Hon. Lee H. Rosenthal United States District Judge Southern District of Texas Chair Judicial Conference Advisory Committee on Federal Rules 515 Rusk Avenue, Room 11535 Houston, Texas 77002

Re: Recent Partial Audit of PACER System by Public.Resource.Org

Dear Judge Rosenthal:

I am writing to you at the suggestion of Assistant United States Attorney Peter Winn, with whom I recently shared a panel at the Conference on Privacy and Public Access to Court Records sponsored by the Center for Legal and Court Technology at William and Mary Law School. In addition to his work at the Department of Justice, Mr. Winn is also a lecturer on privacy law at the University of Washington. Both of us have studied and written about the problem of balancing the right of the public to court records with the need to protect sensitive personal information in judicial records. This letter is prompted by a shared concern we have based on a recent partial audit of records in the PACER system by Public.Resource.Org. A redacted version of that audit has been published at the organization's website at the address noted below, but we understand that you were notified of its results in October prior to their public release.

http://public.resource.org/uscourts.gov/index.html

The partial audit covered only about one fifth of the records in the PACER system and targeted but 32 of the 94 federal judicial districts. It covered records filed after December 1, 2007, when the new privacy rules were added to the Federal Rules of Civil and Criminal Procedure, as well as before that time, when, however, most federal district courts had enacted local rules to protect privacy in court filings, consistent with Judicial Conference policy. Some districts – such as your own – appear to have had few or no problems with the successful implementation of the privacy rules, presumably because of an effective educational campaign with the local bar. However, in several other districts, the partial audit reveals what can only be described as a serious lack of compliance.

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There is no need in this letter to repeat all the disturbing details. But I should say that both Mr. Winn and I were startled by the dimensions of the apparent problem. The two of us had both been concerned for some time that a dispute-oriented adversarial system would not be able effectively to protect the privacy of unrepresented third parties (a concern borne out by the audit). We were surprised to see how many of the privacy violations appear to have involved represented clients and their family members.

While it might be possible to wait until a tort suit is filed against some of the offending attorneys for breach of their duty of care to clients, it is unclear whether tort law would ever be able to adequately protect third parties. In neither instance can it be said that the common law has been well developed. Having given this problem careful consideration – which included considerable public discussion at the recent Court Privacy Conference – we have concluded that there are better ways than liability rules to address it in those districts where non-compliance is an issue. We believe that one cost-effective solution would be for the Administrative Office to complete the audit begun by Public.Resource.Org audit, identify specific violations, communicate the results to the judges and clerks in those districts where problems are identified, and allow those districts to take appropriate action to address rule violations. It might be, for instance, that merely sending a warning letter to the offending lawyer would be enough to "get his or her attention," but this probably should be a matter left in the hands of the local judges.

In addition to Mr. Winn, I am copying Mr. Carl Malamud, who I understand would be pleased to assist the personnel at the Administrative Office in the design of any future audit of the PACER records, or, should they prefer, complete the audit on their behalf, at no charge. I am also copying Judge Barbara J. Rothstein, the Director of the Federal Judicial Center, since this appears to be a problem that "cries out" for further research and education.

Sincerely,

Peter W. Martin Jane M.G. Foster Professor of Law

cc: Judge Barbara J. Rothstein Peter Winn Carl Malamud