March 1, 2006

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Comments concerning Proposed Provisional Rule 46

Dear Mr. Catalano:

In response to the request for written comments concerning the Proposed Provisional Rule 46, Rules of the Tennessee Supreme Court," LexisNexis File & Serve proposes comments to the following rules. Suggested revisions underlined below.

Section A(1)(f) "Electronic Filing Provider" means the vendor selected by the Electronic Filing Task Force to provide electronic filing and electronic service of documents via the Internet.

Comment: Identifying the e-filing and e-service vendor as an "Electronic Filing Provider" provides the court further flexibility in selecting a vendor to provide e-filing, e-service and additional services. The label of E-filing Provider does not limit offered services to just e-filing and e-service, but rather expands the offered services to include electronic file management and document management system assistance.

Section C(1)(a) An authorized user who desires to e-file and /or e-serve shall register with the E-filing Provider. Upon receipt by the E-filing Provider of a properly executed end-user agreement, the E-filing Provider shall assign to the user a confidential login and password to the system. No attorney or other user shall knowingly authorize or permit another unauthorized person to use the registered user's login or password. Additional authorized users may be added at any time after the initial registration process is complete. Except as expressly permitted in this rule, the documents shall be e-filed using the login and username provided to them during the registration process.

Comment: In an effort to ease the burden on the Clerk, users of the E-filing Provider services can be managed by the E-filing provider, who will handle assigning and monitoring user login IDs and passwords.

Section C(1)(b) Registered users of the e-file system shall notify the E-filing Provider by e-mail or regular mail within 10 days of any changes in firm name, delivery address, fax number or e-mail address.

Comment: To ensure proper and timely notices pertaining to e-filing and e-service services, and to ease a potential administrative burden on Clerk, the E-filing Provider can be directly notified of any contact changes so that the E-filing Provider can make the necessary changes in the system.

Section C(2)(a) Any document filed electronically shall be considered as filed with the Clerk's Office when the transmission to the E-filing Provider is complete. Any document received by the E-filing Provider before Midnight local time of the Clerk's Office where the document is e-filed shall be deemed filed on that date if such document otherwise meets all requirements for filing under the relevant rules of court.

Comment: An E-Filing Provider should be capable of an instantaneous transmission to a Clerk's office once a document is transmitted to the E-filing Provider. Thus, the moment the E-filing Provider receives the transmission, so does the Clerk, and the transmission is complete. This method minimizes the potential issues related to any lag time between submitting a document to the E-filing provider and then having the E-filing Provider forward such transmission to the Clerk.

Section C(2)(b) Upon completion of filing, the E-filing Provider shall issue a transaction receipt that includes the date and time of receipt. The transaction receipt shall serve as proof of filing. In the event the Clerk rejects the submitted documents following review, the documents shall not become part of the official court record and the filer will receive notification of the rejection. User may be required to re-file documents to meet necessary filing requirements.

Comments: Based on the above description of instantaneous transmission upon the E-filing Provider receiving a document transmission, the E-filing Provider can provide a transaction receipt indicating the time the Clerk received a filing. This process provides greater efficiency related to the time a filing is received.

Section C(4)(a) Registered users who voluntarily e-file shall pay e-filing fees established by the E-filing Provider as set forth in the contract between the E-filing Provider and the user.

Comments: Statutory filing fees are established by the State and Court and the E-filing Provider can work with the Clerk in collecting such fees. Any additional fees associated with the services provided by the E-filing Provider to the user would need to be addressed by a separate contract between the E-filing Provider and user.

Section C(6)(b) E-service is accomplished by use of the recipient attorney's E-filing Provider provided online inbox. A "Transaction Receipt" is generated automatically by the E-filing Provider upon completion of an electronic filing and/or completion of electronic service. The "Transaction Receipt" acts as proof of service for the user.

Comment: Electronic mail or e-mail is still very unreliable due to numerous points of failure ranging from the individual's IP provider to various "SPAM" filters utilized by individuals. Thus, a hosted E-filing provider can provide a controlled environment of online inboxes that provide greater assurance that documents are delivered and delivered timely. The use of online inboxes will also provide a more accurate means of generating a transaction receipt that can provide the date and time an electronic filing and/or electronic service is completed.

Thank you for the opportunity to submit these written comments and thank you for your consideration.

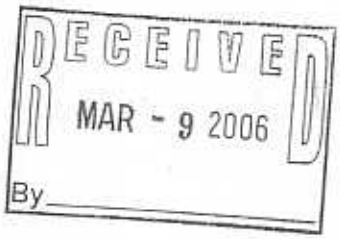
Sincerely,

Evan Y. Uchida
Business Operations Manager
LexisNexis File & Serve
Evan.Uchida@lexisnexis.com

PAUL WHETSTONE
ATTORNEY AT LAW

March 7, 2006

Mr. Mike Catalano, Attorney
Clerk of the Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407



Re: Provisional Rule 46, *Rules of the Supreme Court of Tennessee*

Dear Mr. Catalano:

After I overcame the initial shock that arose from the Federal ECF system, I came to realize that the electronic filing mandate was well-conceived. Since that time, I have saved time and energy by being relieved of the physical mechanics associated with court filings within the Federal venue.

I have read the Task Force version of proposed Rule 46. I was heartened to see that the archaic practice of having counsel sign before a Notary Public, in order to create an Affidavit in support of a given Motion, will be been abolished by prospective operation of Rule 46 (C) (5) (d). However, I suggest that you consider the relatively rare situation where a non-lawyer submits an Affidavit to the Appellate Courts. I'll explain.

Presently, I am in the process of filing a MOTION TO TAX COSTS TO THE STATE[1], which will require the Affidavit of my client's mother, who privately retained me for her imprisoned son's appeal. In that instance, I would suggest that a simple sentence be provided within Rule 46, subpart (C) (5) (d), which compels counsel to create a hard copy of a duly notarized Affidavit, scan it, and then file the document as an attachment to the Motion.

If you are interested, I would be happy to volunteer to create a pilot filing; I have a Rule 11 Application due no later than March 30, 2006. Others filings in the Court of Criminal Appeals and the Supreme Court will be coming due by this summer.

Yours very truly,

Paul Whetstone

[1] *Bronzo Gosnell, Jr. v. State of Tennessee*, No. E2004-02654-CCA-R3-PC (Opinion released August 19, 2005), *perm. app. denied* (Tenn. Dec. 19, 2005).

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MODERN TOOLS FOR MODERN LAW

March 13, 2006

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

via Federal Express

Re: Comments on Proposed E-Filing Rules

Dear Mr. Catalano:

Thank you for taking the time to speak with our CEO, Darris McCord, the other day. Mr. McCord asked that I prepare and send to you Wiznet's comments on the Proposed E-Filing Rules. After review of the proposed Rules, we believe they are very thorough and well thought out. These comments are based on our broad experience in other jurisdictions implementing e-filing. We appreciate having this opportunity to review and comment on your E-filing Rules, and we hope you find our suggestions helpful in preparation of your final Rules.

1. In our experience, e-filing rules generally include documentation regarding Judges and/or other judicial officers e-filing orders, judgments and/or notices. Most systems allow Judges and Clerks to file in a case and all parties listed on the "official service list" receive a copy of the order and/or judgment via the system. We would recommend including a paragraph regarding when orders, judgments or notices are filed from the Court electronically, stating that the party responsible for serving notice of entry of an order or judgment should do so either electronically or by sending a hard copy to the party (if the party has declined electronic service and notice).
2. You might want to consider including some type of requirement about documents that are paper-filed or filed over the counter with the clerk and not available in electronic format through the EFSP site. Perhaps the EFSP site would be required to list all documents filed and, if a document is omitted, state the reason for omission (not e-filed, sealed, or whatever). This gives the attorneys and the Clerk a clear picture of the case through the EFSP site, even if all of the documents are not available online through the EFSP. If the EFSP is fully integrated with the Clerk's DMS, this could be automated, so it would not entail more work for the Clerk's office and would save the Clerk from having to answer questions about case documents that are not available online.
3. It is unclear from the Rules if the EFSP will collect court filing fees or if the fees are expected to be paid directly to the Clerk. In addition to any filing fee charges by the EFSP, most EFSPs will collect the court filing fees and guarantee those fees to the

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Clerk. Thus, the Clerk does not have to worry about collecting on bad checks or credit cards. The fees are deposited directly into the Court's designated account within 24 hours after the filing is approved. The collection of Court filings fees is usually addressed in the Court's e-filing rules.

4. Also, any additional "convenience fees" for use of credit cards for payment of court filings fees is usually addressed in a Court's e-filing rules.
5. If electronic service via fax is an acceptable method of service through the EFSP, this is usually indicated in the e-filing rules.
6. With regard to e-service, we would recommend that during the pilot project a party who has previously agreed to be served via e-service should be allowed to give notice to all parties that they no longer wish to be served via e-service or to "opt out" of the program.
7. E-filing rules generally contain a paragraph stating that "certified" copies must still be issued and obtained through the Clerk's office and cannot be obtained through the EFSP.

If you have any questions regarding any of our comments or suggestions, please feel free to call me. I can be reached at the office at (561) 272-7710 or you can also call my cell (727) 501-4336.

Sincerely,

Barby Sizemore

Barby Sizemore

cc: Darris McCord, CEO
Michael Joyce, CEO

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	]	
PROPOSED PROVISIONAL	]	
RULE 46, RULES OF THE	]	M2006-00306-SC-RL1-RL
TENNESSEE SUPREME COURT	]	
	]	

COMMENT OF THE NASHVILLE BAR ASSOCIATION CONCERNING PROPOSED PROVISIONAL RULE 46, RULES OF THE TENNESSEE SUPREME COURT

The Nashville Bar Association ("NBA"), by and through the Chair of its Appellate Practice Committee, John D. Kitch, submits the following comment concerning Proposed Provisional Rule 46, Rules of the Tennessee Supreme Court:

The NBA Board of Directors, after consultation with its Appellate Practice Committee, and having considered Proposed Rule 46, Rules of the Tennessee Supreme Court, believes that electronic filing in the appellate courts is appropriate and beneficial, and recommends adoption of the general content of proposed Provisional Rule 46. However, there are some concerns. They are as follows:

1. Under § B(1) of the Rule e-filing is permissive, but the e-filing is the official filing under § B(2). There are those who wish to file both electronically and on paper so that a polished presentation prepared by the lawyer him- or herself could be available to the members of the Court, as well as the e-filed document. Some judges may prefer hard copy, and simply printing the electronic version may not be as visually appealing or as useful, especially for those lawyers who wish to tab exhibits and appendices for ease of access and judges who would want the benefits of this tool.

2. Another issue under § B(1)'s permissive filing is the duplication of e-filing but then having to serve non-using lawyers by means of hard copy. This means that an e-filing lawyer still would have to bind briefs, with the appropriate color of cover sheet, solely to send one copy by mail. This should be addressed.

3. Under § B(3) and (4) and § C(1)(a) of the proposed rule there needs to be a better definition of persons authorized to use an attorney's username and password. A lawyer's

associate, paralegal, clerk or assistant should have the ability to use it without running afoul of the rule.

4. Under § B(5) and (6) there needs to be significant attention paid to matters which may be covered under the Health Insurance Portability and Accountability Act (HIPAA). Anything filed containing any sort of medical information will be available on the Web to anyone with a computer, and protections need to be built in, similar to the items listed in § B(5).

5. Under § C(2)(a) a document is considered filed when received by the Clerk's office. If one starts the electronic filing at 11:55 p.m. on the last day before a deadline but the transmission is not completed until 12:05 a.m. the next day, it appears that the document would be late as it would not be "received" until completed. A clarification is necessary.

6. Under § C(4) there is much concern over the "pay-as-you-go" per-filing charge for each filing. For example, would each lawyer have to give a credit card number? Could a lawyer send a check to the Court and have the Clerk draw on that account? What happens if for some reason the payment method doesn't work, such as where the credit card is over limit or the credit card company has put a hold on it? Is the document not filed, thus exposing the attorney to potential liability for late filing? This must be clarified in detail.

The NBA would request that, if Proposed Rule 46, Rules of the Tennessee Supreme Court, is adopted, the Court provide for a formal review of, and opportunity to comment on, the Rule and its impact on the Bar of Tennessee within a year of its effective date.

Respectfully submitted,

Nashville Bar Association

By: 

John D. Kitch, BPR # 4569
Chair
NBA Appellate Practice Committee
Suite 305, 2300 Hillsboro Road
Nashville, Tennessee 37212
(615) 385-9911/Fax 385-9123

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Comment of the NBA Re: Comments to Proposed Provisional Rule 46, Rules of the Supreme Court, has been placed in the United States mail, postage pre-paid, to the Hon. Michael W. Catalano, Clerk of the Supreme Court of Tennessee, 200 Supreme Court Building, 401 Seventh Avenue North, Nashville, TN 37219-1407 on this the 6th day of April, 2006.

John D. Kitch

Cc: Allan Ramsaur, Executive Director
Tennessee Bar Association
421 Fourth Avenue North, Suite 400
Nashville, TN 37219-2198

Marsha Pace, Executive Director
Knoxville Bar Association
406 Union Avenue, Suite 510
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April 5, 2006

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Proposed Provisional Rule 46, TSCt Rules

Dear Mr. Catalano:

I would like to go on record as objecting to any procedure which may evolve into a mandatory process and procedure. The e-filing requirements in the Federal Court system, including bankruptcy courts, have just about put the small solo practitioner out of business in those courts because of the expense involved in the respective software programs and because of the technical expertise required to comply with the requirements. You must remember and tell all those in control of this project that the small business solo practitioner will never be able to keep up with and afford all of the technical and electronical advancements that the government and the large firms can do easily.

The experienced solo practitioner is able to provide effective and economical representation to clients and litigants, in most cases for less cost than a larger firm would be willing to do it for them. Creating a more complex and expensive system will cause legal expenses to increase, causing harm to those least able to afford them, lawyer and client alike.

The paper system has worked just fine over the years and all of us know how to maneuver through it. Please do not create something or implement rules which will become mandatory that change the way we practice law to the extent that the expenses involved will outweigh the benefit. Most of our elder brethren in the practice and even those in mid career will never be able to adapt to these type of changes.

Please do not ever recommend anything that will ever close the door on paper filing. The PDF format is not fool proof and causes problems on many computer systems, including mine which is fairly new.

Sincerely,

John T. Wilkinson III

JTWIII/st

Comments of The Reporters Committee for Freedom of the Press

May 8, 2006

To: The Supreme Court of Tennessee at Nashville
Mike Catalano, Clerk

Re: Request for Comments on Proposed Provisional Rule 46, Rules of the Tennessee Supreme Court

Introduction

The Reporters Committee for Freedom of the Press[1] submits these comments in response to the Request for Comments on Proposed Provisional Rule 46, Rules of the Tennessee Supreme Court regarding voluntary electronic filing in the appellate courts. We appreciate the opportunity to be heard on this important issue.

Discussion

We applaud the Tennessee Supreme Court Task Force on Electronic Filing in the Appellate Courts for harnessing the technological advances of the Internet to improve the transparency and efficiency of the judicial system. We agree with the Task Force Report that electronic filing and Internet access to court records has numerous benefits for the public and the media including enhancing the public's ability to monitor the fairness of its judicial system, permitting more thorough and effective reporting by the media in cases of public interest, and improving judicial efficiency for litigants and court administrators. Providing e-filed documents in appellate cases on the Internet for anyone to access at no charge goes a long way towards accomplishing those objectives.

We are concerned, however, that some of the important public interest in appellate and criminal records is sacrificed in the Proposed Rule for the sake of personal privacy. Though we respect the court's concern for minors, we believe excluding parental termination appeals and certain criminal appeals from electronic access will injure the public that provides the forum and authority for resolving disputes. Moreover, such a rule may fail constitutional scrutiny. Accordingly, we encourage you not

[1] The Reporters Committee is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee assists journalists by providing free legal information via a hotline and by filing *amicus curiae* briefs in cases involving the interests of the news media. It produces several publications to inform journalists and lawyers about media law issues, including *The News Media and the Law* and *News Media Update*, and has published a series of special reports on court access, including *Access to Electronic Records* in 2003. As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing remote access to court records.

to exclude parental termination appeals and certain criminal appeals involving minor victims[2] from e-filing, and instead ask you to encourage court participants to use available methods to protect sensitive information such as protective orders and sealing orders in particularly sensitive individual cases.

A. Restricting access to criminal records may violate well-established law.

The First Amendment guarantees a *presumption* of openness to criminal proceedings that may only be overcome on a case-by-case basis when someone who seeks closure demonstrates that there is a compelling need for secrecy. Unsubstantiated assertions of harm, such as privacy and embarrassment, are insufficient to demonstrate a "compelling need" to overcome this extremely high presumption. Access is granted unless the records have been sealed or otherwise deemed confidential on a case-by-case basis.[3] If a court orders any type of closure in a criminal case, it must be narrowly tailored to serve the compelling need for secrecy. This right has been affirmed numerous times, by many different courts.[4]

Contrary to these principles, Proposed Rule 46 restricts public access to certain types of criminal files without a case-by-case examination of whether secrecy is needed or whether the restriction is narrowly tailored. A case may involve multiple victims, with a juvenile being one among many adult victims. Should concerns for the minor victim's privacy outweigh the public's interest in learning whether the adult victims were vindicated? Even in strictly juvenile cases, the need for secrecy differs from case to case. For instance, there may be no need to protect the identity of a child who has, regrettably, died because of his injuries. And, in a case where it is important to protect a child's identity, using the minors' initials in court filings as legally mandated may be sufficient to protect that interest – in such a case, denying remote access to the entire files instead of just the child's name would not be narrowly tailored.

The U.S. Supreme Court has made clear that determining the level of protection needed in cases involving juvenile victims is best left to individual judges who can weigh the minor victim's age, psychological maturity and understanding, the nature of the crime, desires of the victim, and the interests of parents and relatives. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982). Because Proposed Rule 46 denies judges their authority to make this case-by-case

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[2] Tennessee Code Ann. § 39-13-109 (criminal exposure to HIV) does not concern minor victims, unlike the other 20 provisions listed in B(5)(c), suggesting that the Task Force may have unintentionally included this provision. But if not, we believe Proposed Rule 46 should not create an exception for appeals concerning criminal exposure to HIV because of the well-established First Amendment right of access to criminal records and because concerned litigants may take advantage of other methods of protecting sensitive information, such as protective orders, in such cases.

[3] *See, e.g., Brown & Williamson Tobacco Co. v. Federal Trade Comm.*, 710 F.2d 1165 (6th Cir. 1983).

[4] *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989); *Anderson v. Cryovac*, 805 F.2d 1 (1st Cir. 1986); *Associated Press v. U.S. (DeLorean)*, 705 F.2d 1143 (9th Cir. 1983); *United States v. Myers (In re Nat'l Broadcasting Co.)*, 635 F.2d 945 (2d Cir. 1980).

determination, it could fail constitutional scrutiny, forcing the Task Force to abandon a policy it has spent time and resources drafting. *See, e.g., Blackard v. Memphis Area Med. Ctr. For Women, Inc.*, 262 F.3d 568 (6th Cir. 2001) (citing *Doud v. Hodge*, 350 U.S. 485 (1956) (federal district courts have "jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution.")).

The U.S. Supreme Court has held that the privacy of minor victims does not justify blanket restrictions on public access. *Globe*, 457 U.S. 596. In *Globe*, the appellee urged that a statute banning public access to courtrooms during testimony of a minor victim of a sex crime served two compelling state interests: "the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of victims to come forward and testify in a truthful and credible manner." *Id.* at 607. The Supreme Court acknowledged that both of these interests were compelling. It held, however, that neither would justify an across-the-board ban on access in every instance involving a minor sex victim:

> "[A]s compelling as that interest [in protecting minor victims of sex crimes] is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, and desires of the victim, and the interests of parents and relatives. Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence . . . . If the trial court [in the case before us] had been permitted to exercise its discretion, closure might well have been deemed unnecessary. In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and the public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest." *Id.* at 607-08.

The Supreme Court added:

> "We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. ***In individual cases, and under appropriate circumstances***, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional." *Id.* at 611, n. 27 (emphasis added).

Moreover, the court was unpersuaded by the fact that the statute did not bar the public from discovering child victims' testimony through other means such as transcripts or court personnel or other sources who could describe the testimony. Indeed, the Court found that allowing the public some form of access to the victim's testimony undermined the statute's intended purpose of protecting child victims' and still failed to overcome the unconstitutionality of the statute since it imposes a blanket

ban. Under the *Globe* Court's reasoning, a rule that creates a blanket ban on the public's electronic access to particular information is unconstitutional even if the state has a compelling interest in protecting minor victims of crimes and the public can access the information at the courthouse because such a rule does not require a case-by-case determination before restricting access.

Indeed, Proposed Rule 46 would impair access to information about the types of cases that the public has tremendous concern about – crimes against children. As indicated by the public furor and media attention surrounding the murder of 11-year-old Carlie Brucia in Sarasota, Florida, our society has a strong interest in seeing that violent crimes against children do not go unpunished.[5] Thousands across the nation tuned in to watch television coverage or read newspaper accounts of the Brucia trial to observe whether the defendant was brought to justice, unlike most criminal cases that are never heard of outside courthouse walls. Had the public not been able to access information about the case – the evidence introduced, the lawyers' reasoning, and the judge's decision – they would not have been able to judge whether their court was fulfilling its duty to uphold the law.

In fact, the trial judge in the *Brucia* case was overturned when he attempted to seal photographs of the deceased victim showing the child's nude lower body, revealing the various trauma sustained by her and decomposition. In overturning the sealing, the appellate court ruled that, while it respects "the privacy interests of the victim's family" and the photos were "extraordinarily distressing," "these photographs are evidence in a trial where the state, on behalf of the people, is using its power to pursue the most extreme penalties." *Sarasota Herald Tribune v. State*, 924 So.2d 8, 12 (Fla. Dist. Ct. App. 2005). The Florida Supreme Court refused to review the lower court's decision and U.S. Supreme Court Justice Anthony Kennedy rejected an emergency request to stay the decision.[6] As the *Brucia* case indicates, courts have been overturned for giving too much weight to juveniles' privacy interests even where the information at issue is extremely graphic.

There are many reasons why the Supreme Court has found a First Amendment right to criminal proceedings.[7] In a criminal proceeding, the complainants are "The People," not the particular victim of the crime. The public has a powerful interest in seeing their cases litigated properly and ensuring that those who commit crimes are convicted and those who are innocent are released. Transparency

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[5] "'Public interest [in the Brucia case] is expected to be so great that people who want to watch in the courtroom will be required to line up outside the courthouse for a ticket every morning,' said Senior Deputy Court Administrator Faye Rice." Mitch Stacy, *Jury selection to begin in case over Sarasota child's rape, murder*, Associated Press, Oct. 24, 2005.

[6] In contrast to trial files that are replete with facts and, in the case of a child crime victim, may even include graphic images of the child, appellate files largely comprise long documents containing lengthy discourses on questions of law. That trial courts may be overturned for sealing graphic evidence depicting child victims suggests that restricting entire appellate files in cases that involve minor victims – regardless whether they include graphic photos or descriptions – is over broad.

[7] *See, e.g., Globe*, 457 U.S. at 606 (public access "enhances the quality and safeguards the integrity of the factfinding process," "fosters an appearance of fairness," heightens "public respect for the judicial process," and "permits the public to participate in and serve as a check upon the judicial process–an essential component in our structure of self-government").

ensures that prosecutors do not abuse their power, and permits the public to evaluate fairness and efficiency of the criminal justice system. Further, once a criminal is convicted, the public has an interest in monitoring that person's behavior for his own safety and protection. And if the parties pursue appeals, the public can review the lower court's reasoning. Evaluating the merits of each party's position and the appellate court's holding is crucial to the preservation of justice.

Additionally, judges and other court personnel are public employees. Their conduct is subject to public scrutiny and they may be held accountable for improper or injudicious actions. *See, e.g., United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions."). The only way for the public to fully and fairly evaluate the performance of court personnel is to have full access to court records.

While we appreciate the court's concern for the privacy of minor victims, we believe that Proposed Rule 46 may be unconstitutional. Generalized assertions of juveniles' privacy are simply not sufficient to justify blanket restrictions on the public's ability to access criminal court documents, even those involving juveniles. It is well-founded that restrictions on access to court records should be made by individual judges on a case-by-case basis. Participants who seek to protect sensitive information can take advantage of tools such as protective orders and statutes requiring the use of minors' initials in particular filings.

B. Internet access to criminal court records – particularly those involving juveniles – raises public awareness of important societal issues.

Remote electronic access has enabled journalists to use criminal court records and records involving juveniles to break stories of major public importance.[8] For instance, in January 2006, *The Miami Herald* published a story exposing that Florida's sex offenders aren't receiving promised mental health treatment. The *Herald*'s reporting was based on a computer analysis of more than 100,000 sexual crimes. *See* Jason Grotto, *Predators Among Us*, MIAMI HERALD, Jan. 29, 2006.

In January 2004, *The Denver Post* reported that in 41 percent of Colorado's child abuse and neglect cases – including some cases that resulted in deaths – social service agencies had advance warnings of problems in the home. The report was based on an analysis of thousands of state records, including court documents. The Post noted that "[m]istakes in child abuse cases can remain hidden indefinitely" because "nearly all counties responsible for handling child abuse complaints claim that records of their involvement are confidential." *See* David Olinger, *The Loss of Innocents*, DENVER POST, Jan. 18, 2004.

[8] "The role of the media is important; acting as the 'eyes and ears of the public,' they can be a powerful and constructive force, contributing to remedial action in the conduct of public business." *Houchins v. KQED*, 438 U.S. 1, 8 (1978).

In October 2003, *The (Louisville) Courier-Journal* used a computer analysis of court records to report that more than 2,000 indictments in Kentucky had been pending for more than three years, and that hundreds of cases had been dismissed for lack of prosecution. *See* R.G. Dunlop, et al., *Justice Delayed: Justice Denied*, LOUISVILLE COURIER-JOURNAL, Oct. 12-19, 2004 (four-part series).

And in 2002, *The Washington Post* won a Pulitzer Prize for its exposure of serious problems in the Washington, D.C. foster care system. By documenting instances of physical abuse and death of foster children from public court records, *The Post* focused the public's attention on an issue of paramount importance.

These are just a few examples of how reporters have used the information in court to shed light on important social issues. Few journalists have the time or resources to sift through records in courthouses across the country to ascertain whether sex offenders are treated, prosecutors' effectiveness, or which homes present a danger to a child's safety. Making records remotely available, however, enables such research to be quickly and thoroughly conducted.

In Maryland, where the state judiciary issued proposals that would have imposed broad restrictions on remote access in the name of privacy, citizens with diverse interests came together to protest. Opponents of the proposed rules cited the example of Kathy Morris, a private detective in Harford County, who used electronic access of court records to learn that a client's potential babysitter was a convicted child molester. The Maryland judiciary received similar opposition from bankers, apartment managers, nuclear power plant officials, and other employers who regularly access court records electronically. Maryland eventually abandoned its restrictive proposals and has now instituted a more liberal policy.

Thus, electronic access to criminal court records – arguably *especially* those involving children – aids journalists, concerned citizens, and advocacy organizations in a variety of watchdog capacities. It enables far more effective monitoring of the government's activities, which promotes public safety and increases confidence in the government's actions.

C. Internet access to court records improves reporters' ability to bring important societal issues to the public.

Electronic access to all appellate files improves reporters' ability to do their job. Reporters tell us that electronic access helps them be more accurate as they are able to obtain more relevant information in less time. Furthermore, because journalists are not always permitted to bring recording devices into courtrooms, online access to motions, orders and possibly even transcripts goes a long way toward improving the accuracy of news journalism.

Through remote access, journalists and other members of the public also may obtain information without having to appear at the courthouse, which can be very useful in rural areas and to journalists reporting on issues taking place far from their newsroom. It also allows reporters to obtain information after business hours and on weekends. Such access permits reporters to check case files for background information or updated information when news breaks at night or on weekends.

Internet access to court records also promotes efficiency by accommodating requests from reporters or members of the general public when there is substantial demand for a particular file, or when it is 'checked out' to chambers. Over the past year, the Zacarias Moussaoui death penalty trial illustrated how both media professionals and private individuals often seek records simultaneously. The Eastern District of Virginia's practice of creating a site for the court's "notable cases" allowed all interested persons to access court filings and court schedule without delay and eased the court's administrative burdens.

D. Closing off broad access to particular documents or sensitive information is a legislative, not judicial function.

Although courts may restrict public access to a particular case file after consideration of the circumstances, it is the purview of the legislature, not the courts to limit public access to broad categories of information. To avoid the appearance of judicial legislating, we recommend allowing the Tennessee legislature to determine whether particular records should be electronically unavailable. As indicated by statutes restricting public access to juvenile delinquency proceedings and requiring the use of initials to protect childrens' identities in particular cases, the Tennessee legislature knows how to pass laws to restrict broad access to court records. *See, e.g.*, Tenn. Code Ann. § 37-1-154 (2006) (restricting access to law enforcement records and files in juvenile delinquency proceedings). Presumably, it would pass a law prohibiting electronic access to appeals involving juveniles if it wished to do so.

CONCLUSION

We appreciate the opportunity to present these Comments. The issue of electronic filing and access to court records is being confronted simultaneously by state courts throughout the nation, and it will continue to grow in importance as more and more court documents are computerized. With the refinements noted, Proposed Rule 46 would be a valuable step toward preserving the public's right of access to court records in Tennessee.

Respectfully submitted,

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May 5, 2006

Mike Catalano, Clerk
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Re: Proposed Provisional Rule 46

Dear Mr. Catalano:

On behalf of Courthouse News Service ("Courthouse News"), we are pleased to submit this letter in response to the Supreme Court of Tennessee's request for written comments on proposed Provisional Rule 46, Tenn. Sup. Ct. R., which would establish a two-year pilot project for voluntary electronic filing in the appellate courts. As explained below, the transition from paper to e-filing can, if not carefully implemented, result in unequal access to court documents among members of the media, a matter which raises serious First Amendment problems. Courthouse News therefore appreciates the opportunity to share its concerns about this issue with the Court prior to the implementation of a pilot e-filing program.

Courthouse News is a nationwide news service for lawyers and the news media. Since 1991, it has offered its subscribers daily reports of new civil lawsuits and civil court proceedings, providing information about new actions and rulings on through to final decisions at the appellate level. CNS's subscribers include hundreds of law firms across the country, including many Tennessee firms, as well as media organizations such as *The Dallas Morning News*, the *Los Angeles Times*, Reuters and The Associated Press. CNS's web site also features news reports and commentary about civil cases and appeals in Tennessee and throughout the country.

E-filing service providers (identified in the proposed Rule as "EFSPs") are increasingly engaging in news reporting and news alert activities similar to those of on-line newspapers and news wire services such as Courthouse News, and in many respects are similarly-situated with other members of the news media. In those states where an e-filing program is built around a single EFSP,

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and that EFSP either retains a copy of the court document, serves as the repository for e-filed documents, and/or provides electronic document management services in addition to facilitating e-filing and service, the result can be that the EFSP gains a monopoly over the court record and preferential access to public court documents as compared to other members of the media, both in terms of cost and timing. Preferential access issues arise under the following circumstances:

> **Cost** – Many e-filing programs require the media to pay a fee to access e-filed documents, either to the court, the EFSP, or both. Under such programs, the EFSP (who has already been compensated for enabling e-filing through a fee paid by the e-filing party) enjoys free access to the electronic version of the court record, while other members of the media must pay a fee for the same access.
>
> **Timing** – Even in those cases where the media has access to e-filed court documents free of charge (*e.g.*, through a web site maintained by the court or the EFSP), problems of preferential access can result where the EFSP has access to court documents before those documents are made publicly available. Unless there is some sort of system to provide members of the media with the opportunity to access e-filed documents at the time of filing or immediately thereafter, the EFSP enjoys a period shortly after the filing of every e-filed court document in which it is the only member of the media to have access to that document.

As drafted, proposed Provisional Rule 46 contemplates the use of a single EFSP for the Court's e-filing program, thus raising the risk of preferential access associated with single EFSP programs. Turning first to the cost issue, although the Report and Recommendation of the Task Force on Electronic Filing in the Appellate Courts recommends that e-filed documents be made available to the public and media free of charge via a web site maintained by the EFSP, the proposed Rule itself does not speak to this issue, and is silent as to whether members of the public will be required to pay a fee for that access. To reduce the risk of preferential access and ensure that the EFSP is on the same footing as other members of the media, Courthouse News respectfully suggests that the Rule be amended to make it clear that access to e-filed

documents, as well as any scanned documents made available in electronic form through the EFSP, shall be provided to the public and press free of charge.

With regard to the timing issue, although the proposed Rule provides for a Document Management System "owned and in the custody of the Clerk's office" that would serve as the repository of e-filed and possibly scanned documents (proposed Rule, paragraph A(2)(g)), the proposed Rule also contemplates that these documents would be made available "via an internet web site established by the EFSP" (proposed Rule, paragraph B(4)). Consequently, it appears that the EFSP's role would not be limited to facilitating e-filing and e-service of court documents, but would also include serving as a repository for e-filed documents. As noted above, such a system creates a significant risk that the EFSP will enjoy exclusive access to the public court record for that period between the time the documents are filed and the time they are provided to other members of the media. To avoid such a result, Courthouse News urges the Court to either (1) adopt a Rule whereby the EFSP's role is limited to the transmission and service of documents, making the Court the sole repository of the filed documents, or (2) adopt other provisions designed to ensure that the media and public have access to e-filed documents at substantially the same time as the EFSP -- *i.e.*, as of the time of filing or immediately thereafter.[1]

In light of the risks of preferential access associated with single EFSP systems, the Court may also wish to give serious consideration to an e-filing program that allows litigants to use an EFSP of their choice to enable the transmission of documents to the Court, which would then be maintained by the Court for all members of the public and press to view on an equal basis. It is Courthouse News' understanding that e-filing programs offering parties a choice of EFSPs are currently being tested or are under consideration by courts in California,

[1] It has been Courthouse News' experience that e-filing has a detrimental effect on the ability of the media to obtain timely access to court documents. Courthouse News covers state and federal courts in many jurisdictions, and where courts have shifted from paper filing to e-filing, the result has almost always been that records which were previously made available to the media on the same day of filing are now delayed by a day or more.

Illinois and Arizona. *See generally* California Courts, Electronic Filing in California, http://www.courtinfo.ca.gov/programs/efiling/concepts.htm ("We assume many providers will develop applications for e-filing, given the advent of open standards and a level playing field with universal electronic access to courts."). Alternatively, in several jurisdictions (*e.g.*, Washington and Ohio), courts have developed or are developing their own internal e-filing systems, similar to the federal court PACER model. Under either approach, control over the court record remains firmly with the Court, greatly reducing the potential for a system of preferential access to the court record among competing members of the media.

In the past, access to appellate opinions was controlled by two major legal publishers. The Internet has given the Court the ability to ensure that appellate opinions are equally available to all, and Courthouse News urges the Court to avoid implementing an e-filing system that puts the court record back in the hands of a single publisher.

Courthouse News appreciates the Court's consideration of its views as to Provisional Rule 46. Should there be any questions regarding these comments, please do not hesitate to contact our offices.

Respectfully submitted,

Rachel Matteo-Boehm

cc: Bill Girdner, Editor, Courthouse News Service
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May 4, 2006

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Re: Comments to Provisional Rule 46, Rules of the Supreme Court of Tennessee

Dear Mr. Catalano:

In the Supreme Court's order of February 13, 2006, the Court solicited written comments concerning proposed Rule 46, Rules of the Supreme Court of Tennessee, which implements a two-year pilot project in which parties can test electronic filing in the State's appellate courts. Because this Office is a high-volume contributor in the appellate courts and has already made the transition to electronic filing in the federal district courts, this Office has thoroughly reviewed the proposed rule and the report and recommendation of the task force and submits the following for the Court's consideration in beginning the pilot project.

First, proposed subsection (C)(4)(a) provides for the collection of an electronic filing fee from the parties. The fee is to be established by the electronic filing service provider; provisions for collection of the fee are to be included in the contract between the provider and the Clerk. Currently, all appellate costs incurred by this Office are collected at the conclusion of appellate proceedings by way of approval of cost bills paid through the Appellate Court Cost Center. If possible, this Office would request that provision be made in the request for proposal (RFP) that this e-filing fee could likewise be included as an appellate cost covered by the present cost bill system to be collected at the conclusion of the appellate proceedings. Alternatively, this Office would request that the RFP establish a monthly billing account system for collection of e-filing fees rather than an up-front cost per filing.

The Office's other comment involves a possible omission in the current proposed rule. Proposed subsection (B)(6) places the burden on the parties to redact confidential information from pleadings that are filed electronically. Litigants may continue to file by paper, but they will be assessed a fee to have the Clerk scan the documents into electronic form. Proposed Rule 46(b)(2)(a) and (b). The rule makes no provision for the redaction of confidential information in those documents that are filed on paper but scanned by the Clerk.

Obviously the advent of electronic filing will require changes from the current procedures of both this Office and the Office of the Clerk. This Office will carefully monitor the progress of this test period for electronic filing and will provide feedback, when appropriate, in the evaluation process to help ensure that this system proves as beneficial as possible to the people of Tennessee.

Respectfully submitted,

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Attorney General