AMERICAN CIVIL LIBERTIES UNION of NEVADA

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CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

To: Supreme Court of Nevada; Supreme Court of Nevada's Committee to Review the Preservation, Access, and Sealing of Court Records
From: ACLU of Nevada
Re: ADKT 410, Order Scheduling Public Hearing on Policies Affecting TPO Records
Date: June 1, 2010

ADKT 410

Dear Committee Members:

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The ACLU of Nevada appreciates the Supreme Court's ADKT 410 Order seeking public comment on general principles of access to court records in Temporary Protective Order [TPO] cases. As there is not yet a specific proposal, we instead are listing below general principles that we hope will be considered during the formation of any new rules of access to TPO cases. We very much appreciate the opportunity to weigh in on this critical issue affecting public access to the courts.

- **Sealing should remain the only avenue for creating confidential court records.** As a general matter, the ACLU of Nevada firmly believes, as does the state of Nevada, in a policy favoring open public access to court records. This principle applies with equal force in the criminal and civil contexts, including TPOs. As both the people's right to know about government processes and the First Amendment right of press access are critical public interests, we believe that the withholding of court records or exhibits can only be justified by a specific, compelling government interest. The processes for sealing records reflect the appropriate balancing test for placing court records beyond the public's reach: a seal requires specific, articulated harms that would occur should any particular record or exhibit not be sealed, and that should remain the appropriate process for TPOs as well. We therefore oppose any creation of a 'second-tier' system of confidentiality, as well as the suggestion that TPO records should be presumptively confidential, as like all records they may be of great interest to the public and press.[1]

- **Litigants have an absolute Due Process right to any information necessary to comply with a TPO.** The individual whose actions are limited by a TPO has an absolute right to know all details essential to comply with the Order; for instance, any

[1] The Supreme Court's Order indicates that the Committee may consider making TPO records 'presumptively confidential." Unfortunately, according to the press, at least one court system has already done so in conflict with state law and without authority from the Supreme Court. *See* Brian Haynes and Mike Blasky, *Domestic Violence: Protective orders kept secret*, Las Vegas Review-Journal (May 31, 2010), available at http://www.lvrj.com/news/protection-orders-kept-secret-95246774.html (last checked June 1, 2010) ("Family Court officials apparently have been making up the law for the past six months by implementing a policy to seal temporary protection order documents, contrary to state laws that ensure those records remain open and available to the public."). The article also highlights the clear press interest – and public interest – in newsworthy TPO records involving public figures.

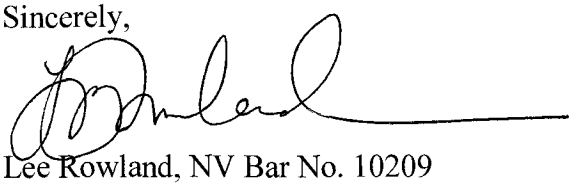
address included in the TPO's reach. No information critical to the TPO can therefore be considered confidential. However, information included by the TPO applicant that is not public knowledge, and is not critical to the TPO's implementation, could be subject to a motion for seal if and when appropriate, after a showing of a compelling interest.

- **The ACLU of Nevada favors full and meaningful access to public documents: including publication on the internet.** We do not believe that once a document is determined to be public, that there should be any procedures that make it intentionally less available than other records. The Supreme Court's Order contemplates a two-tiered system whereby certain records are "public," but then intentionally withheld from accessible online databases. The internet has of course become the go-to tool for public access to government processes and records, and government-run internet databases truly strengthen Nevada's interest in an open and accountable government. Unless a document meets the high bar to be sealed, we do not believe the courts should engage in any attempts to make it less visible or accessible to the public.

- **Older records should remain open unless sealed by court order; and there should be an available petition to unseal older records.** Whenever the Court contemplates changing rules regarding access to records, a sticky issue is how to treat older records filed and preserved prior to any rule change. In this case, the ACLU of Nevada believes strongly that any new confidentiality provisions, if enacted, cannot be intended or construed as retroactive. Records already stored by the courts, and already designated as 'sealed' or 'open,' should remain by default in their existing status unless there is a specific court order to the contrary. Any other solution would necessarily require clerks, or other evidence custodians, to make ad hoc decisions over existing files that are presumptively, and correctly, open to the public. This would not only be an administrative burden on the courts, but would also vest an inappropriate amount of discretion in court personnel outside of the specific courtroom rules applicable to record-sealing. We therefore suggest that any rules changing access to TPO records be prospective only. We do, however, believe that anyone (press, litigant, or member of the public) who is denied access to an old, sealed record should have the ability to petition the proper court for an evaluation of whether the purpose that necessitated the sealing of the records is still valid, so that the extraordinary remedy of sealing lasts only as long as necessary to protect the compelling interest involved.

The ACLU of Nevada will be happy to weigh in on any draft TPO rules should there be further opportunity to do so. Thank you for your time and attention to this letter.

Sincerely,



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