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(Deposit photos)

## Defense attorneys push for remote access

By: Kevin Featherly    April 16, 2020

Because their access to electronic case files has been badly curtailed during the COVID-19 crisis, private criminal defense attorneys are pressuring the courts to give them access from their homes and offices.

Thus far, at least, the courts say no.

“The courts must prioritize limited technological resources during this pandemic and it will not be possible to expand Minnesota Government Access to private defense attorneys,” Court Administrator Jeff Shorba wrote in his March 31 reply to the group.

The list of 87 defense-attorney signatories to the written request includes House Judiciary chair John Lesch, DFL-St. Paul, and a number of other notables. On March 26, they collectively asked state Supreme Court Chief Justice Lorie Gildea for login privileges to the Minnesota Court Information System (MNCIS), the database in which all state court-file records are managed.

However, as Shorba references in his reply letter, what lawyers appear to actually want is login privileges to the courts’ Minnesota Government Access (MGA) system. That online system allows government agencies to remotely retrieve “appropriate” electronic court files stored inside MNCIS, according to the Judicial Branch.

Currently among attorneys, only prosecutors and public defenders can get inside the MGA system. Others are left with the far more restrictive Minnesota Public Access (MPA) Remote system, which is accessible from home or office.

That’s because, like media and other members of the general public, private attorneys haven’t been able to use courthouse terminals since the pandemic kicked into gear in March.

The MPA Courthouse system they’re accustomed to using does allow full access to judicial orders, motions, court transcripts, criminal complaints and other electronic files—just as long as the person looking for them is physically inside the courthouse.

But since March, public computer terminals have been closed down by judicial order because of the coronavirus. So now private attorneys are stuck using the skinnier MPA Remote that serves up only the court’s register of actions—the menu-styled list of court-case activity. MPA Remote does not retrieve court documents.

Kevin Sieben, a partner at Sieben Edmunds Miller P.L.L.C., who wrote Gildea on behalf of the attorneys group, says the situation puts private attorneys in a bind, particularly before they agree to represent clients.

Lacking access to court records, they can’t review the defendant’s criminal history, probation status, criminal complaint and case status, he said. “We need to get these answers before

we can even take any steps to move forward,” he said. “If they want to hire us to work on their case, or if we want to know what the next steps are, we need to be able to get that access.”

If it wanted to, Sieben asserts, the Judicial Branch could easily give lawyers remote access to full case documentation. It would be a matter of assigning attorneys usernames and passwords, just as the branch does for prosecutors and public defenders.

“I think at least in the interim, they should give us the attorneys that work on these cases the same access that they give to public defenders and prosecutors,” he said.

## **Not that easy**

It’s not as simple as that, Shorba said in an email exchange.

For one thing, MGA access is not given out to individuals, but to government organizations, he said. That makes things more complicated.

For example, before they get access, organizations must agree to terms and conditions of use and designate a contact person responsible for staff training and organizational compliance. That agent is also responsible for adding any employees who get MGA access. Use of the system is then regularly audited to ensure that it is used appropriately, Shorba said.

During the COVID-19 crisis, the branch has concentrated most of its technological resources on expanding remote courtroom access. A recent order from Gildea encouraged courts to conduct hearings using remote-conferencing technologies wherever possible, Shorba noted.

“This means the number of cases moving through the courts, remotely, will increase and we must have the tools to ensure Minnesotans can continue to access justice in this new way,” Shorba said.

In his response to the attorneys, Shorba wrote that lawyers still can access the court register of actions, provided they have the defendant’s case file number. The prosecutor’s office will provide the case number if the lawyer doesn’t have it, Shorba wrote, and court staff also are willing to lend a hand.

That will tell lawyers what documents are filed. The problem of accessing them then resolves itself, once the lawyer becomes a case's attorney of record, Shorba wrote.

"Once a private defense attorney has been retained and added as attorney-of-records and is signed up for e-service," his letter says, "the prosecutor's office will start e-serving them with documents filed in the case, and the court will start sending the defense attorney all court notices of orders."

But to Sieben, that describes a Catch-22: The county attorney won't share documents until the lawyer becomes the attorney of record. But the attorney is reluctant to take on the case—and become the attorney of record—until he or she can review the documents. That's not a problem that, say, public defenders have to deal with, he said.

"It's frustrating to have some in the field be treated differently than others," Sieben said.

Still, Shorba suggests, there are two sides to the fairness coin. Unlike private attorneys, county attorneys and public defenders must handle "mass calendars and multiple appearances" during court sessions, he said. MGA access helps them handle that workload, he said.

"In contrast," Shorba said, "private attorneys do not have as many cases, nor are they making as many court appearances on a daily/weekly basis." As a consequence, they have less need for instant remote access to documents across multiple cases, he said.

Christina Zauhar, an attorney with the Bloomington-based Halberg Criminal Defense firm, isn't sold on the counter arguments. She said it has long been "shocking" to her that private defenders lack the same easy access to court records as government-paid attorneys.

"Day-to-day in usual business, it's an annoyance," she said. "And now it's even worse than an annoyance. We don't have access to a lot of documents that we need and that the other side does get access to, which is inherently unfair."

## Ongoing debate

This debate is hardly new, Shorba said. "Private attorneys have occasionally asked for this access long before the current pandemic," he said.

Sieben agreed, noting that the Minnesota State Bar Association recently passed a resolution seeking greater remote document access. For Sieben, the issue has long been a personal passion, he said.

The Judicial Branch, of course, is working to rectify the problem. Five years ago, the state Supreme Court ordered that the general public be given the same access remotely to court records they currently get in the courthouse. A project to turn MPA Remote into full-on, MGA-styled court-records access system is budgeted and in the works.

However, that project, which has had a bumpy history, is at least two years from completion.

In the meantime, Zauhar said, private attorneys and their clients remain on the wrong side of what she considers a constitutional issue.

“Every person has the right to due process of the law, the right to have a fair trial and the right to representation by a lawyer,” she said. “I think this affects all of those constitutional rights that a person has.”

Sieben doesn’t go that far. Attorneys are resourceful, he said, and know how to work with court staff and prosecutors to get the information they need. That can take time and it’s overly burdensome, he agrees, but it’s probably not grounds for a constitutional complaint.

“I look at it more as a fairness type thing,” he said. “If the prosecutor can get it or a public defender can have it, why shouldn’t the private attorney have it?”

#### ABOUT KEVIN FEATHERLY

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Kevin Featherly, who joined BridgeTower Media in mid-2016, is a journalist and former freelance writer who has covered politics, law, business, technology and popular culture for publications and websites in the Twin Cities and nationally since the mid-1990s.

