

**Comments on the Model Policy
Governing Electronic Access to Court Records**

Submitted by the
National Network to End Domestic Violence

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Comments of the National Network to End Domestic Violence on the
Model Policy Governing Electronic Access to Court Records

Introduction and Summary

The *National Network to End Domestic Violence* (“NNEDV”) is a not-for-profit organization incorporated in the District of Columbia since 1995. NNEDV is a network of state domestic violence coalitions, representing over 2,000 member programs nationally. NNEDV serves as the national voice of battered women and their children and those who provide direct services to them. From testifying before Congress on domestic violence issues to assisting state coalitions in better serving the needs of the victim community, NNEDV is a national leader in efforts to assist battered women in protecting themselves and their children. NNEDV submits these comments on the draft model policy governing electronic access to court records (“Model Policy”) in response to the request for public comment issued by the National Center for State Courts (“NCSC”) and the Justice Management Institute (“JMI”).

Domestic violence is a terrifying reality for women and children across the country.¹ Millions of women are physically abused by their husbands or partners each year.² The effects of domestic violence are severe. Physical injuries such as shattered bones, scratches, bruises, and burns are only the most visible consequences. Victims of domestic violence also miss work due to their injuries and can ultimately lose their jobs as a result of the violence committed against them. Battered women can also have trouble establishing independent lives due to poor credit, rental and employment histories resulting from their abuse.³

¹ Because the vast majority of victims of domestic violence and sexual assault are women, NNEDV will use only female nouns and pronouns throughout these comments. See Callie Marie Rennison & Sarah Welchans, U.S. Department of Justice, Intimate Partner Violence, at 1 (2000) (estimating that 85% of reported assaults on partners or ex-partners are committed by men against women). NNEDV acknowledges that men are also victims of domestic violence, especially in same-sex relationships.

² See Patricia Tjaden & Nancy Thoennes, Nat’l. Inst. of Justice, Prevalence, Incidence and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey, at 2, 7 (1998). In fact, the National Institute of Justice reported that 5.9 million assaults are perpetrated against women annually. See id. at 11. See also United States v. Morrison, 529 U.S. 598, 632 (2000) (Souter, J., dissenting) (citing estimate of four million women assault victims every year).

³ See Susan A. Reif & Lisa J. Krisher, Subsidized Housing and the Unique Needs of Domestic Violence Victims, Clearinghouse Rev. 20 (May-June 2000). In addition to the personal toll, the cost of domestic violence to society is also substantial. It has been reliably estimated that family violence costs the nation from \$5 to \$10 billion annually in medical expenses, police and court costs, shelters and foster care, sick leave, absenteeism, and non-productivity. See Morrison, 529 U.S. at 635 (citing S. Rep. No. 103-138, at 41 (1993)).

For victims of domestic violence, there are no easy outs. Battered women face increased violence when they attempt to flee their abusers.⁴ The severity of this “separation violence” often compels women to stay in abusive relationships rather than risk greater injury for them and their children. Those who succeed in leaving their abusers live in constant fear of being found. Often they are, leaving them with no option but to flee again (if they can), or face their attacker.

NNEDV believes that the access regime constructed by the Model Policy will imperil victims of domestic violence by making it more difficult for these women to leave their abusers, and by compromising the locations of those who do flee. NNEDV understands and appreciates the public interest served by access to court records, and believes that these interests can be served without derogating victims’ safety and privacy. To mitigate the jeopardy posed by access to court records, NNEDV recommends that the Model Policy be amended to:

- exclude documents in civil protection matters and family law cases from remote access;
- exclude domestic violence victim and witness identities from public access;
- apply the access principles to all records maintained by the court;
- allow petitioners to exclude all records from remote access;
- link the burden of proof for excluding information to the nature of the information at issue;
- prevent the disclosure of protected information in summary court documents;
- permit local courts to adopt more restrictive access policies;
- provide more robust notification of electronic record management to litigants and victim communities;
- recommend processes for preventing and remedying failures to properly exclude information from public access.

Statement of Interest in a Public Hearing

NNEDV strongly encourages the NCSC and JMI to hold a public hearing on the Model Policy as tentatively scheduled for May 17 in Washington, D.C. NNEDV hereby submits its request to participate in any such hearing.

⁴ The desire to reclaim the family or retaliate can lead to sharp increases in child and spousal abuse at the time of separation. Bowker, L.H., Arbitell, M. and McFerron, J.R., On the Relationship Between Wife Beating and Child Abuse, Yllo, K. and Bograd, M. eds., Perspectives on Wife Abuse, Newbury Park, CA, 1986). During separation, women are five times more likely to be killed by their husbands than prior to separation or after divorce. Crawford, M. and Gartner, R., Woman Killing; Intimate Femicide in Ontario, 1974-1990, Ontario, Canada: Women We Honor Action Committee April, 1992.

Comments

I. The Public Interest in Access to Court Records should not Supersede the Safety and Privacy of Domestic Violence Victims and their Children

NNEDV believes that the Model Policy sacrifices the safety and privacy of domestic violence victims and their children in the name of greater access to court records. This result is absolutely pernicious. Women in the throes of violence turn to the courts for one reason – to obtain protection from their abusers. The level of access to civil protection and family law records provided by the Model Policy will likely result in fewer women invoking the power of the court to stop the violence. The inability to control access to court records will also undermine the safety of victims who have fled their abusers. In order to protect the secrecy of their locations, these women may be forced to forego any court related activity.

NNEDV believes that the Model Policy can strike a better balance between the public’s access to court records, and the safety of domestic violence victims. To that end, NNEDV strongly urges the drafters of the Model Policy to implement the amendments described herein.

A. Documents in Civil Protection and Family Law Cases should be Excluded from Remote Access

The Model Policy creates a presumption in favor of enabling remote access of all court records by posting them on the World Wide Web. See Commentary to Section 3.10 (stating that the definition of court records is meant to be “all inclusive of information that is provided to, or made available to, the court that relates to a case.”). NNEDV believes that this presumption poses a significant threat to the privacy and personal safety of victims of domestic violence and their children.

Civil protection and family law cases involve intensely personal issues that are often bitterly disputed. Documents in these cases contain detailed information regarding spouse abuse, child abuse, substance abuse, adultery, and the litigants’ psychological profiles. It is common for litigants in civil protection and family law cases to lodge unsubstantiated allegations in an effort to gain the upper hand in the proceeding.⁵ All too often, victims of

⁵ The drafters of the Model Policy concede this point in the commentary to Section 3.10 and offer as a potential solution modification of the immunity rules to create consequences for the filing of false allegations. NNEDV believes that modifying the immunity rules will result in increased litigation and a loss of judicial efficiency. Moreover, the drafters’ proposed solution would not suffice. Once false allegations are disseminated over the World Wide Web, the damage is done. The Model Policy should simply exclude from remote access exactly those cases whose litigants are most likely to make – and be harmed by – false accusations.

domestic violence who seek protection from their attackers face reprisals in the form of false and damaging allegations.

Under the Model Policy, all such information would be accessible from anywhere at anytime by anyone with an Internet connection. Countless copies could be downloaded or electronically forwarded to points around the globe. A litigant's only hope to protect against uncontrolled dissemination of the information would be to petition to have the information completely excluded from public access. See Section 4.60. NNEDV believes this puts an inappropriate burden on victims of domestic violence and litigants in family law proceedings to prove the risk of harm posed by unfettered access to these records. Furthermore, foreclosing this information from public inspection would also undermine the Model Policy's stated goal of achieving maximum public access to court records.

NNEDV respectfully submits that the drafters should add a provision to the Model Policy excluding all records associated with family law and civil protection matters from remote access. Batterers have and will use any system available to harm, control, and intimidate their victims. Some victims would rather face down continued violence than risk the humiliation that would result from uncontrolled dissemination of false and inflammatory allegations. Abusers could easily manipulate the access regime provided in the Model Policy to intimidate their victims into staying in violent relationships.

NNEDV's recommendation to exclude civil protection and family law matters from remote access is in line with the well-reasoned decision of the Judicial Council of California to similarly limit remote access.⁶ NNEDV strongly urges the drafters to amend the Model Policy to help standardize this level of protection for litigants in civil protection matters and family law cases.⁷

B. Victim and Witness Identities should be Expressly Excluded from Public Access

The Model Policy excludes certain court records from public access for a variety of policy reasons. See Commentary to section 4.30. For instance, the Model Policy expressly excludes from public access proprietary business information, trade secrets, work product created by the judge or the judge's staff, and the personnel and medical records of court employees. Notably absent from the list – the names, addresses, and telephone numbers

⁶ See California Rules of Court, Rules 2073(c).

⁷ It will not suffice to simply exclude documents relating to civil protection petitions from remote access. Domestic violence cases often spawn divorce proceedings, child custody disputes, and other matters that fall under the larger umbrella of family law. Allowing remote access to documents in these matters will give batterers multiple avenues for harming their victims.

(collectively, “contact information”) of victims of domestic violence and the witnesses called to testify in these matters. The commentary to section 4.30 states that such information may be excluded from public access, if existing state law provides.

NNEDV urges the drafters of the Model Policy to amend section 4.30 to expressly exclude from public access, including remote access, the identities and contact information for domestic violence victims and witnesses, regardless of what state law provides.⁸ Failing to expressly exclude victim and witness identities from public access will mark these victims and witnesses for continued violence and harassment by the batterer. This encroachment on privacy and the resulting threat to personal safety will discourage victims of domestic violence from seeking protection from their abusers just as it will discourage witnesses from lending their testimony to help end the violence.

The drafters of the Model Policy took great care to protect the privacy and security of judges, businesses, and court employees on a categorical basis. Such protections make good sense and responsible policy, but are not necessarily compelled by existing state law. NNEDV respectfully requests that victim and witness identities receive the same amount of protection as a judge’s notes, a court clerk’s health insurance claims, and a business’ revenue projections.

C. The Model Policy should Provide Greater Protection for Persons Seeking to Limit Access to Information

The sad truth is that victims of domestic violence are never truly safe. Even if a victim manages to escape her batterer, and relocate to a new city or state, she constantly looks over her shoulder to ensure that she’s not been found. And she has good reason -- batterers devote tireless energy to seeking out victims who have fled. Some abusers want to locate their victim so that they can continue to inflict physical injury. Others want to emotionally abuse their victims by stealing their identities and wreaking havoc with their lives. The World Wide Web is far and away abusers’ best tool for finding and continuing to harm their victims.

The Model Policy does not contemplate the persistent nature of domestic violence. NNEDV is gravely concerned that if implemented as drafted, the Model Policy will equip perpetrators of domestic violence with the information they need to track their victims. In this section, NNEDV proposes discrete modifications to the Model Policy that will help victims protect themselves without unreasonably comprising the public’s access to court records.

⁸ NNEDV submits that the identities of witnesses should be excluded regardless of whether the underlying action is classified as “criminal” in the jurisdiction. See Commentary to section 4.30.

1. Access Principles should Apply to All Court Records

The Model Policy provides a process for individuals to exclude information in *court records* from public access. Section 4.60 (emphasis added). However, the definition of “court records” does not include filings that are unrelated to cases, such applications for marriage certificates, land records, and bankruptcy filings.⁹ See Commentary to section 3.10. NNEDV believes that this limitation will create an opportunity for abusers to find and harm their victims.

Most public filings give abusers the information they need to track their victims. Posting such filings on the Web increases their utility and accessibility, and thus, increases the chance that the victim will be found. For example, if a victim of domestic violence flees her abuser in Virginia, relocates to Texas, buys property, and files her land record with a court that posts such records on the Web, her abuser can find her with a simple, national HTML search. Because the Model Policy does not apply to non-case court records, it cannot protect against this all-to-common scenario.

NNEDV requests that the definition of “court record” be expanded to include all documents filed with or maintained by the courts, regardless of whether they pertain to a particular case. NNEDV maintains that victims of domestic violence will be left unprotected unless the Model Policy applies to any record that a court can make available over the Internet.

2. Petitioners should be Permitted to Exclude All Records from Remote Access

The Model Policy provides a process for individuals to exclude information in court records from *public access*. Section 4.60 (emphasis added). However, it fails to provide an intermediary level of protection, which would exclude information from *remote access*, but maintain the record for public inspection at the courthouse. NNEDV believes that the inflexible nature of the current model will allow an abuser to beat a path the victim’s door.

NNEDV urges the drafters of the Model Policy to either amend section 4.60, or add an entirely new section, that would permit petitioners to exclude

⁹ Many of life’s most important events involve the court system. In a jurisdiction where the court posts records on the Internet, a victim of domestic violence must weigh the benefits of the activity against the possibility that her attacker will locate her. The Model Policy should provide these victims with the tools they need to protect themselves while they struggle to rebuild their lives.

any court record, or any information contained therein,¹⁰ from Web-enabled remote access. Such an amendment would allow the victim to protect herself without compromising judicial efficiency or the other benefits attendant public access to court records. See Comment to section 1.00. Because the record would still be publicly available, there would be no need to weigh the risks to the individual against the interest in maximum public access as prescribed in section 4.60.¹¹ In place of this standard, the Model Policy should recommend simple, expedient processes for handling exclusion requests. Such processes could include the use of bar codes or other widely available technologies to tag the documents with the appropriate handling instructions.¹²

3. The Burden for Excluding Information from Public Access should Depend on the Specific Request

In reviewing requests to exclude information from public access, the Model Policy instructs courts to weigh the potential harm to the individual against a host of public interest concerns. These concerns include: maximum public access to court records, an effective judiciary, governmental accountability, public safety, use of the courts to resolve disputes, effective use of court staff, and quality of customer service. Section 4.60. NNEDV believes that courts should be encouraged to calibrate this standard based on the type of information involved in the request.

Under the Model Policy, a domestic violence victim's request to remove her name and contact information from a filing would be subject to the same standard as would a request to block access to substantial portions of a case record. It is hard to conceive that the policy concerns enumerated in section 4.60 would ever outweigh a domestic violence victim's need to hide her location from her abuser.¹³

NNEDV respectfully requests that the drafters of the Model Policy include language within the commentary to Section 4.60 instructing courts to calibrate

¹⁰ This information could include the victim's name, contact information, social security number, and any other identifier that alone, or in combination with another identifier, could be used to locate or harm the victim.

¹¹ See infra C.3.

¹² Indeed the Commentary to section 5.00 recommends processes for handling requests for bulk and compiled data. NNEDV respectfully submits that the Model Policy should be just as helpful in suggesting processes for handling requests to exclude data from public access for the protection of an individual's safety and privacy.

¹³ Excluding records from remote access will only protect some victims. Often, victims of domestic violence relocate in close proximity to their abusers. These abusers could canvass local courthouses in an effort to obtain updated contact information. The Model Policy should enable victims of domestic violence to easily remove their names and contact information from all publicly available records.

their standard of review based on the nature of the information at issue. The commentary should make clear that the exclusion of a victim's name and contact information from public access has no impact on the public benefits that accompany access to court records. Again, courts can efficiently manage these requests through the use of bar codes, document imaging, and other technologies.

4. Protected Information should not be Disclosed through Summary Court Documents

The Model Policy maintains the presumption in favor of public access, even where information in court records is otherwise protected. Section 4.10 of the Model Policy provides that the “existence of information in a court record to which access has been restricted will be publicly accessible.” Similarly, in section 4.70, the Model Policy provides that summary documents such as litigant/party indexes and new case filings are presumptively subject to remote access by the public. NNEDV believes that these provisions undermine the Model Policy's processes for excluding information from public access and may imperil the safety of victims of domestic violence and their children.

The protection afforded a victim of domestic violence who is permitted to exclude her filings from public or remote access (in accordance with the amendments recommended herein) would be completely undermined if her name appeared on a docket sheet posted on the Web. A victim's name coupled with the name of the court in which she has filed a petition gives an abuser all the information he needs to track her down.¹⁴ Therefore, any request to exclude information from *public access* should also serve to exclude the information from entry on a *publicly available* summary document. Similarly, any request to exclude information from *remote access* should serve to exclude the information from entry on any *remotely available* summary document.

To provide the protection described above, NNEDV recommends amending sections 4.10 and 4.70 of the Model Policy. Specifically, the drafters should amend the general access provision articulated in section 4.10(b) to provide that “[t]he existence of a court record to which access has been restricted will be publicly accessible except to the extent provided in section 4.20, or restricted by section 4.30 or section 4.60(a).” Similarly, section 4.70 should be amended to provide that the enumerated categories of information are presumptively subject to remote access unless excluded pursuant to section 4.30 and 4.60(a).

¹⁴ The commentary to section 4.70 assumes that the nature of these summaries poses “little risk of harm to an individual or undue invasion of privacy. . . .” NNEDV respectfully submits that this conclusion stands in stark contrast to the everyday realities of victims of domestic violence whose abusers can and will use every tool available to harm them.

5. Information should be Protected from the Time of Request through the Court's Decision

The Model Policy does not expressly provide that courts should keep information that is the subject of an exclusion request private during the pendency of a request. As the drafters implicitly recognize in their comments to section 4.60, failure to do so would completely vitiate the protection being sought. To ensure the viability of the exclusion-request process, NNEDV urges the drafters to amend section 4.60 to expressly provide that information or records that are the subject of an exclusion request be kept private from the time of the request until the court rules on the request.

The Model Policy also does not address what happens if a request for exclusion is denied. Upon denial of the request, NNEDV believes that the requesting party should be able to withdraw all documentation related to the matter (including the petition to withdraw), so that no such information is ever made public. Such a process is vital for victims of domestic violence for whom disclosure of the information could result in grave danger. NNEDV urges the drafters of the Model Policy to spell out this process within the text of section 4.60.

6. Local Courts should be Free to Adopt More Restrictive, but not More Permissive, Access Policies

The Model Policy provides that if the regulations are adopted for the state's judiciary, the state should consider prohibiting local courts from adopting a competing access policy, whether it is more restrictive or more permissive. See Commentary to section 4.10. The model regulation states that such preemption is needed to ensure consistency across state courts.

NNEDV recommends that the drafters amend the commentary to section 4.10 to provide for the preemption of less restrictive, but not more restrictive local rules. Litigants deserve the highest degree of protection available. Local courts may have more technical or substantive experience dealing with access issues than the state judiciary. Litigants within those jurisdictions should benefit from that experience. The purported need for consistency among state courts is illusory. Court rules vary from district to district within a state and from judge to judge within a district. Because of its impact on personal safety, access to court records should not be used as a rallying cry for more consistent court rules.

NNEDV further recommends that the Model Policy grant the state's administrative office of courts the authority to oversee compliance with the relevant access policy, including compliance with technology audit

requirements.¹⁵ Whether a court implements a statewide access policy, or a more restrictive policy of its own, there should be a check in place to ensure compliance. Importantly, such oversight would also provide aggrieved individuals with some recourse for addressing their complaints. Enforcement is an integral part of the privacy regimes already in place in the private and public sectors.¹⁶ Courts should be held to the same type of standards that apply to federal agencies and private companies that hold sensitive information about individuals.

II. Courts should Provide Adequate Notification of Electronic Record Keeping to Litigants and Victim Communities.

The notice provision in the Model Policy only requires courts to notify litigants that the information about them in court records is accessible to the public, including remotely. Section 8.10. The Model Policy does not prescribe the timing, format, or content of such notification. Incredibly, the notice provision does not even require courts to inform litigants that they may limit access to their information.

NNEDV is frankly astounded by the inadequacy of the Model Policy's notice requirement. Robust notification is the cornerstone of every existing privacy law – regardless of whether the law applies to private businesses or government entities. With remarkably little variation, these laws require information collectors to notify individuals (1) whether their information may be disclosed; (2) to whom it may be disclosed; (3) the steps they can take in limiting the disclosure of their information; (4) how long their information will be retained; (5) how to correct inaccuracies; and (6) what protections are in place to guard against the loss or misuse of the information.¹⁷ These laws generally provide that notification be made at the time the information is collected.

A court's failure to adequately notify litigants of its information practices would constitute a serious breach of the public trust. Those who come before the court are vulnerable and often not represented by counsel. This, coupled with the sensitivity of the information a court holds, only accentuates the court's duty to provide adequate notification of their information practices. The

¹⁵ See infra Section III.

¹⁶ In the private sector, information collectors are subject to oversight by the Federal Trade Commission and a variety of self-regulatory organizations. In the public sector, government information collectors are subject to oversight by the Office of Management and Budget. See 5 U.S.C. § 552a(v).

¹⁷ See generally Privacy Act of 1974, 5 U.S.C. §552a; Health Insurance Portability and Accountability Act, Pub. L. No. 104-191 (1996); Children's Online Privacy Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998); Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999).

failure of the Model Policy to define the parameters of what constitutes adequate notification directly contravenes its stated goal of promoting accountability of the judiciary.

NNEDV strongly urges the drafters of the Model Policy to redraft section 8.10 to require the same types of disclosures that are applicable in all other information collection contexts. At a minimum, the Model Policy should require courts to clearly explain (1) that litigants' personal information, along with the full text of court records, will be accessible to the general public, both within the court house and over the Internet; (2) that litigants' information, along with the full text of court records, may be sold in bulk to third party subscription services for further distribution; (3) how they can limit the disclosure of their personal information and/or the full text of the court record; (4) the steps litigants can take to remedy information posted in error;¹⁸ and (5) how they can correct inaccurate information in the court record.

NNEDV agrees with the methods of notification described in the commentary to section 8.10 and encourages the drafters to incorporate some of these recommendations within the text of the regulations. Importantly, NNEDV believes courts should distribute notification in multiple, common languages. NNEDV also recommends providing for electronic notification for those litigants who file court papers electronically.

To assist in the education efforts mentioned in the commentary to section 8.10, NNEDV recommends requiring courts to notify victim communities prior to implementing electronic record systems. The courts can then work with these communities to help educate their constituents regarding the options available to maintain confidentiality of their records.

III. Courts should Develop Processes for Preventing and Remediating Failures to Properly Exclude Information from Public Access

A. Courts should Develop Processes for Taking Down Errant Postings

The Model Policy does not address how to remedy a court's failures to properly exclude records or information from either remote or public access. If adopted in their current form, the Model Policy would leave a victim of domestic violence who has obtained an order to exclude with no recourse, other than a lawsuit, to have the information taken down. This omission significantly undermines the benefit of allowing litigants to petition for exclusion of their information or court records from public or remote access.

¹⁸ See infra Section III.

NNEDV strongly encourages the drafters to give the Model Policy full force and effect by including a process to remove errant postings. The Model Policy should help courts identify personnel from the relevant departments (e.g., intake, customer service, information technology) who should act on such requests. The Model Policy should also set forth reasonable time frames – which should be measured in hours, not days – for removal of the information. As addressed in Section II of these comments, litigants should be notified regarding the proper removal process at the time of their initial filing. Finally, the Model Policy should make clear that this requirement extends to third party vendors engaged by a court to manage its electronic records system.

B. Courts should Conduct Regular Technology Audits

The Model Policy does not require courts or their technology vendors to undergo periodic audits. Audits are vital to ensure the integrity of any electronic records system, especially one that is connected to the World Wide Web. The sensitive nature of the documents held by courts makes audits even more critical.

NNEDV strongly recommends that the Model Policy require courts to establish an annual audit process to ensure the integrity of the electronic records system. As stated in Section I, NNEDV recommends that the state's administrative office of courts oversee compliance with the audit requirement. Funds permitting, NNEDV believes it would be ideal for the administrative office to conduct the technology audit. Under no circumstances should the employee responsible for collecting information from litigants or managing the information on a day-to-day basis conduct the audits. If an audit reveals that restricted documents have been posted, the documents should be removed and the petitioners informed. The Model Policy should make clear that this requirement extends to third party vendors engaged by a court to manage its electronic records system.

Conclusion

NNEDV respectfully requests that the drafters of the Model Policy consider the foregoing, and make the recommended amendments to the Model Policy governing access to electronic court records.

Respectfully submitted,

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