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Keeping Attorneys from Trashing Identities: Malpractice as Backstop Protection for Clients under the United States Judicial Conference's Policy on Electronic Court Records

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KEEPING ATTORNEYS FROM TRASHING IDENTITIES: MALPRACTICE AS BACKSTOP PROTECTION FOR CLIENTS UNDER THE UNITED STATES JUDICIAL CONFERENCE'S POLICY ON ELECTRONIC COURT RECORDS

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Abstract: Federal courts in the United States have embraced electronic access to court records because it promises to allow courts to run more efficiently. At the same time, critics worry that electronically available court records might provide identity thieves with a trove of clients' personal information. The United States Judicial Conference has adopted a policy endorsing electronic access to court records, but the policy does not contain an express enforcement mechanism to protect clients' privacy. While court-directed protections, such as Rule 11 sanctions, might help prevent identity theft, they will not help clients after the crime occurs. To recover their losses from identity theft, clients might seek recovery from the attorneys who caused their losses by failing to redact their personal information from court filings. This Comment proposes that clients use the Judicial Conference's policy as evidence of their attorneys' duty to redact and demonstrates how clients can prove that their attorneys' failure to redact was the proximate cause of their losses resulting from identity theft.

Fueled by the rapidly increasing availability of private information, identity theft is one of the fastest growing crimes in America.[1] In an ironic twist, by making court filings available electronically, the federal court system may be unwittingly facilitating identity theft.[2] In 2001, the

1. *See* SYNOVATE, FEDERAL TRADE COMMISSION—IDENTITY THEFT SURVEY REPORT (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/synovatereport.pdf 5 (noting that 12.7% of national survey participants reported being victims of identity theft in the past five years); *see also* FED. TRADE COMM'N (FTC), FEDERAL TRADE COMMISSION OVERVIEW OF THE IDENTITY THEFT PROGRAM OCTOBER 1998–SEPTEMBER 2003 (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/timelinereport.pdf 7 (noting an increase in reported cases of identity theft from 1,380 in 1999, to a projected 210,000 in 2003); FTC, ID THEFT: WHEN BAD THINGS HAPPEN TO YOUR GOOD NAME 1–2 (Nov. 2003), *available at* http://www.ftc.gov/bcp/conline/pubs/credit/idtheft.pdf [hereinafter ID THEFT]; U.S. GEN. ACCOUNTING OFFICE, IDENTITY FRAUD: INFORMATION ON PREVALENCE, COST, AND INTERNET IMPACT IS LIMITED 40–45 (May 1998), GAO/GGD-98-100BR, *available at* http://www.gao.gov/archive/1998/gg98100b.pdf.

2. *See* Kate Marquess, *Open Court?: As Courthouses Rush To Put Filing Online, Easy Access to Legal Documents Has Many Worrying About Privacy Rights* 1 (May 23, 2002), *at* http://www.courtaccess.org/states/ny/documents/open%20court.pdf (discussing how information now travels from the court "by Internet, instead of by mail or on foot"); *see also About CM/ECF*, *at* http://www.uscourts.gov/cmecf/cmecf_about.html (last visited Nov. 4, 2003) (discussing the filing of documents electronically without going to the courthouse); *Public Access to Court Electronic Records: Overview*, *at* http://pacer.psc.uscourts.gov/pacerdesc.html (last visited Nov. 4, 2003)

Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files (Judicial Conference Committee) officially recommended that civil records[3] in United States district courts be made available electronically, with limited exceptions, "to the same extent they are available at the courthouse."[4]

The Judicial Conference Committee hailed electronic access to court documents as a means to improve the efficiency of court operations.[5] However, critics of electronic access have argued that imaged case files will place clients' personal information in the hands of identity thieves.[6] Responding to these concerns, the Judicial Conference Committee adopted a national policy (Policy) establishing basic guidelines for district courts to follow in determining what documents can be posted electronically and how district courts should protect private information contained within them.[7] The Judicial Conference Committee supplemented the Policy with a Frequently Asked Questions (FAQ) publication designed to answer common questions from court clerks and the bar.[8] Both federal district courts in Washington State have adopted

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(discussing process whereby court records can now be viewed remotely through electronic access); *infra* note 6 and accompanying text.

3. The Judicial Conference Committee's recommendation also discussed bankruptcy, social security, and criminal cases. The main topic of the recommendation involved civil cases, however, and this Comment focuses only upon civil cases. *See* U.S JUDICIAL CONFERENCE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES, *at* http://www.privacy.uscourts.gov/Policy.htm (Sept. 2001) [hereinafter POLICY].

4. *See id.*

5. *See id.*

6. *See* ELIZABETH BACON EHLERS ET AL., BUSINESS, LAW AND THE INTERNET: ESSENTIAL GUIDANCE FOR YOU, YOUR CLIENTS, AND YOUR FIRM § 3.13 (2002); Peter C. Alexander & Kelly Jo Slone, *Thinking About the Private Matters in Public Documents: Bankruptcy Privacy in an Electronic Age*, 75 AM. BANKR. L.J. 437, 437–39 (2001); Janine Benner et al., *Nowhere To Turn: Victims Speak Out on Identity Theft*, *at* http://www.privacyrights.org/ar/idtheft2000.htm (May 2000); Beth Givens, *Public Records on the Internet: The Privacy Dilemma*, *at* http://www.privacyrights.org/ar/onlinepubrecs.htm (Apr. 19, 2002); Marquess, *supra* note 2, at 1.

7. POLICY, *supra* note 3.

8. COMM. ON COURT ADMIN. AND CASE MGMT. OF THE JUDICIAL CONFERENCE OF THE U.S., *Frequently Asked Questions on the Judicial Conference Privacy Policy on Public Access to Electronic Case Files*, at 1, *attached to* IMPLEMENTATION OF JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (Informational Memorandum) (Mar. 29, 2002) (on file with the author) [hereinafter *FAQ*].

the Policy's recommendations on how to protect clients' privacy without expanding or elaborating on the recommendations.[9]

One of the Policy's key provisions requires attorneys to redact their clients' private information from all court filings—paper or electronic.[10] Yet, the Policy contains no mechanism clients can use to enforce this requirement.[11] Therefore, clients may have to rely on Washington's legal malpractice cause of action to make this new duty meaningful. By suing their attorneys for malpractice, clients can shift their losses back to their attorneys, who were responsible for releasing the clients' private information.

This Comment explores the sudden rise of electronic access to federal court records and argues that clients can successfully sue their attorneys for malpractice when they lose their identities due to their attorneys' failure to redact the clients' personal information from court filings. Part I outlines the scope of the public's right to access court records, the federal judiciary's decision to allow electronic access to those records, and the growing crime of identity theft. Part II explains how the Policy attempts to manage electronic access to court records. Part III examines two elements of a malpractice claim under Washington law: breach of duty and proximate causation. Part IV argues that Washington courts should allow client-plaintiffs to introduce the Policy as evidence of their attorneys' specific duty to redact sensitive personal information from federal court filings. Part IV also argues that attorneys' failure to redact is the proximate cause of their clients' losses resulting from stolen identities in situations where the thief obtained the client's information from the unredacted court filings. Finally, Part IV argues that the criminal act of identity theft is not a superseding cause of clients' losses.

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9. The Eastern District of Washington has adopted all the substantive provisions of the Policy, though in a slightly different form. *See In re* Electronic Availability of Case File Information in Civil Cases, Except Social Security Cases, General Order No. 100-02-01 (E.D. Wash. 2002) [hereafter General Order]; *Notice of Electronic Availability of Case File Information* (Apr. 2003), *available at* http://www.waed.uscourts.gov/attorney/public_access.pdf. The Western District of Washington has also sought to implement the Policy through a general order. *See Frequently Asked Questions: Are There Any Things That Should Not Be Filed Electronically?*, *at* http://www.wawd.uscourts.gov/wawd/cm-ecf.nsf/main/page (last visited Sept. 16, 2003) (stating that the Western District of Washington requires sensitive information be redacted pursuant to a general order adopted on May 29, 2003).

10. *See* POLICY, *supra* note 3.

11. *See id.*

I. ELECTRONIC ACCESS TO CASE FILES ENDANGERS LITIGANTS' IDENTITIES

Courts in the United States recognize that the public has a right to access court records.[12] This right can be limited, however, when the public requests a form of access that might lead to improper use of the information contained in the court records.[13] The Policy reflects the federal courts' decision to allow electronic access to court records.[14] Although this access may be more expansive than the law requires, it could greatly improve the efficiency of court operations.[15] While electronic access to court records has its benefits, critics have raised concerns that such access could facilitate theft of clients' identities.[16]

A. The Public Has a Right To Access Court Documents, But Not Necessarily To Do So Electronically

There is a strong tradition in the United States of allowing expansive public access to court records, including all official case filings and exhibits admitted at trial.[17] Courts have rejected even arguably admirable attempts to protect the privacy of victims of violent crimes like rape.[18] Nevertheless, the U.S. Supreme Court has held that courts may limit the

12. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978); POLICY, *supra* note 3.

13. *See infra* notes 20–24 and accompanying text.

14. *See* POLICY, *supra* note 3.

15. *See infra* note 30 and accompanying text.

16. *See supra* note 6 and accompanying text.

17. *See Nixon*, 435 U.S. at 597; Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975); *Ex parte* Drawbaugh, 2 App. D.C. 404, 407 (1894) (noting that "any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record"). *But cf.* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33–34 n.19 (1984) (discussing the traditional common law understanding that items not filed during a case were not subject to public disclosure and that trial courts historically exercised control over access to courthouse records). American courts long ago rejected the English practice of requiring the public to demonstrate a legitimate interest before accessing court records. *See Drawbaugh*, 2 App. D.C. at 406–07. *But see In re* Caswell, 29 A. 259, 259 (R.I. 1893) (denying access which is sought simply out of mere curiosity or to create a scandal). This reaction was motivated by the court's concerns that once the right to access court records was subjected to judicial scrutiny, a Pandora's box of limitations could evolve. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569–81 (1980) (discussing corollary right to access in the context of criminal trials).

18. *See Cox Broad. Corp.*, 420 U.S. at 495.

form of access to court records where "court files might have become a vehicle for improper purposes."[19]

In *Nixon v. Warner Communications, Inc.*,[20] the Court recognized a crucial distinction between the right to access and the form of access.[21] In *Nixon*, the Court held that the trial court properly limited the public's access to paper transcripts of tapes containing the voice of President Nixon that had been admitted into evidence as part of the Watergate criminal prosecution.[22] The Court decided that a paper transcript of the tapes, rather than copies of the tapes themselves, would allow the public access to the actual information contained in the tapes, yet minimize the likelihood that the tapes would be put to improper commercial or spiteful uses.[23] Under *Nixon*, then, courts may regulate the form of access to court records when one particular form of access is less likely to result in improper usage of the records than another.[24]

Congress has encouraged federal courts to make case files available electronically,[25] but it has not mandated any specific level or means of electronic access.[26] Furthermore, while Congress has directed the U.S. Supreme Court to adopt rules of civil procedure to address electronic access, it has not imposed a specific time requirement on the Court.[27] Nevertheless, in 2001, the federal court system's Judicial Conference

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19. *Nixon*, 435 U.S. at 598 (listing improper purposes). While identity theft was not listed as an improper purpose, the Court included actions such as use out of spite or for commercial gain, neither of which is inherently criminal. *Id.*

20. 435 U.S. 589 (1978).

21. *See id.* at 609.

22. *See id.*

23. *See id.* at 603.

24. *See id.* at 603–09.

25. Congress has not required the federal courts to provide electronic access, but has indirectly approved the practice by authorizing the Judicial Conference Committee to establish user fees for the service. *See Chronology of the Federal Judiciary's Electronic Public Access (EPA) Program*, *available at* http://pacer.psc.uscourts.gov/documents/epachron.pdf 1 (last visited Nov. 5, 2003). Some uncertainty remains as to whether the courts, the legislature, or both will be responsible for managing electronic access. *See In Depth: Privacy and Electronic Access to Court Files*, E-FILING REPORT, 1 No. 2 e-Filing Rep. 14 (Jan. 2001).

26. *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913–15. Congress has only required that the courts post paper filings if the courts scan those documents electronically; if the courts choose not to scan the documents, they are not required to post them. Congress has also directed the U.S. Supreme Court to adopt rules of civil procedure designed to protect privacy concerns. Congress did not dictate what the new rules should look like or when they must be completed. *See id.*

27. *See id.*

Committee decided to encourage district courts to make court documents available electronically.[28]

The Judicial Conference Committee decided to embrace an Internet database method of access that provides the public with the same scope of electronic access as that available at the courthouse.[29] It based this decision largely on the theory that courts will function more efficiently if they provide increased accessibility for members of the public and lawyers who are not in close proximity to the courthouse, reducing the workload in clerks' offices.[30] To achieve this efficiency, the Committee envisioned a nationwide system providing extensive access.[31]

Having decided to make court records available electronically, the Judicial Conference Committee placed only nominal limits on who can electronically access those documents.[32] Court records are available through the federal courts' official Public Access to Court Electronic Records system (PACER).[33] PACER is an Internet-based database accessible virtually world-wide.[34] The system requires users to input a password to log onto PACER, but almost anyone can obtain a password within a few weeks by request.[35] The password requirement is designed to create an electronic trail, which the PACER administrators can trace if a problem arises to determine who accessed specific information.[36] Each district court maintains its own PACER database. While practices vary among the districts, fifty-eight districts allow PACER users to view filings that have been electronically scanned.[37] The PACER system then compiles limited information about each civil case, including party

28. *See* POLICY, *supra* note 3.

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.* The requirement that the public first obtain a password appears to be the only limit upon access under the Policy. *See id.*

33. *See id.*; *see also PACER*, *at* http://www.pacer.psc.uscourts.gov (last visited Nov. 29, 2003).

34. While the primary means of access is now Internet based, a direct dial-in version is also available for those without Internet access. *See PACER*, *supra* note 33.

35. *See id.* (explaining that there is no cost to register for the PACER password, and the official registration form only requires users to provide a name and address to which the password can be mailed).

36. *See* POLICY, *supra* note 3. The ability to trace a user is of course dependant on the user having submitted truthful information on their registration form.

37. *See PACER Web Links*, *at* http://www.pacer.psc.uscourts.gov/cgi-bin/links.pl (last visited Nov. 4, 2003). Districts that do not yet scan documents generally provide some alternative information, often in the form of the docket information. *Id.*

names and the subject of each case, into a national database called the U.S. Party Case Index, which is accessible with the same password.[38] This compilation enables nationwide searches for specific kinds of cases across all local PACER systems.[39]

B. *Court Records Contain All of the Information Necessary To Steal an Identity*

Critics quickly vocalized their concerns about litigants' privacy following the Judicial Conference Committee's decision to allow electronic access to court records.[40] The most widespread concern was that criminals would be able to use information contained in court records to steal clients' identities.[41] Identity theft is one of the fastest growing crimes in America,[42] and several commentators have warned that an official case file includes everything needed to steal an identity.[43] According to the Federal Trade Commission (FTC), all that is needed to steal an individual's identity is that person's Social Security number, date of birth, and financial account numbers.[44] The U.S. Party Case Index has simplified access to this information by permitting searches by claim type.[45] A thief need only determine which type of claim would most likely require filings containing the information necessary to steal an identity and conduct such a search.

The consequences of identity theft can be extensive and take on a variety of forms. Victims of identity theft often spend substantial time and money attempting to get creditors to institutionalize victims' losses.[46] The average victim suffers $4,800 to $10,200 in losses from

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38. *See U.S. Party Case Index Overview*, *at* http://www.pacer.psc.uscourts.gov/uspci.html (last visited Nov. 4, 2003) (describing the U.S. Party Case Index).

39. *See id.*

40. *See* Alexander & Slone, *supra* note 6, at 438; Givens, *supra* note 6 (noting situation where a singles club accessed divorce records to find marketing targets).

41. *See* EHLERS ET AL., *supra* note 6, at § 3.13; Givens, *supra* note 6.

42. *See supra* note 1 and accompanying text.

43. *See* EHLERS ET AL., *supra* note 6; at § 3.13; Givens, *supra* note 6.

44. *See* ID THEFT, *supra* note 1, at 1.

45. *See Nature of Suit*, *at* http://www.pacer.psc.uscourts.gov/natsuit.html (last visited Nov. 5, 2003); *U.S. Party Case Index Overview*, *supra* note 38. For example, by entering code 371 into the system to search for Truth in Lending cases, thieves might expect to find more relevant personal and financial data than if they entered code 720 for Labor/Management Relations or searched broadly under all case types.

46. *See* Christopher P. Couch, Comment, *Forcing the Choice Between Commerce and Consumers: Application of the FCRA to Identity Theft*, 53 ALA. L. REV. 583, 586 (2002) (citing

identity theft, and spends thirty to sixty hours resolving the matter.[47] Additionally, many victims of identity theft experience substantial indirect costs.[48] These indirect costs include medical expenses for treating theft-induced stress, sleeplessness, and severe depression.[49]

II. FEDERAL COURT POLICY REGULATES THE POSTING AND FORMATTING OF ELECTRONIC DOCUMENTS

When it decided to make electronic court records available electronically, the Judicial Conference Committee proposed a model Policy to be adopted by individual district courts.[50] Many federal district courts, including both Washington State districts, have adopted this Policy.[51] The Policy acknowledges concerns about the risks to litigants' privacy and attempts to provide a uniform national framework for balancing those risks with the benefits of increased access to court records.[52] Any privacy concerns, however, are tempered by the fact that courts using the PACER system have reported few problems with it thus

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FTC, *Identity Theft Complaint Data: Figures and Trends on Identity Theft January 2000 Through December 2000* 4–5, *available at* http://www.ftc.gov/bcp/workshops/idtheft/trends-update_2000.pdf (last visited Dec. 16, 2003)).

47. *See* FTC—IDENTITY THEFT SURVEY REPORT, *supra* note 1, at 6. Because of various methods to shift the loss back to creditors, individuals on average pay between $500 and $1,200 of the loss from their personal resources. The out-of-pocket cost differs depending on whether the crime is the misuse of an existing account or the opening of a new account. *Id.* The legal rights of creditors and a client's possible contributory responsibility for failing to minimize losses are beyond the scope of this Comment.

48. *See* IDENTITY FRAUD: INFORMATION ON PREVALENCE, COST, AND INTERNET IMPACT IS LIMITED, *supra* note 1, at 49; Couch, *supra* note 46, at 585–86.

49. *See* Couch, *supra* note 46, at 586.

50. *See* POLICY, *supra* note 3.

51. *See supra* note 9. Determining the actual number of districts following the Policy is difficult because many districts have adopted the Policy without clearly disclosing their written orders. *See supra* note 9. For examples from districts in other states, see General Order No. 53: Privacy (N.D. Cal. 2002), *available at* https://ecf.cand.uscourts.gov/cand/docs/rules-orders.htm; *In re* Adopting a Policy on Sensitive Information and Public Access to Electronic Case Files, Standing Order No. 02-01 (N.D. Ga. 2002), *available at* http://www.gand.uscourts.gov/documents/Standing_Order_02_01.pdf; *In re* Privacy Policy Regarding Public Access to Electronic Case Files, Joint General Order WD No. 03-01 & ED No. 03-01 (W.D. Ky. & E.D. Ky. 2003), *available at* http://www.kyed.uscourts.gov/rules/privacyorder.pdf; Privacy Policy and Information Availability Notice of the District of New Mexico (D.N.M. Feb. 18, 2003), *available at* http://www.nmcourt.fed.us/web/Shared%20Files/privpol.htm; Administrative Procedures for Electronic Case Filing, General Order No. 22 (N.D.N.Y. June 26, 2003), *available at* http://www.nynd.uscourts.gov/pdf/genorder/go22.pdf.

52. *See* POLICY, *supra* note 3.

far.[53] Despite this good news, the Policy addresses the continuing risks posed by electronic access by (1) limiting the kind of documents that are available electronically, (2) proposing that trial courts seal certain documents from electronic access, (3) suggesting that trial courts impose Rule 11 sanctions to punish attorneys who use electronic access as a means to maliciously reveal opposing litigants' private information, and (4) requiring attorneys to redact four kinds of information about their clients.[54]

A. The Policy's Definition of Case File Limits the Kind of Documents Accessible Electronically

The Policy's first means of preventing identity theft is its definition of "case file," which determines what kinds of documents will be made available electronically. Only items considered part of the case file are subject to imaging and uploading onto PACER.[55] The Policy defines case file broadly to encompass most litigation-related documents that have traditionally been available at the courthouse.[56] This definition includes documents submitted by the parties, those created by the court, and transcripts of oral proceedings.[57] However, the Policy's definition does not include information such as non-filed discovery materials, trial exhibits not admitted into evidence, and drafts or notes produced by the court.[58] This definition of case file protects private information by keeping most sensitive information contained in voluminous discovery materials out of public view.[59]

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53. *See id.* This conclusion was reached based on an evaluation prior to the advent of widespread imaging by district courts, and its prospective value may be questionable.

54. *See id.*

55. *See id.*

56. *See id.*; Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) (noting that "pretrial depositions and interrogatories are not public components of a civil trial," and that "[s]uch proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice") (citations omitted).

57. *See* POLICY, *supra* note 3.

58. *See id.*

59. *See Seattle Times Co.*, 467 U.S. at 33.

B. *The Policy Proposes That Judges Seal Files on Request*

The Policy also proposes that trial judges use their supervisory power over court records to seal certain documents from electronic access.[60] Before the court will order a file sealed, it must make an affirmative finding, usually upon the request of a party, that the file contains information that should not be available to the public.[61] Clerk's offices are not required to review filings for sensitive information; it is solely the responsibility of attorneys to review documents for compliance with the Policy.[62] Therefore, courts are unlikely to order files sealed if attorneys, unaware of their obligation to protect clients' personal information, fail to raise the matter with the court.

C. *The Policy Recommends That Courts Sanction Attorneys Who Maliciously Endanger Opposing Parties' Identities*

The Policy also recommends that courts use Rule 11 sanctions to protect clients.[63] As with the protection offered by sealing documents, the potential protection provided by Rule 11 sanctions largely depends upon attorneys paying attention to the documents filed by both sides.[64] Attorneys who actively review the opposition's filings will be in a position to inform the court when opposing counsel maliciously files documents containing their clients' personal information.[65] Less diligent attorneys may not notice when opposing counsel files documents that contain their clients' personal information until it is too late to prevent

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60. *See* POLICY, *supra* note 3. The Policy is not clear on what authority or standard exists for the recommended sealing of documents, nor is it clear on whether both the electronic and paper versions will be sealed or just the electronic. *Id.*; *see also* E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(iv), 116 Stat. 2899, 2914 (requiring that if the U.S. Supreme Court's eventual rules for electronic documents permit the redaction of information, parties be allowed to file unredacted copies under seal with the court).

61. *See* FED. R. CIV. P. 26(c) (describing the procedure for obtaining protective orders). Because there are currently no standards under the Policy, courts will likely have to rely on the traditional approach under Rule 26(c).

62. *See FAQ*, *supra* note 8, at 2.

63. *See* POLICY, *supra* note 3. The Judicial Conference Committee, while acknowledging privacy concerns, declined to recommend the adoption of a new rule of civil procedure designed to address the topic. *See id.* The Committee rejected a formal rule of procedure because adopting such a rule would take several years and privacy concerns needed immediate attention. *See id.*

64. *FAQ*, *supra* note 8, at 2 (noting that clerk's offices will not review documents).

65. Because the court and the clerk's office are not responsible for reviewing filed documents the attorney has the sole responsibility to monitor what is filed and take appropriate action. *See id.*

that information from falling into the wrong hands.[66] Rule 11 sanctions, however, are a limited remedy because courts traditionally have been reluctant to impose them in the absence of some action by an attorney clearly warranting judicial sanction.[67]

D. *The Policy Requires That Attorneys Redact Sensitive Information from Their Case Filings*

Finally, the Policy requires that "counsel and pro se litigants" redact, omit, or modify sensitive information from the documents they file with the court.[68] There are four types of sensitive information expressly covered by the Policy: (1) Social Security numbers, (2) dates of birth, (3) financial account numbers, and (4) names of minor children.[69] This protection places the burden of protecting clients squarely on the party making the actual filing, usually an attorney, and does not require courts to take any specific action.[70] Under the Policy, attorneys must "inform their clients that case files may be obtained electronically and ensure private information is not included in the case files."[71] In placing this responsibility on attorneys, the Policy recognizes that "[m]embers of the bar must be educated about the [Policy] and the fact that they must protect their clients."[72] Washington's federal district courts have heeded this call and taken steps to ensure that the bar is aware of its new duty.[73]

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66. Whether an attorney's failure to move to seal or seek Rule 11 sanctions related to an adversary's filing would support a malpractice claim is beyond the scope of this Comment.

67. *See* Conn v. CSO Borjorquez, 967 F.2d 1418, 1421 (9th Cir. 1992) ("Rule 11 is an extraordinary remedy, one to be exercised with extreme caution.") (citation omitted); Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988) (stating that Rule 11 is reserved for "rare and exceptional case[s]"). Because courts have the alternative option to correct the problem by sealing the filing, they may be reluctant to punish attorneys in most situations resulting from simple carelessness.

68. *See* POLICY, *supra* note 3. Hereafter, this Comment uses the term "redaction" to represent all three methods of protecting information. The redaction provision of the Policy applies to all documents filed with the courts. *See FAQ*, *supra* note 8, at 3. Some district courts such as the Eastern District of Washington have used slightly stronger language like "*shall* refrain from including, or *shall* redact" (emphasis added) in their general orders. *See* General Order, *supra* note 9.

69. *See* POLICY, *supra* note 3.

70. *See FAQ*, *supra* note 8, at 2.

71. *Id.*

72. POLICY, *supra* note 3.

73. *See supra* note 9 and accompanying text.

In sum, the Policy primarily places the responsibility of protecting litigants on the judges and attorneys who must develop the actual means for adapting existing procedures to the new electronic reality. The only procedural adaptation the Policy undertakes is its extension of the traditional understanding of what constitutes an official case file.[74] The definition of case file continues the federal courts' tradition of keeping certain types of information out of the public eye, but it does not decrease the amount of information available to the public.[75] While the Policy suggests three means by which courts and attorneys can protect litigants' identities, it does not itself create a new cause of action for litigants.[76] Thus, the Policy does not expressly provide clients a means of enforcing one of its central protections: the attorney's duty to redact the client's personal information before filing documents with the court.

III. THE CURRENT STATE OF LEGAL MALPRACTICE LAW IN WASHINGTON

Clients who suffer harms as a result of their attorneys' acts, or failures to act, may seek a remedy through common law malpractice actions against their attorneys.[77] In Washington, a legal malpractice claim consists of four elements: (1) an attorney-client relationship giving rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney breaching the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of duty and the damages incurred.[78] Once the client establishes an attorney-client relationship, Washington courts have clarified that the remaining elements of a legal malpractice claim are identical to a standard negligence claim.[79]

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74. *See supra* notes 56–57 and accompanying text.

75. This provision simply maintains the status quo protections already recognized for paper files. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984); *supra* note 59 and accompanying text.

76. *See* POLICY, *supra* note 3; *FAQ*, *supra* note 8, at 2.

77. A plaintiff would also likely include the identity thief and other responsible entities as parties. This Comment focuses on the action against the attorney because the attorney is likely the only defendant capable of actually paying on a potential judgment. *See* Benner, *supra* note 6 (discussing the nature of identity theft and indicating that identity thieves are not usually capable of satisfying any potential judgment).

78. *See* Hizey v. Carpenter, 119 Wash. 2d 251, 260, 830 P.2d 646, 651 (1992); Hansen v. Wightman, 14 Wash. App. 78, 88, 538 P.2d 1238, 1246 (1975); 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE, TORT LAW & PRACTICE § 15.41, at 368 (2000).

79. *See* Bowman v. Doe, 104 Wash. 2d 181, 185, 704 P.2d 140, 142 (1985); Bullard v. Bailey, 91 Wash. App. 750, 755, 959 P.2d 1122, 1125 (1998).

A. *Attorneys Breach Their Duty to Clients by Failing To Act in Accordance with the "Reasonable Attorney" Standard of Care*

Legal malpractice decisions focus heavily on the standard of care that attorneys owe their clients, and what constitutes a breach of that standard.[80] Washington courts consistently begin their decisions by stating that the applicable standard of care is the "reasonable attorney" standard.[81] Washington courts then address what evidence plaintiffs may submit to demonstrate that their attorneys owed them a specific duty under the broad reasonable attorney standard.[82] Lastly, Washington courts determine whether the harm alleged is within the general field of harms that the specific duty was meant to protect against.[83]

1. *The Reasonable Attorney Standard of Care*

The Washington State Supreme Court set forth the general standard of care for attorneys in *Walker v. Bangs*.[84] In *Walker*, the court held that the standard of care required by a lawyer performing professional services in Washington state is "'that de[g]ree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction.'"[85] This standard of care has been repeated with little comment in several Washington legal malpractice cases.[86]

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80. *See Hizey*, 119 Wash. 2d at 260, 830 P.2d at 651; Marc R. Greenough, Note, *The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions After* Hizey v. Carpenter, 68 WASH. L. REV. 395, 398–400 (1993).

81. *See infra* notes 84–86 and accompanying text.

82. *See infra* notes 87–99 and accompanying text.

83. Washington courts to date have not addressed the impact of foreseeability of harm as a factor in determining the duty owed by an attorney. The only Washington legal malpractice case to focus on foreseeability of harm was *Bullard v. Bailey*, which did so exclusively in the context of legal causation. 91 Wash. App. at 759, 959 P.2d at 1127. Despite this decision, the general consensus is that the better approach is to treat foreseeability as an aspect of whether the defendant owed the plaintiff a duty. *See* Rikstad v. Holmberg, 76 Wash. 2d 265, 268, 456 P.2d 355, 358 (1969); DEWOLF & ALLEN, *supra* note 78, § 4.26, at 121. This general approach taken in Washington negligence law should apply equally to legal malpractice cases. *See supra* note 79 and accompanying text.

84. 92 Wash. 2d 854, 859, 601 P.2d 1279, 1282 (1979).

85. *See id.* (quoting Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968)).

86. *See id.*; Hizey v. Carpenter, 119 Wash. 2d 251, 259, 830 P.2d 646, 652 (1992) (citing Hansen v. Wightman, 14 Wash. App. 78, 90, 538 P.2d 1238, 1247 (1975)).

2. *Plaintiffs Must Demonstrate That Their Attorneys Had a Specific Duty To Refrain from the Allegedly Negligent Conduct*

In addition to showing that their attorneys failed to live up to the general reasonable attorney standard of care, plaintiffs in legal malpractice actions must also prove that their attorneys breached a specific duty owed to them.[87] A specific duty is a particular action that a defendant should perform in a particular situation.[88] A plaintiff proves the attorney breached the standard of care by proving that the attorney failed to perform a specific duty.[89] Specific duties usually relate to the attorney's trial tactics and procedures.[90]

To prove a violation of a specific duty, plaintiffs in legal malpractice claims must first submit evidence demonstrating that the alleged duty existed.[91] In *Hizey v. Carpenter*,[92] the Washington State Supreme Court held that plaintiffs may not introduce the Rules of Professional Conduct (RPCs) as evidence of their attorneys' duty, and that the RPCs may not be referred to in expert testimony or jury instructions.[93] The motivation behind the court's holding was its reluctance to allow the RPCs, which were created by judges rather than a legislative body, to establish the

87. *See Rikstad*, 76 Wash. 2d at 268, 456 P.2d at 357. While not a legal malpractice case, the *Rikstad* decision did note the general rule that plaintiffs in negligence actions must demonstrate "a *duty* upon defendant[s] to refrain from the complained-of conduct." *Id.*

88. *See* Karen J. Feyerherm, *Recent Development, Legal Malpractice—Expansion of The Standard of Care: Duty To Refer*—Horne v. Peckham, 56 WASH. L. REV. 505, 521 (1981) (discussing the development of an attorney's "specific duty to refer" a client to a specialist in certain situations); *see also* Schooley v. Pinch's Deli Market, Inc., 134 Wash. 2d 468, 478, 951 P.2d 749, 754 (1998) (stating that a harm must not only be within a general duty to be recoverable, but that courts must look to whether the harm was "within the general field of danger covered by the specific duty owed by the defendant"); Raider v. Greyhound Lines, Inc., 94 Wash. App. 816, 819, 975 P.2d 518, 519 (1999) (noting that while a business has a general duty to protect its invitees from reasonably foreseeable criminal conduct by third parties, "the harm must lie within the general field of danger covered by [the] specific duty owed by the defendant").

89. *See supra* note 88 and accompanying text.

90. *See Walker*, 92 Wash. 2d at 858, 601 P.2d at 1282 (discussing the need for an expert to testify on the specific trial techniques and procedures that should have been applied). However, not all legal malpractice cases allege a specific duty related to the trial. *See Hizey*, 119 Wash. 2d at 258–60, 830 P.2d at 650–51 (discussing the scope of an attorney's duty not to enter into conflict-of-interest transactions); Bullard v. Bailey, 91 Wash. App. 750, 759, 959 P.2d 1122, 1127 (1998) (imposing a specific duty on an attorney to prevent his unlicensed associate from representing himself as an attorney to the firm's clients).

91. *See Hizey*, 119 Wash. 2d at 259, 830 P.2d at 652 (attempting, but failing, to get the RPCs admitted as evidence of the attorney's specific duty to the plaintiff).

92. 119 Wash. 2d 251, 830 P.2d 646 (1992).

93. *See id.* at 265, 830 P.2d at 654.

standard of care for an attorney.[94] The *Hizey* court provided three reasons[95] why the RPCs should not be formally admitted as evidence of the standard of care: (1) the RPCs expressly deny creating a standard for civil liability for lawyers;[96] (2) allowing the RPCs to serve as evidence of specific duties owed to clients would cause attorneys to minimize the equally important role the RPCs play in protecting the court system;[97] and (3) the RPCs cannot illuminate the specific duties of a reasonable attorney because they outline a vague ethical scheme rather than particular duties owed in particular situations.[98] Washington's approach of barring the RPCs from legal malpractice actions is one of the most extreme responses, although a majority of states impose some limit on the use of ethical conduct rules in legal malpractice cases.[99]

3. *Attorneys' Duty Is Limited To Preventing Foreseeable Harms*

In addition to requiring proof of the specific duty owed, Washington's negligence law further limits the scope of a defendant's duty to the prevention of only those harms that were foreseeable.[100] The

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94. *See id.* at 261, 830 P.2d at 652. Despite uncertainty regarding the weight of the factors behind the *Hizey* rule, Washington courts continue to impose a rigid barrier between the jury and the RPCs based on *Hizey*. *See Bullard*, 91 Wash. App. at 759, 959 P.2d at 1127. In Washington, an expert may quote passages from the RPCs, but must provide an independent explanation for why the attorney's action violated a particular duty. *See Hizey*, 119 Wash. 2d at 265, 830 P.2d at 654. The expert may not testify regarding whether the attorney's actions violated the RPCs, and the jury instructions may not refer to the RPCs. *See id.*

95. The court's rationale is not clearly presented, but the *Hizey* opinion appears to offer three reasons why the RPCs should not be admitted as evidence of an attorney's specific duty to act. *Hizey*, 119 Wash. 2d at 258, 261–63, 830 P.2d at 650, 652–53; *see infra* notes 96–98 and accompanying text. The *Hizey* court also noted that the RPCs are not analogous to statutes, despite one of the plaintiff's claims to the contrary, because the Washington State Supreme Court, rather than the legislature, created them. *See Hizey*, 119 Wash. 2d at 261, 830 P.2d at 652. This observation countered one of the plaintiff's reasons why the RPCs *should* be admitted into evidence, and is therefore not another reason why the RPCs *should not* be admitted into evidence.

96. *See Hizey*, 119 Wash. 2d. at 258, 830 P.2d at 650.

97. *See id.* at 263, 830 P.2d at 653.

98. *See id.* at 261–62, 830 P.2d at 652.

99. For examples of how other jurisdictions have addressed the role of the RPCs in legal malpractice actions, see Wilburn Brewer Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 744–46 (1994); Greenough, *supra* note 80, at 398–400; and Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 58–66 (1998).

100. *See* Rikstad v. Hokberg, 76 Wash. 2d 265, 268, 456 P.2d 355, 357 (1969); J.N. v. Bellingham Sch. Dist., 74 Wash. App. 49, 57, 871 P.2d 1106, 1111 (1994) (recognizing that "the duty to use reasonable care only extends to such risks of harm as are foreseeable").

Washington State Supreme Court established this requirement in *Rikstad v. Hokberg*,[101] a case involving a defendant who drove his truck over the plaintiff, who was passed out in a field of tall grass.[102] The *Rikstad* court rejected the appellate court's approach, which considered the foreseeability of harm under the element of proximate causation.[103] The court instead looked to the foreseeability of the harm to define the scope of the defendant's duty to the plaintiff.[104] The *Rikstad* court held that, for there to be a duty, the harm that occurs does not have to be one that was specifically anticipated, but must only have been within the general field of dangers that could be foreseen by a reasonable person.[105] Applying this approach, the court found that the risk of the plaintiff being run over while passed out in the field was within the general field of dangers covered by the defendant's duty to use reasonable care while driving a vehicle.[106]

The general field of danger encompasses a broad range of harms; harms fall outside this scope only if "by no flight of the imagination" could they be foreseen.[107] It does not matter that the harm was bizarre or that it came about as a result of a highly improbable sequence of events.[108] It is also inconsequential that the harm could have happened earlier, but did not. For example, in *Palin v. General Construction Co.*,[109] the defendant argued that because oil could have previously been released from unsecured valves on a storage tank, but had never been before, the eventual release of the oil was not foreseeable.[110] The court rejected this argument, holding that the fact that the oil spill could have occurred earlier did not mean that it was not foreseeable that the oil

101. 76 Wash. 2d 265, 456 P.2d 355 (1969).

102. *See id.* at 268, 456 P.2d at 357.

103. *See id.* at 268, 456 P.2d at 357–58.

104. *See id.*; *see also* Hartley v. State, 103 Wash. 2d 768, 798, 698 P.2d 77, 83–84 (1985) (discussing how the question of foreseeability is properly addressed under the element of duty, but is often mistakenly addressed under the element of proximate cause).

105. *See Rikstad*, 76 Wash. 2d at 268, 456 P.2d at 357–58.

106. *See id.*

107. *See* McLeod v. Grant County Sch. Dist., 42 Wash. 2d 316, 322, 255 P.2d 360, 364 (1953) (using example of when a neighbor shooting a baby sitter was found unforeseeable because it was most unusual, and the employer was therefore found not to have had a duty to protect against this harm).

108. *See id.*

109. 47 Wash. 2d 246, 287 P.2d 325 (1955).

110. *See id.* at 250, 287 P.2d at 327.

would spill eventually.[111] There is no firm rule determining the scope of the field of danger; rather, the field's outer limits depend on the facts of each case.

B. There Must Be a Causal Link Between the Attorney's Breach of a Specific Duty and the Client's Harms

Establishing the causal link between the attorney's breach of duty and the harm suffered by the client is often the most difficult part of a legal malpractice claim.[112] To be held liable for the client's harm, the attorney must be the proximate cause of the harm. Proving that the attorney was the proximate cause requires that the client show that the attorney was both the cause in fact of the harm, and the legal cause of the harm.[113]

1. A Plaintiff Proves the Factual Link by Satisfying the "But For" Test

In Washington legal malpractice cases, the cause in fact test is satisfied if the harm would not have happened "but for" the attorney's negligence.[114] Under this standard, the client must prove that the attorney's act "more likely than not" caused the client's harm through a direct, unbroken sequence of events that would not have occurred without the attorney's act.[115] Cause in fact is generally for the trier of fact to decide, based upon the court's instructions on how the "but for" standard is to be applied to the facts.[116]

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111. *See id.*

112. *See* Polly A. Lord, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1480 (1986).

113. *See* Daugert v. Pappas, 104 Wash. 2d 254, 257, 704 P.2d 600, 603 (1985); *see also* City of Seattle v. Blume, 134 Wash. 2d 243, 251, 947 P.2d 223, 227 (1997) (recognizing that "proximate cause consists of two elements: cause in fact and legal causation").

114. *See Daugert*, 104 Wash. 2d at 257, 704 P.2d at 603; Lord, *supra* note 112, at 1480. Cause in fact is generally a question for the jury unless only one reasonable result is possible. *See* Bullard v. Bailey, 91 Wash. App. 750, 757, 959 P.2d 1122, 1126 (1998).

115. *See* Hertog v. City of Seattle, 138 Wash. 2d 265, 282, 979 P.2d 400, 410 (1999).

116. *See Daugert*, 104 Wash. 2d at 257–58, 704 P.2d at 603; Hartley v. State, 103 Wash. 2d 768, 778, 698 P.2d 77, 83 (1985) (stating that "cause in fact is generally left to the jury" and that "such questions of fact are not appropriately determined on summary judgment unless but one reasonable conclusion is possible").

2. *Legal Causation Depends Primarily on Judicial Policy and Whether Defendant's Act Actually Increased Plaintiff's Risk of Harm*

Legal causation represents the determination that, as a matter of law, the defendant's action was a cause of the plaintiff's injury.[117] The test for proving that the attorney was the legal cause of the client's harm is more ambiguous than the test for proving that the attorney was the cause in fact of the client's harm.[118] When deciding whether the attorney was the legal cause of the client's harm, courts examine the facts of the case to determine "'whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.'"[119] As part of making this policy determination, courts ask two questions: (1) did the defendant's act increase the risk of the harm occurring, rather than triggering the harm by mere chance; and (2) was the harm caused by a substantial and unforeseeable intervening action.[120] In addition to these two questions, courts must also consider any other relevant factors affecting whether, as a matter of policy, liability should follow from the defendant's action.[121] The *Washington Pattern Jury Instructions*' definition of proximate causation requires that the plaintiff show that his injury occurred "in a direct sequence, unbroken by any new independent cause."[122] The jury decides the question of legal causation as a component of the overall element of proximate causation.[123] Nevertheless, the element of legal causation is

117. *See* Kim v. Budget Rent A Car Sys., Inc., 143 Wash. 2d 190, 203, 15 P.3d 1283, 1289 (2001); *Bullard*, 91 Wash. App. at 759, 959 P.2d at 1127.

118. Almost all prior legal malpractice cases have focused on determining whether the attorney's action during trial was the cause in fact of an unfavorable outcome during the trial. There is only one legal malpractice case clearly focusing on the issue of legal causation. *See Bullard*, 91 Wash. App. at 759, 959 P.2d at 1127.

119. *Kim*, 143 Wash. 2d at 204, 15 P.3d at 1289 (quoting Tyner v. Dep't of Soc. & Health Servs., 141 Wash. 2d 68, 82, 1 P.3d 1148, 1155–56 (2000) (internal citation omitted)); *see* City of Seattle v. Blume, 134 Wash. 2d 243, 252, 947 P.2d 223, 227 (1997). Legal causation is ultimately a question of law for the court to decide, *see Kim*, 143 Wash. 2d at 203, 15 P.3d at 1289, though the jury may be called upon to make factual determinations on issues such as foreseeability, *see* Greenleaf v. Puget Sound Bridge & Dredging Co., 58 Wash. 2d 647, 654, 364 P.2d 796, 802 (1961).

120. *See* DEWOLF & ALLEN, *supra* note 78, § 4.21, at 115.

121. *See* King v. City of Seattle, 84 Wash. 2d 239, 250, 525 P.2d 228, 234 (1974).

122. 6 WASH. SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL § 15.01, at 179 (2002); *see also id.* § 15.04, at 189, § 15.05, at 191.

123. *See* Hartley v. State, 103 Wash. 2d 768, 778, 698 P.2d 77, 83–84 (1985) (recognizing that while cause in fact is entirely a jury issue, the jury's role in determining legal causation is limited to

generally more of an obstacle for plaintiffs in the realm of summary judgment or motions for judgment not withstanding the verdict, where the court will be called upon to make a specific determination regarding legal causation.[124]

Bullard v. Bailey[125] is the only legal malpractice case in Washington that focuses on the question of whether the defendant's action increased the risk of the harm occurring to the plaintiff.[126] In that case, Bailey, the defendant-attorney, had an unlicensed business associate who held himself out as an attorney and eventually stole the settlement funds belonging to Bailey's client.[127] Bailey failed to take steps to correct his associate's representations.[128] Division One of the Washington State Court of Appeals held that Bailey's failure to act increased the risk that his client would lose his settlement funds.[129] Because the unlicensed associate was having financial difficulties, the court decided that it was not mere chance that the client lost his settlement funds.[130] Therefore, the court held that, as a matter of policy, it was proper to hold Bailey liable for his client's loss.[131]

While no Washington court has addressed the issue of intervening causation in a legal malpractice case, many courts have addressed it in general negligence cases. Under Washington tort law, an intervening act can persuade the court to find that the defendant's act was not the legal cause of the plaintiff's harm if the intervening act was unforeseeable.[132]

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resolving issues of fact); Brust v. Newton, 70 Wash. App. 286, 290–91, 852 P.2d 1092, 1094 (1993).

124. *See Hartley*, 103 Wash. 2d at 779, 698 P.2d at 83 (in reviewing motion for summary judgment the court distinguished between cause in fact as a primarily jury question and legal causation that requires "a determination of whether liability *should* attach as a matter of law given the existence of cause in fact"); *King*, 84 Wash. 2d at 250, 525 P.2d at 234 (1974) (stating that the "court still must adduce from the record whether, as a policy of law, legal liability should attach to the defendant if the other factual elements are proven").

125. 91 Wash. App. 750, 959 P.2d 1122 (1998).

126. While it is the only case discussing the issue of legal causation, the opinion heavily intermingled its discussion on the scope of the duty, the defendant's responsibility for increasing the risk of harm, and the question of whether there was a superseding cause. *See, e.g., id.* at 755–59, 959 P.2d at 1125–27. As a result, the case is better suited for illustrative uses than actual legal authority on any of these issues.

127. *See id.* at 759, 959 P.2d at 1124–25.

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.* at 758–59, 959 P.2d at 1127; DEWOLF & ALLEN, *supra* note 78, § 4.23, at 117.

An intervening act is foreseeable and will not sever liability if it was one of the hazards that made the defendant's act negligent. An intervening act can be negligent or criminal.[133] However, Washington courts have held that the negligence or criminality of the intervening act is not itself determinative, but only one factor to be considered in deciding whether the act was foreseeable.[134]

In *McLeod v. Grant County School District*,[135] the Washington State Supreme Court held that intervening acts are unforeseeable only if their occurrence is "so highly extraordinary or improbable as to be wholly beyond the range of expectability."[136] In *McLeod*, the school negligently left a darkened room under bleachers in the school's gymnasium unlocked.[137] During gym class, three male students took one of their female classmates into this room and sexually assaulted her.[138] The school district argued that the harm suffered by the girl was not a foreseeable result of the school leaving the darkened room unlocked.[139] The district maintained that the sexual assault should break the causal chain between the school's negligence and the female student's harm because it was a crime that could not reasonably have been foreseen.[140] Applying this standard, the court decided that the male students' sexual assault was foreseeable because the district could have foreseen the increased likelihood that some act of indecency would take place in such a location.[141] Thus, the sexual assault did not prevent the school's negligent act from being a legal cause of the girl's harm.[142]

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133. *See* Palin v. Gen. Constr. Co., 47 Wash. 2d 246, 250, 287 P.2d 325, 327 (1955) (noting that "an intervening criminal act may be found to be reasonably foreseeable and, if so, liability may be predicated thereon," and holding that oil tank owner could recover against construction company for lost oil despite intervening act of someone else opening tank release valve).

134. *See* J.N. v. Bellingham Sch. Dist., 74 Wash. App. 49, 58, 871 P.2d 1106, 1112 (1994).

135. 42 Wash. 2d 316, 255 P.2d 360 (1953).

136. *See id.* at 323, 255 P.2d at 364 (citing Berglund v. Spokane County, 4 Wash. 2d 309, 103 P.2d 355 (1940)).

137. *See id.* at 317, 255 P.2d at 361.

138. *See id.* at 318, 255 P.2d at 361.

139. *See id.* at 319, 255 P.2d at 362.

140. *See id.*

141. *See id.* at 322–25, 255 P.2d at 363–65.

142. *See id.*

IV. ATTORNEYS WHO FAIL TO REDACT IN COMPLIANCE WITH THE POLICY SHOULD BE LIABLE FOR LEGAL MALPRACTICE IF CLIENTS' IDENTITIES ARE STOLEN

The Policy's redaction provision is a substantial step towards protecting clients' identities, but it may only truly be effective if it is backed by the possibility of a cause of action against those who fail to abide by it. The ability to pursue a legal malpractice action would provide this effect. Clients face three hurdles to bringing this kind of malpractice claim successfully against their attorneys. First, they must convince courts to accept the Policy as evidence of a specific duty that attorneys owe to clients to redact sensitive information.[143] Second, they must further show that this duty encompasses the harms resulting from identity theft.[144] Finally, clients must establish that their attorneys' breach of the duty to redact proximately caused the harms resulting from the loss of their identities.[145] Under existing Washington malpractice precedent, clients should be able to overcome all three obstacles.

A. A Malpractice Action Is Necessary Because the Policy Does Not Provide an Enforcement Mechanism

The federal courts' rapid implementation of electronic access to court records endangers clients by exposing litigants' personal information to identity theft.[146] Identity thieves can use this information to steal clients' identities, plunder their financial accounts, and rack up bad debt in clients' names.[147] Today, the Policy is the only protection that clients have against identity theft.[148] Yet, standing alone, it insufficiently safeguards clients' identities. At best, the Policy merely reminds courts and attorneys to look after litigants' interests before making sensitive information available electronically.[149] Unfortunately, the Policy does not expressly protect clients once their personal information has already been stolen. It may be difficult, if not highly unlikely, for clients to collect from the thieves who stole their identities given the transitory

143. *See supra* notes 87–99 and accompanying text.

144. *See supra* notes 100–11 and accompanying text.

145. *See supra* notes 112–42 and accompanying text.

146. *See supra* note 6 and accompanying text.

147. *See supra* notes 40–49 and accompanying text.

148. *See supra* notes 5–9 and accompanying text.

149. *See supra* notes 55–73 and accompanying text.

nature and economic recourses of identity thieves.[150] Therefore, to make themselves whole, clients should sue their attorneys for malpractice when these attorneys fail to redact personal information from documents before filing those documents with the court.

B. *The Policy Is Evidence That Attorneys Have a Duty To Redact Their Clients' Personal Information Before Filing Documents with the Court*

The Policy requires that attorneys redact their clients' personal information from documents before filing those documents with the court.[151] Thus, the Policy provides evidence that redaction is a specific duty that attorneys owe their clients. Whether Washington courts will accept the Policy into evidence depends on their interpretation of the reach of the Washington State Supreme Court's decision in *Hizey v. Carpenter*. The *Hizey* decision prohibits clients from using the RPCs as evidence of their attorneys' specific duties,[152] and could also be read to prohibit the use of the Policy as evidence of the duty to redact. Both the RPCs and the Policy were products of judicial policymaking rather than legislative enactment, and Washington courts might be asked to focus on the origin of the Policy rather than the specific rationales that supported the outcome in *Hizey*. However, if Washington courts look beyond the origin of the documents, they will see that the three justifications supporting the *Hizey* court's exclusion of the RPCs do not support exclusion of the Policy. After evaluating the rationales provided in *Hizey*, Washington courts should allow clients to submit the Policy as evidence of attorneys' specific duty to redact clients' personal information from documents before filing those documents with the court.

1. *The Policy Leaves Open the Possibility of Its Use To Support Existing Causes of Action*

The *Hizey* court's first rationale for rejecting the RPCs as proof of attorneys' specific duties was that the RPCs expressly deny establishing any specific "standards for civil liability of lawyers for professional

150. *See supra* note 6.

151. *See supra* notes 68–73 and accompanying text.

152. Hizey v. Carpenter, 119 Wash. 2d 251, 265–66, 830 P.2d 646, 654 (1992).

conduct."[153] The Policy, on the other hand, does not expressly preclude clients from using it to demonstrate their attorneys' specific duties. Because a cause of action for legal malpractice already exists, clients will only use the Policy to prove a specific duty owed to them, not to create a private cause of action. The Policy does not expressly preclude clients from such a use. Therefore, the first *Hizey* factor does not bar use of the Policy as evidence of the attorneys' duty.

2. *The Policy's Redaction Provision Protects Only Clients, Not Courts*

The second reason the *Hizey* court gave for rejecting admission of the RPCs was that they reflect mixed, and at times conflicting, public and private obligations for attorneys.[154] The court found that the RPCs, as adopted by the Washington State Supreme Court, were designed primarily to protect the integrity of the judicial system, with the rights of individual clients being of lesser concern.[155] The *Hizey* court feared that allowing the RPCs into evidence would encourage attorneys to interpret the RPCs primarily as protecting clients, minimizing the role that the RPCs play in maintaining the integrity of the court system.[156] While it is true that the Policy, like the RPCs, protects the integrity of the judicial system, it does so by calling on the courts to impose Rule 11 sanctions against attorneys who fail to manage their court filings carefully.[157] The Rule 11 provision is a distinct part of the Policy, and unrelated to the duty of attorneys to redact their own clients' information. This type of distinction could not be as readily made between the RPCs' court protections and client protections, since as the *Hizey* court noted, all of the RPCs' provisions are designed to remind attorneys "that their first loyalty is to the court."[158] Because the Policy's protections for the system and for the individual do not conflict with each other, the *Hizey* decision should not bar use of the Policy as evidence of attorneys' duty to redact.

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153. *See Hizey*, 119 Wash. 2d at 258, 830 P.2d at 650; *supra* note 96 and accompanying text.

154. *See Hizey*, 119 Wash. 2d at 263, 830 P.2d at 653; text accompanying *supra* note 97.

155. *See Hizey*, 119 Wash. 2d at 263, 830 P.2d at 653; text accompanying *supra* note 97.

156. *See Hizey*, 119 Wash. 2d at 263, 830 P.2d at 652–53.

157. *See supra* note 63 and accompanying text.

158. *See Hizey*, 119 Wash. 2d at 263, 830 P.2d at 653 (citing Jean E. Faure & R. Keith Strong, *The Model Rules of Professional Conduct: No Standard for Malpractice*, 47 MONT. L. REV. 363, 375 (1986)).

3. *The Policy's Mechanical Duty To Redact Is Well Suited to Being Used as Evidence of a Specific Duty*

Finally, the *Hizey* court raised concerns about the fact that the RPCs describe only general obligations without stating particular duties owed to clients.[159] The court emphasized that the RPCs represent a vague scheme for evaluating attorneys' ethical responsibilities to both their clients and the court.[160] For example, the court pointed to several sections of the RPCs that require attorneys to avoid conflicts of interest without specifying how.[161] The court rejected the RPCs' ethical scheme as too vague to establish duties owed to clients in particular cases.[162] In contrast, the Policy calls on attorneys to take a specific action—redaction of four types of personal information—in order to protect their clients.[163] Unlike the RPCs, there is much less subjectivity involved in the Policy's requirement to redact specifically defined types of information. Therefore, under *Hizey*, the Policy is appropriate evidence of a specific duty.

C. *Identity Theft Is a Foreseeable Harm Within the General Field of Danger Contemplated by the Duty To Redact*

In order to prove that the attorney committed malpractice, the plaintiff-client must establish not only that the attorney breached a specific duty, but also that the harm resulting from that breach was within the general field of danger contemplated by the duty.[164] Clients should be able to demonstrate that the harms resulting from identity theft are within the general field of danger that the duty to redact was designed to protect against. For a harm to be within the general field of danger, it must be foreseeable,[165] such as the client's loss of funds in *Bullard*,[166] or the injuries to the plaintiff sleeping in the long grass in *Rikstad*.[167]

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159. *See id.*; text accompanying *supra* note 98.

160. *See Hizey*, 119 Wash. 2d at 263, 830 P.2d at 652; text accompanying *supra* note 98.

161. *See Hizey*, 119 Wash. 2d at 258, 830 P.2d at 650.

162. *See supra* note 98 and accompanying text.

163. *See supra* note 69 and accompanying text.

164. *See supra* notes 100–11.

165. *See supra* notes 100–11.

166. *See supra* notes 125–31 and accompanying text.

167. *See supra* notes 102–06 and accompanying text.

The widespread and public discussion on the risk of identity theft should include the harms resulting from identity theft in the realm of events within the "flight of the imagination"[168] of a reasonable attorney. The harm resulting from loss of identity is foreseeable for three reasons. First, identity theft is a major crime[169] that has received widespread attention.[170] Second, critics of the Policy have already predicted that thieves would use information from court records to steal clients' identities.[171] Third, the Policy recognizes that attorneys will have to protect their clients from the risks associated with making court filings available electronically, including the risk that identity thieves will comb those filings for clients' personal information.[172]

Nevertheless, some defendants might argue that the harms resulting from identity theft are not foreseeable because there have been few problems with electronic access thus far.[173] This argument is not likely to succeed, however, because Washington precedent holds that the fact that a specific harm could have occurred earlier, but did not, is insufficient to make the eventual harm unforeseeable.[174] Therefore, clients should be able to establish that harms resulting from identity theft are within the general field of danger encompassed by the duty to redact.

D. *Clients Should Be Able To Prove That the Failure To Redact Was the Proximate Cause of the Harm Suffered as a Result of Identity Loss*

Once clients demonstrate that their attorneys owed them a duty to redact their personal information from court filings, and that the duty to redact protects against the harms resulting from identity theft, they must still prove that their attorneys' negligence caused them to suffer those harms.[175] The element of causation has long been recognized as the most formidable obstacle in a legal malpractice claim because even the most

168. *See* McLeod v. Grant County Sch. Dist., 42 Wash. 2d 316, 322, 255 P.2d 360, 364 (1953); text accompanying *supra* note 107.

169. *See supra* notes 42–49 and accompanying text.

170. *See supra* note 41.

171. *See* EHLERS ET AL., *supra* note 6, at § 3.13; Givens, *supra* note 6.

172. *See* EHLERS ET AL., *supra* note 6, at § 3.13; Givens, *supra* note 6.

173. *See supra* note 53 and accompanying text.

174. *See* Palin v. Gen. Constr. Co., 47 Wash. 2d 246, 250, 287 P.2d 325, 327 (1955) (holding that the fact that the oil spill could have occurred earlier did not mean that it was not foreseeable that the oil would spill eventually).

175. *See supra* notes 112–18 and accompanying text.

egregious breach of duty has no legal consequence without proof of causation.[176] To establish causation, clients must first show that their attorneys' actions were the cause in fact of their harm.[177] Then, they must prove that their attorneys' actions were the legal cause of their harm.[178]

1. The Simpler Test for Cause in Fact

To establish that their attorneys were the cause in fact of their harm, clients must prove that their attorneys' failure to redact triggered a direct and unbroken sequence of events that would not have occurred but for the attorneys' negligence.[179] It is likely that triers of fact will find that attorneys who fail to redact are the cause in fact of the harms resulting from identity loss when the thief used information contained in court records. Clients will likely need to obtain information tying the thief to the PACER system in order to show that their loss occurred because of the opportunity created by the attorneys' failure to redact, rather than through some other means for the thief to obtain their information.[180] Proving that the thief obtained the client's information from court records should be assisted by the PACER system's ability to track who has viewed specific filings.[181]

In sum, because stealing identities is a crime of opportunity,[182] a jury could reasonably view an attorney's failure to redact as creating the opportunity for an identity thief to assume the client's identity. Without the attorney failing to redact, there would be no chain of events leading to the client suffering harm from a lost identity. Thus, the attorney's failure to redact is a cause in fact of the client's harm.

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176. *See* Lord, *supra* note 112, at 1480.

177. *See supra* notes 114–15 and accompanying text.

178. *See supra* notes 117–24 and accompanying text.

179. *See* Hertog v. City of Seattle, 138 Wash. 2d 265, 282–83, 979 P.2d 400, 410 (1999).

180. This Comment assumes the client will be able to demonstrate that the thief obtained the personal information through the unredacted court records. Although this may be a difficult task, the PACER system has been set up so that the use of a login identity will allow courts to maintain "an electronic trail which can be retraced in order to determine who accessed certain information if a problem arises." *See* POLICY, *supra* note 3.

181. *See id.*

182. *See* Givens, *supra* note 6.

2. *Establishing Legal Causation: Failing To Redact Increases the Risk of Identity Theft*

In order to prove that their attorneys were the legal cause of the harms resulting from their lost identity, clients must show that their attorneys' actions increased the risk of the harms happening, and that those harms were not the result of an intervening act.[183] Proving that an attorney's action increased the risk of identity theft should not be difficult. In *Bullard*, the court held that the attorney's failure to supervise his associate increased the client's risk of losing his settlement money because the associate was having financial difficulties and should not have been given the opportunity to steal the client's funds.[184] Because identity theft is also a crime of opportunity,[185] attorneys who fail to redact their clients' personal information from court filings similarly increase the risk of harm to their clients by giving thieves the chance to steal their clients' identities. Furthermore, the existence of the special redaction protection to prevent identity theft should weigh heavily in favor of finding that an attorney's failure to abide by the protective measure resulted in an increased risk of the harm it was meant to protect against. That an identity thief might use PACER records to obtain information was the type of concern that prompted the creation of the Policy and the impetus behind the requirement that a password be obtained before accessing PACER is allowed.[186] Because the Judicial Conference Committee created the redaction protection in part to prevent court records from assisting in crimes like identity theft,[187] when identity theft based on failure to redact occurs, it would be difficult to argue that the theft occurred by mere chance.

Once clients establish that their attorneys' failure to redact increased their risk of suffering harm, they must be prepared to respond to the argument that identity thieves are intervening actors who break the causal chain between the attorneys' negligent failure to redact and the clients' harms.[188] An intervening act, even if criminal, will only sever

183. *See supra* notes 117–42 and accompanying text.

184. *See* Bullard v. Bailey, 91 Wash. App. 750, 758–59, 959 P.2d 1122, 1127 (1998); *supra* note 131 and accompanying text.

185. *See* Givens, *supra* note 6.

186. *See* POLICY, *supra* note 3; text accompanying *supra* note 36.

187. *See also FAQ*, *supra* note 8, at 2.

188. *See supra* notes 132–34 and accompanying text.

legal causation if it was unforeseeable.[189] To be unforeseeable, the intervening act must be "so improbable or exceptional as to be wholly unexpected."[190]

As shown above, the harms resulting from identity theft are foreseeable. Further, because the act of identity theft is the only way for the harms resulting from identity theft to occur,[191] the act of identity theft is also foreseeable. The intervening act's status as a crime only relates to whether it was foreseeable,[192] and because this crime is not wholly unexpected, its criminal nature is not relevant. Therefore, any argument that identity theft is an unforeseeable intervening act should fail.

Furthermore, holding attorneys liable for the harms resulting from identity theft is sound judicial policy based on the catch-all rule allowing courts to look at any other relevant factors.[193] First, a legal malpractice claim is likely the only meaningful recourse available to clients who lose their identities due to their attorneys' negligence.[194] Second, the threat of malpractice liability may be an effective means of proactively inducing attorneys to protect their clients' interest when filing court materials.[195] In addition, a major implication of failing to find foreseeability would be that, despite vocal concerns prior to cases of identity theft actually occurring, the first victims of identity theft would be forced to bear their losses simply because they were first. Finally, in terms of efficient risk management, the attorney as the skilled professional is likely the best party to bear the burden of ensuring that personal information is omitted from documents filed by the attorney. Given the potentially severe impact from denying legal cause as a matter of policy, combined with the attorney's status as the better risk avoider, strong policy justifications exist for recognizing legal cause in failure to redact cases.

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189. *See supra* notes 133–34, 136 and accompanying text.

190. *See supra* note 136 and accompanying text.

191. *See* Benner, *supra* note 6; Givens, *supra* note 6. Furthermore, identities are inanimate objects and do not steal themselves.

192. *See supra* note 134 and accompanying text.

193. *See supra* note 121 and accompanying text.

194. *See* Benner, *supra* note 6; Givens, *supra* note 6.

195. *See* Scott Peterson, Comment, *Extending Legal Malpractice Liability to Nonclients—The Washington Supreme Court Considers the Privity Requirement*—Bowman v. John Doe Two, 61 WASH. L. REV. 761, 768 (1986) (noting that a purpose of negligence law is to deter culpable behavior, and applying this concept to legal malpractice); *see also* Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 481, 656 P.2d 483, 496 (1983) (recognizing the deterrent purpose of negligence law in the context of medical malpractice).

V. CONCLUSION

The Policy attempts to provide users of the judicial system substantial benefits through electronic access to court records. By reasonably interpreting existing legal malpractice precedent, Washington courts can ensure that these benefits are not achieved at clients' expense. Washington clients can be effectively protected under the Policy as long as the Washington courts are willing to adapt legal malpractice law to the new reality of electronic access to court records. A reasonable development of existing legal malpractice law can help to ensure that clients have some effective recourse when their attorneys fail to adequately protect them. Washington courts should admit the Policy as evidence of an attorney's specific duty of care and recognize proximate causation in legal malpractice cases stemming from an attorney's failure to redact as required by the Policy.