fill an oral argument calendar, extension requests will not be granted. (MD & NC)

Case Assignment/Scheduling Oral Argument
• Similar to the briefing section, two respondents indicated that cases are scheduled for oral argument early in the process. (MD & NC)

Preparing Opinion/Decision
• Many of the respondents referred to one or more of the following as means for controlling delay in this stage:
  o Internal deadlines and standards with respect to circulating drafts of majority opinions and concurrences/dissents.
  o Chief Justice monitoring of assigned cases.

INNOVATIONS IMPLEMENTED OR IN DEVELOPMENT BY RESPONDENT COURTS

<table>
<thead>
<tr>
<th>In recent years, has the court implemented any procedural, organizational, technological or other changes and innovative practices designed to streamline the appellate process and provide quicker overall time to disposition? (Include any instances of changes that were implemented and later revised or abandoned because they did not produce the desired results, resources were not available to continue, or other reasons)</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>84%</td>
<td>21</td>
</tr>
<tr>
<td>No</td>
<td>16%</td>
<td>4</td>
</tr>
</tbody>
</table>

Over eighty percent of respondent COLRs indicated that changes or innovations designed to provide quicker overall time to disposition have been implemented in recent years. Among the innovations that COLRs have implemented were:

• Revised internal procedures to shorten opinion preparation and voting
• Revised briefing deadlines
• Disallow motions to dismiss and permit motions to affirm in criminal post-conviction relief appeals
• Mandatory e-filing of all case documents
• E-signatures
• E-records and transcripts
- Video recording of trial court proceedings
- Accepting fewer cases
- Electronic circulation of drafts
- Web-based process for ordering and paying for trial court transcripts & uploading of audio files to transcriber
- Summary affirmances and reversals
- Electronic voting

<table>
<thead>
<tr>
<th>Is the court currently in the process of developing any procedural, organizational, technological or other changes or innovations in the appellate process?</th>
<th>Response</th>
<th>Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td></td>
<td>72%</td>
<td>18</td>
</tr>
<tr>
<td>No</td>
<td></td>
<td>28%</td>
<td>7</td>
</tr>
<tr>
<td><strong>answered question</strong></td>
<td>25</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Almost three-quarters of respondent COLRs indicated that there were further changes or innovations in process. Among the innovations in development are:

- E-filing
- Mandatory e-record on appeal
- Statewide e-court environment
- Video-conferencing for appellate argument
- E-signature tools
- Performance measures
- Time Standards

**REMAINING ISSUES AND POTENTIAL SOLUTIONS**

- Updating ‘paper-based’ rules
- Increased staffing for appellate defenders and court reporters
- Resources for self-represented litigants
Appellate Court Innovations Survey

Summary of Responses
Intermediate Appellate Courts

This survey was circulated to members of CCJSCA, NCACC and COSCA in late July 2015. Collection of responses was closed on September 25, 2015.

RESPONDENTS

Responses were received from 33 courts (the complete set of responses indicates 35, but the Louisiana 5th Circuit and the Pennsylvania Superior Court each responded twice). Circulation of the survey went to a total of 93 intermediate appellate courts (11 of the 50 states have no IAC, while a number of states have multiple appellate courts). Nevada’s IAC just began operations in July 2015.

Response Rate: 33 / 93 = 35%

<table>
<thead>
<tr>
<th>Does the court issue unpublished opinions?</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>82%</td>
<td>27</td>
</tr>
<tr>
<td>No</td>
<td>18%</td>
<td>6</td>
</tr>
</tbody>
</table>

answered question 33

<table>
<thead>
<tr>
<th>Does the court issue some form of short opinions?</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>70%</td>
<td>23</td>
</tr>
<tr>
<td>No</td>
<td>30%</td>
<td>10</td>
</tr>
</tbody>
</table>

answered question 33

TECHNOLOGICAL APPLICATIONS

<table>
<thead>
<tr>
<th>Are the following technological applications deployed by the Court? (check all that apply)</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electronic filing</td>
<td>73%</td>
<td>24</td>
</tr>
<tr>
<td>Electronic Records</td>
<td>73%</td>
<td>24</td>
</tr>
<tr>
<td>Electronic Transcripts</td>
<td>64%</td>
<td>21</td>
</tr>
<tr>
<td>Document Management System</td>
<td>76%</td>
<td>25</td>
</tr>
<tr>
<td>Other (please describe)</td>
<td>39%</td>
<td>13</td>
</tr>
</tbody>
</table>

Total Responses 33
Does the use of these technologies help to achieve or enhance any efficiencies in the Court’s disposition of appellate cases? | Response Percent | Response Count |
--- | --- | --- |
Yes | 88% | 29 |
No | 12% | 4 |

Total Responses 33

Is the Court planning implementation of any additional technological applications? | Response Percent | Response Count |
--- | --- | --- |
Yes | 67% | 22 |
No | 33% | 11 |

Total Responses 33

Observations:

- Many responding IACs indicated that they were moving toward implementation of the following technological applications:
  - New or Expanded Electronic Filing: Connecticut, Idaho, Indiana, Kansas, Louisiana 2\textsuperscript{nd} Circuit, Massachusetts, Michigan, Nevada, New Jersey, New York Supreme Court 2\textsuperscript{nd} Appellate Department
  - Electronic Circulation of Draft Opinions: Arizona Div. 1, Texas 8\textsuperscript{th} COA, Washington Div 2
  - Electronic Records/Transcripts: Georgia, Indiana, Louisiana 5\textsuperscript{th} Circuit, Missouri Southern District, Pennsylvania Commonwealth Court, Pennsylvania Superior Court
  - Electronic Voting: Iowa
  - Electronic Signatures: Minnesota
  - Electronic Notification: Louisiana 1\textsuperscript{st} Circuit, Minnesota
  - Paperless Office: Pennsylvania Superior Court
- The vast majority of comments from the IACs indicate broad use and acceptance of the benefits of e-filing, e-records, e-transcripts and the use of electronic documents generally. Particularly notable were comments referring to the capability for multiple users to access the same documents simultaneously and for judges who are often geographically dispersed to be able to get their work done much more quickly than in a paper-based system.

Other Technology Based Innovations:

- Appellate Dashboard System: Arizona Division 1 (This is described as a tool that permits judges to view their pending appeals as well as a case details page for each appeal. From that page, they review briefs and pertinent record documents, prepare and revise draft decisions, and make edits or leave comments for other members of the panel. The overall goal is to facilitate collaboration among the judges and staff of a particular panel on each case.)
RESPONDENT COURTS TIME TO DISPOSITION:

In recent years (5 – 10), has the court given consideration to the usual length of time it takes to resolve appellate cases and what actions would be necessary to reduce that time?

<table>
<thead>
<tr>
<th>Response Description</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>88%</td>
<td>29</td>
</tr>
<tr>
<td>No</td>
<td>12%</td>
<td>4</td>
</tr>
</tbody>
</table>

*Total Responses 33*

Does the court as a whole consider the usual length of time that it takes to resolve appellate cases, measured from the initial filing to disposition, as:

<table>
<thead>
<tr>
<th>Response Description</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALWAYS EXPEDITIOUS</td>
<td>6%</td>
<td>2</td>
</tr>
<tr>
<td>GENERALLY TIMELY</td>
<td>58%</td>
<td>19</td>
</tr>
<tr>
<td>THERE IS ROOM FOR IMPROVEMENT</td>
<td>12%</td>
<td>4</td>
</tr>
<tr>
<td>LONGER THAN WE WOULD LIKE</td>
<td>18%</td>
<td>6</td>
</tr>
<tr>
<td>USUALLY TOO LONG</td>
<td>6%</td>
<td>2</td>
</tr>
</tbody>
</table>

*Total Responses 33*

Has the court established time standards by which to measure time to disposition?

<table>
<thead>
<tr>
<th>Response Description</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>YES – Explicit time standards</td>
<td>58%</td>
<td>19</td>
</tr>
<tr>
<td>YES – Implicit time standards or guidelines</td>
<td>18%</td>
<td>6</td>
</tr>
<tr>
<td>NO</td>
<td>24%</td>
<td>8</td>
</tr>
</tbody>
</table>

*Total Responses 33*

Observations:

- A strong majority of the respondent IACs have considered the usual length of time it takes to resolve appellate cases and what actions would be necessary to reduce it.
- Among the respondent IACs, 36% report that the typical time to disposition, measured from filing to disposition, is either ‘usually too long, ‘longer than we would like’ or ‘there is room for improvement.’ 64% report that time to disposition is ‘generally timely’ or ‘always expeditious.’
### ASSESSMENT OF THE 4 STAGES OF AN APPEAL

There are typically 4 distinct stages of an appeal: establishing the record, briefing, case assignment/scheduling oral argument, and preparing opinion/decision. With respect to these typical stages of an appeal, is the listed stage likely to contribute to unreasonable delays in resolving cases?

<table>
<thead>
<tr>
<th>ESTABLISHING THE RECORD</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>73%</td>
<td>24</td>
</tr>
<tr>
<td>No</td>
<td>27%</td>
<td>9</td>
</tr>
</tbody>
</table>

*answered question 33*

<table>
<thead>
<tr>
<th>BRIEFING</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>48%</td>
<td>16</td>
</tr>
<tr>
<td>No</td>
<td>52%</td>
<td>17</td>
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</table>

*answered question 33*

<table>
<thead>
<tr>
<th>CASE ASSIGNMENT/SCHEDULING ORAL ARGUMENT</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>30%</td>
<td>10</td>
</tr>
<tr>
<td>No</td>
<td>70%</td>
<td>23</td>
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</tbody>
</table>

*answered question 33*

<table>
<thead>
<tr>
<th>PREPARING OPINION/DECISION</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>27%</td>
<td>9</td>
</tr>
<tr>
<td>No</td>
<td>73%</td>
<td>24</td>
</tr>
</tbody>
</table>

*answered question 33*

- Establishing the Record is the stage considered most likely to contribute to delay in resolving cases with a 73% yes response. The primary reason reported was delays in transcript production.
- Briefing was fairly evenly split as an appellate stage likely to contribute to unnecessary delay, with 48% responding yes and 52% reporting no (a difference of only one respondent). The most frequently cited reason for delay in briefing was insufficient staffing at the appellate defender/attorney general offices.
- The stages of Case Assignment/Scheduling Oral Argument and Preparing Opinion/Decision were generally not perceived to contribute to delay in most reporting courts; only 30% and 27% respectively responded yes.
- Policies and practices designed to control delay include:
  - Establishing the Record
  - Graduated reduction of the page rate paid to court reporters for preparation of transcripts when delayed (CO)
Briefing

- Most respondents referred to an established briefing schedule and court control of requests for extensions to minimize impact of delay.

Case Assignment/Scheduling Oral Argument

- There does not seem to be a particular innovative approach reported here; the common theme appears to be early setting of the oral argument/submission date.
- Other notable comments appear to deal with the ratio of orally argued cases to the capacity for oral arguments on the court’s calendar. One court reported that only holding a limited number of oral arguments served as a control for delay (IN); another reported that it adjusts argument calendars based on available cases (MN); and one indicated that it includes sufficient frequency of conducting arguments. (NC)

Preparing Opinion/Decision

- Many of the respondents referred to one or more of the following as means for controlling delay in this stage:
  - Establishing time standards/expectations with respect to issuing opinions; these may be internally developed, imposed by Supreme Court order or by a statutory requirement. (AL Court of Civil Appeals, AZ Division 1, AR, ID, LA 5th Circuit, MI, MN, NV, NC, PA Commonwealth Court, PA Superior Court, WA Division 1)
  - Judicial monitoring of caseload reports (CO, KS, PA Superior Court)
  - Report to Chief Justice on cases pending over a stated length of time (AL Court of Criminal Appeals, LA 1st Circuit)
  - Reviewing cases and preparing proposed draft opinions prior to oral argument NY Supreme Court 2nd Appellate Department, OH 2nd District Court of Appeals)
  - Writing shorter opinions limited to issues that 1) are raised and 2) must be addressed to decide the case (TX 6th Court of Appeals)

INNOVATIONS IMPLEMENTED OR IN DEVELOPMENT BY RESPONDENT COURTS

<table>
<thead>
<tr>
<th>In recent years, has the court implemented any procedural, organizational, technological or other changes and innovative practices designed to streamline the appellate process and provide quicker overall time to disposition? (Include any instances of changes that were implemented and later revised or abandoned because they did not produce the desired results, resources were not available to continue, or other reasons)</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>79%</td>
<td>26</td>
</tr>
<tr>
<td>No</td>
<td>21%</td>
<td>7</td>
</tr>
</tbody>
</table>

answered question 33
Almost eighty percent of respondent IACs indicated that changes or innovations designed to provide quicker overall time to disposition have been implemented in recent years. Among the innovations that IACs have implemented were:

- Revised internal procedures to shorten opinion preparation and voting
- E-filing
- E-signatures
- E-records and transcripts
- Electronic circulation and editing of drafts
- Electronic voting
- More stringent requirements for granting motions for extension of time for briefs and transcripts
- Show cause hearings for attorneys and court reporters who miss deadlines
- Alternative Dispute Resolutions programs such as appellate mediation, pre-argument conferences, etc.
- Differentiated Case Management techniques such as summary dockets, and expedited tracks for appeals of orders granting summary judgment

<table>
<thead>
<tr>
<th>Is the court currently in the process of developing any procedural, organizational, technological or other changes or innovations in the appellate process?</th>
<th>Response Percent</th>
<th>Response Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>64%</td>
<td>21</td>
</tr>
<tr>
<td>No</td>
<td>36%</td>
<td>12</td>
</tr>
</tbody>
</table>

Almost two-thirds of respondent IACs indicated that there were further changes or innovations in process. Among the innovations in development are:

- E-filing
- E-record on appeal/transcript
- Attorney access to e-record
- Electronic workflow
- Video-conferencing for appellate argument

**REMAINING ISSUES AND POTENTIAL SOLUTIONS**

- Updating ‘paper-based’ rules
- Increased staffing for appellate defenders and court reporters
- Additional judges/staff
Recruiting, Retaining and Attracting the Best for the Courts

Tuesday, August 2, 2016 | 8:30 am - 9:45 am
Mindy Masias

Mindy Masias is currently the Chief of Staff for the Colorado Judicial Department. Since 1997, she has also served on the University of Denver College of Law faculty as a Professor of Human Resources Management.

After receiving her Bachelor’s degree in Psychology from Metropolitan State College of Denver, Mindy began a career in Human Resources from 1989-2014. She holds higher education degree from the University Of Denver College of Law.

Among her other responsibilities, Mindy has facilitated more than 1000 workshops and training sessions on Human Resources Management for courts and other government entities. Her consulting work has included assistance to the Supreme Courts of Nevada, Minnesota, Missouri, Nebraska and Wyoming as well as the Bulgarian Supreme Court Reform project and the Separation of Powers Program for the Republic of Serbia and most recently court reforms for the Northern Mariana Islands Supreme Court.

Eric D. Brown

Eric D. Brown is the Colorado Judicial Branch as Director of Human Resources. Eric joined the Colorado Judicial Branch in 2004 and previous to joining the Colorado Judicial Branch he worked as Vice President of Human Resources for Preferred Capital Corporation, Director of Human Resources at EchoStar Communications and was the US/Asia Human Resource Manager for Eurlologic/Adpatec Systems. Eric Brown’s work has sent him across the globe working in the field of Human Resources with vast experience in recruitment and compensation.

Eric holds a number of certifications including a Professional of Human Resources (PHR) from the Society of Human Resource Management and is a graduate of the Kennedy School of Government and Leadership Program at Harvard University. Eric also holds a Master’s degree in Human Resources from Leicester University, and a Bachelor’s degree from the University of Nevada and International Relations from the University of Edinburgh.

Eric has most recently been working on court compensation projects in Ohio, Missouri, Nevada, Nebraska and Washington State.
Recruiting, Retaining and Attracting the Best for the Courts

Mindy Masias, Chief of Staff
Eric Brown, Director of Human Resources
Colorado Judicial Branch
Where Did We Begin?
Where Do you Keep Your Ketchup
Are you Suffering From The “We Recruit.. How We Were Recruited Model?”
Workforce is Ever Changing

• The average American employee tenure in 2015 was 4.1 Years

• The public sector average was near twice the national average at 7.8 years

• Of Note…. 1/5 of American workers 21% have been on the job less than 1 year.
Why Do Employees Work for Courts

Respondents to a 2013 NCSC survey stated that their principal motivation for coming to work each day

- Court work was interesting.
- Prided themselves in having the ability to be relied upon to get the job completed.
- Refine their skill set, possibly for other areas of legal profession work.
A Few Things We Are Seeing...

- Sourcing is easier with LinkedIn
- Job fairs and job boards have lower return
- Applicants research you on social media
- Candidates are talking to your employees
- 45% of employees said they will not fill in an application for employment for a job
Where Do We Recruit?

#1 – Court website
#2 – Internet websites (monster, dice, jobing)
#3 – Executive branch website
#4 – Newspaper
#5 – LinkedIn
The Interview
Behavior Based interview Questions..... Thanksgiving?

• Top Three Most asked Interview Questions

• #3  Why do you want to work here?
• #2  What interest you about this job?
• #1  Tell me about yourself?
The Power of Behavior Based Interviews

- Past behavior is the best indicator of future performance
  - Situation (or task, problem)
  - Action
  - Result/outcome
The Interview...What HR Hasn’t Told You

• The first 7-8 minutes- the candidate must
• Can you picture the candidate sitting across the desk angry?
• 45+ minutes...the key to effective talent search
• Hire for energy, motivation and leadership potential – you can teach anyone “the technical”
Reference Checks
Reference Checks

....Who Did You Come Here With Today?
Data on Reference Checks

• CareerBuilder reported in 2015, 31% of references are fake
• 15% of references did not even know the person or had no connection to the person at work
• Secondary references
People make up mind in the first few minutes of their first day how long they will stay...
Onboarding
Onboarding Volunteer Section

• Good onboarding?
• Bad onboarding?
Retention
A View from the Director’s Chair:
Lessons Learned from Two Years at the EEOC and Best Practices in Hiring

Tuesday, August 2, 2016 | 9:45 am – 10:45 am
John C. Lowrie  
**Director, Denver Field Office**  
**U.S. Equal Employment Opportunity Commission (EEOC)-Denver Field Office**

John Lowrie joined the EEOC-Denver Field Office as its director in September 2014. In this position he is responsible for enforcing federal laws prohibiting employment discrimination for the states of Colorado and Wyoming.

Mr. Lowrie often serves as keynote presenter at regional and national conferences such as EEOC’s Technical Assistance Program Seminars, Rocky Mountain Employers Conference, Jackson Lewis Annual Conference, ROAR Conference, CLE Employment Law Conference, Husch Blackwell’s Annual Labor and Employment Seminar, and a variety of Society of Human Resource Management seminars where he discusses laws enforced by EEOC and EEOC’s strategic enforcement plan.

In addition, Mr. Lowrie was selected as one of the three (3) executives to participate in the Colorado Federal Executive Board’s Workforce Development Council (WDC) mentoring forum, is a member of the Federal Inter-Departmental Task Force on Civil Rights, and the Labor & Employment Relations Association.

Prior to joining EEOC, he served as a rule of law advisor and chief of staff with the U.S. Department of State in Afghanistan. Prior to his service in Afghanistan, he worked as a labor and employment attorney in Denver for ten years. From 2006 to 2009, he served as the Colorado chairman for Employer Support of the Guard and Reserve. He also previously served as a board member to the Anchor Center for Blind Children and Colorado Youth at Risk.

He is a graduate of the U.S. Naval Academy and received his J.D. from the University of Texas School of Law. He is a graduate of Leadership Denver and the Colorado Institute of Leadership and Training. In 2015, he received an advanced master’s degree in International Human Rights Law from the University of Oxford.
This workshop will introduce John C. Lowrie, Director of the United States Equal Employment Opportunity Commission (EEOC) Denver Field Office, and explore the laws enforced by EEOC and its mission. As the chief law enforcement officer of employment discrimination in the states of Colorado and Wyoming, Mr. Lowrie will discuss consequences which may arise when a company believes a manager, who is a subject-matter expert in their field, is also competent in the complicated world of human resources. This presentation will address recruiting and hiring issues, immerging patterns of discrimination, equal pay issues, vulnerable workers and the immigrant community, and EEOC’s recent harassment report.
A View from the Director’s Chair

Lessons Learned from Two Years at the EEOC and Best Practices in Hiring

US-Equal Employment Opportunity Commission
Denver Field Office
John C. Lowrie
Director
Challenges for a Clerk’s Office?

- Limited Budgets and Resourcing?
- Lack of staff?
- Competing demands and a never ending backlog of cases?
- Lack of expertise?
- Aversion to change?
- Entrenched views of how to operate?
The EEOC

➢ History

➢ Statutes we enforce (Title VII, ADA, ADEA, GINA, EPA, Rehabilitation Act)

➢ How we are arranged and operate

➢ Interplay with the Department of Justice on state and local cases

➢ Interplay with state FEPAs
EEOC Challenges

- Limited budget and resourcing
- Staffing shortages and very large volume of charges
- Competing priorities
- Need for inter-governmental cooperation
EEOC Hot Button Issues

- Better DOJ collaboration and coordination
- Addressing harassment and bullying
- ADAAA
- The 50th Anniversary of the ADEA
- Strategic Enforcement!
What is the EEOC Strategic Enforcement Plan?

The EEOC’s Strategic Plan for Fiscal Years 2012 - 2016 directed EEOC to develop a Strategic Enforcement Plan (SEP) that:

- establishes priorities and
- integrates all components of EEOC's private, public, and federal sector enforcement.

The purpose of the SEP is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.
SEP Priorities

Eliminating Barriers in Recruitment and Hiring

The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.
SEP Priorities

Protecting Immigrant, Migrant and Other Vulnerable Workers

The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.
SEP Priorities

Addressing Emerging and Developing Issues

The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.
SEP Priorities

Enforcing Equal Pay Laws

The EEOC will target compensation systems and practices that discriminate based on gender.
SEP Priorities

Preserving Access to the Legal System

The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC's investigative or enforcement efforts.
SEP Priorities

Preventing Harassment Through Systemic Enforcement and Targeted Outreach

The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.
Americans with Disabilities Act (ADA)

To be covered an individual must have

- a physical or mental impairment that substantially limits a major life activity,
- or have a record of such an impairment,
- or must be regarded as having such an impairment.
During an interview, can employers ask about a disability (verbally or on an application)?

Basic Rule:

The ADA does not allow you to ask questions about disability or use medical examinations until after you make someone a conditional job offer.

http://www.eeoc.gov/eeoc/publications/adahandbook.cfm
Interview Questions

Examples of what you can ask:

- Whether s/he has the right education, training, and skills for the position.
- Whether s/he can satisfy the job's requirements or essential functions (describe them to the applicant).
- How much time off the applicant took in a previous job (but not why), the reason s/he or she left a previous job, and any past discipline.

http://www.eeoc.gov/eeoc/publications/adahandbook.cfm
Interview Questions

Examples of what you should not ask:

- questions about an applicant's physical or mental impairment or how s/he became disabled (for example: questions about why the applicant uses a wheelchair);
- questions about an applicant's use of medication;
- questions about an applicant's prior workers' compensation history.

http://www.eeoc.gov/eeoc/publications/adahandbook.cfm
Background Checks

- Employers may ask you for all sorts of background information, especially during the hiring process.
  - For example, employment history, education, criminal record, financial history, or your use of online social media.

- Unless the employer is asking for medical or genetic information, it is not illegal to ask you questions about your background, or to require a background check.
  - (Employers are not allowed to ask for medical information until they offer you a job, and they are not allowed to ask for your genetic information - including family medical history - except in very limited circumstances.)
  - [http://www.eeoc.gov/eeoc/publications/background_checks_employees.cfm](http://www.eeoc.gov/eeoc/publications/background_checks_employees.cfm)
Some employers hire entities to conduct "background reports." Two of the most common are:
- credit reports
- criminal background reports.

Special rules apply when an employer gets a background report from a company in the business of compiling background information.
- Generally, written permission should be obtained before getting the report.
- [http://www.eeoc.gov/eeoc/publications/backgroundChecks_employees.cfm](http://www.eeoc.gov/eeoc/publications/backgroundChecks_employees.cfm)
Second, if the employer decides not to hire or retain someone because of something in the report, it must provide a copy of the report and a "notice of rights" that tells how to contact the company that made the report.

- This is because background reports sometimes say things about people that are not accurate, and could even cost them jobs.
- [http://www.eeoc.gov/eeoc/publications/background_checks_employees.cfm](http://www.eeoc.gov/eeoc/publications/background_checks_employees.cfm)
Recommendations in Hiring and the Workplace

- Hire the most qualified candidates
- Be cognizant of conscious and unconscious biases
- Follow your procedures
- Make sure job postings match the job
- Have your HR professionals and managers stay informed
- Address issues! (*i.e.*, biases, harassment, bullying)
- Be consistent and know the pulse
For More Information

Visit us online at
www.eeoc.gov

Or contact
John C. Lowrie
(303) 866-1311
john.lowrie@eeoc.gov
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

STRATEGIC ENFORCEMENT PLAN

FY 2013 - 2016
EXECUTIVE SUMMARY

The U.S. Equal Employment Opportunity Commission’s (EEOC or Commission) Strategic Plan for Fiscal Years 2012 – 2016 directed the Commission to develop a Strategic Enforcement Plan (SEP) that (1) establishes priorities and (2) integrates all components of EEOC’s private, public, and federal sector enforcement.¹ The purpose of the SEP is to focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace. The Commission approved the Strategic Enforcement Plan for Fiscal Years 2013 – 2016 on December 17, 2012.

SEP Priorities

Integrated enforcement uses a range of strategies from among the EEOC’s tools, including investigations, litigation, federal sector oversight and adjudication, policy development, research, and outreach and education. Based on intensive efforts by a staff work group and Commissioners, and extensive public input, the Commission adopts the following national priorities:

1. **Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.

2. **Protecting Immigrant, Migrant and Other Vulnerable Workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

3. **Addressing Emerging and Developing Issues.** The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.

4. **Enforcing Equal Pay Laws.** The EEOC will target compensation systems and practices that discriminate based on gender.

5. **Preserving Access to the Legal System.** The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC’s investigative or enforcement efforts.

6. **Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.
The national priorities of the SEP will be complemented by district and federal sector priorities, recognizing that particular issues most salient to these communities also demand focused attention.

**Integrating the EEOC’s Work**

Through the SEP, the Commission adopts strategies to coordinate and maximize the use of communications, outreach, education, training, research, and technology as enforcement tools. These strategies should also ensure consistent and integrated enforcement throughout all three sectors – private, public, and federal.

In adopting this SEP, the EEOC takes an important step toward fulfilling its mission to “stop and remedy discriminatory practices in the workplace” so that the nation can finally realize the vision of “justice and equality in the workplace.”

**I. INTRODUCTION**

**Background**

The U.S. Equal Employment Opportunity Commission’s (EEOC or Commission) is a bipartisan body composed of five members who are appointed by the President and confirmed by the Senate. The President designates one member of the EEOC to serve as Chair. The Chair is responsible for the administrative operations of the EEOC and for the hiring of personnel.

The EEOC’s General Counsel, also appointed by the President and confirmed by the Senate, is responsible for the conduct of litigation pursuant to the agency’s statutory authority.

The EEOC is the nation’s lead governmental enforcer of employment anti-discrimination laws and chief promoter of equal employment opportunity. The Commission, through its staff, is responsible for enforcing Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), the Equal Pay Act of 1963 (EPA), Section 501 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act of 1990 (ADA), and Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). Together, these laws protect individuals from employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, and genetic information (which includes family medical history). They also make it illegal to retaliate against a person for opposing employment discrimination, filing a charge of discrimination, or participating in an investigation or lawsuit regarding employment discrimination.

The EEOC has jurisdiction to enforce the nation’s anti-discrimination laws in three sectors – private, state and local government (“public sector”), and federal. Congress granted EEOC the power to “prevent any person from engaging in any unlawful employment practice.” The EEOC is charged with achieving this goal by investigating and conciliating charges of
discrimination brought by individuals or by Commissioners alleging unlawful discrimination by private employers, state and local government employers, employment agencies and labor organizations. The General Counsel and legal staff have authority to litigate cases against private employers to enforce all of the federal equal employment opportunity laws and against state and local government employers to enforce the ADEA and EPA. The Department of Justice has authority to bring litigation against state and local governments in Title VII, ADA, and GINA cases.

In the federal sector, the Commission has authority to hold hearings on complaints of discrimination by federal employees and applicants and to adjudicate appeals of decisions on such claims. The Commission also has oversight responsibility to review, approve, and evaluate federal agency compliance with federal equal employment opportunity laws.

The Commission is also charged with providing education and technical assistance on the federal employment anti-discrimination laws and with performing technical studies that will help effectuate the purposes of those laws. Finally, the Commission collects data on the private, public, and federal workforces.

Since the EEOC opened its doors in 1965, the nation has made great strides towards equal employment opportunity for all. Never before in our nation’s history has the American workplace been more inclusive than it is today. Greater racial and ethnic diversity can be found throughout the workforce. Workers who once would have been forced out of jobs due to mandatory retirement policies can choose to remain in the labor force. Women now comprise nearly half of the nation’s workforce. Technological advances have enhanced opportunities for persons with disabilities to participate fully in the workplace. Once-prevalent practices, such as sex-specific advertisements for job openings, have largely been abandoned.

Yet, despite this progress, challenges remain, and the EEOC’s work is unfinished. The nation still confronts discriminatory practices that limit employment opportunities based on race, national origin, sex, religion, age, and disability. Immigrant, migrant and other vulnerable workers are too often subjected to discriminatory treatment in the workplace. Many of today’s workers are still subjected to pernicious forms of discrimination, including harassment. Individuals who exercise their rights to challenge workplace discrimination or assist others in doing so face retaliation too frequently.

Over the last decade, the number of charges filed against private and public employers increased by more than 22 percent. In Fiscal Year (FY) 2012, the EEOC received 99,412 charges of discrimination (85 percent against private employers and 15 percent against state and local government employers). Another 43,467 charges were dual-filed with the EEOC in FY 2012, but investigated by state and local fair employment practices agencies (FEPAs).

While the number of complaints filed in the federal sector has decreased by 23 percent over the last decade, the number of allegations of discrimination is still far too high for the nation’s
largest employer. Federal employees and applicants filed 16,974 complaints of alleged unlawful employment discrimination in FY 2011 (the most recent year available), and in FY 2012, the EEOC received 7,728 requests for hearings on federal sector complaints and received 4,350 appeals of federal agency actions on complaints.

Even as the nation confronts a rise in claims of discrimination, the resources allocated to the EEOC and designated for the FEPAs have failed to keep pace. Between FY 2000 and 2008, EEOC staffing levels and funding dropped nearly 30 percent. An infusion of resources in 2009 allowed for some rebuilding of capacity, but that was quickly stalled when funding was reduced and hiring freezes were implemented in FY 2011 and FY 2012. The agency is faced with meeting all of its mission responsibilities at a time of unprecedented demand for its services, notwithstanding its limited resources.

II. DEVELOPING THE STRATEGIC ENFORCEMENT PLAN

A. The Strategic Plan

On February 22, 2012, the Commission approved a Strategic Plan for Fiscal Years 2012 – 2016 (“the Strategic Plan”). The plan establishes a framework for achieving the EEOC’s mission to “stop and remedy unlawful employment discrimination,” so that the nation might realize the Commission’s vision of “justice and equality in the workplace.” The plan has three objectives: 1) combat employment discrimination through strategic law enforcement; 2) prevent employment discrimination through education and outreach; and 3) deliver excellent and consistent service through a skilled and diverse workforce and effective systems.

Under its first objective, the Strategic Plan required the development of a Strategic Enforcement Plan (SEP) that 1) establishes the EEOC’s priorities and 2) integrates the agency’s investigation, conciliation and litigation responsibilities in the private and public sectors; adjudicatory and oversight responsibilities in the federal sector; and research, policy development, and education and outreach activities.

The Strategic Plan also provides for the development of a Quality Control Plan for private and public sector investigations and conciliations and a Quality Control Plan for federal sector hearings and appeals, both of which will address consistency and customer service issues more extensively.

B. Input into the Development of the SEP

The SEP is the product of an extensive effort by staff and Commissioners and broad public input. A Work Group consisting of a cross-section of field and headquarters staff, led by Chair Jacqueline Berrien, General Counsel David Lopez, and Memphis District Director Katharine Kores provided input to the Commission. See Appendix A for a list of all SEP Work Group members.
On June 5, 2012, the Commission solicited written input on the SEP’s development. In response, comments were received from more than 100 individuals, organizations, and coalitions internal and external to the agency and from across the nation. See Appendix B for June 5 release.

On July 18, 2012, the Commission held a public meeting to receive input from more than 30 stakeholders on the issues they believed should be addressed in the plan. See Appendix C for the press release.

On September 4, 2012, the Commission released a draft of the SEP for public comment and again received comments from more than 100 individuals and organizations. See Appendix D for the press release.

C. Guiding Principles

The Commission is guided by the belief that targeted enforcement efforts will have broad and significant impact to prevent and remedy discriminatory practices in the workplace. Targeted enforcement also supports effective management of the agency’s charge inventory, as a clearly defined set of priorities informs categorization of charges to promote timely resolution. Finally, the Commission recognizes that in order to make the best use of limited resources, the agency will have to undertake an integrated approach to its work --- one that mobilizes all segments of agency operations and emphasizes effectiveness, efficiency and consistency.

1. A Targeted Approach. A targeted approach means focused attention on an identified set of priorities.

Under this approach, priorities will receive a greater share of agency time and resources as the Commission carries out its statutory obligations. Federal agencies, as well as private entities, often direct resources toward specific practices to secure compliance and more effectively manage their limited resources. For agencies that receive complaints, targeted enforcement necessitates a paradigm shift to focus on specific priorities, recognizing that a focused effort should have a broad and lasting impact to more effectively advance the agency’s mission and the public interest.

2. An Integrated Approach. An integrated approach ensures the full use of communications, outreach, education, training, research, and technology as tools to advance the agency’s overall mission in concert with administrative enforcement (investigations, mediations, and conciliations) and legal enforcement (litigation, amicus curiae participation, and policy development in the private and state and local government sectors, and hearings and appeals in the federal sector). An integrated approach also recognizes that, where possible, enforcement in the private, public, and federal sectors should be coordinated and consistent. Commission
policies and positions that apply to private and public employers should be applied to the federal
government as an employer as well.

Moreover, an integrated approach envisions collaboration and coordination among staff, offices,
and program areas and promotes the sharing of information and strategies to implement a
national law enforcement model. An integrated approach also requires that all internal agency
plans, policies, and procedures increase efficiency and consistency and maximize customer
satisfaction to further the ultimate goals of the agency. In short, an integrated approach means
“one EEOC.”

An integrated approach also acknowledges that the EEOC is one part of a multi-pronged national
equal employment law enforcement effort. The Department of Justice, Department of Labor,
Fair Employment Practices Agencies (FEPAs), Tribal Employment Rights Organizations
(TEROs), and the private bar all play a vital role in enforcing laws prohibiting employment
discrimination. As a result, it is important that the EEOC collaborate with each effectively to
further its mission.

3. **Accountability.** The EEOC is a national organization comprised of a Commission,
General Counsel, headquarters office, and 53 district, field, area, and local offices across the
nation. Throughout the Commission’s history, the agency’s success has hinged on a careful
balancing of the need for national priorities, standards, and oversight with the need for local
awareness, responsiveness, and discretion. In this time of limited resources and rising demand,
striking that balance properly has never been more important. To this end, the SEP seeks to
establish clear expectations for those charged with implementing this plan and to provide for
regular and meaningful communication amongst the Commission, General Counsel, agency
leadership, and agency staff. In doing so, the Commission can ensure that the strategic,
integrated and consistent enforcement approach established by the SEP is implemented and the
expertise of the agency’s workforce informs and enhances that implementation throughout the
country.

**D. Previous Plans and Continuing Commitments**

The Commission’s previous efforts to establish priorities, integrate enforcement, and manage the
charge inventory consist of the National Enforcement Plan, Priority Charge Handling

**Priority Charge Handling Procedures.** In 1995, the Commission adopted a Priority Charge
Handling Procedures (PCHP) system to categorize and expedite the handling of its charge
inventory to focus the agency’s resources on strategic enforcement. PCHP revoked the full
investigation protocol of the 1980s. The PCHP system was based on the development of
National and Local Enforcement Plans (NEP, LEPs) that prioritized issues for Commission
action. PCHP identified enforcement plan issues as the first and highest priority for charge
categorization.
With the adoption of the SEP and the Strategic Plan, PCHP must be examined and updated to ensure that meritorious priority matters receive greater resources and attention, as the NEP priorities received in the early years of PCHP implementation. Agency experience demonstrates that PCHP is most effective as a charge management system when priorities are clearly defined and consistently used in the categorization of charges.

PCHP initially resulted in a significant reduction in the EEOC’s pending inventory of charges. However, the charge inventory increased significantly between 2002 and 2008. During this period, the NEP and LEPs were used inconsistently to prioritize charges and the number of investigative staff decreased. While the number of incoming charges also decreased from 2003 through 2006, charge receipts rose in 2007. The charge inventory more than doubled between 2005 and 2008.

Budget increases between 2008 and 2010 allowed the agency to fill many vacant positions, update technology, and expand staff training opportunities. In FY 2010, Chair Jacqueline Berrien initiated a multi-year approach of sustained management attention to reverse the growth of the charge inventory. As a result, the number of unresolved charges was reduced by approximately 9 percent by the end of FY 2011 --- the first reduction in nearly a decade.

This progress will be enhanced by ensuring that PCHP is thoroughly examined and updated to fully implement the SEP and Strategic Plan. The Strategic Plan continues this course by directing staff to “[r]igorously and consistently implement charge and case management systems to focus resources and enforcement on the EEOC’s priorities.”

**National Enforcement Plan of 1996.** Approved by the Commission in 1996, the National Enforcement Plan (NEP) articulated the general principles governing the Commission's enforcement efforts, established national enforcement priorities, set parameters for Local Enforcement Plans (LEPs), and delegated significant litigation authority to the General Counsel. The SEP replaces the NEP.

**Comprehensive Enforcement Program of 2000.** In 2000, Chair Ida Castro initiated a Comprehensive Enforcement Program (CEP) to recommend best practices for administrative and legal enforcement coordination in the development of cases. In 2011, Chair Jacqueline Berrien, General Counsel David Lopez, and Director of the Office of Field Programs Nicholas Inzeo reaffirmed the importance of these principles in directives to the field.

**Systemic Task Force Recommendations of 2006.** The recommendations of the Systemic Task Force, unanimously adopted by the Commission in 2006, established a nationwide systemic program as a top priority of the Commission. In adopting the Systemic Task Force Report, the Commission sought to change how EEOC operated by requiring plans and procedures for early identification of systemic cases, by deploying the resources needed for successful systemic enforcement, and by implementing a national law firm model. Through the SEP, the Commission
reaffirms the approach and principles of the Systemic Task Force, that systemic enforcement must be strategic, nationwide, coordinated and adequately resourced.

III. NATIONAL PRIORITIES FOR INTEGRATED ENFORCEMENT

The Commission’s goal in identifying these priorities is to ensure that agency resources are targeted to prevent and remedy discriminatory practices where government enforcement is most likely to achieve broad and lasting impact. The Commission anticipates that each of these priorities will require the development of a multi-pronged response to include enforcement, education and outreach, research, and policy development. The Commission believes that a comprehensive and coordinated focus on the following priorities will significantly advance its mission.

The Commission does not expect that every EEOC office will approach every SEP priority identically or with the same level of intensity. Charge trends and demographic differences may demand a more localized approach in addressing different priorities, which will be set forth in the District Complement Plans (DCP) (Infra at IV.C).

A. Criteria for Determining Priorities

The Commission has identified priorities for national enforcement in the private, public, and federal sectors based on the following criteria:

1. Issues that will have broad impact because of the number of individuals, employers or employment practices affected;

2. Issues involving developing areas of the law, where the expertise of the Commission is particularly salient;

3. Issues affecting workers who may lack an awareness of their legal protections, or who may be reluctant or unable to exercise their rights;

4. Issues involving discriminatory practices that impede or impair full enforcement of employment anti-discrimination laws; and

5. Issues that may be best addressed by government enforcement, based on the Commission’s access to information, data, and research.

B. National Priorities

The Commission identifies the following issue priorities, with the goal and expectation that a concentrated and coordinated approach will result in reduced discrimination in these areas. Some of the priority categories, such as hiring discrimination, raise challenging and complicated issues
affecting all of the protected classes, which the EEOC is better situated than the private bar to address given its investigatory authority and access to data. Other priorities, such as emerging issues, are more discrete, but a concerted effort by the agency may result in early resolution of an unsettled area that promotes increased and lasting compliance with equal employment laws.

The strategies for effectively addressing the priorities will vary as well. For some, a multi-pronged, coordinated enforcement, outreach, research and policy effort may be appropriate. For others such as harassment and retaliation, the Commission may intensify and target its education and outreach strategies.

1. **Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based intentional recruitment and hiring discrimination and facially neutral recruitment and hiring practices that adversely impact particular groups. Racial, ethnic, and religious groups, older workers, women, and people with disabilities continue to confront discriminatory policies and practices at the recruitment and hiring stages. These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, restrictive application processes, and the use of screening tools (e.g., pre-employment tests, background checks, date-of-birth inquiries). Because of the EEOC’s access to data, documents and potential evidence of discrimination in recruitment and hiring, the EEOC is better situated to address these issues than individuals or private attorneys, who have difficulties obtaining such information.

2. **Protecting Immigrant, Migrant and Other Vulnerable Workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and other discriminatory practices and policies affecting immigrant, migrant and other vulnerable workers, who are often unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

3. **Addressing Emerging and Developing Issues.** As a government agency, the EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics. Under this SEP, the EEOC will continue to prioritize issues that may be emerging or developing. Given the EEOC’s research, data collection, and receipt of charges in the private and public sectors, and adjudication of complaints and oversight in the federal sector, the agency is well-situated to address these issues.

Swift and responsive attention to demographic changes (e.g. the aging of the workforce), recently enacted legislation, developing judicial and administrative interpretations and theories, and significant events (e.g. the attacks of 9/11) that may impact employment practices can prevent the spread of emerging discriminatory practices by promoting greater awareness and facilitating early, voluntary compliance with the law.

For example, the Commission recognizes that elements of the following issues are emerging or developing: 1) certain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat, as refined by the Strategic Enforcement Teams
(Infra at IV.B); 2) accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA); and 3) coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.

These issues are illustrative and not exhaustive. Additional emerging or developing issues may be identified and recommended by the Strategic Enforcement Team for Emerging or Developing Issues (Infra at IV.B). The team will also make recommendations as to when an issue should no longer be considered a priority under the emerging or developing category.

4. **Enforcing Equal Pay Laws.** The EEOC will target compensation systems and practices that discriminate based on gender. Among the many strategies to address these issues, the Commission particularly encourages the use of directed investigations and Commissioner Charges to facilitate enforcement.

5. **Preserving Access to the Legal System.** The EEOC will also target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC’s investigative or enforcement efforts. These policies or practices include retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination, and failure to retain records required by EEOC regulations.

6. **Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** Harassment is one of the most frequent complaints raised in the workplace. Harassment claims based on race, ethnicity, religion, age and disability combined significantly outnumber even sexual harassment claims in the private and public sectors. The same is true in the federal sector. While investigation and litigation of harassment claims has been successful, the Commission believes a more targeted approach that focuses on systemic enforcement and an outreach campaign aimed at educating employers and employees will greatly deter future violations.

IV. **Implementation of SEP National Priorities**

For the SEP to succeed, resources must align with the priorities established herein. As part of the Strategic Plan for Fiscal Years 2012 – 2016, the Commission established Performance Measure 14, which requires the EEOC’s budgetary resources for FY 2014 – 2017 to align with the plan. The following guidelines are intended to ensure that SEP priorities receive the necessary attention and resources to advance the agency’s mission of ending and remedying unlawful discrimination in the workplace and to achieve the goals of a targeted and integrated national law enforcement approach.
A. Implementation of Priorities in Administrative Enforcement and Legal Enforcement (Private and Public Sectors)

Identifying priorities for enforcement is a critical tool for strategically managing investigations and for guiding case selection. The SEP and District Complement Plans (Infra at IV.C) set forth those priorities for the EEOC.

Office Directors and Regional Attorneys are entrusted to exercise leadership and prosecutorial discretion in determining whether government enforcement of select charges and cases furthers the effective implementation of the Strategic Plan, the SEP, and District Complement Plans. The pursuit of any investigation or case must be premised on the strength of the evidence and its potential as a strong vehicle for meaningful law enforcement. Charges or cases should not be pursued, even if they fall within a priority category, unless a rigorous assessment of the merits determines significant law enforcement potential. While resources will focus on priorities, meritorious charges and cases in non-priority areas may be pursued where resources permit and based on the sound discretion of the District Director and Regional Attorney.

The Office of Field Programs and Office of the General Counsel should strengthen capacity in priority areas through expanded training on investigating and litigating priority issues and should facilitate greater collaboration in the investigation, development, and resolution of priority charges.

Implementing SEP priorities through administrative and legal enforcement will require increased coordination within and between offices, particularly for systemic cases, to facilitate strategic decisions about which types of charges and cases within the SEP priorities should be pursued and where and when they should be pursued. Implementation of SEP priorities can also be facilitated by collaboration with other law enforcement partners (such as the Department of Justice on state and local government sector charges and the private bar), and through interaction with employers to promote voluntary compliance.

1. Priority Charge Handling Procedures (PCHP) Implementation

The Commission recognizes that PCHP must be updated and adapted to successfully implement the SEP. The Commission expects staff to fully comply with PCHP as described below and in forthcoming implementation guidance. Rigorous implementation of PCHP remains the key tool for reducing our pending inventory of charges, effectively managing new charges, and ensuring that enforcement priorities receive appropriate attention.

Under PCHP, “enforcement plan cases are the highest priority.” Thus, charges raising priorities identified in either the SEP or in the District Complement Plans (Infra at IV.C) should be afforded the highest priority.
Charges shall be screened promptly to determine if an SEP or district priority issue is raised. Where a preliminary assessment indicates that a priority issue in a charge is likely to have merit, the charge shall be initially designated as the highest category in PCHP. Given the complexity of some of the SEP issues, this initial designation permits a deeper and more expeditious examination to determine whether the charge is sufficiently meritorious to pursue. Charges raising SEP or district priorities that are deemed meritorious shall receive greater investigatory attention and resources to ensure timely and quality enforcement action.

Throughout the investigation of any charge, including charges raising SEP or district priorities, offices are expected to re-evaluate the charge’s category designation on an ongoing basis and should promptly re-categorize a charge, as appropriate. Charges raising priority issues, as with all charges, should be dismissed as soon as the office has sufficient information to conclude that further investigation is not likely to result in a cause finding.

Under PCHP, enforcement plan charges (SEP or DCP) are the highest priority. In addition, PCHP also includes two other types of charges among the top category: where further investigation likely would result in a cause finding or where irreparable harm will result unless processing is expedited. These designations will continue until PCHP is updated (Supra at II.D). Non-priority issue charges may be pursued if resources permit. Where they are of equal merit and strength to an SEP or DCP charge, the priority charge should take precedence.

2. Litigation Program

Meritorious cases raising SEP or district priority issues should be given precedence in case selection. Where appropriate, SEP priorities should also be considered in selecting cases for amicus curiae participation.

Where resources permit, meritorious cases in non-priority areas may also be filed where government enforcement is needed and is likely to have impact. Neither the Commission nor the General Counsel will establish rigid goals as to the number of cases, priority or otherwise, that should be filed.

The Commission recognizes that it will not be able to litigate every meritorious case that fails conciliation, including cases that fall within the SEP or under District Complement Plans. Thus, the Commission encourages the General Counsel, District Directors, and Regional Attorneys to continue to collaborate with the private bar, non-profit organizations, the Department of Justice, the Office of Federal Contract Compliance Programs (OFCCP), and the EEOC’s state and local partners to support their critical role in civil rights enforcement.

3. Systemic Program

Eradicating systemic discrimination has long been one of the EEOC’s top priorities, as underscored in the Strategic Task Force Recommendations of 2006 and reaffirmed in the Strategic Plan. The SEP and District Complement Plans (Infra at IV.C) will focus the types of
systemic investigations and cases to be pursued by the Commission on enforcement priorities at the national and local levels. Meritorious systemic charges and cases that raise SEP or district priority issues should be given precedence over individual priority matters and over all non-priority matters, whether individual or systemic. Where resources permit, meritorious systemic charges and cases in non-priority areas may be pursued based on the sound discretion of the District Director and Regional Attorney.

4. **Alternative Dispute Resolution Programs**

The Commission recognizes that mediation and other forms of alternative dispute resolution (ADR) are integral components of an effective enforcement program. Resolution of charges through mediation comprised 91 percent of all administrative settlements by the agency in FY 2012. The EEOC’s mediation program resolved 76 percent of the 11,380 charges that individuals and employers agreed to mediate in FY 2012. Most parties who participate in EEOC’s mediation program view mediation very favorably, with 98 percent reporting confidence in the program.

Mediation and other forms of ADR also play a critical role in resolving many federal sector and internal agency EEO complaints. ADR has thus contributed significantly to the successful resolution of private and public sector charges and federal sector complaints filed with the EEOC. The Commission encourages the continued use of ADR to resolve individual discrimination charges and complaints.

As the Strategic Plan and Strategic Enforcement Plan shift investigative and litigation resources to address SEP and district priorities, ADR will become even more important as a tool to improve customer service and promote timely resolution of discrimination charges filed with the agency. Offices should explore opportunities to expand the use of ADR by referring meritorious non-priority charges to mediation; through the use of pro bono mediators; partnering with local law school clinics; and encouraging participation in ADR in technical assistance programs and other agency public education events. Increased support for staff and contract mediators should be considered as resources permit.

B. **Strategic Enforcement Teams**

To ensure the development of integrated and comprehensive strategies for addressing the SEP priorities, the Chair will appoint Strategic Enforcement Teams, as appropriate. Each team will identify specific strategies among the wide range of enforcement tools at the EEOC’s disposal, including investigations, mediation, conciliation, litigation, directed investigations, commissioners charges, amicus curiae participation, federal sector oversight, federal sector hearings and appeals, policy development, research, staff training, communications, outreach and education, and state, local, and federal agency collaboration. Teams should also recommend methods of evaluating the effectiveness of the proposed strategies.
Strategies developed by the teams are to be considered recommendations to the Chair, Commission, General Counsel, Program Directors, Office Directors and Regional Attorneys. Nothing in this Section is meant to alter existing lines of authority.

C. **District Complements to the SEP**

The priorities above lay out a vision for the EEOC operating as a whole -- as a national law enforcement agency. The EEOC’s 15 district offices and 38 field, area, and local offices are integral components to the effective implementation of the SEP at the local level. The SEP contemplates that implementation strategies, types of cases investigated, and cases filed raising SEP priority issues may vary from office to office.

Even as EEOC offices focus on national priorities, the Commission recognizes that local challenges demand attention as well and specifically provides for local priorities as an important component of the District Complement Plans. District offices are best situated to address and respond flexibly to significant issues and systemic practices in their communities. In determining the district priorities to complement the SEP, District Directors and Regional Attorneys are expected to consider demographic data, charge data, trends, and input from stakeholders.

Under the leadership of the General Counsel and the Director of the Office of Field Programs, each District Office Director and Regional Attorney, in consultation with Field, Local, and Area Office Directors in their district, shall develop a District Complement Plan to the SEP by March 29, 2013. At a minimum, these plans should: 1) identify how the office will implement the SEP priorities; 2) identify local enforcement priorities, including areas for systemic investigation and litigation and strategies for addressing them; and (3) identify strategies for collaborative legal/enforcement efforts (Infra at V.A.1).

In consultation with members of the Commission, the Chair will review District Complement Plans to ensure that, taken together, they effectively complement national SEP priorities. Plans submitted by March 29, 2013 shall take effect on June 1, 2013, unless expressly disapproved by the Chair.

District Complement Plans shall be evaluated and revised as the SEP is evaluated and revised, or as necessary to remain current and relevant.

D. **Federal Sector Complement to the SEP**

The Strategic Plan also requires that the SEP address the need for a federal sector enforcement plan. After careful consideration, the Commission has determined a federal sector plan is needed.

The Office of Federal Operations and Office of Field Programs shall develop a Federal Sector Complement Plan (FCP) to the SEP by March 29, 2013. At a minimum, this plan should: 1)
identify how the federal sector will implement the SEP priorities; 2) identify specific enforcement priorities for the federal sector and strategies for addressing them; and 3) recommend strategies to improve communication, oversight, and consistency across the federal sector.

This plan should determine how enforcement priorities for the federal sector will be reflected in the federal sector case management system, required by Performance Measure 3 of the Strategic Plan. In addition, the plan should address how enforcement priorities will be incorporated into the forthcoming integrated data system required by Performance Measure 5 of the Strategic Plan, which will be used to identify and address potentially discriminatory policies or practices in federal agencies.

The Commission shall vote on the plan by May 31, 2013.

The FCP shall be evaluated and revised as the SEP is evaluated and revised, as the Strategic Plan performance measures that relate to the federal sector are implemented, or as necessary to remain current and relevant.

E. Other Priorities

The SEP replaces all existing enforcement priorities and initiatives. Like District Complement Plans, Chair initiatives should complement, rather than replace national SEP priorities.

V. INTEGRATION

The EEOC has been afforded many internal tools and authorities – administrative enforcement (including investigations, mediation, and conciliation), litigation, amicus curiae participation, policy development, federal sector oversight and adjudication, education, outreach, and research – through which it pursues its mission to stop and remedy unlawful employment discrimination. The Commission also partners with agencies at the federal, state, and local levels to enforce workplace anti-discrimination laws. Ensuring that each of these components works together efficiently and effectively is both a challenge and an opportunity for the EEOC. As noted in the guiding principles above, the Commission is committed to an integrated approach at the agency that promotes broad sharing and consideration of ideas, strategies, and best practices and furthers collaboration and coordination throughout the agency, beginning with the following requirements.

A. Integrating Administrative Enforcement and Legal Enforcement in the Private and Public Sectors

The Commission has a statutory responsibility to investigate charges. If the Commission determines there is reasonable cause to believe discrimination has occurred, it
attempts to end the alleged unlawful practice through conciliation. If conciliation fails, the Commission has the authority to bring a civil action.

Congress placed those responsibilities upon the Commission as an integrated whole -- not on discrete units within the Commission. As the Supreme Court recognized in a case brought shortly after the Commission was granted litigation authority, Congress created an "integrated, multi-step enforcement procedure" for the agency.30 Having a seamless, integrated effort between the staff who investigate and conciliate charges and staff who litigate cases on behalf of the Commission is paramount. The importance of such integrated, sequential work has been emphasized by the Commission31 and by the courts.32

Many EEOC offices already ensure that legal staff are appropriately consulted during administrative enforcement. To establish a baseline of consistency across all offices so that the “integrated, multistep enforcement procedure” that the Supreme Court referenced becomes an enduring reality, the SEP requires:

1. Consultation between Investigative and Legal Enforcement Staff. The Commission reaffirms the importance of regular and meaningful consultation and collaboration between investigative and legal staff throughout investigations and conciliations. To ensure this occurs, Legal/Enforcement Interaction procedures for such collaboration and coordination will be part of the District Complement Plans. The Commission also expects that the Quality Control Plan, required by Performance Measure 2 of the Strategic Plan for all investigations and conciliations, will further support measures to improve coordination between investigative and legal enforcement functions. The Commission believes that an integrated approach will increase quality and timeliness in the investigation of priority issues as investigative and legal staff work collaboratively on such charges.

2. Coordination of Systemic Enforcement. The Commission reaffirms that systemic enforcement must be coordinated and adequately resourced, in addition to focusing on SEP and district priorities. Pursuit of systemic matters should utilize integrated strategies, including research, outreach, and communications to have the broadest impact.

Systemic enforcement should be coordinated across EEOC districts. Offices are expected to avoid duplication of effort and promote efficiency through collaboration, consultation and strategic partnerships.

To improve coordination, the Committee of Advisors on Systemic Enforcement (CASE) shall review the agency’s systemic efforts in light of the SEP and the DCPs and shall provide recommendations for improvements to the program to the Chair, Commissioners, General Counsel and Director of the Office of Field Programs.
B. **Integrating Federal Sector Activities**

While the statutory obligations of the Commission in the federal sector differ from the Commission’s enforcement responsibilities in the private and public sectors, the same goals for equal opportunity apply for employees, applicants, and employers in all sectors. Moreover, the same principles of targeted, integrated and consistent enforcement apply.

To promote increased coordination in the federal sector, the SEP applies to the federal sector, and requires the development of an FCP (*Supra* at IV.D).

The Commission also believes that it is important to fully evaluate the current structure of the federal sector hearings program, specifically with respect to the placement and status of Administrative Judges in the EEOC’s organization, and related issues impacting the effectiveness of the program. The Commission shall vote on these recommendations (Federal Sector Organization Plan) September 30, 2013. At a minimum, those responsible for developing the recommendation to the Commission shall consult with members of the Commission, the Administrative Judges Association, EEOC Council of Locals 216, the Directors of the Office of Federal Operations and the Office of Field Programs, the Senior Executive Service Advisory Counsel and agency leadership.

C. **Integrating Education and Outreach Activities**

Congress specifically recognized the importance of education and outreach as a part of EEOC’s powers when it created the Commission in 1964 and in subsequent statutory amendments. The Commission has reaffirmed the importance of education and outreach in the Strategic Plan for 2012-2016. The EEOC conducts hundreds of fee-based and free technical training and assistance programs each year for employers, employees, advocates, agency stakeholders, and other interested members of the public. The agency also informs the public about its activities and the requirements of laws enforced by the EEOC through its website (www.eeoc.gov) and various publications. Additionally, the Commission issues regulations and other materials to assist employers and employees in understanding their rights and responsibilities under the federal anti-discrimination laws.

Clear and accessible information and legal guidance are crucial aspects of preventing discrimination and furthering enforcement. To ensure the public has easy access to information and technical assistance from the EEOC and that the EEOC is presenting a coordinated and consistent national message, the Commission adopts the following strategies:

1. The Office of Legal Counsel, in consultation with the Office of General Counsel, Office of Field Programs, and Office of Federal Operations, shall develop a multi-year plan for reviewing and updating subregulatory guidance to support and further the implementation of the SEP priorities, consistent with Performance Measure 11 in the Strategic Plan. In consultation
with members of the Commission and agency leadership, the Chair shall review and approve the plan.

2. The Office of Communications and Legislative Affairs, Office of Field Programs, Office of Federal Operations, Office of the General Counsel, Office of Legal Counsel, and the Strategic Enforcement Teams shall collaborate to develop a multi-year nationwide communications and outreach plan to ensure consistency and coordination in message content and management of the agency’s communications, program outreach, technical assistance, and legislative outreach. The plan may have both national and local components and should address the private, public, and federal sectors. In consultation with members of the Commission and agency leadership, the Chair will review and approve the plan.

3. The Office of Communications and Legislative Affairs shall assume responsibility for the management of the EEOC’s public website.

D. Integrating Research, Data and Enforcement

Among the powers granted to the Commission is the power to “make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public.”

Today, collecting and analyzing data is central to the EEOC’s enforcement and educational efforts.

The Commission must be able to conduct relevant research on a timely basis for cases in litigation, and have the ability to research broad issues of employment discrimination that are not connected to pending cases. Moreover, the Commission must have the appropriate technological capacity to collect data in a useful form.

In order to enhance the integration of its research efforts, the Commission adopts the following strategy:

The Office of Research and Information Planning, the Office of Field Programs, the Office of Federal Operations, the Office of the General Counsel, the Office of Legal Counsel, the Office of Communications and Legislative Affairs, the Office of Information Technology, and the Strategic Enforcement Teams shall collaborate to develop a multi-year research plan that identifies research needs for the SEP priority areas and includes an integrated approach for working with all offices within the Commission.

The Commission shall vote on the plan by July 31, 2013.

E. Collaboration with State and Local Fair Employment Practice Agencies

State and local Fair Employment Practices Agencies (FEPAs) are critical partners in the EEOC’s enforcement of equal employment laws. As noted above, FEPAs currently investigate
approximately 45,000 charges a year that are dual filed with the EEOC. Consistent with Performance Measure 7 of the 2012-2016 Strategic Plan, and to engage the state and local FEPAs in strategic enforcement plan implementation, the Commission adopts the following strategy:

The Office of Field Programs shall consult with the leadership of state and local FEPAs, members of the Commission, and agency leadership to develop recommendations concerning ways to engage FEPAs more fully in the pursuit of SEP and DCP priorities.

F. Supporting Private Enforcement of the Federal Anti-Discrimination Laws

The Commission has an obligation to ensure meaningful legal protections for individuals while also effectively using its resources to have the greatest impact. Given its limited resources, the EEOC litigates only a fraction of the charges it receives annually. In FY 2011, the Commission filed 261 lawsuits on the merits. Workers and their advocates filed 16,879 federal lawsuits under the federal civil rights statutes in calendar year 2011. Suits by individuals are critical to the enforcement of federal anti-discrimination laws. With regard to all charges, the EEOC’s staff may share, to the extent permitted under the law, information to facilitate swift enforcement and early resolution of charges.

To better assist individuals whose charges are not pursued by the EEOC, district offices may provide referrals to local and state bar associations.

G. Revising National Standard Operating Procedures, Practices, and Processes

As a law enforcement agency, the EEOC’s leadership and staff interact each day with thousands of individuals -- employers, lawyers, advocates, members of the general public -- throughout the Commission’s headquarters and 53 field offices. That each of our customers receives the same high quality of service and professionalism in all of our offices is of vital importance to achieving our mission and promoting good government.

In keeping with Strategic Objective I of the Strategic Plan on strategic law enforcement and Strategic Objective III on quality customer service, the Director of the Office of Field Programs and General Counsel shall submit recommendations for standard operating procedures at each stage of interaction with EEOC’s customers, including during private and public sector enforcement and federal sector adjudicatory proceedings.

With respect to federal sector matters, the Director of the Office of Federal Operations (OFO) and the Director of the Office of Field Programs (OFP) and their designees shall develop recommendations to improve communication, oversight, and consistency across the federal sector, including consistency (a) between OFO staff, Administrative Judges, and other staff of the hearings program, and (b) across OFO appeals units, and (c) across all offices.
VI. CONTINUED DELEGATION OF AUTHORITY

With the goal of increasing the efficiency and effectiveness of the agency’s enforcement programs, the Commission has delegated substantial authority to its District Directors, to its General Counsel (and through the General Counsel, to its Regional Attorneys), and to its Office of Federal Operations. Their assessment of how the delegated authority has been exercised and whether the Commission's stated goals have been better achieved as a result of such delegation shall be included in the reports from the Directors of the Office of Field Programs and the Office of Federal Operations, and the General Counsel, described in Part VII below.

In its 2012-2016 Strategic Plan, the Commission committed to improving the timeliness and quality of its enforcement activities in all sectors. Consistent with this goal, staff who investigate, litigate and adjudicate claims have an obligation to act expeditiously in all enforcement matters. The Commission has a similar obligation to expeditiously resolve the matters within its decision-making authority as well.

A. Investigations and Conciliations

The delegation of authority from the Commission to its District Directors is codified in regulations at 29 C.F.R. § 1601. Under these regulations, the Commission delegates authority to its District Directors to negotiate settlements and conciliation agreements, issue no cause findings, and make reasonable cause determinations in most cases that come before the Commission. The Commission reaffirms this delegation of authority.

B. Legal Enforcement

1. The delegation of litigation authority to the General Counsel was established in the 1996 National Enforcement Plan. The Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:

   a. Cases involving a major expenditure of resources, e.g., cases involving extensive discovery or numerous expert witnesses and many systemic, pattern-or-practice or Commissioner's charge cases;

   b. Cases that present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;

   c. Cases that the General Counsel reasonably believes to be appropriate for submission for Commission consideration because of their likelihood for public controversy or otherwise (e.g., recently modified or adopted Commission policy);
d. All recommendations in favor of Commission participation as *amicus curiae*, which shall continue to be submitted to the Commission for review and approval.

A minimum of one litigation recommendation from each District Office shall be presented for Commission consideration each fiscal year, including litigation recommendations based on the above criteria.

2. The Commission ratifies its decision to give the General Counsel the authority to redelegate to regional attorneys the authority to commence litigation. The Commission encourages such redelegation of litigation authority as appropriate.

3. The Commission restates and ratifies its April 19, 1995 delegation to the General Counsel of the authority to refer public sector Title VII and ADA cases which fail conciliation to the Department of Justice, as well as the authority to redelegate this authority to Regional Attorneys. The Commission further authorizes delegation of authority to the General Counsel to refer public sector GINA cases which fail conciliation to the Department of Justice, as well as the authority to redelegate this authority to Regional Attorneys.

C. **Federal Sector**

The Commission regulations at 29 C.F.R. § 1614 grant certain authority in the federal sector to the EEOC’s staff. These regulations authorize Administrative Judges to hold hearings on federal sector complaints and authorize the Office of Federal Operations to issue decisions on appeals "on behalf of the Commission." The Commission reaffirms this authority.

VII. **EVALUATION**

The Commission believes this is an opportune moment for transformative change. But such change will require rigorous and consistent implementation of the strategic enforcement and integration recommendations of the SEP.

A. **Commission Oversight on Implementation of SEP**

The Commission has the responsibility to carry out its statutory mandate in a manner that provides consistent and quality service and that maximizes the use of agency resources to stop and remedy unlawful employment discrimination. The SEP puts into place systems for regular communication with the Chair and members of the Commission to fulfill their oversight responsibilities.
1. **Quarterly Commission Meetings on SEP Enforcement**

Beginning in the second quarter of FY 2013, the Chair will convene quarterly meetings on implementation of the SEP. As noted in Part VI above, all office directors must include an assessment of the delegated authority in their quarterly report.

The Director of the Office of Field Programs shall report on significant decisions by administrative judges in the federal sector and the Director of the Office of Federal Operations shall report on appellate decisions by OFO attorneys on priority areas under the SEP and Federal Sector Complement Plan, and on other significant issues. A written report by each Director to the Commission shall summarize significant decisions by each priority area.

The Director of the Office of Field Programs shall report on investigations, conciliations, and pre-determination settlements on SEP and district priority areas and other significant matters, such as the effectiveness of legal/enforcement interaction strategies. A written report to the Commission shall summarize these investigations, conciliations and settlements by each priority area.

The General Counsel will report to the Commission on cases and settlements within SEP and district priority areas, other significant litigation, and other significant matters, such as the effectiveness of legal/enforcement interaction strategies. A written report to the Commission shall summarize these cases and settlements by each priority area and include non-priority litigation. The report shall also include a discussion of significant Supreme Court decisions that may affect the work of the Commission.

2. **Annual Reporting on SEP Implementation**

As a federal agency, the Commission is required to issue a Performance and Accountability Report (PAR) after the end of each fiscal year. The report presents the agency’s most significant achievements in enforcement, communications, outreach, research, policy and technology efforts and highlights progress made toward achieving the Performance Measures of the Strategic Plan. In keeping with the principle of accountability, the Commission shall hold a public meeting within 45 days of the release of the PAR on implementation of the Strategic Plan, which will include a discussion of the Strategic Enforcement Plan, to evaluate progress and consider recommendations for improvement.

**B. Timeline and Reporting Requirements**

<table>
<thead>
<tr>
<th>Required by SEP</th>
<th>Key Deadlines</th>
</tr>
</thead>
</table>
| Quality Control Plan* | Submitted to the Commission by March 29, 2013.  
Voted on by the Commission by April 30, 2013. |

District Complement Plans (15) Submitted to the Chair by March 29, 2013. Approved by the Chair by May 31, 2013. 
*If not disapproved by this date, a plan becomes effective.*

Research and Data Plan Submitted to the Commission by June 28, 2013. Voted on by the Commission by July 31, 2013.


*The Quality Control Plan is a requirement of the Strategic Plan.*

**EFFECTIVE DATE**

The SEP is effective the day following approval by the Commission and will remain in effect until superseded, modified or withdrawn by vote of a majority of members of the Commission.  

The Commission approved the SEP on December 17, 2012 by a vote of 3-1.

**ACKNOWLEDGEMENTS**

The Commission would like to thank all those who participated in the development of the SEP, beginning with the leaders and members of the SEP Work Group and all those who submitted public comments.
APPENDIX A
EEOC STRATEGIC ENFORCEMENT PLAN WORK GROUP

Leadership
Chair Jacqueline A. Berrien
General Counsel David Lopez
Memphis District Director Katharine Kores

Members
Lynette Barnes
Regional Attorney,
Charlotte District Office

Dexter Brooks
Director of Federal Sector Programs,
Office of Federal Operations

Robbie Dix
Director, Review Division,
Office of Federal Operations

Martin Ebel
Deputy Director, Houston District Office

Greg Gochanour
Supervisory Trial Attorney,
Chicago District Office

Keith Hill
Director, New Orleans Field Office

Dana Hutter
National Systemic Program Manager,
Office of Field Programs

Spencer Lewis
District Director,
Philadelphia District Office

Carol Miaskoff
Acting Associate Legal Counsel,
Office of Legal Counsel

Christine Nazer
Acting Communications Director, Office of
Communications and Legislative Affairs

Jerome Scanlan
Assistant General Counsel,
Office of General Counsel

Tonyaa Shiver
Investigator, EEOC Dallas District Office;
National Council of EEOC Locals No. 216

Cathy Ventrell-Monsees
Senior Attorney Advisor, Office of the Chair

Ex-Officio Members
Claudia Withers
Chief Operating Officer and
Performance Improvement Officer

Deidre Flippen
Director, Office of Research, Information
and Planning and Deputy, Performance
Improvement Officer

Key Staff Support
Leslie Annexstein, Senior Attorney Advisor, Office of General Counsel
Joi Chaney, Special Assistant, Office of the Chair
Patrick Patterson, Senior Counsel, Office of the Chair
EEOC Seeks Public Input in Developing Strategic Enforcement Plan

In February 2012, the U.S. Equal Employment Opportunity Commission (EEOC) approved a Strategic Plan for Fiscal Years 2012 – 2016. The Strategic Plan establishes a framework for achieving the EEOC’s mission to stop and remedy unlawful employment discrimination by focusing on strategic law enforcement, education and outreach, and efficiently serving the public. The first performance measure of the plan requires the Commission to approve a Strategic Enforcement Plan (SEP). The Commission is now developing the SEP and would like input from the public. We encourage participation from individuals, employers, advocacy groups, agency stakeholders and other interested parties.

While no specific format is required, we are most interested in what the EEOC’s national priorities should be for the next three years to have the greatest impact in combating discrimination in the workplace; and recommendations for improving enforcement, outreach and prevention, and customer service. Please also include a contact email and/or mailing address.

Suggestions must be submitted by 5:00 pm EDT on June 19, 2012 to strategic.plan@eeoc.gov or received by mail at Executive Officer, Office of the Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

All submissions will be reviewed for possible inclusion in a future Commission meeting in Washington, D.C. on the development of the SEP. If selected, the author or a representative would be invited to testify before the Commission in person, via phone, or via live video.

For general inquiries about the 2012 Strategic Plan or the development of the SEP, please email strategic.plan@eeoc.gov or call (202) 663-4070/(TTY: 202-663-4494). For press inquiries, please contact the Office of Communications and Legislative Affairs at (202) 663-4191 or newsroom@eeoc.gov. If you are a private citizen seeking EEOC information, please see the "Contact Us" page of our website at www.eeoc.gov/contact or call 1-800-669-4000.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.
APPENDIX C

Press Release 7-18-12

EEOC Holds Unprecedented Public Meeting to Hear Views on Strategic Enforcement Plan

Five Roundtable Discussions With 32 People From Many Different Viewpoints Presented

WASHINGTON—The U.S. Equal Employment Opportunity Commission today held an unprecedented public meeting at which academics, representatives of the civil rights, business and federal sector communities, as well as former EEOC leaders and current employees presented their views about the agency’s proposed Strategic Enforcement Plan (SEP).

“We welcome the views of interested members of the public as we consider how to better leverage the EEOC’s resources to improve enforcement, outreach and customer service,” said EEOC Chair Jacqueline Berrien. “An open strategic planning process ensures that the Commission is prepared for 21st century challenges and also honors the spirit of open government.”

The Strategic Enforcement Plan grew out of the agency’s Strategic Plan (Plan) adopted at a Commission meeting on February 22, 2012, governing fiscal years 2012-2016. That Plan set forth three underlying values that will guide the work of the EEOC: commitment to justice, accountability, and integrity; and three strategic objectives: strategic law enforcement, education and outreach, and efficiently serving the public. One requirement of the Strategic Plan was to develop the SEP and have it in place by the start of fiscal year 2013 — October 1, 2012.

While all cabinet level departments and agencies are required to develop Strategic Plans with enforcement components, it is highly unusual that plans are developed with so much input from the public. The EEOC sought views about what its national priorities should be for the next three years to have the greatest impact in combating discrimination in the workplace; and also recommendations for improving enforcement, outreach, and customer service. Over 80 organizations and individuals responded to the request for input, with their responses totaling more than 450 pages.

At the meeting, participants noted the importance of the EEOC continuing to use systemic investigations and litigation to target specific issues and practices where government enforcement will have the greatest impact. Several advocacy groups urged the Commission to focus its enforcement efforts on hiring discrimination and retaliation which affect so many workers, as well as focusing on pay, pregnancy, and caregiver discrimination, and developing issues under the Americans with Disabilities Act Amendments Act. Both employee and employer representatives highlighted the need for consistent practices and procedures across
Participants from many different backgrounds requested the Commission devote more resources to enhance efficient charge processing, and urged new outreach and education initiatives, including greater use of social media.

Participants in the roundtable focusing on the EEOC’s federal sector program included representatives from other agencies, unions representing federal employees, and federal employee affinity groups. They noted, among other issues, the need to clarify the role of agency counsel in the investigative stage of proceedings, the need for increased oversight of federal agency enforcement, the need for training for managers on supervision as well as EEO, and for employees on navigating the complaints process.

The Commission will consider all of the input—both written and from the meeting—in crafting its SEP. That document will be posted on the Commission’s website when finalized. Additionally, the comments that were submitted will be available for onsite review in the EEOC’s library.

The EEOC will hold open the July 18, 2012, Commission meeting record for 15 days, and invites audience members, as well as other members of the public, to submit written comments on any issues or matters discussed at the meeting. Public comments may be mailed to Commission Meeting, EEOC Executive Officer, 131 M Street, N.W., Washington, D.C. 20507, or e-mailed to Commissionmeetingcomments@eeoc.gov.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.
EEOC Seeks Input on Strategic Enforcement Plan

The U.S. Equal Employment Opportunity Commission (EEOC) has released for public comment a draft of its Strategic Enforcement Plan (SEP). Comments must be submitted by 5:00 pm ET on September 18, 2012 at strategic.plan@eeoc.gov or received by mail at Executive Officer, Office of the Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, D.C. 20507. The Commission plans to vote on the draft plan at the end of this fiscal year.

The first requirement of the EEOC's Strategic Plan for Fiscal Years 2012 - 2016 was to develop the SEP by the start of fiscal year 2013 -- October 1, 2012. The SEP will establish the Commission's priorities and integrate all components of EEOC's private, public and federal sector enforcement.

The process for developing the SEP has been highly inclusive and collaborative. The plan was developed by the Commission with input from a Work Group consisting of district and headquarters staff, led by Chair Jacqueline Berrien, General Counsel P. David Lopez, and Memphis District Director Katharine Kores. On June 5, the Commission solicited written input on the SEP's development. In response, comments were submitted by more than 100 individuals, organizations, and coalitions - internal and external to the agency - from across the nation. On July 18, the Commission held a public meeting to receive input from more than 30 stakeholders on the issues they believed should be addressed in the plan.

The Commission is continuing this inclusive effort by soliciting comments from the general public on a draft of the SEP. Your input is vital to their efforts to ensure accountability to our nation's workers, employers, and taxpayers in general. All comments will be reviewed and considered as the Commission continues to edit the plan.

The EEOC has served as the nation's lead enforcer of employment antidiscrimination laws and chief promoter of equal employment opportunity (EEO) since 1965. The agency is responsible for enforcing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, Section 501 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act of 1990, and Title II of the Genetic Nondiscrimination Act of 2008. Together, these laws protect private, public, and federal workers from employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, or genetic information. They also make it illegal to retaliate against a person for filing a charge of, or participating in an investigation or lawsuit regarding, employment discrimination.

U.S. Equal Employment Opportunity Commission – Strategic Enforcement Plan
For general inquiries about the plan, please email strategic.plan@eeoc.gov or call (202) 663-4070/(TTY: 202-663-4494). For press inquiries, please contact the Office of Communications and Legislative Affairs at (202) 663-4191 or newsroom@eeoc.gov. If you are seeking EEOC information, please call (202) 663-4900 or e-mail info@eeoc.gov. Further information about the EEOC is available on its web site at www.eeoc.gov.
ENDNOTES


3  “Charges” are filed in private and public sector enforcement proceedings, see 42 U.S.C. §2000e-5(b), while “complaints” are filed with federal agencies in federal sector enforcement proceedings. See 42 U.S.C. §2000e-16(c).


6  This represents a decrease of 4.7 percent from 8,113 requests for hearings in FY 2011 and a decrease of 16 percent from 5,175 appeals in FY 2011.

7  Strategic Plan, supra note 1, at 11.

8  Id. at 16-18.

9  See David Weil, Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division of the Department of Labor (2010).

10  The Commission has a statutory obligation to accept charges, serve notice on the respondent, and to “make an investigation.” 42 U.S.C. § 2000e-5(b). The statute does not define the elements or scope of that investigation, nor condition an individual’s right to sue on the agency taking any action. Federal Express, Corp. v. Holowecki, 552 U.S. 389 (2008). Determining the appropriate extent of an investigation of a particular charge lies within the discretion of the agency, guided by the purposes of the anti-discrimination statutes.


12  “Category A: Enforcement Plan/Potential Cause Charges. The first category includes (1) charges that fall within the national or local enforcement plan and (2) other charges where further investigation will probably result in a cause finding. Cases should also be classified as
Category A if irreparable harm will result unless processing is expedited…. Within resource constraints, enforcement plan cases are the highest priority.” *Id.* at 4.


14 *Strategic Plan, supra* note 1, at 11.


19 In the last four years, one third of the systemic discrimination suits filed by the agency challenged discriminatory harassment in the workplace.

20 *Strategic Plan, supra* note 1, at 12.

21 As required by the Strategic Plan, more detailed internal guidance will be developed and coordinated by the Chair to insure that the SEP is fully implemented.
22 *Strategic Plan, supra* note 11, at 4.

23 The Commission defines systemic cases as pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area. While systemic cases typically involve a class of individuals, they may also originate from a single charging party alleging that a policy is discriminatory, for example. In the current Strategic Plan, the Commission established a performance measure requiring that systemic cases figure more prominently in the agency’s litigation docket by setting a target percentage rather than a fixed number of cases filed each year. *See Strategic Plan, supra* note 19.

24 An administrative settlement is a signed agreement to which the EEOC and the charging party or the respondent are parties, negotiated before a determination has been made on the merits of the case.


26 *Id.* at 26.

27 *Strategic Plan, supra* note 1, at 16.

28 *Id.* at 17-18.

29 *Id.* at 19-20.

30 *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359-60 (1977) (“In the Equal Employment Opportunity Act of 1972, Congress established an integrated, multistep enforcement procedure culminating in the EEOC’s authority to bring a civil action in a federal court. That procedure begins when a charge is filed with the EEOC . . . The EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true . . . When ‘the Commission (is) unable to secure . . . a conciliation agreement acceptable to the Commission, the Commission may bring a civil action….’”). (footnotes omitted; emphasis added).

31 In the 1996 NEP, the Commission required a “coordinated enforcement strategy, which the Comprehensive Enforcement Program (CEP) of 2000 reaffirmed by “link[ing] and integrat[ing] every phase of the Commission’s work in the private sector program, from outreach to taking and developing charges of discrimination, investigation, and final resolution.”

32 *See also* Hickey-Mitchell Co., 507 F.2d 944, 948 (8th Cir. 1974) (“’The Commission’s 'power of suit and administrative process [are not] unrelated activities, [but] sequential steps in a
unified scheme for securing compliance with Title VII.")(alterations in original), quoting EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1333 (D. Del. 1974)).


34 See Strategic Plan, supra note 1, at 23-27.


36 The Commission anticipates that the Quality Control Plans for private sector investigations and for federal sector hearings and appeals as part of the implementation of the Strategic Plan will provide focused attention on consistency and quality issues.


38 29 C.F.R. § 1614.405 (2012).

39 See Strategic Plan, supra note 1 at 15.
What’s Bugging You?

Tuesday, August 2, 2016 | 11:00 am - 12:15 pm
Jenny Kitchings

Jenny Kitchings, Clerk of the South Carolina Court of Appeals, was elected to the Executive Committee of the National Conference of Appellate Court Clerks (NCACC) at the organization’s 2015 annual meeting in Utah.

Jenny Abbott Kitchings received a Bachelor of Arts from Converse College with a major in Modern Languages, including Spanish, Italian, and French. She graduated from the University of South Carolina School of Law with a Juris Doctor and from the top-ranked Moore School of Business with an International Masters of Business Administration.

Upon graduation, Jenny came to work in the judicial system as a law clerk for the Honorable Daniel F. Pieper, then a trial judge. She transitioned to private practice upon Judge Pieper’s election to the Court of Appeals. She later returned to the court system as a law clerk at the Court of Appeals, until her appointment as Clerk of Court on January 25, 2012.
Real Ethics in a Virtual World

Wednesday, August 3, 2016 | 8:30 am – 10:30 am
Justice Daniel J. Crothers

Justice Daniel J. Crothers has served on the North Dakota Supreme Court, Bismarck, North Dakota, since June 2005. Prior to taking the bench, he was a commercial litigator and legal and judicial educator. Justice Crothers received his undergraduate and law degrees from the University of North Dakota. He has written and lectured on multitude of topics including the interaction of technology and legal and judicial ethics, discovery and admissibility of electronically stored information in civil and criminal proceedings, judicial disqualification, and ethics for new judges and their families. He has taught lawyers and judges throughout the United States as well as from Guam, the Virgin Islands, and Thailand.

He is a member of the ABA Standing Committee on Ethics and Professional Responsibility. He is a past president of the State Bar Association of North Dakota and past chair of the ABA Standing Committee on Client Protection, past chair of the ABA Center for Professional Responsibility’s Policy Implementation Committee, and past member of the ABA President’s Taskforce on Cybersecurity.
Real Ethics in a Virtual World

Daniel J. Crothers, Justice
North Dakota Supreme Court

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Ethical Duties

- ABA Rule Prof. Conduct 1.1, comment [8]:
  - "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject"

Lawyer’s Duty

- “A lawyer shall act with reasonable diligence and promptness in representing a client”
  
  ABA Model Rule Prof. Conduct 1.3
Ethical Duties

- ABA Rule Jud. Conduct 2.5(A):
  - "A judge shall perform judicial and administrative duties competently and diligently"

- Ethical Duties
  - "A lawyer shall not reveal information relating to the representation of the client [unless certain exceptions apply]"

  ABA Model Rule Prof. Conduct 1.6(a)

- Ethical Duties
  - Rule 1.6:
    - "(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client"

  ABA Model Rule Prof. Conduct 1.6 (c)
Ethical Duties

Ethics Rule 1.6

- "Paragraph (d) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."

ABA Model Rule Prof. Conduct cmt. 18

Ethical Duties

Ethics Rule 1.6 “reasonable precautions”

- "The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure."

ABA Model Rule Prof. Conduct cmt. 18

Ethical Duties

Rule 1.6 "reasonable efforts“ factors?

- Sensitivity of the information
- Likelihood of disclosure without additional safeguards
- Cost of employing additional safeguards, and
- Difficulty of implementing safeguards, and
- Extent safeguards adversely affect lawyer’s ability to represent clients (e.g., by making a device or important software excessively difficult to use)

ABA Model Rule Prof. Conduct 1.6 cmt. 18
Ethical Duties

- "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing"

ABA Model Rule Jud. Conduct 2.10(A)

Ethical Duties

- "A judge shall require court staff, court officials, and others subject to the judge’s direction and control to refrain from making statements that the judge would be prohibited from making"

ABA Model Rule Jud. Conduct 2.10(C)

Ethics

CLOUD COMPUTING
Cloud Computing

What is it?
- "noun: Internet-based computing in which large groups of remote servers are networked so as to allow sharing of data-processing tasks, centralized data storage, and online access to computer services or resources"

www.dictionary.com

Cloud Computing

Court personnel regularly use personal laptop computers and iPads for judicial work.
- Work includes transferring case-related information between devices via Dropbox or iTunes, depending on the internet connection

Any problems or concerns?

Cloud Computing

Can judges use cloud computing resources?

Do not know but lawyers can, usually...

- Alabama Bar Ethics Op. 2010-02
- Arizona Bar Ethics Op. 09-04
- California Bar Ethics Op. 2010-179
- Iowa Bar Ethics Op. 11-01
- Massachusetts Bar Ethics Op. 12-03
- North Carolina Ethics Op. 6 (2011)
- North Dakota Bar Ethics Op. 1999-03
- Ohio Ethics Op. 2013-03
- Oregon Bar Ethics Op. 2011-188
- Pennsylvania Ethics Op. 2011-200
- Vermont Bar Ethics Op. 2003-03
Ethics

SMARTPHONES, TABLETS & OTHERS

Smartphones & Tablets

- Data Loss (High Risk)
- Phishing, Spyware, Network Surveillance and Dialware attacks (Medium Risk—But growing)
- Denial of service attacks and network congestion (Low Risk)

Ethics

INDEPENDENT INVESTIGATION
The Rule?

- “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed”

ABA Model Code of Judicial Conduct 2.9(C)

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The Rule?

- “The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic”

ABA Model Code of Judicial Conduct 2.9 cmt. 6

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The Rule?

- “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”

United States R. Evid. 201(2)
Non-Exclusive Factors

Consider before internet researching:

- 1. Is the information easily available to litigants?
- 2. Has a case actually been assigned to the judge?
- 3. If 2 is “no,” is it reasonably likely that the type of case will be assigned to the judge?
- 4. Is the information the type that would and could be the subject of a request for judicial notice?
- 5. Is the information akin to the definition of a word in a dictionary?
- 6. Is the information “background knowledge” of a type necessary to understand issues at trial?
- 7. Are disclosure to the parties and the opportunity to be heard sufficient remedies?

Ethics

QR CODES

QR Codes

- Malicious QR code displayed
- Malicious QR code pasted over legitimate one
- Result:
  - Directs device to unsafe website
  - Installs app or software on device
  - Jailbreaks or root device and installs malware
  - Copies and transmits private, personal or confidential judicial information
What is Cybersecurity?

- “[M]easures taken to protect a computer or computer system (as on the Internet) against unauthorized access or attack.”
  - [link to Merriam-Webster's dictionary](http://www.merriam-webster.com/dictionary/cybersecurity)

Information at Risk

- Portable electronic devices:
  - Laptop computers
  - Tablet computers
  - Smartphones
  - Portable hard drives
  - Flash drives, CDs or DVDs
  - Printers or copy machines
Information at Risk

Cloud computing dangers:
- Information is transmitted over the internet
- Information is stored on servers not owned or controlled by user
- Servers can be located anywhere in the world
- Information is available only when internet and third-party’s servers are working
- Information can persist after you “delete” it

Wi-Fi dangers:
- Software to hack Wi-Fi networks is easily available on the internet
- Rogue wireless access points can be hooked up by anyone, exposing entire computer network to unauthorized users

Other points of penetration or ESI loss:
- Users opening maliciously linked emails, text messages or website links (“phishing”)
- QR codes linking to malicious websites
- Transmitting documents containing metadata
- Postings on social media, blogs or forums
- Mixing client and personal data on BYOD
Precautions and Solutions

- Live in a cave and get off the grid
- Maintain all electronic devices
  - Current operating system
  - Meaningful password
  - Firewall to internet
  - Virus protection software
  - Consider encryption
- Maintain timely backup of all data
- Select WI-FI and cloud vendors carefully

Daniel Crothers
701-328-4205
dcrothers@ndcourts.gov
Colorado Library Publishing Project

Wednesday, August 3, 2016 | 2:15 pm – 3:15 pm
Daniel B. Cordova

Career:
Daniel B. Cordova was appointed Colorado Supreme Court Librarian on December 29, 2006. Immediately prior to his appointment as Supreme Court Librarian, Cordova worked for five-and-a-half years as the Reference Librarian for the U.S. Courts Library at the Tenth Circuit Court of Appeals, also located in Denver. Additionally, he was employed by the Tucson-Pima Public Library from 1995-2000 where he worked in 17 of its then 22 branches, including urban, rural, community center, and detention facility locations. Including his military service, 1991-1996, Cordova has worked in public service for 25 years. He holds a juris doctor degree from the University of Colorado-Boulder and a Master’s degree in Library and Information Science from the University of Arizona-Tucson.

Responsibilities:
The Colorado Supreme Court Librarian is responsible for the overall operation of the Supreme Court’s Library. He prepares budget estimates to match the various requirements of the Library program, and supervises the arrangement of the Supreme Court Law Library and similar materials to facilitate legal research, ready reference, and patron assistance needs. The Library exists to serve the legal information needs of not only the State Bench, but also the Bar, and General Public. Intergovernmental assistance is also provided upon request and as required by statute. Library services are provided in place and virtually, via online and hard copy materials. The Supreme Court Librarian also serves as a consultant to other librarians when appropriate.

Cordova is a past-president of the Colorado Association of Law Libraries and current president of the Colorado Association of Libraries. He currently serves on the Governor’s Historical Records Advisory Board, and served as Chair of the Legislative Digital Policy Advisory Committee, associated with the implementation of the Uniform Electronic Legal Material Act. Cordova is also interim executive director of the Equal Access Center.
Christopher T. Ryan

Christopher T. Ryan was appointed clerk of the Colorado Supreme Court on May 23, 2011. He has also been the Clerk of the Colorado Court of Appeals since December 3, 2007. Ryan has worked in several positions for the Colorado Judicial Branch beginning as a Bailiff in the Denver District court in 1990. Immediately prior to his appointment as Clerk of the Court of Appeals, Ryan served as a Senior Budget Analyst with the Colorado State Court Administrator’s Office. Additionally, he was employed by the National Center for State Courts from 2001-2005 as a Senior Court Management Consultant. His work focused on the assessment of operations and caseflow management in the courts and the development and maintenance of workload assessment models for judges and court staff. Ryan holds a bachelor’s degree in political science from the University of Colorado.
Backlash – Responses to Judicial Branch Decisions

Wednesday, August 3, 2016 | 3:15 pm – 4:15 pm
Callie T. Dietz

Callie T. Dietz became State Court Administrator of the Washington State Administrative Office of the Courts (AOC) in 2012. Before that, she retired from the Alabama Administrative Office of Courts, where she was the first woman to serve as Administrative Director of Courts. Ms. Dietz retired with 32 years of experience in state government, having served as Director of the Alabama Judicial College and Family Court Divisions; Assistant Director of the Alabama Judicial College and Municipal Court Divisions; and State Coordinator of Court Referral Programs as well as employment with the Department of Mental Health and Mental Retardation. She has many years of professional and volunteer experience in addiction treatment, prevention and education at the local, state and national level. Much of her career has also been devoted to judicial education for all court officials and employees and to the expansion of services for court defendants with special needs (addiction, mental illness, domestic violence, elder abuse and neglect or juvenile/family issues). Ms. Dietz serves on the COSCA Board of Directors and as Chair of both the Education Committee and the Elders and the Courts Committee. She is also a member of the Services to New Members Committee. Additionally, she is a Member of the National Association of State Judicial Educators and the National Association for Court Management. She has received numerous awards for her work with the courts, criminal justice associations and judicial education, such as the C. C. “Bo” Torbert, Jr. Award, the District 9 State Employee Public Service Award, Presidents Award from the Alabama Association of Community Corrections, Clerk’s Association Appreciate Award and the Carl Nowell Leadership Award. Additionally, she has been honored by community groups such as United Way and other non-profit agencies including being selected in 1996 as a “Local Hero in Montgomery, AL” which enabled her to carry the Olympic Torch on its way to Atlanta. She has a Master of Public Administration degree from Auburn University and Bachelor of Arts Degree from Jacksonville State University.
Stephanie Bunten, CPA, JD, LLM
Budget and Fiscal Officer Kansas Office of Judicial Administration, Topeka

As budget and fiscal officer in the Office of Judicial Administration, Stephanie Bunten directs the fiscal office and its accounting functions, including maintaining financial, budgetary and payroll records. She also is responsible for developing cost accounting procedures for effective fiscal control and for compiling financial data for annual and other reports. Previously she worked as a certified public accountant for Mize Houser and Company, PA. Bunten also has prior judicial branch experience working as a research attorney for Judge Henry W. Green on the Kansas Court of Appeals, a position she held for seven years. Bunten has a Bachelor of Business Administration Accounting degree from Washburn University, a law degree from the Washburn University School of Law, and a Master of Laws degree from the University of Missouri-Kansas City School of Law. She is a current member of the Kansas CPA Society and the American Institute of Certified Public Accountants, and a past member of the Meals on Wheels Board, Metropolitan Ballet of Topeka, and Safe Streets National Night Out Against Crime.
BACKLASH

Responses to Judicial Branch Decisions

National Conference of Appellate Court Clerks
August 3, 2016
Recent Decisions
School Funding and Taxes
The State has failed to meet its duty under article IX, section 1 by consistently providing school districts with a level of resources that falls short of the actual costs of the basic education program.
The portions of I-1240 designating charter schools as common schools violate article IX, section 2 of the Washington Constitution and are invalid. For the same reason, the portions of I-1240 providing access to restricted common school funding are also invalid. These provisions are not severable and render the entire Act unconstitutional.
Washington State Constitution

Article IX, Section 2
Public School System
... But the **entire revenue** derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

Article I, Section 29
Constitution Mandatory
The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

Article IX, Section 1
It is the **paramount duty** of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste or sex.
Retaliation

Punishing the Supreme Court for Performing the Duties of Their Job
Retaliation

Some ways the Legislature is retaliating against the Supreme Court:

• Attacks via social media.
• Creation of legislation or initiatives to negatively impact the Supreme Court.
• Eliminating the Chief Justice’s State of the Judiciary Address
Retaliation

RIDICULING THE SUPREME COURT FOR PERFORMING THEIR JOB

@senatorfain please make your questions multiple choice when addressing the WA SC. It gives them a 25% chance of being correct.

@btsigall @WA_News_Junkie at 4:59 the Washington State Supreme Court is going to declare Mother's Day unconstitutional.

Breaking News: Baumgartner fines Supreme Court for civic incompetence. Orders Judges to write "co-equal branches" 100x per day. #waleg

The only difference between John Stewart and the WA Supreme Court is that Stewart is funny on purpose.

thenewstribune.com/opinion/editor...
Retaliation

RIDICULING THE SUPREME COURT FOR PERFORMING THEIR JOB

Michael Baumgartner
January 15, 2014

This bag of sand and hammer is my proposed response to the state Supreme Court's absurdity that it controls the state budget. #StayInYourLane

Matt Manweller
October 13, Ellensburg WA

Dear WA Sup Ct. When the rappers are against you, it is a bad sign. Although I don't think many singers in this video should quit their day jobs, it's too funny not to post.

https://www.youtube.com/watch?v=B252ninTZqM&t=2&app=desktop
Retaliation

LEGISLATION/INITIATIVES TO CONTROL THE ACTIONS OF THE SUPREME COURT

Matt Manweller
September 14

Tomorrow at 1 pm, I will submit an initiative to the Legislature at the Secretary of State’s office.

The initiative will require WA Supreme Court justices to recuse themselves from a case if they have received more than $1,000 from any party to that case.

Justice should not be for sale in WA. Legal decisions should not go to the highest bidder.

Matt Manweller @MManweller 10/28/15
You can now donate to the Stop Buying Our Judges initiative.

Click here to support Stop Buying Our Judges by St... fundly.com

Michael Baumgartner
September 9

I will be introducing legislation to block judges from hearing cases brought by donors to their campaigns. The WEA teachers union has bought our Supreme Court elections and our kids are suffering from the result. This conflict of interest must end and balance and confidence must returned to the court.

http://www.seattletimes.com/.../the-trouble-with-union-donat...

The trouble with union donations, school cases

Conservatives are bashing the state Supreme Court for its recent school rulings. Most of the critiques are off-target, but one hits closer than the justices...
Retaliation

STATING THE SUPREME COURT’S CAMPAIGN CONTRIBUTORS INFLUENCE THEIR DECISIONS

Matt Manweller @MManweller 9/4/15
Ever notice the WA Sp Ct only issues press releases when their decisions benefit their donors? #waleg

Matt Manweller
September 7 - Ellensburg, WA.

"Checkbook justice" is the best term I have heard to describe the WA Sup. Court's decision to stop charter schools on behalf of the WEA. How better to describe a system where unions can buy the decisions they want?

Matt Manweller @MManweller 8/13/15
@bFenstermacher all 9 justices funded by WEA. No surprise.
Retaliation

STATING THE SUPREME COURT’S CAMPAIGN CONTRIBUTORS INFLUENCE THEIR DECISIONS

Matt Manweller
September 22

State Supreme Court Keeps Dancing to WEA’s TUNE

Michael Baumgartner @Votebaum... 11/3/15
Odds of reversal about the same as Supremes sending their WEA checks back. #DancePuppetsDance #KidsDeserveBetter

Four attorneys general refute Supreme Court's c... mynorthwest.com
Retaliation

CLAIMS OF JUDICIAL OVERREACH

Multiple Choice Friday: How would you respond to the judicial overreach of the mushy-headed leftists on our union funded state Supreme Court? A) accept the ruling and run back to Oly to satisfy them by passing an income tax; B) Stand firm that judges don't have the authority to write budgets and that improving education is about reform, not throwing ever more money in a broken system; C) Advance legislation like school vouchers and increased local control that increases choice, accountability, and parental involvement in students outcomes. D) Impose a fine of $200K a day on the court for civic incompetence.
https://www.washingtonpolicy.org/..../should-washington-follow....

Should Washington follow New Jersey's response to Court K-12 sanctions? Fuhgeddaboudit |...

Matt Manweller Retweeted
Bill Bryant @BillBryantWA 8/19/15
The court is micromanaging instead of acting as co-equal branch of government. The court is filling a leadership vacuum in the gov office.

Matt Manweller Retweeted
Bill Bryant @BillBryantWA 8/19/15
The role of the supreme court is to rule on the constitutionality of laws passed, not dictate what laws to pass.

Matt Manweller Retweeted
Hans Zeiger @hanszeiger 9/4/15
Very concerned that the @WASupremeCt is acting more like a legislature than a court
Retaliation

THREATS OF REPLACING THE SUPREME COURT

Matt Manweller
August 13
The Washington Supreme Court court just issued a contempt citation against its own citizens and fined the tax payers $14 million. It is time for articles of impeachment.

Matt Manweller
August 25 · Ellensburg, WA
Hey Folks. Even the Seattle Times is coming around to realizing our state Supreme Court is a partisan, ideologically driven court that ignores the plain language of the law. 2016 is coming. Let’s be ready!!

Matt Manweller
September 4
The Washington St Supreme Court just declared all charter schools unconstitutional. They did it on a Friday afternoon before Labor Day to avoid the media. Who wants to help me elect three new Justices in 2016 now??
Questions?

Callie T. Dietz
Administrative Office of the Courts
PO Box 41170
Olympia, WA 98504-1170
(360) 357-2120
callie.dietz@courts.wa.gov
www.courts.wa.gov
Court Structure in Germany and Technology Initiatives in European Courts

Thursday, August 4, 2016  |  8:45 am - 10:00 am
Curriculum vitae

of

Dr. iur. Ulrich Herrmann (married, two children 30 and 24 years old)

August 4th, 2015: Appointment to Presiding Justice of the Federal Court of Justice (Bundesgerichtshof = German Federal Supreme Court for Civil, Family and Criminal cases), Chairman of the IIIrd Civil Panel (jurisdiction for state liability, liability of notaries, service contracts, mandate law, law of private foundations and several other subjects)

Since March 2007: Beside the judicial tasks representative of the court for IT matters

December 10th, 2003: Appointment to Justice of the Federal Court of Justice, member of the IIIrd Civil Panel

December 1st, 2002: Vice president of the agency for legal exams of the state of Brandenburg

December 1st, 1999: Chief of staff of the Brandenburg Ministry of Justice

August 1st, 1998: Judge of the Higher Regional Court of Brandenburg, as presidential judge beside the judicial tasks responsible for the personal matters of the judges of the state of Brandenburg

November 1st, 1995: Appointment to Presiding Judge of the Regional Court of Frankfurt (Oder)

June 1st 1991 – July 31st, 1998: presidential judge of the Regional Court of Frankfurt (Oder) in the state of Brandenburg, beside the judicial tasks responsible for the personal matters of the judges of the district of the court

February 2nd, 1990: Appointment to judge, working at the Regional and the Local Court of Bonn

December 14th, 1989: Second legal state exam

February 3rd, 1986 – December 14th, 1989: state legal trainee


February 9th, 1984: First legal state exam

Fall 1979 – winter 1983/1984: Law Studies at the University of Bonn

1966 – 1979: School

Born: July 2nd, 1960 in Bonn (state of North Rhine-Westphalia)
Welcome to the Homepage of the Federal Court of Justice

The Federal Court of Justice (Bundesgerichtshof – BGH) is Germany’s highest court of civil and criminal jurisdiction, i.e., “ordinary jurisdiction”. The Federal Court of Justice was instituted on 1 October 1950 and has its seat in Karlsruhe.

The task of the Federal Court of Justice is primarily to ensure uniform application of law, clarify fundamental points of law and develop the law. In general, it reviews rulings of the lower courts only with regard to errors of law. Even if the binding effect of the judgments and rulings of the Federal Court of Justice is technically confined to the respective case decided, in practice the lower courts follow its interpretation of the law virtually without exception. The far-reaching effect of rulings of the Federal Court of Justice is also due to the fact that, particularly in the field of civil law, legal practice is often guided by these rulings. Banks and insurance companies as well as landlords and divorce lawyers respond to a “ruling from Karlsruhe”.

Judgments of the Federal Court of Justice

Judgments made by the Federal Court of Justice since 1 January 2000 can be accessed via our judgments database. The judgments are available only in German. For searching the Federal Court’s judgments by English terminology please use the Common Portal of Case Law [http://network-presidents.eu/rcsiue/?lang=en] of the Network of the Presidents of the Supreme Courts of the European Union [http://www.networkpresidents.eu/].

Brochure

Our bilingual brochure (German and English) provides an overview of the tasks and functions of the Federal Court of Justice, including information about its history and its buildings. It contains numerous photos and flowcharts of the stages of appeal in civil and criminal proceedings. The 72-page brochure can be downloaded here:

The Federal Court of Justice (PDF, 19 MB, Not barrier-free file.)
The Tasks of the Federal Court of Justice

With a few exceptions, the Federal Court of Justice acts as a court of appeal. Its principal task is to ensure uniformity of the law through clarification of fundamental points of law and development of the law.

It will not undertake fact-finding of its own but will confine itself to reviewing the legal assessment of a case by the lower courts. The facts established by these courts are binding on the Federal Court of Justice, unless such findings are affected by a procedural error at the lower court pointed out in the statement of grounds for appeal.

Evidence will therefore not normally be heard by the Federal Court of Justice. One of the few exceptions to this rule is the Federal Court of Justice's Civil Panel X, which is responsible for patent cases and performs trial-judge functions as a court of appeal in patent revocation proceedings (German Patent Law, sections 110 and 115).

Coat of Arms of the Federal Court of Justice
Picture by Frederik Busch

Print
© 2016 Bundesgerichtshof
The Position of the Federal Court of Justice in the German Court System

Apart from the Federal Court of Justice, there are four other supreme Federal courts: the Federal Administrative Court [http://www.bverwg.de/information_in_English_q0.html] (Bundesverwaltungsgericht) in Leipzig, the Federal Finance Court [http://www.bundesfinanzhof.de/content/information-english] (Bundesfinanzhof) in Munich, the Federal Labour Court [http://www.bundesarbeitsgericht.de/englisch/start.html] (Bundesarbeitsgericht) in Erfurt and the Federal Social Court [http://www.bundessozialgericht.de] (Bundessozialgericht) in Kassel.

A special role is played by the Federal Constitutional Court [http://www.bundesverfassungsgericht.de/en/index.html] (Bundesverfassungsgericht), also headquartered in Karlsruhe. Its task is to monitor compliance with the constitution. In what is known as judicial review proceedings, it examines laws and, in case of complaints of unconstitutionality, other acts of state such as court rulings, for their constitutionality. In that case, however, appellants must assert that a violation of their constitutionally guaranteed rights has occurred. The interpretation and application of so-called ordinary law – i.e., rules and regulations of a non-constitutional nature – lie outside the purview of constitutional jurisdiction.

Based in Luxembourg, the Court of Justice of the European Union [http://curia.europa.eu/cms/cms/en/6/] (ECJ) constitutes the highest judicial authority of the European Union. In accordance with Article 267(3) TFEU, the Federal Court of Justice, as the court of last instance in matters of ordinary jurisdiction, will refer questions concerning the interpretation of European Union law to the Court of Justice of the European Union for decision.

Finally, in order to enforce the rights laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, cases can be taken to the European Court of Human Rights [http://www.echr.coe.int/echr/Homepage_EN] (ECHR) in Strasbourg.

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Allocation of Jurisdiction

The composition of the panels and the judicial duties allocated to the individual panels are laid down in the annual Schedule of Jurisdiction adopted before the beginning of each business year by the Federal Court of Justice's Presiding Committee which consists of the President and ten judges elected by all the judges of the Court. The complete Schedule of Jurisdiction, also published annually in an annex to the Federal Gazette, is at present basically structured as follows:

Civil cases

In civil cases, responsibilities are allocated according to fields of law. The civil panels are currently assigned the following fields of law:

<table>
<thead>
<tr>
<th>Panel</th>
<th>Field of law</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Civil Panel</td>
<td>copyright, protection of intellectual property rights, transport law, brokerage law</td>
</tr>
<tr>
<td>Second Civil Panel</td>
<td>corporate law, law of associations</td>
</tr>
<tr>
<td>Third Civil Panel</td>
<td>state and notaries' liability, mandate law, law on foundations and endowments, agency without specific authorisation</td>
</tr>
<tr>
<td>Fourth Civil Panel</td>
<td>inheritance law, insurance contract law</td>
</tr>
<tr>
<td>Fifth Civil Panel</td>
<td>real property law, matters of deprivation of liberty</td>
</tr>
<tr>
<td>Sixth Civil Panel</td>
<td>law of torts, product liability, medical liability</td>
</tr>
<tr>
<td>Seventh Civil Panel</td>
<td>construction and architectural law, law of compulsory enforcement</td>
</tr>
<tr>
<td>Eighth Civil Panel</td>
<td>law on the sale of goods, landlord and tenancy law</td>
</tr>
<tr>
<td>Ninth Civil Panel</td>
<td>insolvency law, lawyers' liability</td>
</tr>
<tr>
<td>Tenth Civil Panel</td>
<td>patent law, tourist travel law, law of donations</td>
</tr>
<tr>
<td>Eleventh Civil Panel</td>
<td>banking law, capitalmarket law</td>
</tr>
<tr>
<td>Twelvth Civil Panel</td>
<td>family law, commercial tenancy law</td>
</tr>
</tbody>
</table>

Criminal cases

In criminal cases, allocation of responsibilities is primarily governed by locational criteria. Each panel is assigned appeals in criminal cases from specific higher regional court circuits. Irrespective of this, the following panels are also allocated special fields of law:

<table>
<thead>
<tr>
<th>Panel</th>
<th>Field of law</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Criminal Panel</td>
<td>tax and customs offences, military criminal cases, national defence transgressions</td>
</tr>
<tr>
<td>Third Criminal Panel</td>
<td>crimes against the state</td>
</tr>
<tr>
<td>Fourth Criminal Panel</td>
<td>road traffic cases</td>
</tr>
</tbody>
</table>
Proceedings at the Federal Court of Justice

- 1. Civil cases
- 2. Criminal cases
- 3. The Referral Procedure

1. Civil cases

In civil cases, the remedy of appeal on points of law (Revision) is, in principle, available against final judgments passed by regional and higher regional courts acting as appellate courts. In practice, the possibility of lodging a “leapfrog appeal” against a first-instance judgment given by a regional court (in family proceedings: a local court) is very rarely used. Appeal proceedings will only take place if the lower appellate court has granted leave to appeal in its judgment, or if allowed by the court of appeal following an appeal against refusal of leave to appeal. The appeal shall be allowed if the case is of fundamental legal importance, or if the development of the law or ensuring uniformity of the law calls for a decision by the court of appeal. The court of appeal is bound by the leave to appeal granted by the lower appellate court. If the Panel holds that an appeal is inadmissible, it will be dismissed by judgment or order. In the other cases, a judgment on the appeal will be handed down following a hearing before the Panel.

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2. Criminal cases

In criminal cases, the Federal Court of Justice will rule on appeals on points of law from judgments passed by the regional courts and higher regional courts of first instance. This includes serious (“capital”) crimes tried before a regional court criminal division by a mixed bench of professional and lay judges, as well as any other criminal offences of a certain degree of severity if, at the time the charge was brought before the regional court, the public prosecutor’s office considered that a sentence of more than four years in prison, confinement in a psychiatric hospital or preventive detention was to be expected. Also included are any crimes against state security where in the first instance charges were brought before the state security division of a regional court or, in proceedings against terrorist organisations, the criminal division of a higher regional court.

With an appeal on points of law, both the defendant and the public prosecutor’s office can claim violation of a norm of substantive criminal law or procedural law. If the Panel unanimously considers an appeal to be manifestly unfounded or an appeal lodged for the benefit of the defendant to be well-founded, it may decide the case by court order without a hearing. In the other cases, a judgment on the appeal will be handed down following a hearing before the Panel.

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3. The Referral Procedure

To ensure uniformity of the law, lawmakers provided for referral obligations for the higher regional courts in various types of proceedings (e.g. section 28 (2) FGG [Law on Non-contentious Jurisdiction]; section 79 (2) GBO [Land Register Code]; section 121 (2) GVG [Judicature Act]), leading to referral of a legal dispute to the Federal Court of Justice whenever a higher regional court wishes to deviate from the decision of another higher regional court or the Federal Court of Justice. However, going into the details of the procedure is not possible here.

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The Bar at the Federal Court of Justice

The task of the bar at the Federal Court of Justice consists of representing the parties involved in civil proceedings before the Federal Court of Justice. In civil proceedings, only the lawyers licensed in the Federal Court of Justice are entitled to submit pleas. These lawyers are largely prohibited from working in other courts. This restriction and the rule regarding specialisation are designed to ensure that civil appeals on points of law, appeals against refusal of leave to appeal and complaints on points of law are professionally handled. Currently, 45 lawyers are licensed in the Federal Court of Justice.

To be licensed in the Federal Court of Justice, a lawyer must be at least 35 years of age, have practised law for at least five years without interruption, and be nominated by the Lawyers Election Committee of the Federal Court of Justice. The Committee consists of the President of the Federal Court of Justice, the presiding judges of the civil panels, and the members of the presiding committees of the German Federal Bar and the Chamber of Lawyers at the Federal Court of Justice. The application for admission of a lawyer nominated by the Election Committee will be decided by the Federal Minister of Justice.

Further information about the bar at the Federal Court of Justice can be found on the website of the Chamber of Lawyers at the Federal Court of Justice: "Rechtsanwaltskammer beim Bundesgerichtshof" [http://www.rak-bgh.de].

In criminal proceedings, any lawyer licensed in Germany and any lecturer in law at a German university who is qualified to hold judicial office may act as a defence counsel for the defendant or as a representative of the joint plaintiff in cases heard by the Federal Court of Justice.
Privacy and Court Records

Thursday, August 4, 2016 | 10:15 am – 11:30 am
Anne Klinefelter is Director of the Law Library and Associate Professor of Law, positions she has held since 2007. She teaches courses on Privacy Law and writes and speaks on information policy and law topics including privacy and confidentiality law, particularly as these areas apply to libraries and legal information management. Professor Klinefelter serves as a Faculty Affiliate of the UNC Center for Media Law and Policy and as a member of the Advisory Board of the Future of Privacy Forum.

Professor Klinefelter has been active in library associations and library education. In 2012, she received the Distinguished Lecturer Award from the American Association of Law Libraries. She is a past chair of the American Association of Law Schools Section on Law Libraries and past president of the Southeastern Chapter of the American Association of Law Libraries. She also chaired the Copyright Committee of the American Association of Law Libraries.

Professor Klinefelter held leadership roles in two library consortia, serving as chair of the Consortium of Southeastern Academic Law Libraries and of the Triangle Research Libraries Network Council of Directors. Professor Klinefelter has taught Law Librarianship and Legal Research as well as Copyright Law for Librarians courses in the UNC School of Information and Library Science.

Prior to coming to UNC, Anne Klinefelter served as Acting Director of the Law Library at the University of Miami and also held positions in the law libraries at Boston University and the University of Alabama.
Privacy and Court Records:
Sensitive Information in North Carolina Supreme Court Briefs

Anne Klinefelter
National Conference of Appellate Court Clerks
Denver, Colorado, August 8, 2016
Two Projects

1. Digitization of court materials held in print at the Kathrine R. Everett Law Library, University of North Carolina at Chapel Hill

2. Empirical study of the appearance of sensitive information in briefs & appendices submitted in print format and part of digitization project

David Ardia and Anne Klinefelter,

Sensitive Stories and Data, Public Courts

- Law
- Policy
- Practicalities
Sensitive Stories and Data, Public Courts


Focus of Both Projects

• **Court Records**
  Available from courts, some libraries
  Recent years in electronic filing systems
  & retrospective digitization projects

• **Court Opinions**
  Primary law
  Traditionally widely published, print/online
Court Transparency Long Protected in U.S.

• “The early history of open trials in part reflects the widespread acknowledgment...that public trials had significant community therapeutic value.... [T]he means used to achieve justice must have the support derived from public acceptance of both the process and its results.”

But Privacy is also Protected

- Generally as piecemeal exceptions
- Sometimes through general balancing of interests
Authority of the Courts

- “Every court has supervisory power over its own records and files” and the federal common law right of access could be denied when “court files might become a vehicle for improper purposes.”

Competing Values

Access

• Accountability of the Courts
• Government Property is the People’s Property
• History
• Social Goods through Data Mining

Privacy

• Chilling Effects on Use of the Courts
• Personal Information is the Individual’s Property
• Dignitary Harm
• Financial Harm/ID Theft
The Law of Court Records

Access
- 1st Amendment, 6th Amendment
- Common law
- Public records law
- Court rules
- Law of sealing records, pseudonymous litigants

Privacy
- Constitutional privacy
- Common law
- Public records law exemptions
- Court rules for redaction
- Law of sealing records, pseudonymous litigants
North Carolina

- NCGS 132-1 (b) “The public records and public information compiled by the agencies of North Carolina government or its subdivision are the property of the people.”

- Exemptions:
  - Settlements in med mal against public hospitals
  - Arrest and search warrants until returned
  - Grand jury proceedings
  - Most adoption records
  - Reports of cases of juvenile abuse, neglect, or dependency
North Carolina

- E-filing Rule 6.3

  ...filers must comply with GS 132-1.10(d) to exclude or partially describe sensitive, personal or identifying information such as any social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords from documents filed with the court.

Effective Mary 15, 2009, amended effective June 24, 2013
“Digital is Different”

Public

?

Private
“Digital is Different”

- The law’s balance of access and privacy is only part of the reality
- Court files & library shelves are less accessible
- “Practical obscurity” lost through e-filing & digitization
- Digital industries present new privacy risks
- E-filing & digitization require rebalancing of the interests
“Digital is Different”

• “The increasing use of computers and sophisticated information technology… has greatly magnified the harm to individual privacy…”

• Federal Privacy Act (1974)

• Newer Disruptive Practices
  Web Scrapers, Data Brokers, ID-Theft, Informant/Cooperating Witness Sites, Celebrity Autopsy Photo Sites, Re-identification
Empirical Study Overview
Research Questions

• How often does sensitive information appear in appellate court records created before e-filing?
• What is the context of this information?
The Digitization Project

- Digitized N.C. Supreme Court briefs and appendices submitted in cases decided from 2000 going back to 1967, all pre-e-filing
- The set of briefs held by the library is incomplete, but substantial---all donations sent by the court system
- Current plans include redaction of select types of information from online version but not from print copies; modest list compared with empirical study taxonomy
The Empirical Project

• Studied 504 digitized N.C. Supreme Court briefs and appendices submitted in cases decided between 1984 to 2000
• Taxonomy of sensitive information
• Coders and a coding system
• Analysis of frequency, proximity, context of different types of sensitive information
• Analysis of logistics of isolating, managing sensitive information in court records
Creating a Taxonomy of Sensitive Information

• Surveyed federal and state law, some foreign law, and privacy scholarship
• Categorized information types
• Required full or last name to be associated with info type, except for SSN
• Coded for adult/minor
## 13 Sensitive Information Categories

<table>
<thead>
<tr>
<th>Assets</th>
<th>Financial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Biometric</td>
<td>Health</td>
</tr>
<tr>
<td>Civil Proceedings</td>
<td>Identity</td>
</tr>
<tr>
<td>Computer</td>
<td>Images</td>
</tr>
<tr>
<td>Criminal</td>
<td>Intellectual Privacy</td>
</tr>
<tr>
<td>Education</td>
<td>Location</td>
</tr>
<tr>
<td>Employment</td>
<td>Sex</td>
</tr>
</tbody>
</table>
Key Variables

*Information Variables*

- Information Type (140 types)
- Information Category (13 categories)
- Subject of Information (Adult, Minor)
- Location of Information (Brief Body, Appendix)
- Page #
- Number of appearance on page
Highlights of Results

• Records vary substantially in sensitive information contained
• Briefs by state contained most sensitive information
• Criminal information is pervasive
• Criminal cases contain more
• 7% info associated with minors
• Unwise to focus on appendices
• No trends during time studied
Practical Implications

- Some sensitive information is easier to find than others
- Human readers (re-readers) still needed for some occurrences
- Some sensitive information is not redaction-friendly, too interwoven into the narrative
- Redaction fails some information types such as gender, or story of child abuse
- Document types might cue priorities (state briefs high/amicus briefs low)
Remaining Questions

• Does court record disclosure of sensitive information make other costly privacy compliance efforts ineffective?
• What is the impact of online, free, searchable access to full databases of court records?
• Who is doing retroactive digitization?
• Who should do retroactive digitization?
• Should court administrators and law libraries coordinate efforts?
Remaining Questions

• What is the proper policy for retroactive efforts to digitize in service of court transparency? Should it matter who does the digitizing?

• Should we develop a national set of best practices, or does each redaction require a court’s review under the First Amendment?

• What tools and approaches would support balancing of privacy and access?
Privacy and Court Records: Sensitive Information in North Carolina Supreme Court Briefs

Anne Klinefelter
National Conference of Appellate Court Clerks
Denver, Colorado, August 8, 2016
PRIVACY AND COURT RECORDS: AN EMPIRICAL STUDY

David S. Ardia* & Anne Klinesfelter**

ABSTRACT

As courts, libraries, and archives move to make court records available online, the increased ease of public access raises concerns about privacy. Little work has been done, however, to study how often sensitive information appears in court records and the context in which it appears. This Article fills this gap by analyzing a large corpus of briefs and appendices submitted to the North Carolina Supreme Court from 1984 to 2000. Based on a survey of privacy laws and privacy scholarship, we created a taxonomy of 140 types of sensitive information, grouped into thirteen categories. We then coded a stratified random sample of 504 court filings in order to determine the frequency of appearance of each sensitive information type and to identify relationships, patterns, and correlations between information types and various case and document characteristics.

We present several important findings. First, although a wide variety of sensitive information appears in the court records we sampled, it is not uniformly distributed throughout the records. Most of the documents contained relatively few incidences of sensitive information while a handful of documents contained a large number of pieces of sensitive information. Second, court records vary substantially in the types and frequency of sensitive information they contain. Sensitive information in seven of the categories—"Location," "Identity," "Criminal Proceedings," "Health," "Assets," "Financial

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* Assistant Professor of Law, University of North Carolina School of Law, and Faculty Co-Director, UNC Center for Media Law and Policy.
** Associate Professor of Law, University of North Carolina School of Law, and Director, Kathrine R. Everett Law Library.

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Information," and "Civil Proceedings"—appeared much more frequently than the other categories in our taxonomy. Third, information associated with criminal proceedings, such as witness and crime victim names, is pervasive in court records, appearing in all types of cases and records. Fourth, criminal cases have disproportionately more sensitive information than civil or juvenile cases, with death penalty cases far exceeding all other case types. Fifth, appendices are generally not quantitatively different from legal briefs in terms of the frequency and types of sensitive information they contain, a finding that goes against the intuition of many privacy advocates. Sixth, there were no overarching trends in the frequency of sensitive information during the seventeen-year period we studied.

Although we found a substantial amount of sensitive information in the court records we studied, we do not take a position regarding what information, if any, courts or archivists should redact or what documents should be withheld from online access or otherwise managed for privacy protection. These largely normative questions must be answered based on a careful balancing of the competing public access and privacy interests. Nevertheless, we expect that this highly granular view of the occurrence of sensitive information in these North Carolina Supreme Court records will help policymakers and judges evaluate the potential harms to privacy interests that might arise from online access to court records. We also hope that scholars will draw on our taxonomy and empirical data to develop and ground normative arguments about the proper approach for balancing government transparency and personal privacy.

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I. INTRODUCTION

Courts across the country are moving quickly to digitize their records and make them available online. Some courts are doing this work themselves, while others are relying on third parties, such as libraries and archives, to make public access possible. All, however, are dealing with one central and unavoidable issue: privacy.

Court records contain a variety of types of information that could be characterized as "private" or "sensitive," ranging from social security numbers to the names of minor children involved in sexual abuse. In State v. Bright, for example, a brief filed by the State of North Carolina describes the abduction and rape of a ten-year-old girl, naming the child in full on the first page and continuing to identify her by first name on nearly every subsequent page of the brief. Similarly, in Dean v. Cone Mills Corporation, the plaintiff-appellant's petition for discretionary review to the North Carolina Supreme Court includes an appendix comprising the plaintiff's voluminous medical file and contains multiple references to his social security number, date of birth, and home address.

Little work has been done, however, to study how often sensitive information appears in court records and the context in which it appears.

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1. See NATIONAL CENTER FOR STATE COURTS, TRENDS IN STATE COURTS (2014), http://www.ncsc.org/-/media/Microsites/Files/Future%20Trends%202014/2014%20NCSC%20Trends%20Report.pdf (highlighting state courts' efforts to move to e-filing and the conversion of paper case documents into digital images); Paul H. Anderson, Future Trends in Public Access: Court Information, Privacy, and Technology, in FUTURE TRENDS IN STATE COURTS 2011, at 11 (Carol R. Flango et al. eds., 2011) (reviewing the trends and issues relating to "an environment where most court systems maintain all or part of their information electronically").

2. A wide range of technical and policy challenges continue to be a part of the effort to increase public access to court records, both in the context of electronic filing and the digitization of older court records. But one of the central issues is privacy.

3. The terms "private" and "sensitive" in the context of personally identifiable information are not necessarily coterminous. As we discuss in Part III, there are no uniform definitions for these terms and their scope is widely debated by privacy scholars. For readability, we use "sensitive information" to refer to all types of personally identifiable information that might raise privacy concerns.


6. One important study of court records was conducted by Carl Malamud using automated software to search a large sample of court filings downloaded from the federal court's Public Access to Court Electronic Records (PACER) system. Malamud reported to the federal courts that a significant number of social security numbers and other types
The lack of empirical data hamstrings courts and archivists who are attempting to balance privacy interests with the public’s right of access, as well as scholars looking to adapt privacy law and First Amendment doctrines to deal with the flood of public records going online.

This Article helps to fill this gap in our knowledge by analyzing a large corpus of court records from the North Carolina Supreme Court. These records are held by the Kathrine R. Everett Law Library at the University of North Carolina School of Law ("UNC Law Library"), one of several libraries with copies of briefs and court filings submitted to the North Carolina Supreme Court. Through sampling and content coding of briefs and appendices filed in cases decided between 1984 and 2000, we cataloged the types of sensitive information that appeared in these records, determined the frequency of appearance of this information, and analyzed the context in which it appeared.

As is the case for courts and archivists everywhere, UNC Law Library personnel are grappling with the question of whether—and if so, how—to limit access to sensitive information that could cause financial, reputational, or emotional harm to individuals identified in the records. Although a patchwork of court rules, statutes, and government regulations provides some guidance as to the various categories of information that might raise privacy concerns, no studies address how often this information is likely to appear in court records, in what types of documents, and the specific context of its appearance.

The results of our research are valuable for a number of reasons. First, this study provides a highly granular view of sensitive information in judicial records. Based on a survey of the laws that apply to court records

of sensitive information were present in the downloaded files. See John Schwartz, An Effort to Upgrade a Court Archive System to Free and Easy, N.Y. TIMES (Feb. 12, 2009), http://www.nytimes.com/2009/02/13/us/13records.html (interviewing Malamud who states that he found several types of sensitive information in the downloaded case files); see also Letter from Carl Malamud to The Honorable Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Oct. 24, 2008), https://public.resource.org/scribd/7512383.pdf (documenting 1,669 unredacted social security numbers and other proximate sensitive information in records from 32 district courts). Computer scientist Timothy Lee followed Malamud’s report with a study that found some documents submitted to courts with intended redactions were not successfully redacted. Timothy B. Lee, Studying the Frequency of Redaction Failures in PACER, FREEDOM TO TINKER (May 25, 2011), https://freedom-to-tinker.com/blog/tbke/studying-frequency-redaction-failures-pacer. Our study provides a similar, but more extensive, examination of North Carolina Supreme Court briefs and appendices.

7. We did not code for the appearance of sensitive information in the court’s decisions themselves.
as well as other privacy laws and scholarship, we have identified 140 types 
of sensitive information that may exist in court records. By coding for 
these information types, we are able to determine whether their frequency 
of appearance is correlated with case type, document type, or other 
contextual factors.

Second, an understanding of the types and context of sensitive 
information in the North Carolina Supreme Court’s case files will help 
policymakers and judges evaluate the potential harms to privacy interests 
that might arise from the disclosure of sensitive information in court briefs 
and related records. Although this project examines only briefs and 
appendices filed in the North Carolina Supreme Court during a 
seventeen-year period, we expect that the results of our study will be 
generalizable to appellate court filings in many courts throughout the 
United States.

Third, this research will have practical implications for court personnel 
and archivists as they develop rules and practices for electronic filing of 
court records or the digitization of older records. Based on our informal 
survey of archivists and law librarians around the country, we have found 
that digitization initiatives are proceeding without a clear or consistent 
strategy for addressing privacy concerns. This project will help to identify 
and support the development of best practices for courts and archivists 
developing or implementing redaction protocols or making other choices 
regarding access and privacy.\footnote{8}

Finally, this research will be valuable to privacy scholars who can use 
our taxonomy and data to ground their normative arguments. Legal 
scholars, archivists, and law librarians have written extensively about the 
competing interests of government transparency and personal privacy. A 
number of these publications focus on court records, but little research 
provides empirical data concerning the frequency of sensitive information 
in particular types of court records. Although federal court rules require 
that some categories of information be redacted from court filings

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\footnote{8. All providers of court records face issues with regard to quality assurance, 
including data entry errors and other incorrect information. Courts and other archives 
that redact information face significantly greater quality assurance challenges. The results 
of this study should help to improve accuracy and reduce the cost of implementing 
redaction protocols, whether they are done manually (as the majority of such protocols 
are handled today) or through software. See Eric O. Scott et al., \textit{Text Mining for Quality 
Control of Court Records} (Mitre Corp., Case Number 14-3510). http://mason.gmu.edu/
~escott8/publications/Scott%20et%20al.%20Text%20Mining%20for%20Quality%20Control 
%20of%20Court%20Records.pdf (presented at SemADoc 2014: Semantic Analysis of 
Documents Workshop, 16 September 2014).}
submitted via electronic filing, and some states are following in the same direction, debate continues about how to address transparency and privacy in the context of e-filing systems and the digitization of older court records. This project supports discussion and policy shaping in these developing areas.

The loss of "practical obscurity" lies at the heart of the debate about privacy risks from online access to court records. Although court records have historically been available to the public for review, the information in these records was for practical purposes obscure because the records were "stored in such an inaccessible fashion that only the determined and resourceful could obtain them." Peter Winn was one of the first to examine the loss of practical obscurity with the advent of electronic filing systems, noting that online access provided significant public benefits but raised serious privacy challenges. Helen Nissenbaum and her coauthors

9. Federal e-filing rules now require redaction of several categories of data, including social security numbers and taxpayer numbers, dates of birth, names of minor children, financial account numbers, and in criminal cases, home address. See FED. R. APP. P. 25(a)(5); FED. R. CIV. P. 5.2; FED. R. CRIM. P. 49.1; FED. R. BANKR. P. 9037.

10. For example, since 2009 North Carolina has required e-filers to "exclude or partially describe sensitive, personal or identifying information such as any social security number, employer taxpayer identification, driver's license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords from documents filed with the court. In addition, minors may be identified by initials, and, unless otherwise required by law, social security numbers may be identified by the last four numbers." Second Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project, Rule 6.3, N.C. COURT INFO. SYS. (Aug. 27, 2013), http://www.efiling.nccourts.org/manual/eFilingRules.htm [hereinafter N.C. eFiling Rules] (referring to N.C.G.S. 132-1.10(d)). North Carolina also provides for non-parties to litigation to request removal or redaction of court documents available online for public viewing "if the document contains sensitive, personal or identifying information about the requester." Id. at Rule 6.4 (referring to N.C.G.S. § 132-1.10(f)).


12. See Peter A. Winn, Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information, 79 WASH. L. REV. 307 (2004) [hereinafter Winn, Online Court Records]; Peter A. Winn, Judicial Information Management in an
also have highlighted the chasm of difference between traditional in-person public access to court records at the courthouse and Internet access through Google and electronic filing systems. Nisenbaum also articulated the importance of protecting information-flow norms threatened by disruptive technologies and practices such as the movement to make court records electronic and widely accessible. Others too have explored this tension of interests, and many propose that various types of information should be protected from broad exposure.

Archivists and law librarians also have noted the challenges posed by electronic court records and documented their own efforts to address privacy concerns while developing new projects to digitize court documents in order to expand and facilitate public access. For example,


14. Helen Nisenbaum, Privacy as Contextual Integrity, 79 WASH. L. REV. 119 (2004) (concluding that social and practical norms regarding information flow are superior to formal bifurcations of information into categories of public or private).

15. See, e.g., Lynn M. LoPucki, Court-System Transparency, 94 IOWA L. REV. 481, 537 (2009) (suggesting privacy objections to highly transparent electronic federal court records should be addressed through removal of sensitive data and selective sealing of records and should not be used to shield the courts from scrutiny); Peter W. Martin, Online Access to Court Records: From Documents to Data, Particulars to Patterns, 53 VILL. L. REV. 835, 882–84 (2008) (warning that litigants are unlikely to adapt quickly to protect privacy, especially on behalf of non-litigants whose data may be in court filings); Will Thomas DeVries, Protecting Privacy in the Digital Age, 18 BERKELEY TECH. L.J. 283, 301 (2003) (“Digital technology is turning the asset of open government into a privacy nightmare. In the analog age, public records were all available, but languished in ‘practical obscurity’ in courthouse basements or isolated file cabinets.”).


17. See, e.g., Michael Whiteman, Appellate Court Briefs on the Web: Electronic Dynamism or Legal Quagmire? 97 L. LIBRARY J. 467, 470–77 (2005) (describing the need to preserve access to court records and discussing the challenges associated with protecting privacy, including the Northern Kentucky Law Library’s decision to refrain
the Montana State Law Library, which began scanning and posting Montana Supreme Court opinions and briefs in 1996, removed records it had already posted online to extract exhibits and appendices because the library found that these records contained a variety of sensitive information; the library ultimately reposted only the briefs with redactions.16

The goal of this study is to inform these scholarly and policy discussions about the appropriate balance between public access and privacy in the context of court records. We begin in Part II by noting that court records present a special challenge for privacy advocates. Unlike in many other areas of privacy law, court records are presumptively open to the public. Part II describes the origin of the right of public access to court records and examines its scope under the federal Constitution, common law, statutory law, and court rules. As we note in Part II, not all repositories of court records are obligated by law to provide public access. For many librarians and archivists, the question is not what the law requires, but rather what is the best approach for ensuring the protection of privacy interests while at the same time informing the public about the functioning of the court system.

In Part III, we survey privacy laws and privacy scholarship to create a taxonomy of sensitive information in court records.19 Based on this survey, from scanning appendices to briefs filed in the Kentucky Supreme Court). Archivists have been dealing with privacy concerns in a broad range of materials for many years and are considering how born-digital and digitized materials can be managed to address access and privacy. See, e.g., Christopher A. Lee & Kari Woods, Automated Reduction of Private and Personal Data in Collections: Toward Responsible Stewardship of Digital Heritage, in PROCEEDINGS OF THE MEMORY OF THE WORLD IN THE DIGITAL AGE: DIGITIZATION AND PRESERVATION: AN INTERNATIONAL CONFERENCE ON PERMANENT ACCESS TO DIGITAL DOCUMENTARY HERITAGE (2012), http://ila.unc.edu/calllec/p298-lec.pdf.

18. See Tammy A. Hinderman, State Law Library Gets a 21st Century Makeover, 32 MONT. L. REV. 6 (2007). According to Montana State Law Library reference librarian Tammy Hinderman, the library began providing online access to the Montana Supreme Court records in 2006, before realizing the records contained sensitive information that could facilitate identity theft and other privacy harms. Id. at 7. She explains that the library then removed all exhibits and appendices from the electronic version of the documents and redacted some information from the briefs before reposting them to the Internet. Id. In Kentucky, the Chase College of Law Library of Northern Kentucky University began its scanning of briefs from the state’s supreme court by omitting appendices, both to address privacy concerns and to limit the burden on the library. See Whiteman, supra note 17, at 477.

19. Taxonomies of sensitive information appear throughout the law of the United States and other jurisdictions, and electronic filing systems at both the federal and state
we identified 140 types of sensitive information that might appear in court records and grouped them into thirteen categories. Part III explains the justifications—and shortcomings—of our taxonomic approach and describes the sensitive information types we coded for in this project. Of course, not everyone will agree with our taxonomy. That is to be expected, given that privacy is itself a contested concept. Nevertheless, the taxonomy has proven to be helpful to us in the identification of the privacy risks that can arise from the public disclosure of court records at a time when privacy laws have limited or unclear application to such records. Moreover, we think our extensive taxonomy will be useful to others who wish to understand the broad range of privacy interests implicated by public records.

In Part IV, we provide an overview of our study design and methods. In short, we analyzed a stratified random sample of 504 court documents pulled from the briefs and other filings submitted to the North Carolina Supreme Court from 1984 to 2000. After performing content coding of the documents, we determined the frequency of appearance of each sensitive information type and identified relationships, patterns, and correlations between different information types and other coded variables, including trends over time.

In Part V, we present a summary of our findings. We begin by providing descriptive statistical information about the court records in our sample and the sensitive information they contain. We then examine the extent to which different types of sensitive information are related to various case and document characteristics. Although we suggest ways in which our data can aid in the assessment of the privacy risks that might arise from public access to court records, it is not our aim to tell courts or archivists what information, if any, should be redacted or what documents should be withheld from online access or otherwise managed for privacy protection.21

Instead, in Part VI, we discuss how our study can inform the debate about privacy and court records and how our results can help to identify and remedy some of the challenges courts and archivists are likely to face if they decide to implement procedures for addressing privacy concerns in

level rely extensively on predefined lists of information types that must be handled with special care. See infra notes 89–98 and accompanying text.

20. Scholars have long criticized this approach because it relies on debated definitions of privacy, ignores contextual variations in privacy, and presents implementation challenges because of these definitional and contextual problems. We discuss these concerns and how we dealt with them in Part III.

21. We plan to address these normative questions in subsequent articles.
court records. We made several important findings in this regard. First, although a wide variety of sensitive information appears in the court records we sampled, it is not uniformly distributed throughout the records. Most of the documents contained relatively few incidences of sensitive information while a handful of documents contained a large number of pieces of sensitive information. Second, we found that court records vary substantially in the types and frequency of sensitive information they contain. Sensitive information in seven categories—"Location," "Identity," "Criminal Proceedings," "Health," "Assets," "Financial Information," and "Civil Proceedings"—appeared much more frequently than information in the other categories we identified. Third, we found that information associated with criminal proceedings, such as witness and crime victim names, is pervasive in court records, appearing in all types of cases and records. Information in the "Criminal Proceedings" category not only appeared in most of the documents we reviewed, but also appeared more often in those documents than any other category of sensitive information. Fourth, the data showed that criminal cases have disproportionately more sensitive information than civil or juvenile cases, with death penalty cases far exceeding all other case types. Fifth, we found that appendices are generally not quantitatively different than legal briefs in terms of the frequency and types of sensitive information they contain, a finding that goes against the intuition of many privacy advocates. Sixth, we saw no overarching trends in the frequency of sensitive information during the seventeen-year period under study.

We close by providing some suggestions for courts and archivists seeking to manage sensitive information in court records. A number of practices have been introduced or recommended, including redaction of electronic records, redaction of both electronic and print records, removal of categories of court records from Internet access, and increased filing of court documents under seal. Our research will help courts and archivists evaluate these approaches.

II. PUBLIC ACCESS TO COURTS AND COURT RECORDS

A. THE RIGHT TO ACCESS COURT PROCEEDINGS AND RECORDS

Public access to the courts has a long and venerated history in America, even predating enactment of the United States Constitution.\(^\text{22}\)

\(^{22}\) See, e.g., Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993) (concluding that “[t]he existence of this right, which antedates the Constitution and which is applicable in both criminal and civil cases, is now beyond
This openness serves many salutary functions, including ensuring that our system of justice functions fairly and is accountable to the public. As Chief Justice Warren Burger noted in *Richmond Newspapers, Inc. v. Virginia*:

The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

Public access also has been extended to many of the records associated with court proceedings. Access to judicial records plays a critical role in fostering public awareness about the operation of the courts because so few people are able to attend court proceedings in person and because most courts do not generally allow live or archival recordings. The movement by courts and archivists to allow online access to court records has made it possible for many more people to stay informed about the functioning of the judicial system. Online access also has a leveraging effect because it makes it possible for the media to cover court proceedings at a lower cost and allows for greater depth of reporting at a time when many media...
organizations are cutting back on the number of reporters assigned full-time to the courts.27

Although public access to court records is longstanding and deeply ingrained in our legal system, courts can—and often do—impose limits on public access. The First Amendment provides a right of access to court proceedings and to many records,28 as does federal and state common law.29 These rights, however, are not absolute.30 While the precise standard that a court must apply will vary depending on the source of the public’s right of access, in general courts must at least conclude that the interest in prohibiting disclosure outweighs the strong presumption of public access. In *Nixon v. Warner Communications*, for example, the United States Supreme Court instructed that “[e]very court has supervisory power over its own records and files” and that the federal


28. See, e.g., *Richmond Newspapers*, 448 U.S. at 575 (finding First Amendment right of public access to criminal trials and noting that “[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees”). Although the U.S. Supreme Court has not explicitly held that a First Amendment right of access applies in civil cases, most of the federal circuits that have addressed this issue have recognized such a right. See, e.g., *Westmoreland v. Columbia Broad. Sys.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publixer Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067–71 (3d Cir. 1984). Courts have also applied a constitutional right of access to the judicial records associated with criminal and civil proceedings. See, e.g., *Associated Press v. United States Dist. Court for Cent. Dist. of Cal.*, 705 F.2d 1143, 1145 (9th Cir. 1983); *In re Search Warrant*, 855 F.2d 569, 573 (8th Cir. 1988); *Newcastle LLC v. Cnty. of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013); *Publixer Indus.*, 733 F.2d at 1074. *But see Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 908 (E.D. Pa. 1981) (“With respect to the question whether the common law right to inspect and copy [discovery materials] has a constitutional dimension, we conclude that it does not.”).


30. When the right of public access arises under the First Amendment, “it must be shown that the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982). When the right of access is merely a common right, courts have more leeway in denying access and can balance the presumption of public access against other interests, including the possibility of prejudicial pretrial publicity, the danger of impairing law enforcement or judicial efficiency, and the protection of the legitimate privacy interests of litigants and other trial participants, such as witnesses, victims, and jurors. See, e.g., *Nixon*, 435 U.S. at 598.
common law right of access could be denied when "court files might . . . become a vehicle for improper purposes." Among the improper purposes the Court noted were uses "to gratify private spite or promote public scandal," as "reservoirs of libelous statements for press consumption," and as a source of unfair competitive "business information." Although there is considerable variation among the states, state common law rights of access also are typically qualified rights, allowing courts to restrict public access if an overriding interest supports closure or sealing of specific information. In California, for example, court records are "presumptively open to the public and [court proceedings and records] should not be closed except for compelling countervailing reasons."

In addition to constitutional and common law rights of access, a number of state and federal statutes also provide a public right of access to court records. At the federal level, access to court records is governed by rules and policies promulgated by the Administrative Office of the U.S. Courts on behalf of the federal judiciary pursuant to the Rules Enabling Act. At the state level, a variety of statutory authority provides for and impacts public access to judicial records. For example, every state has a public records statute, although not all of these statutes explicitly address access to court records. In those states that do have a public records law that covers judicial records, rights of access are typically governed by both the statute and court rules.

32. Id.
As a result, many states have multiple overlapping sources of law that require—and potentially limit—public access. In North Carolina, which is illustrative of the law in many states, public access is governed by, *inter alia*, a common law right of access, a constitutional right of access rooted in both the First Amendment to the U.S. Constitution and article 1, section 18 of the N.C. Constitution, which states that “[a]ll courts shall be open,” and court rules that specify how court records are to be handled, including rules for electronic-filing.

Furthermore, the North Carolina General Assembly, through the state’s public records law (“NC PRL”) and other statutes, has both expanded and narrowed the public’s right of access. The NC PRL, which states that all state records “are the property of the people,” is applicable to every agency of the North Carolina government, including the judiciary.

37. See Richard J. Peltz, et al., *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 Ark. L. Rev. 555, 591 (2006) (noting that “[s]ome states decided that only one type of law was necessary to adequately provide a right of access, while others applied multiple types of law to provide more depth to their access law”).

38. See *Virmani v. Presbyterian Health Servs. Corp.*, 515 S.E.2d 675, 691 (N.C. 1999) (observing that “[a]t least since 1887, this Court has recognized a common law right of the public to inspect public records”). As with the federal common law, the common law right of access in North Carolina is a qualified right. The decision to deny access “is left to the sound discretion of the trial courts, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” *In re Investigation into Death of Cooper*, 683 S.E.2d 418, 425 (N.C. App. 2009) (internal quotation marks omitted).

39. *Virmani*, 515 S.E.2d at 692 (holding that the N.C. Constitution guarantees a qualified constitutional right on the part of the public to attend civil court proceedings and access court records). In the words of the North Carolina Supreme Court: “That courts are open is one of the sources of their greatest strength.” *Raper v. Berrier*, 97 S.E.2d 782, 784 (N.C. 1957).

40. For example, N.C.’s eFiling Rule 6.3 states, in part:

Except where otherwise expressly required by law, filers must comply with G.S. 132-1.10(d) to exclude or partially describe sensitive, personal or identifying information such as any social security, employer taxpayer identification, driver’s license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords from documents filed with the court.

N.C. eFiling Rules, supra note 10, at Rule 6.3.


42. N.C. Gen. Stat. § 132-1(b) (2015) (“The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may
The NC PRL does not grant court records any special dispensation from public access requirements, except to define two narrow exceptions to the law. The first exception allows for the withholding of settlements in medical malpractice actions against public hospitals. The other exception makes arrest and search warrants confidential until they have been returned. Various statutes outside the NC PRL also treat some court documents as confidential. These include records of grand jury proceedings, most adoption records, and reports of cases of juvenile abuse, neglect, or dependency. Other than these significant exceptions, almost all court records are subject to public inspection under the NC PRL unless otherwise specifically restricted by law.

Given this overlapping and sometimes ambiguous legal authority, it should come as no surprise that individual judges and court clerks frequently struggle with how to implement the public’s right of access to court records. As Amanda Conley, Anupam Datta, Helen Nissenbaum, and Divya Sharma note, “restrictions on access trickle down from state and federal appellate courts to the local courthouses themselves, where state and local law, custom, and in some cases simply the whims of court clerks determine which information in the court record will actually be made available to the public, and how.”

Moreover, librarians and archivists, who may not be bound by law to provide public access to court records, have an even broader range of

obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law.

48. See News & Observer Pub. Co. v. Poole, 412 S.E.2d 7, 19 (N.C. 1992) (“[W]e hold that in the absence of clear statutory exemption or exception, documents falling within the definition of ‘public records’ in the Public Records Act must be made available for public inspection.”).
49. Conley et al., supra note 13, at 787.
50. The applicability of public records statutes to publicly supported libraries’ collections is not well established. Public libraries have been described as requiring autonomy to add and withdraw materials from their collections, at least in the context of First Amendment analysis. See United States v. Am. Library Ass’n, 539 U.S. 194, 195 (2003) (Rehnquist, C.J., plurality opinion) (“To fulfill their traditional missions of facilitating learning and cultural enrichment, public libraries must have broad discretion to decide what material to provide to their patrons.”). State archives, however, tend to have statutory requirements for providing access to public records. See Carol D. Billings, State Government Efforts to Preserve Electronic Legal Information, 96 L. LIBRARY J. 625, 626 (2004) (noting that “most state libraries that operate the depository programs and
options for dealing with sensitive information in court records. For many, the question is not what the law requires, but rather what is the best policy for ensuring the protection of privacy interests while at the same time informing the public about the functioning of the court system.\footnote{51} As a result, some libraries exclude whole categories of records from public access,\footnote{52} whereas others engage in targeted redactions of sensitive information based either on their own assessment of what is private\footnote{53} or on the electronic filing rules adopted by their courts.\footnote{54} Alternatively, several libraries have adopted a middle-ground approach. They provide mediated access to court records, allowing only bibliographic information to be discoverable on the Internet, not the contents of the records themselves,\footnote{55} or limiting access to unaltered briefs to registered library users.\footnote{56}

\footnote{51}{See, e.g., Hinderman, \textit{supra} note 18, at 7 (discussing the Montana State Law Library’s efforts to balance privacy and public access concerns); Whiteman, \textit{supra} note 17, at 477 (describing the approach taken by Northern Kentucky University’s law library). Even if a library or other archive decides to make case files available without any restrictions on access, it should not face legal liability if the records contain information that violates privacy law. \textit{See} Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (“Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.”).}

\footnote{52}{See Hinderman, \textit{supra} note 18, at 7 (describing the exclusion of appendices); Whiteman, \textit{supra} note 17, at 477 (same).}

\footnote{53}{The Montana State Law Library redacted social security numbers, dates of birth and other “obviously private information” from the briefs in its database of supreme court briefs. Hinderman, \textit{supra} note 18, at 7. The Blakely Law Library at the Arizona State University Sandra Day O’Connor College of Law has posted digital versions of state appellate and supreme court briefs to the Internet with the caveat, “Certain types of personal information may have been removed from briefs on the Arizona Memory Project to allow for online publication.” \textit{About Collection}, ARIZONA MEMORY PROJECT, http://azmemory.azlibrary.gov/cdm/landingpage/collection/asuross (last visited May 31, 2015).

\footnote{54}{See Faye Jones & Caroline Osborne, Lessons Learned: Creating Digital Collections and Privacy: Best Practices, Presentation at the Southeastern Association of Law Libraries Annual Meeting (April 16, 2015) (presentation slides on file with authors) (comments of Faye Jones, describing the Florida State University College of Law Library’s collaboration with other Florida law libraries to provide Internet access to state supreme court briefs and citing Florida public records laws (FLA. STAT. §§ 119.01–.15 as well as FLA. R. JUD. ADM. 2.420), which outline confidentiality guidelines for filing of court records including redaction).

\footnote{55}{Id. (comments of Caroline Osborne, explaining Washington and Lee Law Library’s project to digitize and not redact copies of Virginia Supreme Court briefs, to store the digital briefs in a “dark archive,” and to develop policies and procedures for responding to requests for individual briefs, citing state statutes on freedom of information (VA. CODE §§ 2.2–3700–3714), prohibition of posting certain information.
B. **Countervailing Interests**

Court records contain a variety of information that can cause harm to individual, organizational, and governmental interests. A court’s file for a single case may consist of thousands of documents, including motions, pleadings, briefs, transcripts, exhibits entered into evidence, and records and responses produced during pre-trial discovery that have been filed with the court.\(^{55}\) For individuals, information ranging from social security numbers to sexual history can appear in these documents raising, among other concerns, the risk of identity theft and reputational harm.\(^{56}\) For businesses and other organizations, court records can contain trade secrets and other confidential information.\(^{57}\) For the government, information in court records such as the names of confidential informants and descriptions of intelligence gathering techniques can potentially harm national security or undermine law enforcement efforts.\(^{60}\) Although all of these countervailing interests are worthy of study, our focus is on the impact that the disclosure of sensitive information in court records can have on individuals.

Given that "[t]he courts are a stage where many of life's dramas are performed, where people may be shamed, vindicated, compensated, punished, judged, or exposed,"\(^{61}\) it is natural that court records, which

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\(^{55}\) See Policies for Utah Court Briefs, HOWARD W. HUNTER LAW LIBRARY, J. RUBEN CLARK LAW SCHOOL, BRIGHAM YOUNG UNIVERSITY, http://digitalcommons .law.byu.edu/utah_court_briefs/policies.html (last visited Feb. 1, 2016) (explaining that briefs are "supplied to the Hunter Law Library by the courts for the purposes of legal scholarship and academic research. The Hunter Law Library provides this collection as authorized by the Utah Courts. The Law Library is not responsible for the selection or content of individual records.").

\(^{56}\) See Conley et al., supra note 13, at 781 (noting that "[e]ach and every form filled out by the parties, their lawyers, or by related third parties (witnesses, jurors, etc.) potentially contains vast amounts of personal data including home or school addresses, places of employment, birthdates, and, in many cases, Social Security numbers."). Some documents such as sealed discovery materials, see Leucadia, Inc. v. Applied Extrusion Techs, Inc., 998 F.2d 157, 163–65 (3d Cir. 1993), and certain financial information about the parties, see United States v. Lexin, 434 F. Supp. 2d 836, 849 (S.D. Cal. 2006), are often excluded from the public court record.

\(^{57}\) See infra Part III.


\(^{61}\) Conley et al., supra note 13, at 774.
serve as a chronicle of these dramas, are littered with private and sensitive information. In fact, they are full of information not just about the parties in a case, but also about witnesses, family members, victims, and jurors, among other individuals who are brought willingly or unwillingly into a legal dispute.

Although concerns about private information in court records existed long before the Internet, many commentators see the move to electronic court records as effectuating a qualitative shift in the balance between the competing interests of public access and individual privacy. Not so long ago it was difficult and time-consuming to access and search an entire case file. Today, with the advent of electronic court records and online access, it takes little effort to find and link information across cases, courts, and states. The following sections highlight the most pressing concerns that arise from the transition to online court records. We then dive much more deeply into these issues in Parts III and VI.

1. Privacy and the Loss of Practical Obscurity

Courts, like other institutions in our society, are in the midst of a transformation. The largely paper-based world of the twentieth century is giving way to an interconnected, electronic world where physical and temporal barriers to public access are evaporating. Over the past decade, courts across the country have been moving with alacrity to digitize their records and make them available to the public online.62 Some courts are doing this work themselves, while others are relying on third parties, such as libraries and other archives, to make online access to historical records possible. A growing number of courts also require litigants to file their pleadings, motions, and other documents in electronic format.63

62. See John T. Matthias, E-Filing Expansion in State, Local, and Federal Courts 2007, in FUTURE TRENDS IN STATE COURTS 2007, at 34 (highlighting state courts' efforts to move to e-filing and the conversion of paper case documents into digital images), http://ncsc.contentdm.oclc.org/edm/ref/collection/tech/id/570; HON. PAUL H. ANDERSON, FUTURE TRENDS IN PUBLIC ACCESS: COURT INFORMATION, PRIVACY, AND TECHNOLOGY 11 (2011) (reviewing the trends and issues relating to "an environment where most court systems maintain all or part of their information electronically").

63. See, e.g., Peter W. Martin, Online Access to Court Records—from Documents to Data, Particulars to Patterns, 53 VILL. L. REV. 855, 872 (2008) ("By the end of 2007, electronic filing was an option in nearly all federal trial courts and was mandatory in a large number."); Eric J. Magnuson & Samuel A. Thumma, Prospects and Problems Associated with Technological Change in Appellate Courts: Envisioning the Appeal of the Future, 15 J. APP. PRAC. & PROCES 111, 114 (2014) ("By late 2012, all federal courts of appeals were using electronic filing (e-filing.").); Matthias, supra note 62, at 34 (reporting
As discussed in the previous section, court records have for centuries been open for public review. Yet the difficulty of actually accessing individual records—for example, traveling to the courthouse, identifying the relevant case, finding the sought after document, and copying the information—made the information in these records practically obscure in the sense that private and sensitive information could remain in the records without creating a significant risk of harm. Today, this practical obscurity is vanishing. Although the specifics of electronic access vary by state (and sometimes by court), in most federal courts and many state jurisdictions anyone can access a court’s electronic case database through a website interface. That interface typically provides the ability to search by party names, case type, keywords, and other information, as well as providing case-by-case browsing. If users wish to copy a document, they can usually do so by downloading it as a PDF file.

The loss of practical obscurity that has resulted from this nearly frictionless access to court records lies at the heart of the debate about the privacy risks arising from online access. The Supreme Court recognized the importance of practical obscurity in holding that rap sheets aggregating public—but difficult to assemble—information qualify for a privacy exemption from disclosure under the federal Freedom of Information Act. The Court stated, “Plainly there is a vast difference between the public records that might be found after a diligent search of

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64. Some courts charge for access, some merely require registration, while others do not require either payment or registration.

65. In jurisdictions that have public records laws that cover court records, a requester may even be entitled to a copy of a court’s entire case database, though some limitations might apply. See LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of Courts, 776 S.E.2d 651, 652 (N.C. 2015) (finding that the court’s Automated Criminal/Infraction System (ACIS) database was a public record under the North Carolina Public Records Act subject to a limiting statutory provision requiring requesters to secure a nonexclusive contract and pay for reasonable cost recovery).

66. U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 479, 762–63 (1989) (describing the view that aggregated information provides no more privacy harm than its discrete components as a “cramped notion of personal privacy”). It should be noted that the Court’s decision in Reporters Committee for Freedom of the Press did not address access to court records, but rather a request for access under FOIA to a database of criminal history information compiled by the FBI. Id. at 751–52. The standard for determining whether public access can be denied under FOIA is less demanding than the standard for restricting access to court records; all that the government was required to show was that disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Id. at 756 (quoting 5 U.S.C. § 552(b)(7)(C)).
courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”

2. Navigating the Transition to Online Court Records

As a result of these and other concerns, court administrators, judges, lawyers, librarians, and legislators are in active discussion about how to navigate the transition to online court records. Privacy scholars have also been trying to influence this transition. Indeed, a number of legal scholars consider practical obscurity to be a stand-in for privacy interests and now, with the loss of this obscurity, are suggesting that courts and archivists should implement various approaches to obscuring sensitive information in court records. Other scholars also have explored the tension between privacy and public access to court records, with some recommending a substantial curtailment of public access through redaction of electronic and print records, restricted public access, removal of categories of court records from Internet access, and increased filing of court documents under seal.

Although important theoretical work is being done with regard to the nature and extent of the privacy interests implicated by public access to court records, we are only just beginning to develop a sufficient body of

67. Id. at 764.
68. See Conley et al., supra note 13, at 776 (noting that “public and internal deliberations over state access policies have remained actively in progress”).
69. See Hartzog & Stutzman, supra note 11, at 41 (“Obscurity obligations would not aim to completely curtail information disclosure; rather, they would seek to minimize the likelihood of discovery, comprehension, or contextualization.”); Steven C. Bennett Pleadings, Privacy and Ethics: Protecting Privacy in Litigation Documents, 2 REYNOLDS CT. & MEDIA L.J. 25 (2012); Daniel J. Solove, Access and Aggregation: Public Records, Privacy and the Constitution, 86 MNN. L. REV. 1137 (2002); Will T. DeVries, supra note 15.
70. See, e.g., Gomez-Velez, supra note 16, at 431–32 (examining the decisions of some states to exclude categories of court records from online systems); Morrison, supra note 16, at 925–27 (recommendating redaction of identifying information of cooperating defendants and other informants while increasing transparency in using these law enforcement practices); Henderson, supra note 16, at 76–77 (supporting the American Association of Law Libraries’ advocacy for redaction of sensitive information from bankruptcy court records accessible to the public through electronic case files). Not all scholars argue for restricting public access. See, e.g., Lynn LoPucki, The Politics of Research Access to Court Data, 80 TEX. L. REV. 2161 (2002) (arguing against selective restriction of access to court records to enable better empirical research about the courts).
71. See, e.g., Nissenbaum, supra note 14, at 136–38 (concluding that accepted social and practical norms for information flows are superior to formal bifurcations of information into categories of public or private); Hartzog & Stutzman, supra note 11, at 3–4 (suggesting that the concept of “online obscurity” is a critical component of online
research that examines the risks to privacy when court records are made available through the Internet compared with long-standing public access that was practically obscure due to the logistical barriers to access.

Our present research helps to fill this gap in our knowledge. Empirical data about the frequency and context of sensitive information in the North Carolina Supreme Court's files will allow policymakers and scholars to better understand and evaluate the range of privacy risks that can arise from online court records.

III. A SENSITIVE INFORMATION TAXONOMY FOR COURT RECORDS

Our project draws on the longstanding approach to privacy of identifying certain types of information that present risks of harm that can be reduced through restrictions on public exposure. Taxonomies of sensitive information appear throughout the law of the United States and other jurisdictions, and electronic filing systems at both the federal and state level rely extensively on predefined lists of information types that must be handled with special care. The use of sensitive information taxonomies is pervasive because they provide an attractive, seemingly simple solution, for balancing privacy and competing interests. Indeed, this approach to privacy is the basis of much of privacy law.

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privacy and developing an analytical framework for use by lawmakers and courts); Solove, supra note 69, at 1176–78 (criticizing the "secrecy paradigm" in privacy discourse and suggesting that there is an "expectation of limits on the degree of accessibility" to public records).


73. See Ohm, supra note 72, at 1128–29 ("The great variety of regulations, law, technical standards, and corporate practices that have been implemented to protect the privacy of information stored in databases share at their core this unifying construct [of sensitive information].")
A. The Challenges of Creating a Taxonomy of Sensitive Information

1. Building a Taxonomy on Debated Definitions of Privacy and Related Concepts

The creation of a comprehensive taxonomy of sensitive information types is a challenge because privacy law and policy are not grounded in a coherent understanding of or approach to privacy. Moreover, some conceptions of privacy simply do not lend themselves to a sensitive-information approach. In addition, disagreement about the proper role of related concepts of confidentiality, practical obscurity, and contextual privacy increases the difficulty of creating a taxonomy of sensitive information.

One of the core problems is the lack of consensus about the underlying interests and risks that define privacy. Financial integrity, personal safety, non-discrimination, confidential access to professional advice,


75. Identity-theft statutes prohibit the disclosure of data such as financial account numbers and PIN codes. See, e.g., N.C. GEN. STAT. § 14–113.20(b) (2015); MASS. GEN. LAWS ch. 266, § 37E(a) (2015). Data security breach notification statutes require that companies and government entities encourage individuals to monitor their accounts for tampering if sensitive data is not kept confidential. N.C. GEN. STAT. § 75–65 (2015); CAL. CIV. CODE § 1798.82 (West 2015). Gramm–Leach–Biliey mandates notice requirements to allow bank customers to opt-out of permitted sharing of some of their financial information. Gramm–Leach–Biliey Act (GLBIA), 15 U.S.C. § 6802 (2012).

76. Publication of location information can place persons, particularly police officers, cooperating defendants, and victims of stalking, in harm’s way. Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 77 (2006); Morrison, *supra* note 16, at 971. Some federal and state statutes offer privacy protection under limited circumstances to particular groups. See, e.g., Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g(a)(5)(B) (2012) (mandating the option for parents to opt-out from the publishing of student directory information); CAL. GOV. CODE § 6254.21 (West 2015) (prohibiting the posting of any elected or appointed official’s home address or telephone number to the Internet without written permission).

77. Although Federal EEO law does not require non-disclosure of protected class status, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, some employers have developed best practices for avoiding related questions in order to provide a defense that they could not have based hiring decisions on information they did not have. In effect, privacy works as a barrier to discrimination. See Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177 (2003) (arguing that a shift in the presumption of failure to hire for discriminatory reasons has occurred in favor of employers); Daniel J. Bugbee, *Employer’s Beware: Violating USERRA through Improper Pre-Employment*
and protection of intellectual development space for certain creative pursuits and for children are some of the interests protected under the umbrella of privacy law.\textsuperscript{79} Other concepts associated with privacy include autonomy, dignity, and liberty.\textsuperscript{80} Some of these privacy interests relate to rights against the government while others address privacy in the context of private relationships. In addition, although privacy is generally considered a personal interest, it is also advanced as an important benefit to society.\textsuperscript{81}

Another point of debate is the authority for defining privacy interests. Some approaches embrace the idea that privacy is a personal choice.\textsuperscript{82}


78. Evidentiary privileges such as the attorney-client privilege are designed to encourage disclosure by providing confidentiality. MODEL CODE OF PROF'L CONDUCT R. 1.6 (1983).


80. Protections of some areas of personal integrity are recognized as constitutional freedoms from government intrusion, and this body or bodies of law are characterized as decisional privacy, information privacy, and/or liberty protections. See, e.g., Griswold v. Conn., 381 U.S. 479 (1965) (holding that the right of marital privacy was violated by a statute restricting the use of or provision of advice in support of contraception); Whalen v. Roe, 429 U.S. 589, 598-599 (1977) (noting privacy jurisprudence recognizes at least two types of interests, avoiding disclosure of personal information and independence in making certain kinds of important decisions); Lawrence v. Texas, 539 U.S. 538 (2003) (finding a Texas statute that criminalized sodomy intruded into the personal and private lives of individuals and violated the right to liberty under the Fourteenth Amendment). The Federal Trade Commission has committed to enforcing privacy promises even when the harm is not economic or physical or an unwanted intrusion, but merely unexpected disclosure of sensitive information about health or precise geolocation as well as less sensitive information such as purchase or employment history. FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS, 13–14 (March, 2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.


Other approaches suggest privacy standards should reflect cultural norms,\textsuperscript{83} and yet another view is that privacy might need to be imposed upon individuals by a paternalistic government.\textsuperscript{84}

Disputes over the role of confidentiality also contribute to the instability of any comprehensive taxonomy. While privacy is generally considered to be about an individual's ability to avoid disclosure of his or her personal information, confidentiality is often used to describe a state of limited disclosure of that same information, perhaps to a person who has a duty to prevent further disclosure of conversations, such as an attorney providing legal advice. Some confidential relationships are recognized broadly throughout the law, while others are based on contractual principles or specific statutes that limit sharing of information.\textsuperscript{85} Still other confidential relationships are supported by cultural, religious, or other social norms and have no enforcement mechanisms in the law.

\textsuperscript{83} The two-prong \textit{Katz} test for violations of the Fourth Amendment includes both a subjective test for the defendant's expectation of privacy and an objective measure of the reasonable expectation of privacy. \textit{Katz} v. United States, 389 U.S. at 347, 360–62 (Harlan, J., concurring). The reasonable expectation prong might well be an assessment of existing societal norms and realities. See Orin S. Kerr, \textit{Four Models of Fourth Amendment Protection}, 60 STAN. L. REV. 503 (2007) (noting that societal understandings of privacy could be relevant to determining what constitutes Fourth Amendment reasonable expectations). In the online context, industry self-regulation for privacy is largely a measure of how much intrusion the market will tolerate without calling on Congress to formally regulate. See Omer Tene & J. Trevor Hughes, \textit{The Promise and Shortcomings of Privacy Multistakeholder Policymaking: A Case Study}, 66 MICH. L. REV. 437 (2014) (noting criticisms of industry codes of conduct and recommending structural supports to improve upon failed self-regulation).

\textsuperscript{84} See Anita L. Allen, \textit{Coercing Privacy}, 40 WM. & MARY L. REV. 723, 755 (1999) (“Government will have to intervene in private lives for the sake of privacy and values associated with it.”).

The role of practical obscurity adds another element to the conceptual framing of privacy. Like confidentiality, practical obscurity creates expectations of limited disclosure based on practical barriers to sharing rather than on legal or social restrictions. Most of the debate about confidentiality and practical obscurity relates to the role that the law should play in supporting these social or practical norms.86

Context plays an important role in defining privacy, confidentiality, and practical obscurity, yet this is a difficult factor to encapsulate in a taxonomy of sensitive information. The contextual approach emphasizes that privacy risks vary based on the circumstances in which information is shared, including the relationships between the sharer and recipient as well as their expectations at the time of sharing. Time is also a contextual factor that can have an impact on both the harms and benefits that attach to the disclosure of sensitive information. Some approaches to privacy embrace the idea that the value of privacy increases over time compared with other interests,87 and yet in other instances privacy interests are treated as decreasing with the passage of time.88

2. Charting the Piecemeal U.S. Approach to Privacy

Another challenge in creating a taxonomy of sensitive information is that different information types are treated as sensitive in different areas of the law. The piecemeal approach evident in U.S. privacy law is a function of the federal system, a history of legislating in response to startling events,89 and the balancing of interests promoted by stakeholders. Many

86. See Nissenbaum, supra note 14, 155–56 (describing privacy norms as a function of many variables and suggesting that “protecting privacy will be a messy task”).

87. The Court of Justice of the European Union held that Google must remove from its search results a link to a news article about a foreclosure that occurred more than a decade ago because the information was no longer timely. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos (May 13, 2014), http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&doclang=EN.


89. For example, Congress passed the Video Privacy Protection Act (VPPA), 18 U.S.C. § 2710 (2012), in 1998 following the disclosure of Robert Bork’s video rental history during his nomination to the Supreme Court. See Neil M. Richards, The Perils of Social Reading, 101 GEO. L.J. 689, 694 (2013) (describing how “a horrified Congress quickly passed the VPPA,” perhaps upon realizing that politicians’ video rental records might otherwise be revealed as easily as Bork’s); Andrea Peterson, How a Failed Supreme Court Nomination Is Still Causing Headaches for Hulu and Netflix, WASH. POST (Dec. 27,
U.S. privacy laws protect particular types of information within the context of a regulated sector, such as health care and banking, or within the context of limiting government power. The result is that particular information types may be protected in one sector although their privacy benefits can be outweighed by competing interests in another. Activity at the state level has also resulted in multiple approaches in areas such as data security breach notification requirements, and so the fragmentation is ongoing and pervades the U.S. legal system.

A related issue for the creation of a comprehensive taxonomy is that some sensitive information types are more clearly defined by law than others. Some laws are grounded in general principles like “unfair or deceptive trade practices” or tautologies found in common law torts that provide civil remedies for the disclosure of “private facts.” These vague constitutional and tort protections for privacy contrast with health regulations such as the Health Insurance Portability and Accountability Act (HIPAA) that contains a list of seventeen sensitive information types that need to be redacted before regulated health entities can share personal health information. Some privacy-related laws do not define sensitive information types at all and instead draw on influential policy statements, industry standards, and other areas of law. Some U.S.
privacy laws are hybrids, with illustrative but non-exhaustive lists of protected information types. Sometimes information is protected from some uses but not others, as in the Fair Credit Reporting Act, which limits the circumstances under which a consumer reporting agency can distribute consumer credit reports.

Whatever benefits the sectoral approach brings, they are increasingly threatened by the ease with which information can be shared and aggregated. The increase in data brokers and the work of computer scientists and journalists highlight the leaky boundaries between separately regulated sectors and the potential for recreating previously redacted information by merging separate databases. Information not restricted from disclosure in one context can obviate privacy protections in other parts of the dynamic information ecosystem. This development affects not just those individuals whose sensitive information is exposed through one sector but also those industry actors who invest in costly privacy and security approaches that prove to be ineffective. Public records in particular can spoil the privacy protections required in other areas because

partially described in court documents. The statutory basis for Rule 6.3 is N.C. Gen. Stat. § 132-1.10(d).


they provide information that can be used for re-identifying individuals or for connecting a profile with information that carries privacy risks.

With these concerns in mind, we set out to create a sensitive information taxonomy that would allow for the identification of sensitive information in court records. We utilized a taxonomic approach for several reasons. First, we wanted to study the frequency of sensitive information in court records without first making a normative claim about what information types should be considered private. As a result, we cast the net widely and included a large number of information types, even those that appeared to have only a modicum of support in existing privacy law and scholarship. Second, we believe that the process we undertook to create our taxonomy will be valuable to other scholars and policymakers. In the sections that follow, we describe how we created our taxonomy and why we chose the information types that we did. Of course, not everyone will agree with our final list. Nevertheless, our taxonomy has proven to be a helpful guide in the assessment of the privacy risks that can arise from the public disclosure of court records, especially at a time when privacy laws have limited or unclear application to such records. Finally, even for those who disagree with our inclusions and exclusions, the instant taxonomy will serve as a useful starting point for the development of alternative taxonomies that scholars can apply to other information contexts.

B. CRITERIA FOR INCLUSION IN THIS STUDY

This project's taxonomy of sensitive information represents a broad list of information types that are protected by U.S. privacy law or that have been identified by scholars or others as information that should be protected from public disclosure.\footnote{We conducted a survey of federal and state constitutional, tort, statutory, and regulatory law as well as federal and state court rules, European law, and legal scholarship.} To facilitate coding and analysis of the court records in our study, we grouped the various sensitive information types into the following thirteen categories:

1. Assets
2. Civil Proceedings
3. Computer Use
4. Criminal Proceedings
5. Education
6. Employment
7. Financial Information
8. Health

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9. Identity
10. Images
11. Intellectual Pursuits
12. Location
13. Sexual Activities

These are thematic categories that capture similarities in subject matter for the 140 sensitive information types that we searched for in the court records. Some information types logically fit in multiple categories, but we placed them in one category as a matter of simplicity for the coding and analysis of the records. There are, of course, other ways the individual information types can be categorized. We describe the makeup of each category in the sections that follow and provide a full listing of all of the coded information types in the Appendix.

After initial testing of the taxonomy, we decided to limit recording of sensitive information types to those occurrences that the coder could associate with an identified individual. In other words, we only coded for sensitive information that was associated with a person named in full or by last name within the brief or appendices of each document in the study. The identified individual did not have to be named on the same page where the sensitive information type occurred, but the association had to be clear to the coder from the information within the document. For example, we would code for “Anne Klinefelter’s Browning semi-automatic handgun” because it is apparent from the document that the gun is owned or possessed by Anne, but we would not code for “a Browning semi-automatic handgun was found in the street outside the grocery store” because the information is not associated with an identified individual.

100. The only exception we made was for social security numbers because of their utility as a stand-in for personal identification. See infra note 139 and accompanying text.
101. Our requirement that sensitive information types needed to be associated with individuals named within the court briefs means that our findings do not include data that might directly support considerations of how discrete appearances of sensitive information (not associated with persons identified in court records) might be linked to individuals when court records are read in conjunction with outside sources. See FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY, supra note 80, at 35–38 (suggesting that non-personally identifying information (PII) can be increasingly transformed into personally identifying information through re-identification); Christopher Wolf, Technological Advances and Privacy Challenges, in UNDERSTANDING DEVELOPMENTS IN CYBERSPACE LAW 23 (2014) (advising that traditional solutions focused on personally identifying information are undercut by big data practices and should be supplemented with techniques such as measuring risk of re-identification, and noting that publicly released data present greater risks for re-identification than data not publicly released); Paul M. Schwartz & Daniel J. Solove, The PII Problem: Privacy and a
We did not record occurrences of names alone, other than the names of minor children, absent some connection between the name and another piece of sensitive information (e.g., a person named as a juror, witness, or rape victim). Where an individual was associated with another piece of sensitive information, we coded for whether the individual was an “adult,” “minor,” or “unknown.” In privacy law, minors receive more protection than adults, so this status is itself a piece of sensitive information. We did not code for information types associated with entities such as businesses, associations, and other groups.

What follows is an overview of the information types and categories in our taxonomy and some description of the sources that we used to create the taxonomy.

1. Assets

The “assets” category contains information relating to an identified person’s possession or ownership of assets that might be considered sensitive, including financial assets, real estate, and vehicle identification numbers and license plate numbers. It also contains information indicating that an individual has a gun permit, filed a gun permit application, or possessed or owned a gun.

Scholars have noted that property ownership, including real estate ownership or rental status, constitutes information that can be used to identify individuals and that enables the creation of profiles used by data aggregators. The Federal Trade Commission has noted that property records maintained by states are part of a growing data broker industry

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102. We tested the coding of every appearance of a name early in the project, but so many names appeared in the briefs and appendices that it threatened to overwhelm our resources. We decided to leave this particular type of examination of court records to other researchers.


104. Helen Nissenbaum, Private in an Information Age: The Problem of Privacy in Public, 17 LAW AND PHILOSOPHY 559, 561, 577 (1998) (listing information types traditionally treated as public and increasingly being used in the digital environment as identifying information in the organized surveillance of individuals).
that creates some risks of harm for consumers.\textsuperscript{105} Vehicle identification numbers and license plate numbers are used in similar ways and are restricted under some state laws as well as the federal Driver's Privacy Protection Act.\textsuperscript{106}

Information on gun ownership and possession is included because some states have passed legislation to protect the privacy of gun owners. For example, North Carolina exempts gun registration records from its public records law which would otherwise require public access to that information.\textsuperscript{107} The Florida Firearm Owners Privacy Act limits a physician’s ability to inquire about firearm access in patient interviews.\textsuperscript{108} In addition, scholars raise the possibility that public disclosure of gun registration unconstitutionally burdens the right to bear arms.\textsuperscript{109}

2. Civil Proceedings

The “civil proceedings” category is an organizing point for a number of types of information that relate to civil lawsuits and other non-criminal judicial proceedings. This category includes information relating to adoption, child support, civil commitment to a penal or mental facility, custody or guardianship proceedings, information indicating that an

\textsuperscript{105} FED. TRADE COMM’N, DATA BROKERS supra note 98, at 11–12 (reporting how state and local government records including property records are collected by data brokers either directly or indirectly); see also FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY, supra note 80, at 69 (recommending legislation to improve transparency in the data broker industry).

\textsuperscript{106} For example, North Carolina limits the sharing of vehicle identification numbers acquired through toll road administration. N.C. GEN. STAT. § 136-89.213 (2015). Regulations implementing the HIPAA Privacy Rule prohibit the sharing of vehicle identifiers and serial numbers, including license plate numbers, connected to personal health information. 45 C.F.R. § 164.514(b)(2)(iii) (2015). The federal Driver’s Privacy Protection Act, 18 U.S.C. §§ 2721–2725 (2012), limits state departments of motor vehicles from sharing personal information except for specified purposes. The statute has been read to curtail distribution of “personal information,” which is defined broadly. See Dahlstrom v. Sun–Times Media, 777 F.3d 937, 943 (7th Cir. 2015) (“[T]he DPPA’s language appears broad: personal information means information that identifies an individual,... and there is no indication that Congress intended the enumerated list of examples to be exhaustive.” (internal quotations omitted)).

\textsuperscript{107} N.C. GEN. STAT. §§ 14–415.17(c), 14–405(b), 14–406(a) (2015).

\textsuperscript{108} See Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014) (finding constitutional the effect of the Florida Firearm Owners Privacy Act on physicians’ free speech rights); Act of April 26, 2011, 2011 Fla. Laws 112 (codified at Fla. STAT. §§ 801.026, 456.072, 790.338).

identified individual was the subject of a dependency or neglect proceeding, party to a divorce, juror name, and prior adverse civil judgments.

Information that falls within this category may be regarded as sensitive because individuals have no choice but to share these types of personal information in order to make use of government services or to remain law-abiding citizens. The particular privacy implications of each of these information types are also advanced because of the special dignitary harms or, in the case of juror names, risk of retaliatory harms from public disclosure. Information arising in civil proceedings that falls into a more specific category such as financial or health information is included in those more detailed categories below.

3. Computer Use

A number of information types that relate to an individual’s use of computers or electronic information services comprise the “computer use” category: Instant Messenger or SMS identifier; IP address; Internet search history; Internet Service Provider (ISP) records including account number, billing information, or online access logs; computer password; Radio Frequency Identification (RFID); screen or user name for accessing a website or other online service; and Voice Over Internet (VOIP) username or number. These information types are culled from several different federal and state statutes as well as scholarship advocating protection for this kind of information.

110. See Grayson Barber, Personal Information in Government Records: Protecting the Public Interest in Privacy, 25 ST. LOUIS U. PUB. L. REV. 63, 71–72 (2006) (suggesting that court records “often contain information that is exquisitely personal”); Whalen v. Roe, 429 U.S. 589, 605–06 (1977) (holding that a state database on individuals with prescriptions for controlled substances did not violate a right to privacy because the data was not for public disclosure and was kept secure); Grayson Barber & Frank L. Corrado, Public Access to Government Records and How Transparency Protects Privacy, N.J. LAWS., Oct. 2011, at 60 (protesting the government practice of selling personal information, and advocating transparency in order to generate citizen advocacy for greater privacy protection).


112. See, e.g., Children’s Online Privacy Protection Act (COPPA), C.F.R. §§ 312.1–2; Omer Tene & Jules Polonetsky, To Track or “Do Not Track”: Advancing Transparency and Individual Control in Online Behavioral Advertising, 13 MINN. J.L. SCI. & TECH.
4. Criminal Proceedings

Like the civil proceedings category, the "criminal proceedings" category serves as an organizing device for sensitive information related to the justice system. For this category, the information types are associated with law enforcement and criminal judicial proceedings, including information that identifies an individual as the subject of a criminal investigation, arrest, incarceration, conviction, sentence, or parole. The category also includes mug shots and pre-sentence investigation reports, sexual abuse allegations, child abuse allegations, and information concerning charges or convictions arising in juvenile proceedings. Additional information types are included for juror name, domestic violence victim name, rape victim name, and other crime victim name. The criminal proceedings category also includes cooperating defendant name, informant name, and witness name.

The information types we have listed within this category are widely regarded as sensitive. For example, many scholars assert that the public disclosure of the names of crime victims and witnesses leads to the further victimization of those who have suffered from or witnessed criminal activity. Others point to the stigma that attaches to individuals who have been subjected to criminal investigation, charge, or conviction.

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113. See, e.g., JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 54-69 (2015) (describing the many types of criminal information in court records and criticizing their widespread availability); Sadiq Reza, Privacy and the Criminal Accused: In Search of a Right, In Need of a Rule, 64 MD. L. REV. 755 (2005) (proposing increased privacy protections for the criminally-accused); Deanna K. Shullman & Mark R. Caramanica, Mug Shots on Lockdown: Government and Citizen Backlash to “Exploitation” Websites Surges, Free Speech is the Casualty, 30 COMM. LAW. 13 (2014) (surveying responses to businesses offering to take down mug shots for a fee and examining a split in federal circuit courts on the constitutionality of restrictions); Rebecca Hulse, Privacy and Domestic Violence in Court, 16 WM. & MARY J. WOMEN & L. 237 (2010) (examining the privacy rights of domestic violence victims in court and concluding that special protections should extend beyond family court contexts); Morrison, supra note 16 at 921 (highlighting the risks of harm from online court records in criminal cases and recommending the redaction of names of cooperating defendants and other informants while increasing transparency in the use of these law enforcement practices).

114. See, e.g., Joel M. Schumm, No Names, Please: The Virtual Victimization of Children, Crime Victims, the Mentally Ill, and Others in Appellate Court Opinions, 42 GA. L. REV. 471, 486–93 (2008).

115. See, e.g., Devah Pager, Bruce Western & Naomi Sugar, Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records, 623 ANNALS AMER. ACAD. POL. & SOC. SCI. 195, 199 (2009), http://ann.sagepub.com/content/623/1/195 (finding that men with a felony drug conviction were fifty percent less
The combination of online and data broker exposure of often stale and incomplete arrest and conviction information is criticized as creating long-term barriers to fresh starts including negative impacts on "employment and housing prospects, parental rights, educational opportunities, freedom of movement, and just about every other aspect of daily life."\textsuperscript{116} Broad exposure of and reliance on records of criminal activity is said to permanently mark ex-offenders as outlaws and restrict their ability to forge a path outside of crime, "a terrible outcome for society."\textsuperscript{117} Information arising in juvenile delinquency proceedings has long been considered to be particularly sensitive because the disclosure of such information was "thought to hinder their rehabilitation by impairing their relations with the community [and] by stigmatizing them such that they view themselves as wrongdoers and act accordingly."\textsuperscript{118}

As a result, a number of states have adopted or are considering broad scaling and expungement laws for various types of criminal information.\textsuperscript{119} Although some of these laws will likely face significant constitutional challenges,\textsuperscript{120} there is clearly a concerted effort by privacy and criminal justice advocates to limit the public disclosure of many types of criminal information.

5. Education

The "education" category encompasses five information types that relate to students at all levels of the education system: income eligibility for the National School Lunch program, the amount of financial aid awarded from federal or private sources, information indicating that a student was disciplined by his or her school, grades or other feedback from a school about a student's performance, and student identifiers.

Educational information is generally regarded as sensitive because it relates to a vulnerable class of individuals, often minors, who must share information with educational institutions, sometimes in a compulsory

\textsuperscript{117} JACOBS, supra note 113, at 306.
\textsuperscript{118} Reza, supra note 113, at 785.
\textsuperscript{119} See Roberts, supra note 116, at 322.
\textsuperscript{120} See supra notes 25–30 and accompanying text.
education context. The information types included in this category are
drawn from several federal statutory protections. 121

6. Employment

Three information types are included in the “employment” category:
information that an individual was disciplined by an employer,
information describing an individual’s military discharge, and performance
evaluations of an employee. Information about the location where an
individual works is included in the “location” category.

Employee privacy requirements vary by jurisdiction under statutory
and common law. 122 In some states, performance evaluations are exempt
from public disclosure. 123 The federal Freedom of Information Act
includes an exemption for disclosure of contents of personnel files if that
information would constitute a clearly unwarranted invasion of personal
privacy, 124 and this exemption has been applied to performance
appraisals. 125 Private employee privacy in performance appraisals varies,
but in some states this information is protected by statute or by common
law. 126

121. The Family Educational Rights and Privacy Act protects student education
records of institutions receiving federal funding. Family Educational Rights and Privacy
Act protects the confidentiality of the names of individual students who qualify for school

122. See Pauline T. Kim, Privacy Rights, Public Policy, and the Employment
Relationship, 57 OHIO ST. L.J. 671 (1996); Access to Social Media Usernames and Passwords,
Natl’l Conference of State Legislatures, http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-
2013.aspx (last visited Apr. 3, 2015) (listing recent legislation intended to strengthen
workplace privacy regarding personal employee social media and other accounts); N.C.

123. States take different approaches to the accessibility of public employees’
performance evaluations. See Roger A. Nowak, A Comparative Analysis of Public
Records Statutes, 28 URB. LAW. 65, 86 (1996) (surveying states’ laws and finding that in
most states personnel files are presumptively private).


125. McLeod v. U.S. Coast Guard, No. 96-5071, 1997 WL 150096 (D.C. Cir. 1997)
(finding privacy interest in Coast Guard officer’s evaluation report); Smith v. Dep’t of
Labor, 798 F. Supp. 2d 274, 284–85 (2011) (holding that disclosure of records
containing performance appraisal information would constitute an unwarranted invasion
of employee’s personal privacy.)

126. See Laura B. Pincus and Clayton Trotter, The Disparity Between Public and
Private Sector Employee Privacy Protections: A Call For Legitimate Privacy Rights for Private
statute and common law).
7. Financial Information

The “financial information” category contains a number of information types that relate to a person’s financial condition and accounts. Separate types were specified for the account numbers associated with an individual’s savings, checking, or other financial account; loan account numbers; credit card numbers; debit card numbers; and other types of financial accounts not already specified. Other information types in this category include information indicating that a person filed for bankruptcy or was adjudged to be bankrupt, that a person has been the subject of a foreclosure judgment, that a person owes a debt, or that a person has a lien on assets due to unpaid taxes. The ownership of physical financial assets such as stock certificates, cash, and coins is included in the “assets” category.

Tax returns are listed in this category as is information about compensation in the form of salary, wage, or other financial benefits, including stock options, court ordered payments, and other forms of compensation. Other policy numbers, credit reports, and an individual's status as an identity theft victim are also considered sensitive information types under various laws.

Information that falls within this category is regarded as sensitive because it not only reveals details about a person’s net worth, but it also may be useful in the commission of identity theft and consequential financial theft or credit harm. States have passed varying forms of restrictions on the sharing of financial and identifying information in order to reduce the risk of identity theft. Other statutes such as the federal Fair Credit Reporting Act and the Gramm-Leach-Bliley Act provide protections for consumers seeking to restrict sharing of financial and related information. In addition, debt and bankruptcy can result in

127. See Cynthia Blum, The Flat Tax: A Panacea for Privacy Concerns?, 54 AM. U. L. REV. 1241, 1262–81 (2005) (outlining a variety of harms that could result from inappropriate uses of tax information and recommending safeguards against disclosure and misuse).


negative treatment even after an individual has regained financial stability. 130 The evolving law of court rules for electronic filing generally requires redaction of financial account numbers. 131

8. Health

The “health” category includes information about abortion, cause of death, place of death, communicable diseases, dates of a hospital stay, disability status, drug or alcohol dependency, drug or alcohol treatment, HIV/AIDS status, and information relating to prescription medications. Paternity test information and pregnancy information are both in this category. Also included in this category are health plan beneficiary numbers, medical billing numbers, medical device identifiers or serial numbers, and medical record numbers. Other information in this category includes health diagnosis or treatment information not previously specified, genetic information, and medical conditions that are not the subject of diagnosis or treatment by a health care professional.

Information that falls within this category is regarded as highly sensitive because of the potential for discrimination based on perceptions of reduced capabilities or assumptions about unpopular causal behaviors. 132 Confidentiality of health information shared with a physician dates at least as far back as the Hippocratic Oath, 133 and is protected by many privilege laws and tort liability in some situations. 134

The sources for information under the health category include the regulations authorized by HIPAA and its amendments, 135 privacy tort


130. Negative treatment of an individual based on debt that has been settled is sometimes considered an inappropriate response that should be prevented through restrictions in access to information about the debt. The right to be forgotten decision in Spain addressed this issue. See supra note 87.

131. See supra note 10.


133. Oath and Law of Hippocrates, circa 400 B.C.

134. Most states recognize an evidentiary privilege for physician–patient communications. See Edward J. Imwinkelried, THE NEW WICMORE: EVIDENTIARY PRIVILEGES § 6.2.6 (2014); McCormick v. England, 494 S.E.2d 431, 437 (S.C. Ct. App. 1997) (reviewing the law of other states and joining the majority to recognize a tort for a “physician’s breach of the duty to maintain the confidences of his or her patient in the absence of a compelling public interest or other justification for the disclosure”).

135. The HIPAA Privacy Rule prevents the sharing of personal health information unless it is de-identified through the redaction of seventeen identifiers or through some
cases,\textsuperscript{136} and federal constitutional law suggesting that information privacy may apply to some prescriptions.\textsuperscript{137} The federal Genetic Information Nondiscrimination Act provides regulatory protection for genetic information.\textsuperscript{138}

9. **Identity**

The "identity" category contains a number of information types that relate to an individual's physical and other characteristics that allow others to identify the individual. Like the other information types that we coded, information in this category must be associated with an identified individual. We did not code for the occurrence of full names or last names alone, even though we did use the appearance of associated names as the qualifying factor for almost all of the information types. We coded for Social Security Number (SSN) with or without names because SSNs are unique identifiers on their own.\textsuperscript{139} We found that tracking names was simply too coder-intensive and provided inconsistent levels of information given that some names are common in the population and others are not. We did, however, code for the name of a minor child if it appeared in the


\textsuperscript{137} See Whalen v. Roe, 429 U.S. 589, 605 (1977) (holding that a New York database containing the names of individuals who were prescribed a controlled drug to treat depression did not burden a constitutional right to privacy because the statute had a rational basis and because the state adopted reasonable data security, but suggesting that a right to avoid wide disclosure of prescription information was at issue).


\textsuperscript{139} For a discussion of why we did not code for names alone, see *supra* note 102 and accompanying text. The perceived utility of social security numbers in facilitating identity theft and financial harm has inspired many states to pass legislation to restrict government collection of this information. *See, e.g.*, N.C. GEN. STAT. § 132-1.10(d) ("No person preparing or filing a document to be recorded or filed in the official records of the register of deeds, the Department of the Secretary of State, or of the courts may include any person’s social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords in that document, unless otherwise expressly required by law or court order, adopted by the State Registrar on records of vital events, or redacted.").
records because privacy laws provide special protection for children in a variety of contexts.\textsuperscript{140}

The identity category includes driver’s license number, email address, fax number, mother’s maiden name, passport number, city and state of birth, professional certificate or license number, state identification number, and telephone number. Although we initially sought to code for gender,\textsuperscript{141} we ultimately dropped this information type because it became unworkable. English language and naming conventions make gender cues so numerous that it was overwhelming the coding process.\textsuperscript{142} We kept an information type for gender identity change, even though that designation is itself a contested and complicated issue.

This category also includes a number of information types associated with biological traits. Age, date of birth, date of death, barefoot print, fingerprint, gait, iris print or recognition, and voice print are included here, as are racial or ethnic origin. Some of this biological information is considered sensitive under a number of laws and is the subject of scholarship advocating increased privacy protection relating to the collection and use of biometric information.\textsuperscript{143} Dates of birth and death

\textsuperscript{140} The Children’s Online Privacy Protection Act provides special requirements for the collection of identifying information from children under the age of thirteen including first and last name. 16 C.F.R. §§ 312.1–3 (implementing 15 U.S.C. §§ 6501–6508). Federal Model Rule of Appellate Procedure 5.2(a)(3) provides that minor children may be identified with initials only. The North Carolina e-filing rules permits minors to be "identified by initials," N.C. eFiling Rules, supra note 10, at Rule 6.3; see also Schumm, supra note 114.

\textsuperscript{141} Federal and state statutes prohibit discrimination on the basis of gender in contexts such as employment and housing. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (prohibiting employment discrimination based on race, color, national origin, sex, and religion); Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 (prohibiting housing rental or sale on the basis of certain traits including sex).

Constitutional protections have also been recognized for gender nondiscrimination. See Craig v. Boren, 429 U.S. 190 (1976) (applying intermediate scrutiny to gender discrimination). While access to gender information is generally not restricted, requests for information relating to gender can create vulnerability for discrimination claims, so this information has been considered sensitive.

\textsuperscript{142} Pronouns alone triggered huge numbers of coding opportunities and created confusion about their meaning as neutral or gender-aware applications. In addition, coders might misread some names as conveying gender information.

\textsuperscript{143} The National Institute of Standards and Technology (NIST), an agency of the U.S. Department of Commerce, states, “Biometric technologies are used to establish or verify personal identity against previously enrolled individuals based upon recognition of a physiological or behavioral characteristic. Examples of biological characteristics include hand, finger, facial, and iris. Behavioral characteristics are traits that are learned or acquired, such as dynamic signature verification and keystroke dynamics.” Biometric Standards Program and Resource Center, NIST, http://www.nist.gov/itl/csd/scn/
are restricted from disclosure under regulations implementing HIPAA. State identity-theft protection acts and court rules for electronic filing systems tend to require redaction of full birth dates.144 Racial and ethnic origin define groups that are protected under the Fourteenth Amendment and by nondiscrimination statutes that generally place limitations on access to or use of this information.145

10. Images

The “images” category captures occurrence of photographs and video that contain a full-frontal view of an individual’s face or features; show sexual organs of an undressed individual; show a person in a state of partial undress indicated to be taken without their consent; and photographs or videos depicting violence, abuse, or death of an individual. Video recordings that depict sexual acts are included in the “sexual activities” category.

These information types are drawn from protections provided through privacy torts, state statutes, and scholarship advocating additional protections for images, especially with the growing use of facial recognition.146


145. See U.S. CONST. amend. XIV; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201–02 (1995); Gratz v. Bollinger, 539 U.S. 244, 249–50 (2003); see also Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012) (prohibiting employment discrimination on the basis of race, color, national origin, sex, and religion); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2012) (prohibiting age discrimination against individuals over forty). States may also have nondiscrimination laws. While these statutes may not prohibit the gathering of information related to the protected traits, a strong defense against discrimination claims is that the sensitive information was not accessed.

146. See, e.g., N.C. GEN. STAT. § 132-1.8. (protecting the confidentiality of photographs and video or audio recordings made pursuant to autopsy). Nonconsensual sharing of nude photographs or images of sexual activity are the subject of privacy torts claims and new statutes. See Danielle Keats Citron & Mary Anne Franks, Criminalizing Reveget Forn, 49 WAKE FOREST L. REV. 345 (2014); Clay Calvert & Justin Brown, Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace, 18 CARDOZO ARTS & ENT. L.J. 469 (2000); Jeffery R. Boles, Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns, 22 CORNELL J.L. &
11. Intellectual Pursuits

The "intellectual pursuits" category is a catch-all category that covers a range of information considered to be sensitive because it conveys information about the thoughts and views of individuals.\textsuperscript{147} It includes cable television subscription records, cable television viewing history, video rental records, records of library use, and records of reading material purchased. Also in this category are the content of recorded conversations, political opinions, religious or philosophical beliefs, trade union membership, and voting information.\textsuperscript{148} While activity on the Internet often reveals similar information,\textsuperscript{149} we did not include computer-related identifiers in this category. Those identifiers were included under the computer use category.

A variety of statutes at the federal and state level address television viewing, video rental, and library use.\textsuperscript{150} Records of books purchased may be protected as a constitutional right or through state legislation.\textsuperscript{151} The
confidentiality of associations that reveal unpopular political beliefs has been recognized as protected under the U.S. Constitution, and scholars have advocated for recognition of other intellectual privacy protections.

12. Location

Information in the "location" category includes geolocation information, home address, school address, and work address. Another information type in this category is full zip code with four or more digits that are associated with an identified individual.

At present, geolocation information is considered sensitive information requiring limits on disclosure under the Federal Trade Commission Act's Section 5 "unfair or deceptive trade practices" protections. Geolocation information is considered sensitive when it is collected from a child using the Internet, and collection of this information is restricted under the Children's Online Privacy Protection Act. Travel patterns evident in geolocation information are arguably sufficiently sensitive to merit Fourth Amendment recognition.


152. NAACP, 357 U.S. at 463.

153. See Anita L. Allen, Associational Privacy and the First Amendment: NAACP v. Alabama, Privacy, and Data Protection, 1 ALA. C.R. & C.L. L. REV. 1 (2011) (reviewing the growth of protections for associational privacy, decisional privacy, and anonymity after NAACP v. Alabama); Neil Richards, INTELLECTUAL PRIVACY 5, 161 (2015) (examining law, policy, and practical approaches to "safeguard the processes of intellectual explorations and belief formation" and advocating for recognition that "intellectual records are sensitive records that demand higher protection than other kinds of data"). Additionally, the European Union provides protection for "personal data revealing... political opinions, religious or philosophical beliefs, [or] trade-union membership..." Council Directive 95/46, art. 8, 1995 O.J. (L 281) 38 (EC).


156. See Hu, supra note 143, at 1481–82, 1500–03 (questioning the capacity of current Fourth Amendment jurisprudence to prevent growth in body and device tracking
13. Sexual Activities

The "sexual activities" category contains two information types: information about sexual activity and video or audio recordings of an identified individual engaged in a sexual act. Information and images relating to sexual activity are sometimes protected through privacy torts and through state statutes designed to address hidden cameras and non-consensual distribution. 157

IV. STUDY DESIGN AND METHODOLOGY

To better understand the privacy interests that might be implicated by public access to court records, we selected a random sample of court records from a large corpus of North Carolina Supreme Court case files that are part of an ongoing digitization project by the UNC Law Library. We coded these documents in order to collect data about the frequency of appearance of sensitive information in the records, as well as other contextual information about the documents and the underlying cases. Once the coding was complete, we used statistical software to analyze the data we collected.

A. CORPUS OF COURT RECORDS UNDER STUDY

The UNC Law library has approximately 400 bound volumes of North Carolina Supreme Court case filings from 1928 to 2000. In 2013, the library embarked on an ambitious project to digitize some of these records and eventually make a version of them available and searchable online. 158 To date, the library has digitized 12,137 briefs and other filings from the North Carolina Supreme Court comprising 535,106 pages. 159 Each case


158. The North Carolina Supreme Court began providing electronic access to its filings in 2000, but does not provide electronic access to records from prior years. Copies of filings prior to 2000 were shared with several non-court libraries in the state, including the UNC Law Library.

159. For the period 1984–2000, the library has scanned and digitized the case filings from 2255 cases heard by the North Carolina Supreme Court; this is approximately 85% of the cases in which the court issued a decision during this time period. For reasons unknown, the court did not send the library any case filings from approximately 15% of
file in this corpus contains at least one merits brief, which may include an appendix. When a brief does have an appendix, it may contain court transcripts, witness testimony, and exhibits entered into evidence such as bank statements, medical records, psychological evaluations, and emails.

Our study used a stratified random sample by year of documents pulled from this corpus of records spanning the time period 1984 to 2000. These documents included briefs and petitions for discretionary review, along with their associated appendices. We did not review the "record on appeal," which is a separate filing containing, inter alia, copies of the case pleadings, jury instructions, transcripts, and other evidence filed in the lower courts. In total, we analyzed 504 documents drawn from 466 cases. One hundred and ninety-eight (39%) of these documents contained an appendix.

B. Coding and Analysis

We then performed content analysis on the documents in our sample. This involved coding each document based on its content and case characteristics. The coding, which was performed by a team of eleven research assistants, captured information about each document (e.g., document type, length); information about the underlying case (e.g., date, case type); the type of sensitive information found in the record (e.g., social security number, HIV status); the general category of sensitive information (e.g., financial, health); and information about the location of the cases the court heard and decided during this time period. These digitized records are being redacted in preparation for posting as searchable documents on the Internet.

160. In addition to a brief filed by the appellant, the case files also contain briefs by the appellee, reply briefs, and amicus curiae briefs. For cases that do not involve an appeal as of right to the North Carolina Supreme Court, the case file will also contain a petition for discretionary review.


162. The number of documents exceeds the number of cases because some cases produced more than one document in our sample.

the sensitive information within the document (e.g., brief body, appendix).\textsuperscript{164}

The selection and identification of sensitive information types was one of the central challenges of this study. As we described in Part III, there is no single, comprehensive list of private and sensitive information that we could utilize at the start of this project. Existing privacy laws, regulations, and customs have created a patchwork of inconsistent approaches and there is, as yet, no consensus among privacy scholars as to what information should be deemed private or sensitive in the context of court records.\textsuperscript{165} Nevertheless, in order to make this study possible, we created a list of 140 sensitive information types based on a survey we conducted of existing legal authority and privacy scholarship and grouped those information types into thirteen categories.\textsuperscript{166}

Once the documents were coded, we used STATA, a general-purpose statistical software package, to determine the frequency of appearance of each sensitive information type and to identify relationships, patterns, and correlations between different information types and other coded variables, including trends over time. A summary of our findings is included in Part V.

To check the reliability of the coding process we conducted two phases of testing.\textsuperscript{167} First, we “pilot tested” a preliminary version of our coding form by having our coders review an identical set of five case documents.\textsuperscript{168} We also reviewed those documents ourselves and compared the results of all coders. This resulted in minor alterations to the coding scheme and coder instructions. Second, we conducted a formal test of reliability at the conclusion of the coding process by selecting a random sample of fifty documents from the 504 documents in the study set.\textsuperscript{169} We assigned each

\textsuperscript{164} The coders used Qualtrics, an online survey platform, to record their observations. The coding instrument and codebook are available on the authors’ website. See \textit{Media Law Resources}, UNC CTR. FOR MEDIA L. & POL’Y, http://mediaweb.unc.edu/resources (last visited Feb. 1, 2016).

\textsuperscript{165} See Conley et al., supra note 13, at 775 (concluding that a complex body of rules, regulations, principles, and policies govern the creation of court records and access to them).

\textsuperscript{166} See supra Part III.

\textsuperscript{167} See Petherbridge & Wagner, supra note 163, at 2074 (noting that reliability testing is crucial because “the process of content analysis . . . is inherently subject to some level of subjectivity”).

\textsuperscript{168} See Lee Epstein & Andrew D. Martin, An Introduction to Empirical Legal Research 101 (2014) (suggesting the use of a “pilot study” to pretest content coding schemas).

\textsuperscript{169} There is no bright-line standard dictating the sample size to be used when doing reliability testing. See Petherbridge & Wagner, supra note 163, at 2074, n.118 (stating
of the documents in this subset to a coder who had not previously coded the document. We then compared the results of the two codings in order to assess the degree of inter-coder reliability.170

V. RESULTS AND DISCUSSION

We begin in this part by presenting descriptive statistical information about the court records in our sample and the sensitive information they contain. We then examine the extent to which different types of sensitive information are related to various case and document characteristics.

A. DESCRIPTIVE STATISTICS

1. Sample Summary

The 504 court records that we reviewed contained a total of 24,156 pages, with a mean document length of 47.9 pages.171 Table 1 presents a breakdown of the various document types that were in our sample, including the number of documents with an appendix and the length (in pages) for each document type.172 As shown in Table 1, 198 (39%) of these documents included an appendix. Not surprisingly, documents that contained an appendix were substantially longer (mean length of seventy-one pages) than documents without an appendix (mean length of thirty-three pages).173 We also found considerable variability among the

170 The percentage rate of agreement and "Krippendorff's alpha," see KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY 221–30 (2d ed. 2004), for each of the variables is listed on the coding form, which is available on the authors' website. See Media Law Resources, UNC CTR. FOR MEDIA L. & POL'Y, http://medialaw.unc.edu/resources (last visited Feb. 1, 2016).
171 The median document length was thirty-two pages. We report the median length in addition to the mean because document length was not normally distributed within the sample. The median document length is therefore a better measure of central tendency.
172 The document types were coded based on the document title on the first page of the brief or petition. According to the North Carolina Rules of Appellate Procedure, "The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLLEE'S BRIEF, or BRIEF FOR THE STATE." N.C. R. APP. P. app. E (1975). "Briefs for the State" are briefs filed by the State of North Carolina as either an appellant or appellee; the brief captions do not designate the specific role of the State.
173 These results suggest that there is a statistically significant difference between the distributions of page lengths for documents with and without an appendix (z = -9.372, p = 0.0000). We utilized the Wilcoxon-Mann-Whitney test for statistical
document types with regard to the inclusion of an appendix. Nearly all "Petitions for Discretionary Review" contained an appendix (98%)\textsuperscript{174} while "Briefs for the State" were the least likely document type to include an appendix (16%).\textsuperscript{175}

The most commonly occurring document type in the sample was briefs filed by the appellant, which constituted almost half of the documents (41%). The sample also included a number of non-party \textit{amicus curiae} briefs (3%), which tended to be the longest documents in the sample. Although our sample did not include any reply briefs, we know from our review of the North Carolina Supreme Court’s case files that a small number of reply briefs also exist in the population under study.\textsuperscript{176}

\textsuperscript{174} The high proportion of petitions that included an appendix is likely due to the requirements in the North Carolina Rules of Appellate Procedure, which state that a petition for discretionary review “shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court.” N.C. R. APP. P. 15(c). We did not code for the type of documents attached as appendices, so we cannot state what proportion of the appendices included only a copy of the lower court’s opinion.

\textsuperscript{175} The difference between these document types with regard to their inclusion of appendices is statistically significant (chi-square with five degrees of freedom = 97.9666, $p = 0.000$).

\textsuperscript{176} As with all random sampling approaches, there is a chance that our sample of documents did not capture the entire range of characteristics in the population of North Carolina Supreme Court records. It is likely, however, that any characteristics that are not in the sample appear very infrequently in the target population. Prior to 2009, the North Carolina Rules of Appellate Procedure did not permit the filing of a reply brief unless the court requested such a brief or certain special circumstances existed. See N.C. R. APP. P. 28(h) (1975).
Table 1: Frequency of document types in the sample, including the number of documents with an appendix \(n, (\%)\) and length (in pages) for each document type.

<table>
<thead>
<tr>
<th>Document Type</th>
<th>(n)</th>
<th>Appendix</th>
<th>Mean</th>
<th>Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brief of Appellant</td>
<td>212</td>
<td>87 (41%)</td>
<td>54.4</td>
<td>34</td>
</tr>
<tr>
<td>Brief of Appellee</td>
<td>140</td>
<td>41 (29%)</td>
<td>37.8</td>
<td>30</td>
</tr>
<tr>
<td>Brief for the State</td>
<td>87</td>
<td>14 (16%)</td>
<td>46.0</td>
<td>30</td>
</tr>
<tr>
<td>Petition for Discretionary Review</td>
<td>46</td>
<td>45 (98%)</td>
<td>46.7</td>
<td>36</td>
</tr>
<tr>
<td>Brief of Amicus Curiae</td>
<td>16</td>
<td>9 (56%)</td>
<td>67.6</td>
<td>36</td>
</tr>
<tr>
<td>Other(^{177})</td>
<td>3</td>
<td>2 (67%)</td>
<td>30.7</td>
<td>26</td>
</tr>
<tr>
<td>All Document Types</td>
<td>504</td>
<td>198 (39%)</td>
<td>47.9</td>
<td>32</td>
</tr>
</tbody>
</table>

Our sample of documents came from cases decided by the North Carolina Supreme Court between 1984 and 2000, the years immediately preceding the introduction of electronic filing in North Carolina when additional rules regarding the redaction of sensitive information took effect.\(^{178}\) Table 2 lists the number of documents in the sample by the type of case and the year in which the court issued its decision in the case. Because we selected a random stratified sample by year, the totals for each year are relatively constant, with a spike in the number of documents selected from cases decided in 1986 and a drop in documents from 2000. Although there was some variation in the proportions each year, nearly two-thirds of the documents in the sample came from civil cases (62%), slightly more than a third came from criminal cases (36%), and only a small proportion (1%) came from juvenile proceedings.\(^{179}\)

\(^{177}\) The sample also included a motion to amend, guardian ad litem's brief, and brief by a cross-appellant.

\(^{178}\) See supra note 10 and citations therein.

\(^{179}\) Each state has special courts—typically called juvenile courts—that have jurisdiction over cases involving children under a specified age. See Juvenile Court, BLACK'S LAW DICTIONARY (10th ed. 2014). Juvenile court proceedings are civil as opposed to criminal. Id. In North Carolina, "[a] person who has not reached the person’s eighteenth birthday and is not married, emancipated, or a member of the Armed Forces of the United States” is eligible for juvenile court if the case relates to abuse, neglect, or dependency. N.C. GEN. STAT. § 7B-101(14). Persons sixteen years and older who are charged with certain criminal violations or infractions are not eligible for juvenile court in North Carolina. See N.C. GEN. STAT. § 7B-1501(7) & c (27). In our coding of the juvenile cases, we did not differentiate between delinquency cases and abuse, neglect, and dependency cases.
Table 2: Number of documents by case type and year of North Carolina Supreme Court’s decision, including overall percentages for each case type.

<table>
<thead>
<tr>
<th>Year</th>
<th>Civil</th>
<th>Criminal</th>
<th>Juvenile</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>9</td>
<td>11</td>
<td>1</td>
<td>21</td>
</tr>
<tr>
<td>1985</td>
<td>16</td>
<td>12</td>
<td>0</td>
<td>28</td>
</tr>
<tr>
<td>1986</td>
<td>20</td>
<td>21</td>
<td>0</td>
<td>41</td>
</tr>
<tr>
<td>1987</td>
<td>23</td>
<td>11</td>
<td>1</td>
<td>35</td>
</tr>
<tr>
<td>1988</td>
<td>15</td>
<td>15</td>
<td>1</td>
<td>31</td>
</tr>
<tr>
<td>1989</td>
<td>11</td>
<td>12</td>
<td>0</td>
<td>23</td>
</tr>
<tr>
<td>1990</td>
<td>19</td>
<td>11</td>
<td>1</td>
<td>31</td>
</tr>
<tr>
<td>1991</td>
<td>24</td>
<td>10</td>
<td>0</td>
<td>34</td>
</tr>
<tr>
<td>1992</td>
<td>23</td>
<td>10</td>
<td>1</td>
<td>34</td>
</tr>
<tr>
<td>1993</td>
<td>20</td>
<td>9</td>
<td>0</td>
<td>29</td>
</tr>
<tr>
<td>1994</td>
<td>20</td>
<td>17</td>
<td>0</td>
<td>37</td>
</tr>
<tr>
<td>1995</td>
<td>23</td>
<td>9</td>
<td>0</td>
<td>32</td>
</tr>
<tr>
<td>1996</td>
<td>23</td>
<td>11</td>
<td>0</td>
<td>34</td>
</tr>
<tr>
<td>1997</td>
<td>20</td>
<td>10</td>
<td>1</td>
<td>31</td>
</tr>
<tr>
<td>1998</td>
<td>21</td>
<td>6</td>
<td>0</td>
<td>27</td>
</tr>
<tr>
<td>1999</td>
<td>18</td>
<td>5</td>
<td>1</td>
<td>24</td>
</tr>
<tr>
<td>2000</td>
<td>3</td>
<td>4</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td>313 (62%)</td>
<td>184 (36%)</td>
<td>7 (1%)</td>
<td>504</td>
</tr>
</tbody>
</table>

The cases themselves covered a wide variety of subject areas, ranging from appeals challenging death penalty sentences to workers’ compensation determinations. To facilitate the coding of case subject areas, we adopted the twelve appellate case type designations created by the Court Statistics Project at the National Center for State Courts.¹⁸⁰ Not surprisingly, given that nearly two-thirds of the documents in our sample came from civil cases, the most commonly occurring appellate subject area

¹⁸⁰. The appellate case types are: (1) Death Penalty; (2) Felony (non-Death Penalty); (3) Misdemeanor; (4) Criminal-Other; (5) Tort, Contract, and Real Property; (6) Probate; (7) Family; (8) Juvenile; (9) Civil-Other; (10) Workers’ Compensation; (11) Revenue (Tax); and (12) Administrative Agency-Other. See COURT STATISTICS PROJECT, STATE COURT GUIDE TO STATISTICAL REPORTING 39–44 (2014), http://www.courtsstatistics.org/-/media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%202011.pdf. The Court Statistics Project at the National Center for State Courts created these categories in order to provide a “standardized reporting framework for state court caseload statistics designed to promote intelligent comparisons among state courts.” Id. at 1.
was "tort, contract, and real property," which constituted 32% of the documents in our sample. The next most common subject area was "felony (non-death penalty)," which arose in 26% of the documents, followed by appeals of administrative agency decisions, which appeared in nearly 9% of the documents in the sample. Documents from death penalty cases constituted 7% of the sample, yet they contained more than a quarter (28%) of the sensitive information we found.  

2. Sensitive Information Summary

Although a wide variety of sensitive information appears in the court records we sampled, it is not uniformly distributed throughout the records. Most of the documents contained relatively few incidences of sensitive information while a handful of documents contained a large number of pieces of sensitive information. Figure 1 presents a histogram of the frequency of sensitive information per document. It shows a pronounced rightward skew indicating that sensitive information is not "normally" distributed throughout the records. In other words, the histogram is asymmetrical and does not have the classic bell shaped curve that would indicate that most documents fall within the middle of the range. Instead, the vast majority of documents contained fewer than forty pieces of sensitive information while only a few documents contained more than 400 pieces of sensitive information. At the far right of the graph we see that several documents contained more than 1,000 pieces of sensitive information. Overall, the records we reviewed contained an average of 113 appearances of sensitive information per document, with a median of thirty-six appearances of sensitive information.  

We saw considerable variation in the frequency of sensitive information among the different document and case types. Table 3 presents the median frequency of sensitive information by document type along with the location (brief body or appendix) where the information appeared. Figure 2 presents similar information by case type.

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181. We discuss the potential implications of this finding in Section VI.A.3.
182. A rightward skew is when the long tail is on the right side of the peak, which is also called a positive skew.
183. The standard deviation for the frequency of sensitive information coded per document is 209.07 and the interquartile range, covering the middle 50% of the observed frequencies, is 11–122.
184. The difference in the frequency of sensitive information between brief bodies and appendices is statistically significant (paired t-test with 104 degrees of freedom = −5.5484, p = 0.0006). We report the median frequency in Tables 3 and 4, rather than the mean, because the frequency of sensitive information was not normally distributed.
Figure 1: Histogram of frequency of sensitive information per document overlaid with kernel density plot.

Table 3: Median frequency of sensitive information coded per document, listed by document type and location within the document.

<table>
<thead>
<tr>
<th>Document Type</th>
<th>Median Frequency of Sensitive Information</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Brief Body</td>
</tr>
<tr>
<td>Brief for the State</td>
<td>96.0</td>
</tr>
<tr>
<td>Brief of Appellant</td>
<td>39.0</td>
</tr>
<tr>
<td>Petition for Discretionary Review</td>
<td>14.5</td>
</tr>
<tr>
<td>Brief of Appellee</td>
<td>12.5</td>
</tr>
<tr>
<td>Brief of Amicus Curiae</td>
<td>8.0</td>
</tr>
<tr>
<td>Other</td>
<td>6.5</td>
</tr>
<tr>
<td>All Document Types</td>
<td>29.0</td>
</tr>
</tbody>
</table>

Figure 2 presents similar information by case type and reveals that criminal cases had substantially more sensitive information per document than either civil or juvenile cases. In fact, the median frequency of sensitive information in documents filed in criminal cases was approximately five times that of documents filed in either civil or juvenile cases. Figure 2 also reveals that in criminal and juvenile cases, sensitive information appeared
much more frequently in the brief body than in the appendix. In civil cases, sensitive information appeared with equal frequency in both appendices and briefs. We return to the role of appendices in Section V.B.

Figure 2: Dot plot of median frequency of sensitive information per document, by case type and location within the document.

As we noted in Part III, we grouped the specific sensitive information types into thirteen categories in order to facilitate comparisons between sensitive information types that shared similar characteristics. Table 4 reports the number of documents in the sample that contained sensitive information falling within each of these information categories. As Table 4 shows, information types in the "location" category appeared in more documents than any other category, appearing in 67% of the documents in the sample. Information in the "identity" and "criminal proceedings" categories also appeared in more than half of the documents, occurring in 66% and 56% of the documents, respectively. Overall, information in seven of the thirteen categories appeared in at least 20% of the documents.185 Information in each of the remaining six categories appeared in fewer than 8% of the documents.

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185. We break down the specific information types within these categories in Section V.B.
Table 4: Number of documents that contained sensitive information, listed by category of sensitive information, including the percentage of the total sample size (n = 504) and median number of times per document that information in that category appeared.

<table>
<thead>
<tr>
<th>Information Category</th>
<th>Documents in Sample</th>
<th>Median Per Doc</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Location</td>
<td>336</td>
<td>67%</td>
</tr>
<tr>
<td>Identity</td>
<td>331</td>
<td>66%</td>
</tr>
<tr>
<td>Criminal Proceedings</td>
<td>280</td>
<td>56%</td>
</tr>
<tr>
<td>Health</td>
<td>205</td>
<td>41%</td>
</tr>
<tr>
<td>Assets</td>
<td>175</td>
<td>35%</td>
</tr>
<tr>
<td>Financial Information</td>
<td>134</td>
<td>27%</td>
</tr>
<tr>
<td>Civil Proceedings</td>
<td>103</td>
<td>20%</td>
</tr>
<tr>
<td>No sensitive information</td>
<td>37</td>
<td>7%</td>
</tr>
<tr>
<td>Employment</td>
<td>33</td>
<td>7%</td>
</tr>
<tr>
<td>Sexual Activities</td>
<td>31</td>
<td>6%</td>
</tr>
<tr>
<td>Intellectual Pursuits</td>
<td>23</td>
<td>5%</td>
</tr>
<tr>
<td>Education</td>
<td>6</td>
<td>1%</td>
</tr>
<tr>
<td>Images</td>
<td>1</td>
<td>0%</td>
</tr>
<tr>
<td>Computer Use</td>
<td>0</td>
<td>0%</td>
</tr>
</tbody>
</table>

A few categories stand out in Table 4 because of their relative absence in the documents. Information about "sexual activities" appeared infrequently, as did information in the "intellectual pursuits" category, which includes religious beliefs, political opinions, and voting and reading records. Information about "education" was also mostly absent from the documents as were photos and videos captured by the "images" category. None of the documents contained any sensitive information in the "computer use" category (e.g., user names, passwords, and search history). Moreover, thirty-seven documents in the sample (7%) did not contain any of the sensitive information types that we coded for in this project.  

Table 4 also presents the median number of times per document that information in each category appeared. For most of the information categories, sensitive information appeared between three and six times per document. There are two outliers, however. Information in the "criminal proceedings" category appeared far more frequently in the documents than any other category (median appearance per document of 54.5), showing up approximately nine to eighteen times as often as information in the other categories. The "images" category was the other outlier, with a median of

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186. A full list of the information types we coded is included in the Appendix.
seventeen appearances of sensitive information per document.\footnote{187} Although sensitive information in the “images” and “sexual activities” categories did not appear in very many documents, when they did appear, they generally did so with greater frequency than information in all of the other categories excluding “criminal proceedings.”

B. ANALYSIS

It would be of little value to the debate over privacy and public access to simply add up the total number of times that various types of sensitive information appeared in court records. Indeed, we knew going into this study that court records are replete with sensitive information. Instead, in reporting and interpreting the results, we focus on the relative differences between document types, case types, and information categories rather than on the absolute numbers.

As noted in Part III and discussed more fully below, we purposefully coded a broad range of sensitive information types. Not all of the information that we identified presents the same privacy concerns. In the following sections we discuss the types of sensitive information that we found in the documents and examine the context in which they appeared.

1. Variations Within and Among Information Categories

Not surprisingly, the court records did not contain every category or type of sensitive information in equal measure. As Table 4 shows, information relating to location, identity, criminal proceedings, health, assets, finances, and civil proceedings appeared in many more documents than information that falls within the remaining six categories. We observed the same “top seven” categories of information when we calculated the total frequency of sensitive information throughout all of the records, but in a slightly different order.\footnote{188} For example, although the criminal proceedings category was only the third most frequently occurring information category on a per document basis (information types in this category appeared in 56% of the documents) it far exceeded every other category of information on the basis of total frequency of

\footnote{187} This may be due to the fact that only one document in the sample contained information that fell within this category. A sub-sample consisting of only a single observation is too small to be statistically significant.

\footnote{188} The top seven categories in terms of total appearance of sensitive information were criminal proceedings (\(n = 38,136\)), health (3,549), identity (3,217), assets (2,385), location (2,128), civil proceedings (1,428), and financial information (1,097).
appearance. In other words, information related to criminal proceedings not only appeared in most court records, it also appeared more often in those records than any other category of sensitive information.

We might speculate that information related to criminal proceedings appears more frequently because criminal cases may be more common than civil cases. Documents from criminal cases, however, made up only 36% of the sample, so the higher frequency of criminal information is not due to a larger number of criminal documents. Instead, criminal information was dispersed across all of the document types and case types. It is not just criminal cases that contain criminal information; this information appeared in a wide variety of contexts. We consider this further in the next section.

Turning to the individual information types in each of the most frequently occurring information categories, we saw a general pattern in the distribution of sensitive information. Figure 3 presents dot plots for the eight most frequently occurring information categories. In each category, a few information types appeared far more often than the other information types in that category. This pattern was most evident for the financial information category, where information about an individual's compensation far outnumbered the other types of financial information in terms of frequency of appearance in court records. This pattern was less pronounced for the assets and location categories, which had three and four types respectively of sensitive information that constituted more than 10% of their category's total. For the criminal proceedings and civil proceedings categories, the distribution was also more evenly spread; both of these categories had at least three information types that comprised 10% or more of their category's total.

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189. Information in the criminal proceedings category appeared 38,136 times in the sample. Information in the next highest category, health, had an overall frequency of appearance of 3,549. The substantially higher number of median appearances per document of information related to criminal proceedings as shown in Table 4 suggests this disparity as well.

190. See Table 2.

191. We present dot plots for the eight most frequently occurring categories, rather than just the top seven categories, to make full use of the space available in Figure 3. Note that the horizontal axes for these plots varied from a maximum frequency of 250 (for the "employment" category) to 15,000 (for the "criminal proceedings" category). The axes were presented in this way in order to allow clearer comparisons of frequency within each category.

192. There were surprisingly few incidences of bank account numbers (n = 9), credit card numbers (2), or other financial account numbers (4) in the sample. See Figure 3.

193. The criminal proceedings category dwarfed all other categories in terms of overall frequency of appearance. Unlike the other categories, six information types in the
As Figure 3 confirms, the criminal proceedings category far exceeded every other category of information on the basis of total frequency of sensitive information in the court records. Names of witnesses in criminal cases appeared more often than any other coded information type, followed somewhat distantly by the name of an individual who was the subject of a criminal investigation. The name of a victim of criminal activity other than rape (rape victim name is a separate information type) was the third most frequently occurring information type in the criminal proceedings category—and the third most frequently occurring information type overall. It is not until after the fifth most frequently occurring criminal information type, “conviction,” that information in the other categories begin to place in the rankings of most frequently occurring sensitive information types.

Figure 3A: Frequency of individual information types in the most commonly occurring categories of sensitive information.

The criminal proceedings category appeared more than 1,000 times and three types of sensitive information appeared more than 4,900 times. See Figure 3.
Figure 3B: Frequency of individual information types in the most commonly occurring categories of sensitive information.

The higher frequency of information related to criminal proceedings could be due to the fact that documents filed in criminal cases were, on average, longer than documents filed in other types of cases.\(^{194}\) We would naturally expect longer documents to have more sensitive information. The data support this intuition, although the relationship between document length and frequency of sensitive information only partially explains the variations in the documents. Figure 4 presents a scatterplot of total sensitive information per document as a function of document length (in pages). The line through the scatterplot is the best-fitting linear regression line that provides an estimate of the relationship between the frequency of sensitive information in a document and the document's length.

\(^{194}\) Documents associated with criminal cases were on average 11.6 pages longer than civil cases: criminal cases had a mean [median] document length of 55.5 [36] pages compared to 43.9 [30] pages for documents filed in civil cases. Juvenile cases had on average the shortest documents, with a mean [median] of 32.3 [36] pages.
Figure 4: Scatterplot of frequency of sensitive information per document on document length (in pages) with linear regression line.

We draw several conclusions from Figure 4. First, the relationship between total frequency of sensitive information in a document and document length is positive (as documents get longer, we can expect to find more sensitive information). Second, the overall ratio is approximately 1:3 (for each additional page in length, we can expect to find approximately three more pieces of sensitive information). Although as Figure 4 demonstrates, document length is an important indicator of the frequency of sensitive information in a court record, it accounts for only an estimated 33% of the variation in total frequency of sensitive information in the documents. In other words, other independent variables, either alone or in combination, are likely to have a

195. Utilizing ordinary least squares, the regression model's coefficient for page length was 3.363195 (n = 52,998, std. err. = 0.0205702, R² = 0.3299, p-value = 0.000).
196. The linear regression model used in Figure 4 produces an estimate, known as the coefficient of determination (R²), of the fit between the model's prediction of the number of appearances of sensitive information in a document as a function of page length and the actual frequency of sensitive information. For Figure 4, R² was 0.3299. This estimate tells us the percentage of the variance in the frequency of sensitive information explained by the model is 32.99%.
more substantial effect than page length on the frequency of sensitive information in a court record.\textsuperscript{197}

Indeed, there are signs that other factors are at work when we look at scatterplots comparing the frequency of sensitive information as a function of document length across the three different case types. As Figure 5 shows, criminal cases had a higher density of sensitive information per page than either civil or juvenile cases. As page length increased, the number of pieces of sensitive information in criminal cases increased at a higher rate than it did in civil and juvenile cases. For criminal cases, the ratio between page length and frequency of sensitive information was roughly 1:4.\textsuperscript{198} For civil cases, the ratio was approximately 1:1.\textsuperscript{199}

\begin{figure}
  \centering
  \includegraphics[width=\textwidth]{scatterplot.png}
  \caption{Scatterplot of frequency of sensitive information per document on document length (in pages) by case type with linear regression lines.}
\end{figure}

\textsuperscript{197} We report on the results of our multiple regression model in Part V.B.4.
\textsuperscript{198} Utilizing ordinary least squares, the regression model's coefficient for page length in criminal cases is 4.012137 (\(n = 40,440\), std. err. = 0.0235338, \(R^2 = 0.4182\), \(p\)-value = 0.000).
\textsuperscript{199} Utilizing ordinary least squares, the regression model's coefficient for page length in civil cases is 0.9802669 (\(n = 12,423\), std. err. = 0.014221, \(R^2 = 0.2767\), \(p\)-value = 0.000). There were too few documents from juvenile cases (\(n = 7\)) to draw any conclusions about the relationship between document length and frequency of sensitive information.
2. **Contextual Variations**

We turn now to the question of whether certain contextual factors influence—or at least are correlated with—the types of sensitive information found in court records. We coded for a number of case and document characteristics that might be linked to the appearance of sensitive information, including case type, case subject area, document type, subject of the information (adult or minor), location of the information (brief body or appendix), and year of case decision.\(^{200}\) As the preceding discussion noted, we have already seen some variability in the types and extent of sensitive information associated with criminal cases, so we will start by analyzing the role that case type plays in the appearance of sensitive information.

a) **Case Types**

We know from Figures 2 and 5 that criminal cases have, on average, more sensitive information than civil and juvenile cases, but we cannot tell from those figures which types of sensitive information are more prevalent in criminal cases. Figure 6 presents the percentage of sensitive information in civil and criminal cases by category of sensitive information.\(^{201}\) From Figure 6 we can discern some important differences about the extent of sensitive information in civil and criminal cases.

First, sensitive information is not uniformly distributed in all types of cases. The top bar in Figure 6 shows that overall, approximately 75% of the sensitive information we identified appeared in documents filed in criminal cases. Many of the information categories, however, deviated substantially from this 75/25 split.

In civil cases, we found a significantly higher proportion of sensitive information in the assets, civil proceedings, employment, financial, and location categories. In fact, sensitive information in the employment and financial categories appeared almost entirely in civil cases (92% and 94% of the time respectively). Sensitive information in the health, identity, and intellectual pursuits categories, on the other hand, appeared more frequently in documents associated with criminal cases, and information in the education and images categories appeared only in criminal cases. Only

\(^{200}\) Other contextual factors may also be relevant, but our focus here is on the case and document characteristics that courts themselves use in their filing systems.

\(^{201}\) Figure 6 does not include documents from juvenile cases because they were too few in number to warrant graphing.
information in the health and sexual activities categories appeared in roughly equal measure in both civil and criminal cases.

![Horizontal bar graph showing percentage of sensitive information in civil and criminal cases by category of sensitive information.](image)

Figure 6: Horizontal bar graph showing percentage of sensitive information in civil and criminal cases by category of sensitive information.

Second, not only did criminal cases evidence more sensitive information than civil and juvenile cases, they also contained a greater variety of sensitive information. Criminal cases contained sensitive information from all of the categories we found in the documents, whereas information from two categories, education and images, were absent from civil cases. We also found that overall, criminal cases contained more types of sensitive information. Of the 140 sensitive information types we coded for in the records, ninety-five distinct types actually appeared in the documents. Although some types appeared exclusively, or nearly so, in civil cases, documents filed in criminal cases contained a greater variety of sensitive information types. Table 5 lists the information types that appeared in documents associated with only one

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202. We did not find any information in the documents that fell within the “computer use” category. See supra Part III.B.3 (describing the information types in this category).

203. Six of the thirteen information categories were absent from documents filed in juvenile cases.
case type at least 90% of the time. As Table 5 shows, criminal cases had a greater variety of sensitive information types than civil cases.

Table 5: Information types that appeared in documents associated with only one case type at least 90% of the time.

<table>
<thead>
<tr>
<th>Civil Cases</th>
<th>Criminal Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adoption</td>
<td>Abortion</td>
</tr>
<tr>
<td>Bank Account Number</td>
<td>Arrest or Charge</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>Child Abuse</td>
</tr>
<tr>
<td>Cable Television Subscription Record</td>
<td>Communicable Disease</td>
</tr>
<tr>
<td>Child Support</td>
<td>Conviction</td>
</tr>
<tr>
<td>Compensation</td>
<td>Credit Card Number</td>
</tr>
<tr>
<td>Debt</td>
<td>Drug or Alcohol Treatment</td>
</tr>
<tr>
<td>Discipline</td>
<td>Full-Face Photograph</td>
</tr>
<tr>
<td>Driver's License Number</td>
<td>Genetic Information</td>
</tr>
<tr>
<td>Foreclosure Judgment</td>
<td>Gun Possession or Ownership</td>
</tr>
<tr>
<td>Insurance Policy Number</td>
<td>Incarceration</td>
</tr>
<tr>
<td>Paternity Test</td>
<td>Informant Name</td>
</tr>
<tr>
<td>Performance Evaluation</td>
<td>Juror Name</td>
</tr>
<tr>
<td>Political Opinion</td>
<td>Juvenile Court History</td>
</tr>
<tr>
<td>Prior Civil Judgment</td>
<td>Military Discharge</td>
</tr>
<tr>
<td>Professional Cert. or License Number</td>
<td>Name of Subject of Investigation</td>
</tr>
<tr>
<td>SSN - Full</td>
<td>Parole Status</td>
</tr>
<tr>
<td>State ID Number</td>
<td>Photos or Videos of Violence,</td>
</tr>
<tr>
<td>Tax Lien</td>
<td>Abuse or Death</td>
</tr>
<tr>
<td>Tax Return</td>
<td>Presentence Investigation Report</td>
</tr>
<tr>
<td>Voting Record</td>
<td>Rape Victim Name</td>
</tr>
<tr>
<td></td>
<td>Sentence</td>
</tr>
<tr>
<td></td>
<td>Sexual Abuse Allegation</td>
</tr>
<tr>
<td></td>
<td>Student Discipline</td>
</tr>
<tr>
<td></td>
<td>Student Grades or Performance Evaluation</td>
</tr>
<tr>
<td></td>
<td>Vehicle License Plate Number</td>
</tr>
<tr>
<td></td>
<td>Video Rental Records</td>
</tr>
</tbody>
</table>

204. None of the sensitive information types we coded for appeared more than 10% of the time in juvenile cases. There were several information types, however, that were disproportionately common in juvenile cases: “Adoption,” “Custody or Guardianship,” “Date of Birth,” “Juvenile Court History,” “Name of Minor Child,” “Pregnancy,” and “Sex Life.”
b) Adults and Minors

Most of the sensitive information we found was associated with adults. Overall, only 7% of the sensitive information we coded was associated with an identified minor,205 and the difference between civil and criminal cases with regard to sensitive information associated with minors was modest (information about minors appeared 6.1% and 7.2% of the time respectively). The percentage of sensitive information about minors was significantly higher in juvenile cases, where 40% of the information that we coded was associated with an identified minor.

Although appeals from juvenile cases are now subject to additional privacy protections under the North Carolina Rules of Appellate Procedure,206 these protections were not in place during the time period we studied and we found a considerable amount of sensitive information in juvenile cases that was associated with an identified minor. Documents in juvenile cases contained an average of 10.27 pieces of sensitive information connected to an identified minor, with the following information types being the most common: “Name of Minor Child,”207 “Rape Victim Name,” “Adoption,” “Age,” “Arrest or Charge,” and “Other Health Diagnosis or Treatment.”208

We also found a few interesting differences between the information categories with regard to minors across all of the case types. Relative to their baseline percentages, minors were less likely to be associated with

205. For our purposes, an identified minor was any individual under the age of eighteen years, regardless of whether he or she met the requirements for juvenile court jurisdiction under North Carolina law. See supra note 179 (describing the jurisdictional requirements for juvenile court in North Carolina).

206. In 2006, the North Carolina Rules of Appellate Procedure were amended to provide additional privacy protections for juveniles. The current rules state that “covered juveniles . . . shall be referenced only by the use of initials or pseudonyms in briefs, petitions, and all other filings, and shall be similarly redacted from all documents, exhibits, appendixes, or arguments submitted with such filings” and that a “juvenile’s address and social security number shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts.” N.C. R. APP. P. 3.1(b).

207. As we noted in Part III.B, we coded for “Name of Minor Child” as a specific information type; this information type made up nearly 9% of the total frequency of all sensitive information in the records.

208. We did not record whether the minor in question was a “covered juvenile” under North Carolina law, so we cannot state whether the information we found would violate North Carolina Rule of Appellate Procedure 3.1(b). We can state, however, that we found no appearances in juvenile cases of addresses or social security numbers associated with minors. As we note in Part VI.A.4, the number of documents in our sample from juvenile cases was relatively small (n = 7), so we recommend further research on the privacy risks associated with minors.
information related to criminal proceedings (3.7%) and more likely to be associated with information in the education (33.3%), health (10.5%), identity (12.9%), and sexual activities (16.0%) categories.

There also were intriguing variations in the relative proportions of some of the specific information types with regard to minors. Figure 7 shows the percentage of sensitive information associated with adults and minors for the seventeen information types that were identified with minors more than 10% of the time. As Figure 7 reveals, a number of information types were disproportionately associated with minors (i.e., their association with minors was substantially greater than would have been expected based on the overall frequency of sensitive information associated with minors). Information about communicable diseases and minor names, for example, were exclusively identified with minors, and seven of the seventeen information types appeared more than 30% of the time in relation to a minor.

![Figure 7: Horizontal bar graph showing percentage of sensitive information types associated with adults and minors. Only information types associated with minors more than 10% of the time are listed.](image-url)
c) Appendices

Some scholars and archivists have suggested that appendices included in court records contain more sensitive information than legal briefs, but our data did not bear this out. As we reported in Section V.A, we found that overall, brief bodies contained a higher frequency of sensitive information than appendices. As the dot plot in Figure 2 showed, this disparity was particularly evident in criminal and juvenile cases; for civil cases, sensitive information appeared with equal frequency in both the appendices and brief bodies.

Several information types, however, were more prevalent in appendices. Figure 8 lists the information types that appeared more than 30% of the time in appendices. Of the ninety-five information types we identified in the documents, sixteen appeared more than 30% of the time in an appendix, a marked deviation from the overall proportion of sensitive information in appendices (14%) as shown in the top bar in Figure 8. Moreover, seven information types appeared more than 50% of the time in an appendix, and three types appeared only in the appendices: “SSN - Full,” “State ID Number,” and “Video Rental Records.”

As Figure 8 shows, only seven of the ninety-five information types that we identified in the records appeared more often in appendices. On the other hand, twenty-seven information types appeared exclusively in the brief bodies, including: “Abortion,” “Adoption,” “Bankruptcy,” “Communicable Disease,” “Credit Card Number,” “Dependency or Neglect,” “Drug and Alcohol Treatment,” “Genetic Information,” “Juvenile Court History,” “Parole Status,” “Paternity,” “Student Grades or Performance,” “Tax Lien,” “Vehicle License Plate Number,” and “Voting Record.” Recall that nearly 40% of the documents contained an appendix. Although there was substantial variability among the different

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209. See, e.g., Whiteman, supra note 17, at 470, 477 (describing the Northern Kentucky Law Library's decision to refrain from scanning appendices to briefs filed in the Kentucky Supreme Court); Hinderman, supra note 18, at 6 (noting that the Montana State Law Library pulled electronic court records it had already posted online to remove all exhibits and appendices before reposting the briefs).

210. See supra note 184 and accompanying text.

211. The median frequency of sensitive information in briefs and appendices filed in criminal cases was 113 and 41, respectively; for juvenile cases, the median frequency of sensitive information was 17 and 6.5, respectively. The median frequency of sensitive information in briefs and appendices filed in civil cases was 16.

212. See supra Table 1.
document types with regard to the inclusion of an appendix, the variation between case types with regard to appendices was less pronounced and the differences were not statistically significant. Accordingly, we can conclude that it is not a dearth of documents with appendices in our sample that is suppressing the appearance of sensitive information in the appendices. We will return to the role of appendices in Part VI.

Figure 8: Horizontal bar graph showing percentage of sensitive information types in appendices and brief bodies. Only information types that appeared more than 30% of the time in appendices are listed.

3. Temporal Variations

Our final contextual factor is time. Following the approach of the North Carolina Supreme Court, which maintains its case files based on the year a case is decided by the court, we assigned the corresponding case year to each document in our sample. Figure 9 graphs the total number of

213. Nearly all petitions for discretionary review contained an appendix (98%) while briefs by the state were the least likely document type to include an appendix (16%). See supra Table 1.

214. Overall, 40% of civil cases included an appendix and 35% of criminal cases included an appendix. See supra Table 1. As noted in the text, the difference between the various case types with regard to the inclusion of appendices was not statistically significant (chi-square with 2 degrees of freedom = 2.1090, \( p = 0.348 \)).
documents in our sample by year, as well as the number of documents that did not contain any of the sensitive information types we coded for. As Figure 9 shows, there was considerable year-to-year variation in both of these measurements.

![Graph showing total documents and no sensitive information over years](image)

Figure 9: Total number of documents in sample and number of documents without sensitive information, by year.

We also found substantial variation in the total frequency of sensitive information per year. Figure 10 presents a two-way area graph of the total appearance of sensitive information by year as well as for the four most frequently occurring information categories: criminal proceedings, health, identity, and location. As Table 10 indicates, the total amount of sensitive information ranged from a low of 1,068 in 1984 to high of 6,052 in 1994, with an average of 3,117.5 pieces of sensitive information per year during the seventeen-year period under study.215

From Figure 10 we can see that in addition to variation in the overall frequency of sensitive information per year, the individual categories of sensitive information also varied during this time period. Not surprisingly,

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215. The median frequency of sensitive information per year is 2,922; standard deviation is 1,700.3; and the interquartile range, covering the middle 50% of the observed frequencies, is 1,617–4,727.
information related to criminal proceedings tracked the overall totals quite closely (this is not surprising because the vast majority of sensitive information each year was associated with the criminal proceedings category). The other categories showed some variability as well, but did not parallel as closely the timing of the changes in the overall total. For example, the health category varied from a high of 626 in 1987 to a low of forty-four in 1997; the identity category varied from a high of 458 in 1995 to a low of fifty-seven in 1998; and the location category varied from a high of 305 in 1985 to a low of two in 1992.

Figure 10: Total appearance of sensitive information by year of case decision including the 4 most frequently occurring information categories.

If we compare Figures 9 and 10, we might surmise that at least some of this variation is due to the fluctuations in the number of documents in our sample from each year. To remove this factor from our analysis, we calculated the frequency of appearance of the various categories on a per document basis. Figure 11 presents this measure of “sensitive information density” for the six most frequently occurring information categories.

Figure 11 suggests that there was no overarching trend in the appearance of sensitive information during the 1984 to 2000 time period. Instead, the numbers vary within a relatively constant range. It should be noted that the individual line graphs in Figure 11 do not all utilize the
same y-axis scale. The criminal proceedings category varied between twenty and 120 pieces of sensitive information per document whereas the location and civil proceedings categories varied between zero and ten. By varying the y-axis scale, Figure 11 allows us to compare the relative changes in sensitive information density within each category over time and leads to two important observations.

![Figure 11: Sensitive information per document by year of case decision for the six most frequently occurring information categories.](image)

First, there was considerable variability both within the categories and among the categories during this time period. None of the categories evidenced a consistent amount of sensitive information per document on a year-to-year basis. In some years there were sharp increases in the amount of sensitive information associated with these categories while in other years there were steep declines. For example, the amount of sensitive information per document in the health category spiked in 1987 and 1984 and fell in 1990 and 1997, whereas the identity category showed sharp increases in 1986 and 1995 and declines in 1990 and 1998. Moreover, the peaks and valleys evident in the individual graphs in Figure 11 do not align. When some categories were peaking, others were dipping.

Second, we do not see either a declining or rising trend for these categories. Although there is a pronounced increase in sensitive
information per document beginning in 1998 for the criminal proceedings, health, and identity categories, the location and civil proceedings categories declined during that same period, and overall the five-year moving averages for all of the categories show no discernable trend. From Figure 9 we can see that the upswing in sensitive information for the criminal, health, and identity categories in 1998 occurred during a period when the total number of documents was declining. Whether this increase in sensitive information continued after 2000 is beyond the scope of this study.

4. Regression Analysis

In this section we use multiple regression analysis to examine whether and to what extent certain document and case characteristics influence the amount of sensitive information in court records. As we previously noted, document length is a statistically significant predictor of the amount of sensitive information in a court record.\textsuperscript{216} Recall that the linear regression line shown in the scatterplot of sensitive information per document in Figure 4 provided an estimate of the relationship between the frequency of sensitive information in a document and the document's length.\textsuperscript{217} We now add other independent variables to our analysis in order to better predict the amount of sensitive information in court records.

Figure 12 presents a nomogram of the multiple regression coefficients for the analysis of the frequency of sensitive information per document (log transformed) for nine independent case and document variables.\textsuperscript{218} It shows that six independent variables—criminal case type, appellant's brief, appellee's brief, petition for discretionary review, state's brief, and document length (in pages)—are statistically significant predictors of the total amount of sensitive information in a document because their 95% confidence intervals do not cross zero.

\textsuperscript{216} See supra note 195 and accompanying text.

\textsuperscript{217} The best fitting linear regression line in Figure 4 predicted a relationship of approximately 1:3 between document length and frequency of sensitive information, with a coefficient of determination, $R^2$, of 0.3299. See supra note 195 and accompanying text.

\textsuperscript{218} We utilized a log transformation of the total amount of sensitive information per document because this variable is not normally distributed. Each parameter estimate in Figure 12 is represented by a dot along with the 95% confidence interval for the estimate depicted by a horizontal line. Parameters with narrower confidence intervals are estimated more precisely than those with wider confidence intervals. Only those parameters with a confidence interval that does not cross zero are statistically significant at a 95% level. Figure 12 does not include the intercept parameter, which has a coefficient of 0.6542635 [95% CI: -1.089448 to 2.397975].
confidence intervals do not cross zero. In other words, holding all other variables in the model constant, the amount of sensitive information in a document can be predicted based on the document's length, the type of brief (other than an amicus brief), and whether it was filed in a criminal case. The other variables listed in Figure 12 may also influence the amount of sensitive information in a document, but the findings from the multiple regression model do not show that we can be sufficiently confident to assess what effect, if any, they have on the amount of sensitive information.

Figure 12: Nomogram of multiple regression parameters and 95% confidence intervals for the analysis of sensitive information per document (log transformed) listed by case and document variables.

What the multiple regression model tells us is that, other things being equal, criminal cases contain significantly more pieces of sensitive information per document than civil cases (coef. = 1.55, \( p = 0.000 \)). In addition, appellee briefs (coef. = 1.92, \( p = 0.032 \)), petitions for discretionary review (coef. = 1.95, \( p = 0.030 \)), briefs by the state (coef. =

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219. The model's other relevant statistics include \( F(9,457) = 43.71, p < 0.0000, R^2 = 0.4626 \). All six independent variables described in the text added statistically significantly to the prediction, \( p < 0.05 \). The full regression table is included in the Appendix.
2.23, $p = 0.013$), and appellant briefs (coef. = 2.32, $p = 0.009$) contain significantly more pieces of sensitive information than the other briefs category (reference group), with the relative impact of the various brief types increasing as their coefficients increase. It also tells us that the number of pages in a document is another significant predictor of sensitive information. The more pages in a document, the more pieces of sensitive information appear in the document (coef. = 0.01, $p = 0.000$). As for the inclusion of an appendix, the model shows that this does not predict the overall frequency of sensitive information in the document.

This final point about the lack of impact of appendices may strike some readers as surprising, but given our earlier finding that brief bodies contain a higher median frequency of sensitive information—as well as a wider variety of sensitive information types—than appendices, it is not unexpected. We will return to the implications of these findings in Part VI.

VI. IMPLICATIONS FOR ACCESS POLICIES AND PRACTICES

As we noted in the introduction, courts and libraries are moving quickly to digitize court records and make them available online. The results of this study will, we hope, inform these efforts by providing much-needed detail about the extent and context of sensitive information in these important public records. In this part we discuss how our study can aid the ongoing debate about privacy and court records and how our results can help to identify and remedy potential implementation challenges if courts or archivists decide to carry out privacy management protocols.

It is not our goal in this Article to tell courts or archivists what information, if any, should be redacted or what documents should be withheld from online access or otherwise managed for privacy protection. These largely normative questions must be answered based on a careful balancing of the competing public access and privacy interests. Moreover, the privacy interests cannot be evaluated based solely on the presence or absence of specific types of sensitive information in individual court records. Other factors, including what one can learn or infer about individuals from other sources, as well as the value to society of the

220. See supra note 184 and accompanying text.
221. Another possible explanation is that the inclusion of an appendix is highly correlated with page length.
information in question, must also be taken into account. The data we present will be invaluable in doing this evaluation, but our findings should not be read to dictate one approach or another.

As discussed in Part IV, our sample of court documents came from a large corpus of briefs and other filings submitted to the North Carolina Supreme Court spanning the time period 1984 to 2000. Although our results are specific to this population of court records, we believe that the data we collected shed light on court records held by other state appellate courts, particularly courts of last resort.

Trial court records, however, are a different story. It is unlikely that our findings are generalizable to the records held by trial courts. Unlike appellate courts, which are primarily engaged in deciding questions of law, trial courts must resolve competing factual claims. As a result, their files likely contain a higher frequency of sensitive information from a wider array of records, including pre-trial discovery materials, expert reports, juror questionnaires, court transcripts, physical evidence, and audiovisual materials. Nevertheless, the methods we used in coding and analyzing the North Carolina Supreme Court's records could be applied to trial court records as well, and we hope that other researchers will do so.

222. See supra note 161 and accompanying text. We did not review the "record on appeal," which is a separate filing containing, inter alia, copies of the case pleadings, jury instructions, transcripts, and other evidence entered in the lower courts.

223. Unfortunately, we could not find any data comparing state court appellate caseloads during the time period we studied. The National Center for State Courts (NCSC) did not implement the State Court Guide to Statistical Reporting until 2007, see supra note 180, and has not reclassified its historical data using the new reporting schema outlined in the guide. See Email to David Ardia from Shaun M. Strickland, Senior Court Research Analyst, NCSC, dated July 1, 2015 (on file with authors). Because of this, we cannot match our results with the data reported by other states during the time period we studied. We hope that other researchers will collect the data needed to do such comparisons.

224. We are aware of no comprehensive studies of trial court records. Carl Malamud, who used software to search for unredacted social security numbers in federal district court filings on PACER, noted that "often when our tool reported a Social Security number violation, when we looked around the document we also picked up many other Social Security numbers, birth dates, driver license numbers, Alien IDs, and bank account numbers." Malamud Letter, supra note 6, at 1.

225. Some of these materials may end up in an appellate court's files if they are submitted as part of the record on appeal, but rarely do they appear to the same extent in the parties' briefs and appendices. See Conley et al., supra note 13, at 776 (noting that trial court records "contain an abundance of personal information, some of which may drop away as cases move from trial courts to appellate courts").
A. IDENTIFYING WHERE PRIVACY RISKS ARE GREATEST

We knew going into this study that court records contain sensitive information. Indeed, scholars have long argued that court records raise substantial privacy concerns. What we lacked, however, was comprehensive data about the extent and context of this information. These data are essential to understanding the threats to privacy that court records present.

In Part V, we identified the most common types of sensitive information that appear in the North Carolina Supreme Court’s case files. In this section we begin to evaluate the potential “harmfulness” of this information, based on frequency of appearance, certain document and case attributes, and existing legal authority requiring or recommending redaction. We note at the outset that “harmfulness” is a contested concept in privacy law, and we do not take a position in this Article as to how “harm” should be defined in the context of public records. Instead, we present an assessment of relative risk based on the frequency of occurrence and context of a broad range of sensitive information types. Regardless of how one defines the harm that comes from the disclosure of certain types of sensitive information, the harmfulness of that information will likely be influenced by the frequency of disclosure and its context both within court records and the larger information ecosystem.

The following sections highlight our key findings.

1. Court Records Vary Substantially in the Sensitive Information They Contain

We found that court records vary substantially in both the types and frequency of sensitive information they contain. The records we studied did not exhibit every type of sensitive information in equal measure. Some information appeared much more often than other information. And some types of information that privacy advocates have highlighted did not appear at all in the records we studied. Moreover, nearly one in ten documents in our sample did not contain any of the 140 sensitive information types we coded for in this project.

226. As we noted in Part III, there is considerable disagreement among privacy scholars about the nature of the interests that privacy advances. In fact, some scholars argue that courts should abandon harm-based rationales entirely when evaluating privacy claims. See, e.g., James Peterson, Behind the Curtain of Privacy: How Obscenity Law Inhibits the Expression of Ideas About Sex and Gender, 1998 Wis. L. REV. 625, 632 n.38 (1998) (“In practice, the distinction between harm and offense is not always easy to maintain, because extreme forms of offense can cause emotional and even palpable physical harm.”).
Although it is not surprising that certain types of sensitive information appeared more often than others, we were surprised by some of the patterns we found. To facilitate the collection and analysis of our data, we grouped the various information types into thirteen categories.\textsuperscript{227} When we compared these categories, we found that sensitive information in seven categories appeared much more frequently than the other categories of information. The most commonly occurring categories—location, identity, criminal proceedings, health, assets, financial information, and civil proceedings—each appeared in at least 20% of the documents we studied; the remaining six categories each appeared in fewer than 8% of the documents.\textsuperscript{228}

Information types in the less frequently appearing categories warrant comment because of their unexpected absence in the documents. Information about sexual practices appeared infrequently, as did information in the intellectual pursuits category, which includes religious beliefs, political opinions, and voting and reading records.\textsuperscript{229} Information about education was also mostly absent from the documents as were photos and videos. None of the documents contained any sensitive information that fell within the computer use category (e.g., user names, passwords, and search history).

We also found substantial variability in how often certain types of sensitive information appeared in individual documents. For most of the information categories, sensitive information appeared between three and six times per document.\textsuperscript{230} There were outliers, however. Information in the criminal proceedings category appeared far more frequently in the documents than any other information category, showing up approximately nine to eighteen times as often as the other categories.\textsuperscript{231} Interestingly, although information in the images and sexual activities categories did not appear in very many documents, when it did appear, it appeared more often in a document than all the other categories except the criminal proceedings category.\textsuperscript{232}

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\footnotesize
227. For a description of the categories we utilized, see supra Section III.B.
228. See supra Table 4 and accompanying text.
229. Intellectual pursuits are a category of information that only recently began to receive protection under U.S. privacy laws, but is the subject of an increasing amount of privacy scholarship. See supra Section III.B.11.
230. See supra Table 4 and accompanying text.
231. The "images" category is the other outlier, with a median of seventeen appearances per document. See supra Table 4.
232. See supra Section V.A.2 and accompanying text.
\end{flushleft}
Again, it is just as important to focus on what we did not find in the records. The types of information that most people would associate with financial fraud and identity theft appeared less often than we expected. We found surprisingly few social security numbers, bank account numbers, credit card numbers, and other financial account numbers, each of which appeared in no more than three documents in our sample of 504 documents.\textsuperscript{233} We also found no partial social security numbers, debit card numbers, credit reports, or personal identification numbers (PINs) in the records.

Several types of sensitive health information also appeared less frequently than we expected. Information about abortion, paternity, and communicable diseases each appeared in only one document. Genetic information appeared in only three documents, which may be due in part to the time period we studied (1984–2000),\textsuperscript{234} and information about drug or alcohol treatment appeared in only four documents. We found no references in the documents to an identified individual having HIV or AIDS.

2. Criminal Information Is Pervasive in Court Records

What we did find in great numbers in the court records was information related to criminal proceedings, particularly witness names, crime victim names, arrests, criminal charges, and the names of subjects under investigation. Indeed, information in the criminal proceedings category pervaded the court records we reviewed. It not only appeared in most of the documents, it also appeared more often in those documents than any other category of sensitive information.

More than half of the documents we analyzed contained information that fell in the criminal proceedings category, and the individual information types in this category far outpaced every other type of information we coded for in terms of frequency of occurrence. The names of witnesses in criminal cases appeared more often than any other information type in our data set, followed by the name of an individual

\textsuperscript{233} See supra Figure 3 and accompanying text. Although the North Carolina Rules of Appellate Procedure do not require that social security numbers be excluded from briefs filed in the North Carolina Supreme Court, the rules do state that SSNs “shall be deleted or redacted from any document before including the document in the record on appeal.” N.C. R. APP. P. 9(a)(4). Our project did not involve the coding of the records on appeal.

\textsuperscript{234} See MICHAEL LYNCH ET AL., TRUTH MACHINE: THE CONTENTIOUS HISTORY OF DNA FINGERPRINTING 13 (2008) (noting that DNA evidence was first used in criminal investigations in the late 1980s but challenges in the courts and scientific press slowed its acceptance until the mid-1990s).
who was the subject of a criminal investigation. The name of a victim of criminal activity other than rape (rape victim name is a separate information type) was the third most frequently occurring information type, and information about arrests and convictions were the fourth and fifth most common information types, respectively.

Additionally, when information about criminal proceedings appeared in a document, it did so in large numbers. As we noted above, for most of the information categories sensitive information appeared between three and six times per document. By comparison, information in the criminal proceedings category appeared more than fifty times per document. This substantially higher frequency of appearance is not due to a profusion of criminal cases. Documents from criminal cases made up only 36% of our sample. Instead, what we see in the data is that criminal information appeared in documents filed in every type of case, including civil and juvenile cases.

Our data cannot tell us why criminal information is so pervasive in court records, but we can speculate based on qualitative factors. Information types in the criminal proceedings category—and in the civil proceedings category as well—relate to the functioning of the court system itself, so it is perhaps not surprising to find these information types throughout the North Carolina Supreme Court's records. Indeed, when we examine the context of information from both of these categories, we see that information about the functioning of our criminal and civil courts is widely dispersed across all of the document types and case types we coded. As we noted, however, our data cannot definitely answer why criminal information is so common in court records. We hope that other researchers will take up this question.

3. Criminal Cases Have Disproportionately More Sensitive Information

Although documents from criminal cases constituted only slightly more than a third of the sample, they had an outsized impact on the types and frequency of sensitive information. More than three quarters (76.3%) of the sensitive information came from documents filed in criminal cases.

235. The criminal category appeared at a median frequency of appearance per document of 54.5. See supra Table 4 and accompanying text.
236. See supra Table 2.
237. Briefs filed in appellate courts often include arguments that turn on how the justice system functions, including acts and omissions by law enforcement, the credibility of witnesses, the relevancy of prior convictions and civil judgments, and the fairness of the jury.
And not only did criminal cases contain more sensitive information than civil and juvenile cases, they also contained a greater variety of sensitive information.

Criminal cases contained sensitive information from all of the categories that we identified in the documents, whereas information from two categories, education and images, was entirely absent from civil cases. Overall, criminal cases contained more individual types of sensitive information than civil and juvenile cases. Of the 140 sensitive information types that we coded for in the records, ninety-five distinct types appeared in the documents. Although some types appeared exclusively or nearly so in civil cases, documents filed in criminal cases contained a greater number of sensitive information types.

Criminal cases also had substantially more sensitive information per document than either civil or juvenile cases. In fact, the median frequency of sensitive information in documents filed in criminal cases was approximately five times greater than that of documents filed in either civil or juvenile cases. As a result, criminal cases had a higher density of sensitive information per page than either civil or juvenile cases. As page length increased, the number of pieces of sensitive information in criminal cases increased at a higher rate than it did in civil and juvenile cases. For criminal cases, the ratio between page length and frequency of sensitive information was four times greater than that of civil and juvenile cases.

One of the drivers of this disparity may be the disproportionate impact of death penalty cases. Although documents from death penalty cases constituted only 6.5% of our sample, they contained more than a quarter

238. We did not find any information in the documents that fell within the “computer use” category. See supra Table 4.

239. Six of the thirteen information categories were absent from documents filed in juvenile cases.

240. See supra Table 5 and accompanying text.

241. Sensitive information in criminal cases also appeared much more frequently in the brief body than in the appendix. See supra Figure 2.

242. During the period from 1989–1998, there was a sharp increase in the number of documents from cases in which a defendant was sentenced to death (from 0.8 documents per year to 2.7 per year). This corresponded to an increase in death penalty verdicts in North Carolina, which rose from nine in 1989 to thirty-four in 1995. CTR. FOR DEATH PENALTY LITIG., ON TRIAL FOR THEIR LIVES: THE HIDDEN COSTS OF WRONGFUL PROSECUTIONS IN NORTH CAROLINA 16 (2015), http://www.cdpl.org/wp-content/uploads/2015/06/INTERACTIVE-CDPL-REPORT.pdf. In North Carolina, death penalty convictions are subject to automatic review by the North Carolina Supreme Court. N.C. GEN. STAT. ANN. § 15A-2000(d)(1) (West 2015).

243. The most commonly occurring appellate subject area was “tort, contract, and real property,” which constituted 32% of the documents in the sample, followed by
(27.7%) of the total amount of sensitive information. Documents from death penalty cases also were, on average, the longest documents in the sample.\textsuperscript{244} Interestingly, most of the appearances of sensitive information types in the education category occurred in documents filed in death penalty cases, whereas information types in the employment and financial categories were largely absent from documents filed in these cases.\textsuperscript{245}

4. Minors Deserve Additional Attention

The vast majority of the sensitive information was associated with adults. Nevertheless, because of heightened concerns about the privacy of children, information associated with minors deserves special attention.\textsuperscript{246}

As the data showed, sensitive information about minors was not limited to juvenile cases. Overall, 7% of the sensitive information was associated with an identified minor. Criminal cases evidenced slightly more information associated with minors than civil cases, but the difference was not substantial.\textsuperscript{247} Not surprisingly, juvenile cases contained significantly more information about minors: 40% of the sensitive information in juvenile cases was associated with a minor.\textsuperscript{248}

\textsuperscript{244} "Felony (non-death penalty)," which arose in 26% of the documents. See supra notes 180–181 and accompanying text.

\textsuperscript{245} Documents filed in death penalty cases had a mean length of 113.63 pages, more than twice the average length for all documents in the sample (sample mean was 47.92 pages).

\textsuperscript{246} The higher frequency of appearance of information relating to education in death penalty cases may be due to its relevance as mitigation evidence. See N.C. GEN. STAT. § 15A-1340.16(e). Documents in death penalty cases also had the highest incidences of the following sensitive information types: "Criminal Sentence," "Incarceration," "Juror Names," and "Student Discipline."

\textsuperscript{247} Some commentators have argued that all juvenile proceedings should be closed by default in order to protect the interests of minors. See, e.g., William Wesley Patton & Kelly Crecco, \textit{An Update to Striking a Balance: Freedom of the Press Versus Children's Privacy Interests in Juvenile Dependency Proceedings}, 12 FIRST AMEND. L. REV. 575, 589 (2014) ("Children are at much more risk of juridical psychological harm in a presumptively open dependency court system than in a discretionarily open court system for a number of reasons."); see also Kristin Henning, \textit{What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice}, 97 CALIF. L. REV. 1107, 1158–60 (2009) (suggesting there can be tensions between victim rights and the confidentiality of juvenile prosecutions).

\textsuperscript{248} Sensitive information in criminal cases was associated with minors 7.2% of the time. In civil cases it was 6.1%.

\textsuperscript{248} See supra Section V.B.2.b. Although we did not record whether the minor in question was a "covered juvenile" under North Carolina law and thus entitled to additional privacy protections, a recent study published by the Juvenile Law Center found that the vast majority of states—including North Carolina—are failing to protect highly sensitive information contained in juvenile court records. JUVENILE LAW CTR., FAILED
Although the overall amount of information associated with minors was low, there were some notable differences between the information categories with regard to minors. Relative to their baseline percentage across all categories, minors were less likely to be associated with information relating to criminal proceedings and more likely to be associated with information in the education, health, identity, and sexual activities categories. In addition, a number of specific information types were disproportionately associated with minors. Information about “Communicable Disease” and, unsurprisingly, “Name of Minor Child,” for example, were exclusively identified with minors, and several information types associated with both adults and minors appeared more often with minors than the overall percentages would have suggested, including: “Adoption,” “Custody or Guardianship,” “Date of Birth,” “Juvenile Court History,” “Pregnancy,” and “Sex Life.”

On the other hand, there were several information types we expected to find associated with minors more often than we observed. For instance, no photographs or videos were associated with minors. Information about “Student Discipline” appeared in only one document, and “Student Grades and Performance Evaluations” appeared in only six documents.

Given the small number of documents from juvenile cases in the sample (n = 7), the inferences regarding the extent of sensitive information associated with minors is limited, especially in juvenile cases. A larger sample of documents from juvenile cases is necessary to better understand the privacy risks associated with minors. This is also an area we hope future researchers will explore.

5. It Is Unwise to Focus Exclusively on Appendices

When we began this study we assumed, based largely on anecdotal reports from archivists and privacy scholars, that appendices included in court records would contain more sensitive information than legal briefs and that highly sensitive information that had been kept out of legal briefs would nevertheless appear in the appendices. Our study showed, however, that appendices are for the most part not quantitatively different from


249. See supra Section V.B.2.b.

250. Information concerning “Communicable Disease” appeared only once in the sample. As noted in Part III, we coded for “Name of Minor Child” as a specific information type; this was the most common information type associated with minors. See supra Section V.B.2.b, especially Figure 7.
legal briefs in terms of the frequency and types of sensitive information they contain.

In terms of the amount of sensitive information in a document, the data actually showed that legal briefs contained a higher frequency of sensitive information than appendices. This disparity was particularly evident in criminal and juvenile cases, where the brief bodies contained approximately three times as much sensitive information as the appendices; for civil cases, sensitive information appeared with equal frequency in the appendices and briefs.251 These findings were reinforced by the multiple regression model, which showed that a document's inclusion of an appendix did not affect the total amount of sensitive information in the document.252

With regard to the specific types of sensitive information in briefs and appendices, the results were more mixed. Only seven of the ninety-five information types that we identified in the records appeared more often in the appendices.253 On the other hand, twenty-seven information types appeared exclusively in the briefs, and many more appeared more than 50% of the time in the briefs. Nevertheless, the information types that did appear more often in the appendices were the types of information many would regard as particularly sensitive from the standpoint of identity theft. Uniquely identifying physical characteristics, drivers' license numbers, social security numbers, and state identification numbers all appeared more often in the appendices, with the latter three information types appearing exclusively in an appendix.

Accordingly, although there is good reason to pay careful attention to appendices when reviewing court records for sensitive information, it is unwise to focus exclusively on appendices. More types of sensitive information appear in legal briefs, and at a higher overall frequency than in appendices.

6. Trends in Sensitive Information over Time

Although the amount of sensitive information in the case files of the North Carolina Supreme Court varied significantly during the time period of this study (1984–2000), there were no overarching trends in the frequency of sensitive information during this seventeen-year period.254
Instead, the most commonly occurring information types appeared with a frequency that varied within a relatively consistent range.

This is not to say that the amount of sensitive information was constant during this time period. To the contrary, there was a great deal of year-to-year variability. In some years there were sharp increases in the amount of sensitive information while in other years there were steep declines. Moreover, the various categories of information did not rise and fall together.

Nevertheless, these variations, which appear to be cyclical, do not show a declining or rising trend during the time period under study. Whether this would continue to be the case if we extended our collection of court records earlier or later in time is beyond the scope of this study.

A number of important events occurred in the late 1990s and early 2000s that might have a significant impact on the frequency and extent of sensitive information in court records in the years following our study. In 1999, the North Carolina court system began allowing electronic filing and in 2009 implement e-filing rules that placed the onus on the parties to redact a number of types of sensitive information from case filings, including social security numbers and certain financial information. In addition, in the late 1990s there was a significant rise in the use of computers and electronic communication systems that might have led to the generation of different types of sensitive information in court records. Given the time it takes for a case to work its way up to a state's highest court, we can expect that these changes would likely take a few years to be reflected in the North Carolina Supreme Court's files.

B. CHALLENGES IN IMPLEMENTING PRIVACY PROTECTIVE PRACTICES

In addition to aiding our understanding of privacy in the context of court records, the results of this research and the experience of the coders will have practical implications for court personnel and archivists as they develop rules and practices for electronic filing of court records or the digitization of older records. Although all of our findings should have some bearing on these efforts, we highlight four main points.

First, some types of sensitive information are easier to identify in court records than others. If courts or archivists decide to limit access to certain

types of sensitive information, they will inevitably have to make choices about which information types should be restricted based, at least in part, on whether the burden of addressing privacy is commensurate with the risk of harm and whether investments in privacy protection practices will be effective. Such proportionality considerations get to the heart of the debate about the nature of privacy harms and the risks, both foreseeable and perhaps unforeseeable, that are presented by current and future practices of information aggregation and use. Without solving the normative and broader practical problems, though, this study nonetheless reveals that some of the sensitive information types in court records appear in standard formats—such as social security numbers, dates of birth, and financial account numbers—and therefore are more easily identifiable through automated searching techniques.256

Second, many sensitive information types require human readers to review records more than once in order to identify the information. Our coders reported that some sensitive information was identifiable only by reading the record and developing a sense of the narrative. For example, the first mention of an individual might not reveal that she was indeed a cooperating defendant or that a particular named person was a minor. This type of information would likely require a human reader to review the record and make note of names associated with sensitive information. Coders also reported that reading a document once would not necessarily be sufficient to capture all occurrences of names that could be associated with sensitive information. Even after this investment of human effort, the question remains about how best to balance privacy and judicial transparency if the sensitive information arises through the course of the narrative. The name itself might be amenable to redaction, but the story of cooperation might be too interwoven in a brief or appendix to make redaction feasible.

Third, redaction may be a poor strategy for dealing with some sensitive information types. Our coders reported that some court briefs and

256. See Rebecca Green, Petitions, Privacy, and Political Obscurity, 85 TEMP. L. REV 367, 406 n.272 (2013) (noting that courts and judicial administrators have explored redaction using computer software, but also noting the prevalence of redaction errors in the federal court records PACER database); Ronald Leighton, Joe Cecil, Michael Ishakian & Edward Felten, Panel Three: Implementation—What Methods, If Any, Can be Employed to Promote the Existing Rules’ Attempts to Protect Private Identifier Information from Internet Access? 79 FORDHAM L. REV. 45, 49 (2010) (Felten discusses the amenable of social security numbers to software redaction because of their fixed pattern and suggests that advanced machine learning methods could be developed to help locate and redact even “difficult types of information, such as names of minor children.”).
accompanying appendices revealed information that was difficult to code as a discrete occurrence. The story of child abuse, for example, might pervade a particular case record. Options for addressing privacy would need to account for this challenge. The preliminary coding also revealed that the occurrence of language conveying a person’s gender is a poor fit for redaction because gender is so integral to the English language. As explained in Part III, the coding for gender threatened to overwhelm the coding process, and the same would be true for any redaction effort.

Fourth, the data showed that there might be some value in prioritizing the review of certain documents when searching for sensitive information in appellate court records. We found that the various brief types were not all equal in the amount of sensitive information they contained. For example, briefs filed by the state had the highest frequency of sensitive information, whereas amicus briefs had the fewest appearances of sensitive information. 257 In addition, documents filed in death penalty cases had a disproportionately higher rate of sensitive information than other types of cases. For court personnel and archivists seeking to make the best use of limited resources, it may make sense to focus on some types of documents and cases over others. We would caution, however, against focusing exclusively on appendices. 258

VII. CONCLUSION

Court records present a special challenge for privacy advocates. Unlike in many other areas of privacy law, the information in court records is presumptively open to the public. This openness serves many salutary functions, such as ensuring that our system of justice functions fairly and is accountable to the public. The public’s right of access to court records and the information they contain, however, is not absolute.

Courts can—and frequently do—restrict public access when an overriding interest supports closure or sealing of specific information. Although the precise standard that a court must apply will vary depending on the circumstances, in general courts must conclude that the interest in prohibiting disclosure outweighs the strong presumption of public access. In the context of libraries and other archives, which may not be bound by

257. Briefs filed by the state had a median of 105.5 appearances of sensitive information per document; for amicus briefs, the median was 10.5. See supra Table 3. Multiple regression modeling also showed that the brief types (other than amicus briefs) were statistically significant predictors of the amount of sensitive information in a document.

258. See supra Section VI.A.5.
law to provide public access to court records, the question is not about what the law requires but about what policy best ensures the protection of privacy interests while simultaneously informing the public about the functioning of the court system.

Although we found a substantial amount of sensitive information in the court records we studied, we have not sought to tell courts or archivists what information, if any, should be redacted or what documents should be withheld from online access or otherwise managed for privacy protection. These largely normative questions must be answered based on a careful balancing of the competing public access and privacy interests. The data presented in this study will be helpful in this balancing, but the findings should not be read to dictate one approach or another.

Privacy interests cannot be evaluated based solely on the presence or absence of specific types of sensitive information in a single court document. Other factors, including the context of the information and the extent of information about an individual that is available from other sources, must also be taken into account. On that latter point, this study is but one piece in a complicated mosaic.

What this study has shown is that court records vary significantly in the types of sensitive information they contain. Records in civil cases are not identical to records in criminal cases or juvenile cases. Consequently, when scholars and policymakers discuss privacy and court records, they must be cautious of generalizing. Depending on the privacy concerns considered paramount, we are likely to see a very different risk profile between different types of court records, cases, and levels of the court system.

Much work remains in order to understand the privacy risks that might arise from online access to court records. We hope that future researchers will answer some of the questions that the data have raised, including the prevalence of criminal information in court records, the differences between appellate court records and trial court records, the extent of sensitive information in juvenile court files, and the impact of e-filing procedures on the types and frequency of sensitive information in court records.
APPENDIX

Table A1: Sensitive information types in coding list, with category and number of documents that contained each information type, percentage of the total sample of documents (n = 504), overall frequency of appearance, and percentage of total frequency of all sensitive information identified in the sample.

<table>
<thead>
<tr>
<th>Sensitive Information Type</th>
<th>Category</th>
<th>Documents</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>n</td>
<td>%</td>
</tr>
<tr>
<td>Abortion</td>
<td>Health</td>
<td>1</td>
<td>0.2%</td>
</tr>
<tr>
<td>Adoption</td>
<td>Civil Proceedings</td>
<td>4</td>
<td>0.8%</td>
</tr>
<tr>
<td>Age</td>
<td>Identity</td>
<td>84</td>
<td>16.7%</td>
</tr>
<tr>
<td>Arrest or Charge</td>
<td>Criminal Proceedings</td>
<td>160</td>
<td>31.7%</td>
</tr>
<tr>
<td>Asset-Other</td>
<td>Assets</td>
<td>3</td>
<td>0.6%</td>
</tr>
<tr>
<td>Bank Account Number</td>
<td>Financial</td>
<td>3</td>
<td>0.6%</td>
</tr>
<tr>
<td>Bankruptcy</td>
<td>Financial</td>
<td>4</td>
<td>0.8%</td>
</tr>
<tr>
<td>Cable Television Subscription Record</td>
<td>Intellectual Pursuits</td>
<td>1</td>
<td>0.2%</td>
</tr>
<tr>
<td>Cable Television Viewing History</td>
<td>Intellectual Pursuits</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>Cause of Death</td>
<td>Health</td>
<td>70</td>
<td>13.9%</td>
</tr>
<tr>
<td>Child Abuse</td>
<td>Criminal Proceedings</td>
<td>27</td>
<td>5.4%</td>
</tr>
<tr>
<td>Child Support</td>
<td>Civil Proceedings</td>
<td>11</td>
<td>2.2%</td>
</tr>
<tr>
<td>Civil Commitment</td>
<td>Civil Proceedings</td>
<td>3</td>
<td>0.6%</td>
</tr>
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<td>Civil Proceedings-Other</td>
<td>Civil Proceedings</td>
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<td>0.4%</td>
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<tr>
<td>Communicable Disease</td>
<td>Health</td>
<td>1</td>
<td>0.2%</td>
</tr>
<tr>
<td>Compensation</td>
<td>Financial</td>
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</tr>
<tr>
<td>Computer Use - Other</td>
<td>Computer Use</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>Content of Recorded Conversations</td>
<td>Intellectual Pursuits</td>
<td>3</td>
<td>0.6%</td>
</tr>
<tr>
<td>Conviction</td>
<td>Criminal Proceedings</td>
<td>150</td>
<td>29.8%</td>
</tr>
<tr>
<td>Cooperating Defendant Name</td>
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<td>32</td>
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</tr>
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</tr>
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<td>Credit Report</td>
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<td>-</td>
</tr>
<tr>
<td>Criminal Proceedings-Other</td>
<td>Criminal Proceedings</td>
<td>17</td>
<td>3.4%</td>
</tr>
<tr>
<td>Custody or Guardianship</td>
<td>Civil Proceedings</td>
<td>17</td>
<td>3.4%</td>
</tr>
<tr>
<td>Date of Birth</td>
<td>Identity</td>
<td>30</td>
<td>6.0%</td>
</tr>
<tr>
<td>Date of Death</td>
<td>Identity</td>
<td>85</td>
<td>16.9%</td>
</tr>
<tr>
<td>Date of Hospital Stay</td>
<td>Health</td>
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<td>Debit Card Number</td>
<td>Financial</td>
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<td>-</td>
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<td>Debt</td>
<td>Financial</td>
<td>7</td>
<td>1.4%</td>
</tr>
<tr>
<td>Dependency or Neglect</td>
<td>Civil Proceedings</td>
<td>2</td>
<td>0.4%</td>
</tr>
<tr>
<td>Disability Status</td>
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<td>24</td>
<td>4.8%</td>
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1893
<table>
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<tr>
<th>Sensitive Information Type</th>
<th>Category</th>
<th>Documents</th>
<th>Frequency</th>
<th></th>
<th></th>
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</thead>
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<td></td>
<td>$n$</td>
<td>%</td>
<td>$n$</td>
<td>%</td>
</tr>
<tr>
<td>Discipline</td>
<td>Employment</td>
<td>20</td>
<td>4.0%</td>
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<td>Civil Proceedings</td>
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<td>6.9%</td>
<td>200</td>
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<td>Domestic Violence Victim Name</td>
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<td>Driver's License Number</td>
<td>Identity</td>
<td>2</td>
<td>0.4%</td>
<td>6</td>
<td>0.0%</td>
</tr>
<tr>
<td>Drug or Alcohol Dependency</td>
<td>Health</td>
<td>34</td>
<td>6.7%</td>
<td>325</td>
<td>0.6%</td>
</tr>
<tr>
<td>Drug or Alcohol Treatment</td>
<td>Health</td>
<td>4</td>
<td>0.8%</td>
<td>6</td>
<td>0.0%</td>
</tr>
<tr>
<td>Drug or Alcohol Use</td>
<td>Health</td>
<td>8</td>
<td>1.6%</td>
<td>135</td>
<td>0.3%</td>
</tr>
<tr>
<td>Education-Other</td>
<td>Education</td>
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<td>0.2%</td>
<td>4</td>
<td>0.0%</td>
</tr>
<tr>
<td>Eligibility for School Lunch Program</td>
<td>Education</td>
<td>0</td>
<td>-</td>
<td>0</td>
<td>-</td>
</tr>
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<td>Email Address</td>
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<td>-</td>
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Table A2: Regression results for the analysis of sensitive information per document (log transformed).

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R-squared: 0.4626
Num. of observations: 467

* indicates statistical significance (P < 0.05)