

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Francisco, CA
January 6-7, 2011
(Vol. II)

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 6-7, 2011

1. Opening Remarks of the Chair
 - A. Introduction; new members
 - B. Report on the September 2010 Judicial Conference session
 - C. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court
2. **ACTION** – Approving minutes of the June 2010 committee meeting
3. Report of the Administrative Office
4. Report of the Federal Judicial Center
5. Report of the Civil Rules Committee
 - A. Rule 45
 - B. Discovery
 - C. Pleading
 - D. Preservation and sanctions; panel presentation on proposals for rule amendments and other steps to provide better guidance on preservation obligations and more clarity on sanctions for spoliation
 - E. Other work relating to the 2010 Duke Conference
 - F. Minutes and other informational items
6. Report of the Appellate Rules Committee
 - A. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 13, 14, and 24
 - B. Minutes and other informational items
7. Report of the Criminal Rules Committee
 - A. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 11, 12, and 34
 - B. Minutes and other informational items

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8. Report of the Evidence Rules Committee
 - A. Possible rules amendments in light of *Melendez-Diaz v. Massachusetts*
 - B. Minutes and other informational items
9. Report of the Bankruptcy Rules Committee
 - A. Minutes
 - B. Report on revisions to Part VIII of the Bankruptcy Rules and issues relating to those revisions
10. **ACTION** – Approving and transmitting to the Judicial Conference revised *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*
11. **ACTION** – Approving recommendations proposed by the Subcommittee on Privacy (Appendices A-E below contained in separate volume II)
 - A. Administrative Office report on unredacted social security numbers identified by PublicResource.org
 - B. Federal Judicial Center report on frequency of unredacted social security numbers in federal court filings
 - C. Administrative Office report on redaction of personal-identifier information in local rules
 - D. Federal Judicial Center survey of judges, clerks, and practitioners on managing personal-identifier information in court filings
 - E. Fordham Law School Conference on the operation of the federal privacy rules
12. Long-Range Planning Report
13. Next Meeting: June 2-3, 2011

TAB
11 (Vol. II)

Operation of the Federal Privacy Rules

A Report to the Judicial Conference Standing Committee on the Rules of Practice and Procedure by the Subcommittee on Privacy

1 **I. Introduction**
2

3 A. The 2007 Adoption of the Privacy Rules
4

5 The E-Government Act of 2002 required the federal judiciary to formulate rules “to
6 protect the privacy and security concerns relating to electronic filing of documents” in federal
7 courts.¹ In response to this mandate, the Judicial Conference Committee on the Rules of
8 Practice and Procedure (the “Standing Committee”) established a Privacy Subcommittee,
9 composed of a representative from each of the Advisory Rules Committees and
10 representatives from the Committee on Court Administration and Case Management
11 (CACM), to make rule recommendations. That Subcommittee’s proposals for amendments
12 to the Federal Rules of Civil Procedure,² Criminal Procedure,³ Bankruptcy Procedure⁴ and
13 Appellate Procedure⁵ (referred to collectively hereafter as “the “Privacy Rules”) were
14 adopted by the Standing Committee and went into effect on December 1, 2007. The
15 Standing Committee recognized a likely need to review the operation of the Privacy Rules
16 in the near future given the challenges of implementation, rapid technological advances, and
17 ongoing concerns about the proper balance between public access to court proceedings and
18 various claims to privacy.
19

20 B. Request for a Status Report on the Operation of the Privacy Rules
21

22 Since the Privacy Rules took effect, members of all three branches of government and
23 of the public have raised questions about implementation and operation. Meanwhile, courts
24 and litigants have gained practical experience in using the Privacy Rules in the context of
25 expanding electronic access to court proceedings under CM/ECF and PACER. Thus, when
26 in 2009, the Executive Committee of the Judicial Conference directed the Standing

¹ Pub. L. 107-347, § 205(c)(3).

² Fed.R. Civ. P. 5.2.

³ Fed.R. Crim. P. 49.1.

⁴ Fed.R. Bkrtcy. P. 9037.

⁵ Fed.R.App. P. 25(a)(5).

1 Committee to report on the operation of the Privacy Rules, the Standing Committee revived
2 its Privacy Subcommittee to conduct the necessary investigation. Once again, each Advisory
3 Committee designated a member to serve on the Privacy Subcommittee, with the Advisory
4 Committee Reporters serving as consultants. CACM also designated four members to serve
5 on the Subcommittee, with former CACM Chair, Judge John Tunheim, serving as a member-
6 at-large.

7
8 C. Principles Controlling Review
9

10 In undertaking its review, the Privacy Subcommittee recognized that its task was
11 discrete. It was not charged with developing new policy, but only with assessing how the
12 Privacy Rules operate consistent with existing policy established by the Judicial Conference
13 (largely on the basis of extensive research and consideration by CACM). This policy
14 generally favors making the same information that is available to the public at the courthouse
15 available to the public electronically.⁶
16

17 In urging this “public is public” policy, CACM was mindful of an irony: that a system
18 of public access that required a trip to the courthouse to see court filings, while outdated, may
19 have afforded litigants, witnesses, and jurors more privacy – “practical obscurity” – than a
20 system of easy electronic access. CACM further recognized that some persons availing
21 themselves of electronic access might have illegitimate motives: identity theft, harassment,
22 and even obstruction of justice. Nevertheless, CACM concluded that the judiciary’s access
23 policy should generally draw no distinction between materials available at the courthouse and
24 online. This policy not only promotes long-standing principles of judicial transparency; it
25 ensures against profiteering in information available only at the courthouse by entrepreneurs
26 who could gather such information and market it over the Internet. CACM determined that
27 privacy interests in electronically available information could be protected sufficiently by
28 imposing redaction obligations on parties filing documents containing private information,
29 specifically, social-security numbers, financial-account numbers, dates of birth, names of
30 minor children, and, in criminal cases, home addresses.
31

32 The Standing Committee implemented these policy determinations in drafting the
33 Privacy Rules. The Privacy Subcommittee’s review of the operation of these rules is

⁶ The Judicial Conference’s privacy policy incorporated several policies, including those adopted by the Conference in 2001 and 2003 regarding electronic public access to appellate, bankruptcy, civil, and criminal case files (JCUS-SEP/OCT 01, pp. 48-50; JCUS-SEP 03, pp. 15-16), as well as guidance with respect to criminal case files (JCUS-MAR 04, p. 10).

1 informed by the judiciary's continued adherence to the stated policy.⁷

2
3 **II. Organization and Work of the Privacy Subcommittee**

4
5 A. Subjects Addressed By Working Groups

6
7 The Privacy Subcommittee quickly identified four general subjects for consideration
8 and constituted itself into corresponding working groups to address each matter.

9
10 1. Implementation of the Privacy Rules

11
12 Members of Congress and of the public have questioned how effectively the courts
13 have implemented the Privacy Rules, with particular concern for the appearance of
14 unredacted social-security numbers in some court filings. The Privacy Subcommittee has
15 reviewed this matter. It has further reviewed the efforts of individual courts and the
16 Administrative Office to educate attorneys about their redaction responsibilities. The
17 Subcommittee has reviewed local court rules addressing privacy concerns to determine their
18 compliance with the national Privacy Rules. Finally, the Subcommittee has considered other
19 procedures that might be implemented better to protect private information in court files.

20
21 2. Privacy Concerns in Criminal Cases

22
23 In criminal cases, a particular privacy concern has arisen with respect to electronic
24 access to plea and cooperation agreements, aggravated by the emergence of various websites
25 publicizing such information, of which *whosarat.com* is simply one example. In response
26 to a Department of Justice request for a judicial policy denying any electronic access to plea
27 agreements, CACM issued a March 2008 report to the Judicial Conference recommending
28 against such a policy because it would deny public access to all plea agreements, including
29 those that did not disclose cooperation.⁸ In so reporting, CACM noted that the district courts
30 vary widely in affording public access to plea and cooperation agreements. Thus, the Privacy
31 Subcommittee has reviewed and evaluated these approaches with a view toward facilitating
32 any future consideration of a uniform policy or rule.

33

⁷ The Privacy Rules provide exceptions for Social Security cases and immigration cases. These cases are not subject to the redaction requirements, but non-parties can obtain access only at the courthouse. The Privacy Subcommittee reviewed the continuing viability of these exceptions, and its conclusions are stated later in this report.

⁸ See Report of CACM to Judicial Conference, March 2008 at 9.

1 3. Electronic Access to Court Transcripts

2
3 Consistent with the E-Government Act, clerks of court are responsible for placing
4 transcripts of court proceedings on PACER. The Judicial Conference has made clear that it
5 is the parties, not the clerks, who are responsible for making necessary redactions from such
6 transcripts. The Privacy Subcommittee has considered the operation of this division of labor
7 in practice as well as the efforts made by courts and parties to minimize references to private
8 information in records that will eventually be transcribed. Special attention has been given
9 to *voir dire* transcripts containing private information about jurors.

10
11 4. Possible Amendments to the Privacy Rules

12
13 The Privacy Subcommittee was asked to consider whether the redaction requirements
14 of the existing Privacy Rules needed to be expanded to include more information, such as
15 alien registration numbers, driver’s license numbers, mental health matters, etc. At the same
16 time, the Subcommittee was asked to consider whether the Privacy Rules should be
17 contracted to eliminate or modify two exceptions to the basic “public is public” policy for
18 social security and certain immigration cases.

19
20 B. Information Obtained by the Privacy Subcommittee

21
22 In conducting its review, the Privacy Subcommittee made extensive efforts to obtain
23 information about how the Privacy Rules were working and how they might be improved.
24 In addition to considering existing sources of information, the Subcommittee conducted its
25 own surveys of court filings and of persons experienced with the operation of the Privacy
26 Rules. Finally, the Subcommittee conducted a conference at which it heard from over thirty
27 persons – judges, court personnel, attorneys, legal scholars, and media representatives – who
28 expressed diverse views on the issues of public access to court filings and the need to protect
29 private information. The results of the Subcommittee’s efforts, which should assist in the
30 future development of policies and rules regulating access to private information in court
31 filings, are detailed in multiple attachments to this report. The Subcommittee here briefly
32 describes its research efforts.

33
34 1. Review of Existing Report on Court Filings by PublicResource.org

35
36 A report published at PublicResource.org indicates that social-security numbers
37 remain unredacted in a number of publicly available court files. With the assistance of Henry
38 Wigglesworth of the Administrative Office, the Subcommittee conducted an in-depth
39 analysis of the data contained in the PublicResource.org report. That analysis is attached to
40 this Report. As the attachment indicates, very few cases (relative to the large number of

1 court filings) in fact revealed unredacted social-security numbers. Most of the disclosures
2 cited by PublicResource.org related to filings made before the Privacy Rules were enacted,
3 while others reflected a common disclosure made multiple times in the same case.
4
5

6 2. Survey of Court Filings for Unredacted Social-Security Numbers 7

8 At the request of the Privacy Subcommittee, the Federal Judicial Center conducted its
9 own survey of court filings from a two-month period in 2010 to determine the frequency with
10 which unredacted social-security numbers appear in court filings. The FJC found roughly
11 2400 documents — out of 10 million documents searched — with unredacted social-security
12 numbers that did not appear to be subject to the exceptions to redaction provided by the
13 Privacy Rules. Joe Cecil, who conducted the principal research, concluded that while the
14 number of unredacted documents should not be ignored, it was proportionally minimal and
15 did not indicate a widespread failure in the implementation of the Privacy Rules.⁹
16
17

18 3. Review of Local Rules 19

20 With the assistance of Heather Williams of the Administrative Office, the Privacy
21 Subcommittee collected and reviewed all local rules governing redaction of private
22 information in court filings. The Subcommittee determined that most local rules are intended
23 to educate attorneys about their redaction obligations consistent with the Privacy Rules. The
24 Subcommittee identified only a few local rules that conflict with the Privacy Rules, generally
25 by requiring more redactions than the national rules. Such conflicts are easily addressed by
26 an appropriate communication from the Standing Committee to the district chief judge.
27

28 4. Survey of Practical Experience with Privacy Rules 29

30 The Subcommittee early determined a need to know how those who regularly work
31 with the Privacy Rules view their operation. With the assistance of Joe Cecil and Meghan
32 Dunn of the FJC, the Subcommittee prepared and sent out surveys to a large number of

⁹ Joe Cecil provides the following illustration:

If those 2,400 documents were the equivalent of one sheet of paper, and those papers were piled on top of each other, the stack of 2,400 sheets of paper would be just over nine and a half inches high. That sounds like a lot, but keep in mind that if we stack up 10 million sheets of paper to represent the almost 10 million documents that we searched, the stack of 10 million sheets of paper would be well over twice the height of the Empire State Building.

1 randomly selected district judges, clerks of court, and attorneys with electronic filing
2 experience. The survey sought experiential information and invited opinions on the need for
3 any rules changes. The results of this survey – including a description of methodology —
4 are attached to this report. The survey data indicates that the Privacy Rules are generally
5 working well and do not require amendment, but that continuing education efforts are
6 necessary to ensure compliance.

7
8 5. Fordham Conference
9

10 The Privacy Subcommittee asked its reporter, Fordham Professor Daniel Capra, to
11 identify persons with diverse views on the four areas of identified interest and to secure their
12 participation at an all-day conference at Fordham Law School on April 13, 2010. Thanks to
13 Professor Capra’s efforts and Fordham’s hospitality, the Subcommittee heard panel
14 discussions on

- 15
16 ● the broad question of transparency and privacy relating to court filings by a
17 judge and various legal scholars;
- 18
19 ● the exemption of immigration cases from electronic filing by private and
20 public attorneys, a legal scholar, a member of the media, and a court
21 representative;
- 22
23 ● the present implementation of the Privacy Rules by a judge, a legal scholar, a
24 member of the media, an AO representative, and a clerk of court;
- 25
26 ● electronic access to plea and cooperation agreements and the need for a
27 uniform rule on this subject by a prosecutor, criminal defense lawyers, a legal
28 scholar, and a Bureau of Prisons official;
- 29
30 ● the same subject by judges from districts affording different degrees of public
31 access to such information; and
- 32
33 ● electronic access to transcripts, including *voir dire* transcripts by a judge, two
34 United States Attorneys, a First Amendment lawyer, and a jury clerk.

35
36 A transcript of these proceedings is attached to this report and will be published in the
37 Fordham Law Review. Insights gained at the the Fordham Conference inform all aspects of
38 the findings and recommendations contained in this Subcommittee report.
39
40

- (1) **Social Security Numbers:** if an individual's social security number must be included in a filing, use only the last four digits of that number.
 - (2) **Names of Minor Children:** if the involvement of a minor child must be mentioned, use only the child's initials.
 - (3) **Dates of Birth:** if an individual's date of birth must be included in a filing, use only the year.
 - (4) **Financial Account Numbers:** if financial account numbers are relevant, use only the last four digits of these numbers.
 - (5) **Home Address in Criminal Cases:** If a home address must be included in a document to be filed, include only the city and state.
- (b) Redaction Policy: In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above must:
- (1) File a redacted, unsealed version of the document along with a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list must refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as a right, or
 - (2) With approval of the Court, file an unredacted version of the document under seal. The Court may, however, still require the party to file a redacted copy for the public file. The unredacted version of the document or the reference list shall remain sealed and retained by the Court as part of the record.
 - (3) The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each filing for compliance with this Local Rule.
- (c) Transcripts of Hearings: If information listed in section (a) of this Rule is elicited during testimony or other court proceedings, it will become available to the public when the official transcript is filed at the courthouse unless, and until, it is redacted. The better practice is to avoid introducing this information into the record in the first place. If a restricted item is mentioned in court, any party or attorney may ask to have it stricken from the record or partially redacted to conform to the privacy policy, or the Court may do so on its own motion.

1 **III. Findings**

2
3 **A. Implementation of the Privacy Rules**

4
5 1. Overview

6
7 The Privacy Subcommittee was charged with reviewing and reporting on the operation
8 of the existing Privacy Rules throughout the federal courts, with particular attention to
9 protection of the specified private identifier information in electronic filings available on
10 PACER. The Subcommittee reports considerable success in the implementation of these
11 Rules. At the same time, the Subcommittee identifies a continuing need for education
12 efforts, monitoring, and study to ensure continued effective implementation.

13
14 2. Specific Findings

15
16 a. Administrative Office Efforts

17
18 The Privacy Subcommittee reports that the Administrative Office has made significant
19 and effective efforts to implement the Privacy Rules' redaction requirements, while still
20 providing the public with remote electronic access to court filings. For example:

21
22 ● In 2003, the AO modified CM/ECF so that only the last four digits of a social
23 security-number can be seen on the docket report in PACER. In the same vein, in
24 May 2007 the AO's Forms Working Group, comprising judges and clerks of court,
25 reviewed over 500 national forms to ensure that they did not require
26 personal-identifier information. The Working Group identified only six forms that
27 required personal identifier information, and those forms were revised or modified to
28 delete those fields.

29
30 ● In August 2009, the AO asked the courts to implement a new release of
31 CM/ECF specifically designed to heighten a filer's awareness of redaction
32 requirements. The CM/ECF log-in screen now contains a banner notice of redaction
33 responsibility and provides links to the federal rules on privacy. CM/ECF users must
34 check a box acknowledging their obligation to comply with the Privacy Rules
35 redaction requirements in order to complete the log-in process. CM/ECF also
36 displays another reminder to redact each and every time a document is filed.

37
38 ● The Judicial Conference approval of a pilot project providing PACER access
39 to audio files of court hearings raised concerns about audio disclosure of personal
40 information. The eight courts participating in the pilot project employ various means

1 to discourage attorneys and litigants from introducing personal identifier information
2 except where absolutely necessary. Lawyers and litigants are also warned that they
3 could and should request that recorded proceedings containing information covered
4 by the Privacy Rules or other sensitive matters not be posted, with the final decision
5 made by the presiding judge. The AO has endeavored to ensure that courts and
6 litigants are mindful of their redaction obligations as they participate in this project.
7

8 b. Efforts by the Courts

9
10 (1) Generally

11
12 All aspects of the Subcommittee's review confirm that federal courts throughout the
13 country are undertaking vigorous and highly effective efforts to ensure compliance with the
14 Privacy Rules generally and with the requirement that personal identifier information be
15 redacted from or never included in court filings in particular. These efforts include:
16

- 17 ● ECF training programs for both lawyers and non-attorney staff at law firms.
18 The extension of training to staff is important because experience indicates that
19 redaction failures, while infrequent, are frequently the result of filings made by staff
20 who are unaware of the Rules requirements.
21
- 22 ● ECF newsletters containing reminders about the redaction requirements.
23
- 24 ● Making counsel aware of the Privacy Rules at the initial court conference and
25 at evidentiary hearings, and also specifically advising counsel against unnecessary use
26 of personal identifiers.
27
- 28 ● Discouraging counsel from asking questions that would elicit testimony that
29 would disclose private identifier information.
30
- 31 ● Requiring redaction of exhibits containing personal identifier information as
32 a condition of admissibility.
33
- 34 ● Providing notices at counsel's table that describe the Rules' redaction
35 requirements and that caution counsel not to put unredacted personal identifier
36 information into the record.
37
- 38 ● Reading a prepared statement to witnesses cautioning against disclosure of
39 private identifier information.
40

1 disclosures remains small.¹¹ This is a tribute to the court efforts described generally in the
2 preceding subsection, which include efforts by the bankruptcy courts.¹² The Subcommittee
3 is, therefore, confident that, as educational efforts continue and other initiatives are pursued,
4 the instances of errors in filing unredacted personal identifier information in bankruptcy
5 cases will be reduced even further.

6
7
8 (4) Use of Local Rules
9

10 The Privacy Subcommittee conducted a comprehensive review of local court rules
11 intended to implement the national Privacy Rules. The Subcommittee recognizes that local
12 rules can have some value in educating filers about their redaction obligations. But local
13 rules cannot impose obligations inconsistent with national rules. *See, e.g.*, Fed.R.Civ.P. 83(a).
14 The Privacy Subcommittee has identified a few local rules inconsistent with the national
15 Privacy Rules, notably, local rules demanding the redaction of *more* information than
16 required by the national rules. National rules are a product of a carefully considered policy
17 that calibrates the balance between the judiciary’s commitment to public access and its
18 protection of personal privacy. Local rules requiring more information to be redacted alter
19 that balance.

20
21 An attached report identifies local rules that the Privacy Subcommittee finds
22 inconsistent with the Privacy Rules. It recommends that the procedure employed in the last
23 local rules project be employed here: the Standing Committee should inform the chief judge
24 of a district with an inconsistent rule, and the Standing Committee should work together with
25 the chief judge to remedy the situation.

26
27
28
¹¹ Notably, Bankruptcy Rule 1005, as amended in 2003, now provides that the petitioner disclose only the last four digits of the petitioner’s social-security number. Other Bankruptcy Rules require disclosure of the full social-security number, but that information is not available to the public. *See, e.g.*, Bankruptcy Rule 1007(f), which requires an individual debtor to “submit” to the clerk, rather than “file” a verified statement containing an unredacted social-security number. At this point, in a bankruptcy case as in any other, unredacted social-security numbers are not accessible to the public unless permitted by one of the exceptions to the Privacy Rules.

¹²A paper prepared by Hon. Elizabeth Stong and submitted for the Fordham Privacy Conference provides a helpful description of how the Privacy Rules are implemented in the Eastern District of New York Bankruptcy Court. That paper is attached to this Report.

1 3. Possible Future Initiatives

2
3 Given inevitable advances in technology, the Subcommittee suggests that future
4 attention be given to two possible developments.

5
6 ● Current technology permits detection of unredacted social-security numbers
7 in court filings, as the Federal Judicial Center did in the attached report. Current
8 technology does not permit a comparable search for other unredacted personal
9 identifiers, such as names of minor children. Nevertheless, at the Fordham
10 Conference, Professor Edward Felten predicted that future technological
11 developments might well provide such capacity. The Privacy Subcommittee
12 recommends that the AO continue to monitor the state of search technology.

13
14 ● Technology might also make it easier for a filing party to search for material
15 to redact in a transcript or in a document that the party is going to file. For example,
16 a pdf document is obviously easier to search if it is in searchable format. More
17 broadly, as stated above, software might be developed in the future that would make
18 it easier to search exhibits, immigration records, or indeed any document. While it is
19 not the obligation of the courts to redact filings for litigants, to the extent the courts
20 are already engaged in extensive and highly effective educational efforts, they might
21 be encouraged to include relevant technological advances in the information
22 conveyed.

23
24 While such future initiatives should be pursued, the Privacy Subcommittee concludes
25 that the most important means of ensuring effective implementation of the Privacy Rules is
26 to continue the current efforts to educate filers and other court participants about the need (a)
27 to redact private identifiers from documents that must be filed, and (b) to avoid disclosure
28 of private identifiers except when absolutely necessary.

29
30 Finally, the Subcommittee suggests continued monitoring of the implementation of
31 the Privacy Rules. Specifically, a study of court filings for unredacted personal identifiers,
32 such as that conducted by the Federal Judicial Center for this report, should be conducted on
33 a regular basis, possibly every other year.

34
35 **B. Criminal Cases: Affording Electronic Access to Plea and Cooperation**
36 **Agreements**

37
38 1. Overview

39
40 The Privacy Subcommittee quickly identified electronic public access to plea and

1 cooperation agreements in criminal cases as an area warranting careful review. Survey
2 information and the Fordham Conference indicate that easy electronic access to such
3 information, coupled with Internet sites committed to its collection and dissemination, have
4 heightened concerns about retaliation against cooperators and prosecutors’ ability to secure
5 cooperation.
6

7 The Privacy Subcommittee views the recruitment and protection of cooperators as
8 matters generally committed to the executive branch. At the same time, it recognizes judicial
9 responsibility to minimize opportunities for obstruction of justice. How to do so without
10 compromising public access to court proceedings – especially proceedings that may be of
11 particular public interest, including the treatment of defendants who cooperate with the
12 prosecution – admits no easy answer.
13

14 The Subcommittee has identified varied approaches by the district courts to the public
15 posting of plea and cooperation agreements and general court resistance to a uniform national
16 rule. To the extent the Department of Justice, some defense attorneys, and legal scholars
17 support a national rule, the Subcommittee has identified no consensus on what that rule
18 should be. Nor can it presently identify a “best practice.”
19

20 The Subcommittee suggests that CACM and the Standing Committee encourage
21 district courts to continue the discussion begun at the Fordham Conference about the relative
22 advantages of various practices in order to determine if a consensus emerges in favor of a
23 particular practice or rule. It further suggests that courts might consider methods, where
24 appropriate, to avoid permanent sealing of plea or cooperation agreements — possibly by
25 providing for such orders to expire at a fixed time subject to extension by the court upon
26 further review.
27

28 2. Specific Findings

29 a. Existing District Court Practices for Posting Plea and 30 Cooperation Agreements 31

32 The Privacy Subcommittee identified various approaches by the district courts in
33 publicly posting plea and cooperation agreements,¹³ which are summarized here in
34
35

¹³ A chart of the various approaches, prepared by Susan Del Monte of the Administrative Office, is attached to this Report.

1 descending order of accessibility:
2

- 3 ● Full electronic access to plea and cooperation agreements, except when sealed
4 on a case-by-case basis.
5
- 6 ● No remote electronic access to plea or cooperation agreements, but with such
7 agreements fully available at the courthouse unless sealed in an individual case.
8
- 9 ● Full electronic access to plea agreements, but with a separate sealed document
10 filed in every case indicating whether or not the defendant has entered into a
11 cooperation agreement.¹⁴
12
- 13 ● No public access to plea or cooperation agreements either electronically or at
14 the courthouse, because these documents are not made part of the case file.
15
16

17 b. Concerns with the Identified District Court Practices
18

19 At the Fordham Conference, prosecutors, defense counsel, and legal scholars
20 expressed concerns about the various district court approaches. Again, working from the
21 least to most restrictive approach, these concerns are summarized as follows:
22

- 23 ● Full remote access to plea agreements with sealing of cooperation information
24 in individual cases means a sealing order effectively raises a red flag signaling
25 cooperation.
26
- 27 ● Prohibiting electronic access to plea and cooperation agreements but allowing
28 courthouse access to such documents encourages the development of cottage
29 industries to acquire and post such information (often for sale), the very concern that
30 prompted the Judicial Conference to adopt the “public is public” policy.
31
- 32 ● Posting plea agreements that say nothing about any cooperation, or posting
33 documents that use the same boilerplate language whether a party is cooperating or
34 not, result in misleading court documents and preclude public scrutiny of how the
35 judicial system treats cooperating defendants.

¹⁴ This approach is intended to minimize the ability to identify a cooperating defendant from the presence on the public record of sealed document. The Subcommittee notes the possibility of such identification from other public record entries, such as delayed or frequently adjourned sentencing proceedings.

- 1 ● Not posting plea or cooperation agreements at all hampers public scrutiny
2 not only of the treatment of cooperators but of the process by which guilty pleas are
3 obtained.
4

5 Some Conference participants also raised a general concern: that as defendants from
6 different districts found themselves housed together in the federal prison system, some might
7 misconstrue records from districts with which they were not familiar. For example, a
8 prisoner from a district where individual sealing signaled likely cooperation might mistakenly
9 infer that every prisoner with a sealed record entry was a cooperator without realizing that
10 some districts made a sealed entry in every case to ensure no difference between the dockets
11 of cooperators and non-cooperators.
12

13
14 c. Support for a Uniform Rule
15

16 While prosecutors, most defense attorneys, and legal scholars urged a uniform rule
17 for posting plea and cooperation agreements, they did not agree as to the content of that rule.
18 Some urged few, if any, limits on public access to such agreements, while others supported
19 strict limitations.¹⁵
20

21 The Subcommittee has considered the uniform rule proposal recommended by
22 Professor Caren Myers in her article, *Privacy, Accountability, and the Cooperating*
23 *Defendant: Towards a new Role for Internet Access to Court Records*, 62 Vand. L. Rev. 921
24 (2009), a copy of which is attached to this Report. Professor Myers, a former federal
25 prosecutor, urges a rule that would (1) generally deny public access to individual plea and
26 cooperation agreements except where ordered by the court on a case-by-case basis; and (2)
27 provide public access to plea and cooperation information in the aggregate, without
28 identifying individual defendants. As Professor Myers explained at the Fordham
29 Conference, she thinks that in most cooperation cases, the risk to a defendant from public
30 disclosure of the defendant's cooperation far outweighs any public interest in knowing that
31 the defendant decided to cooperate. To the extent there is a public interest in knowing what
32 kinds of deals the government is making with cooperators and what kinds of benefits they
33 are receiving from the courts, Professor Myers submits that information can be provided
34 anonymously or in the aggregate.

¹⁵ Because the Department of Justice has historically supported a uniform rule with strict limitations, the Subcommittee, early in its work, invited DOJ to propose a draft rule as a basis for Subcommittee discussion. DOJ continues to work on the issue, including the viability of a national rule, but has not at this time submitted draft language.

1 Some participants at the Fordham Conference questioned the sweep of Professor
2 Myers’s proposal, which would severely limit public access to plea and cooperation
3 agreements in individual cases. They also questioned the effectiveness of such a rule in
4 protecting cooperators, given the ability to infer cooperation from delayed or adjourned
5 sentences or from the sealing of sentencing minutes, in whole or in part.
6

7
8 d. Judicial Opposition to a Uniform National Rule
9

10 At the Fordham Conference, the Subcommittee also heard the views of judges drawn
11 from districts pursuing each of the identified approaches. Their thoughtful responses to the
12 concerns and suggestions of lawyers and legal scholars and their explanations for how and
13 why their courts employed various approaches to posting plea and cooperation agreements
14 were particularly informative. This discussion revealed that the various practices employed
15 by courts with respect to plea and cooperation agreements were not casually developed.
16 Rather, district courts have carefully considered the question of public access to such
17 agreements, with individual courts soliciting the views of attorneys and other interested
18 parties and engaging in substantial internal discussion before settling on an approach. The
19 discussion further revealed that each district is strongly committed to its chosen approach,
20 convinced that the approach satisfactorily balances the twin concerns of public access and
21 cooperator safety, and resistant to the idea of a uniform national rule (particularly if it would
22 differ from its own practice).
23

24
25 e. Subcommittee Conclusions
26

27 The Subcommittee concludes that no best practice has yet emerged supporting a
28 uniform national rule with respect to granting public access to plea and cooperation
29 agreements. The Subcommittee suggests that CACM and the Standing Committee encourage
30 district courts to continue the discussion begun at the Fordham Conference as to the relative
31 benefits of various practices, with a view toward determining if a consensus emerges in the
32 coming years as to a best practice that might provide a basis for a uniform national rule.
33

34 At the same time, the Subcommittee is of the view that the rationale for limiting
35 public access to such agreements – cooperator safety – does not necessarily support the
36 permanent sealing of most cooperation agreements, much less plea agreements. Courts
37 limiting access to such agreements might consider whether it is appropriate to include a
38 “sunset” provision that allows sealing orders within a time prescribed either automatically
39 for every case or specifically in individual cases with further sealing dependent on a court
40 determination of a continued need.

1 **C. Redacting Electronic Transcripts**

2
3 1. Overview

4
5 Judicial Conference policy requires that court transcripts be posted on PACER within
6 90 days of delivery to the court clerk.¹⁶ The Privacy Subcommittee has considered the
7 judiciary’s ability to comply with this policy while ensuring the redaction of personal
8 identifier information as required by the Privacy Rules. The Subcommittee reports that the
9 redaction of private information from transcripts on PACER is still a work in progress.
10 Nevertheless, that work appears to be going well. Because the process relies on the vigilance
11 and sensitivity of lawyers, judges, and court staff, continuing education is important to ensure
12 these persons’ awareness of the need to minimize record references to private identifier
13 information and to redact such information when it appears in transcripts.
14

15 The Privacy Subcommittee has separately considered the privacy issues implicated by
16 the electronic posting of *voir dire* transcripts, which may reveal personal information about
17 potential jurors not required to be redacted by the Privacy Rules. Such information could be
18 used to retaliate against jurors and could compromise the identification of prospective jurors
19 able to serve without fear or favor. Because the Judicial Conference has recently provided
20 the courts with guidance as to how to balance the competing interests in public access to *voir*
21 *dire* and juror privacy, the Subcommittee suggests that the Standing Committee request
22 CACM to monitor the operation of these guidelines to determine the need for any further
23 policy action.
24

25
26 2. Specific Findings

27
28 a. The Redaction of Electronically Posted Transcripts

29
30 (1) Judicial Conference Policy for Electronic Filing

31
32 Consistent with the mandate of the E-Government Act to create a complete electronic
33 file in the CM/ECF systems for every federal case, in 2003, the Judicial Conference, as stated
34 above, adopted a policy requiring courts electronically to post transcripts of court
35 proceedings within 90 days of their receipt by the clerk of court. In the 90-day period
36 preceding electronic filing, each party’s attorney (or each *pro se* party) must work with the

¹⁶ See JCUS Sep. 07 at 7. Extensive guidance on the implementation of the transcripts policy is found in a letter to clerks from Robert Lowney of the AO, dated January 30, 2008. See also Report of CACM to the Judicial Conference on Electronic Transcripts, June 2008.

1 court reporter according to a prescribed schedule to ensure that any electronically filed
2 transcript is properly redacted of personal identifier information consistent with the
3 requirements of the Privacy Rules.
4
5

6 (2) Survey Results Indicate General Compliance with
7 Transcript Policy
8

9 The FJC survey reveals that, as of December 2009, all bankruptcy courts and all but
10 a few district courts are posting trial transcripts on PACER, though most courts do not
11 routinely post deposition transcripts. A majority of the surveyed courts have established
12 local rules or policies to address privacy concerns arising from the electronic posting of trial
13 transcripts. The number of clerks and judges who reported complaints about personal
14 identifier information appearing in electronically filed transcripts is small.
15

16 The survey further revealed that clerks of court, judges, and lawyers are actively
17 engaged in ensuring proper redaction of electronically filed transcripts. Specifically, a
18 significant number of clerks reported that their courts require that transcripts be filed as text-
19 searchable PDFs to facilitate redactions. Other clerks reported using software programs
20 specifically developed to identify personal identifier information. Still more clerks expressed
21 interest in the development of such programs.
22

23 The survey revealed that judges employ various means to educate counsel about their
24 redaction obligations with respect to electronically filed transcripts. A common practice is
25 to provide counsel with a card urging that personal identifier information not be elicited on
26 the record and that any such information that appears in transcripts be redacted. Similar
27 guidance is provided to counsel at the initial case conference, in formal written orders, and
28 through communication with chambers staff. Judges also intervene to cut off a line of
29 questions that appears to be eliciting personal identifier information. Judges report that they
30 also rely on chambers staff and docket clerks to alert them to the appearance of personal
31 identifier information in a transcript that will require redaction.
32

33 The survey confirms general attorney awareness of the Privacy Rules' redaction
34 requirements. Two-thirds of attorneys responding reported that they redacted personal
35 identifier information before transcripts were electronically filed. Half of attorneys surveyed
36 reported that they actively sought to avoid eliciting personal identifier information on the
37 record. Nevertheless, because 17% of responding attorneys reported that they made no effort
38 to redact transcript before electronic filing, there is plainly a need for continuing education
39 and monitoring in this area.
40

1 (3) The Fordham Conference

2
3 Participants at the Fordham Conference reinforced the conclusions drawn from the
4 survey: (a) that courts and attorneys are striving to avoid disclosure of personal identifying
5 information on the record, and (b) that the redaction procedure for electronic transcripts
6 adopted by the Judicial Conference is generally working as intended.
7

8 Two United States Attorneys stated that although the redaction requirements were
9 initially met with some displeasure by their Assistants, experience had shown that the
10 required procedures were workable and not unduly burdensome. One of the United States
11 Attorneys reported developing a standard form to facilitate the specification of pages and line
12 numbers where personal identifier information needed to be redacted.
13

14 Both government and private attorneys stated that they generally sought to avoid
15 eliciting personal identifier information in proceedings that could be transcribed. They
16 agreed that there was rarely a need for such information, and that attorneys could usually
17 avoid personal information coming into the record by applying some forethought to questions
18 asked and documents introduced into evidence. The lawyers discussed the value of reaching
19 advance agreements with opposing counsel to minimize the introduction of personal
20 identifier information.
21

22 Some Conference participants identified concern that parties in civil cases were urging
23 court reporters to redact from transcripts confidential information – such as proprietary
24 information – not falling within the categories specified in Fed. R. Civ. P. 5.2(a). Parties and
25 court reporters need to be made aware that redactions beyond those specified in Rule 5.2(a)
26 require a court order pursuant to Rule 5.2 (e) and its counterparts.
27
28

29 b. The Electronic Filing of *Voir Dire* Transcripts

30
31 (1) Concerns Attending *Voir Dire* Transcripts

32
33 Electronic filing of *voir dire* transcripts raises unique concerns and, thus, was
34 considered separately by the Privacy Subcommittee. *Voir dire* may elicit a range of personal,
35 sensitive, or embarrassing information from a juror that need not be redacted under the
36 Privacy Rules. The possibility of such information making its way from PACER access to
37 broad disclosure on the Internet poses real risks for juror harassment or even retaliation.
38 Many jurors may presently be unaware that *voir dire* transcripts will be electronically filed.
39 With such awareness, courts may find it more difficult to identify potential jurors able to
40 serve without fear or favor.

1 c. Subcommittee Conclusions

2
3 The Privacy Subcommittee concludes that the policies and practices for protecting
4 personal identifier information in electronically filed transcripts are in place and, on the
5 whole, being effectively applied by litigants and the courts. The Subcommittee suggests that
6 CACM regularly review these policies and practices in light of constant technological
7 advances. The Subcommittee also suggests continuing and expanding education efforts by
8 the courts to raise attorneys' awareness of their redaction obligations with respect to
9 electronically filed transcripts. Attorneys and court reporters also need to be made aware that
10 the redaction of material not specified in subsection (a) of the Privacy Rules requires a court
11 order.

12
13 With respect to *voir dire* transcripts, the Judicial Conference has recently provided
14 guidance for courts in balancing the right of public access – including electronic access – to
15 such transcripts with juror claims to privacy. The Subcommittee suggests that the Standing
16 Committee request CACM to monitor whether this guidance is adequate to ensure the
17 selection of fair and impartial jurors from a broad pool of persons and to safeguard against
18 retaliation and harassment.

19
20
21 **D. The Need For Rule Changes**

22
23 1. Overview

24
25 Upon careful review of the survey data and the information provided at the Fordham
26 Conference, the Privacy Subcommittee reports that, with the possible exception of the rules'
27 treatment of immigration cases, there is no significant call by the bench or bar for changes
28 to the Privacy Rules. Users of the rules generally agree that existing redaction requirements
29 are manageable and provide necessary protection against identity theft and other threats to
30 privacy presented by remote public access. Such complaints or suggestions as were heard
31 derive from the necessary learning curve involved in recent implementation of the Privacy
32 Rules. The Subcommittee thus concludes that the data collected do not support either
33 expansion or contraction of the types of information subject to redaction requirements.

34
35
36 2. Areas Specifically Considered for Changes to the Rules

37
38 a. Alien Registration Numbers

39
40 In considering possible amendments to the Privacy Rules, the Subcommittee gave

1 particular attention to the need to redact alien registration numbers insofar as they might be
2 analogized to social-security numbers. After extensive discussion and debate, including
3 consideration at the Fordham Conference, the Subcommittee concludes that redaction of
4 alien registration numbers is not warranted at this time.

5
6 Disclosure of an alien registration number, unlike a social-security number, poses no
7 significant risk of identity theft. Moreover, the Subcommittee heard from a number of court
8 clerks and Department of Justice officials, all of whom stressed that redacting alien
9 registration numbers would make it extremely difficult for the courts to distinguish among
10 large numbers of aliens with similar or identical names and to ensure that rulings were being
11 entered with respect to the correct person. Redaction would create a particularly acute
12 problem in the Second and Ninth Circuits, which have heavy immigration dockets. Given
13 the lack of any expressed support for the redaction of alien registration numbers, the Privacy
14 Subcommittee sees no reason to add them to the list of information subject to redaction under
15 subdivision (a) of the Privacy Rules.

16
17
18 b. The Exemption for Social Security Cases

19
20 The Privacy Subcommittee considered the continued need for exempting Social
21 Security cases from the redaction requirements of the Privacy Rules. The Subcommittee
22 reports no call for a change to that exemption. Further, the reason for the exemption
23 identified in 2007 pertains equally today: Social Security cases are rife with private
24 information, individual cases hold little public interest, and redaction would impose
25 unusually heavy burdens on filing parties.

26
27
28 c. The Exemption for Immigration Cases

29
30 The Privacy Subcommittee also considered the continued need for exempting
31 immigration cases from the redaction requirements of the Privacy Rules.¹⁹ Participants at the
32 Fordham Conference vigorously argued both sides of the question. The argument for
33 abrogating the exemption and affording remote public access to immigration case files was
34 that the current system gives “elite access” to those with resources to go to a courthouse that,

¹⁹ It should be noted that the Judicial Conference policy drafted by CACM provided an exemption from the redaction requirements for Social Security cases but not for immigration cases. During the process of drafting the Privacy Rules, the Department of Justice made arguments and provided data that persuaded the Privacy Subcommittee and eventually the Standing Committee that an exemption for immigration cases was warranted.

1 especially in transfer cases, might be hundreds of miles away from a party interested in the
2 information. It was argued that limiting access to the courthouse was particularly burdensome
3 for members of the media. Under the current rule, the media must often depend on the parties
4 to get information about habeas petitions and complaints in an immigration matter. It was
5 also suggested that the exemption is ineffectual in that certain information in immigration
6 cases *is* available over PACER — including the docket, identity of the litigants, and the
7 orders and decisions, which will frequently contain sensitive information about asylum
8 applicants. Thus, the media argues that the current system of access impairs First
9 Amendment interests without providing much privacy protection.

10
11 On the other hand, the Privacy Subcommittee also heard forceful arguments from
12 DOJ and court personnel in favor of the current system of limiting remote public access to
13 immigration cases. They note the explosion of immigration cases since 2002, particularly in
14 the Second and Ninth Circuits, and argue that immigration cases, especially asylum cases,
15 are replete with private information on a par with or greater than Social Security cases. That
16 personal and private information is necessary to the court’s disposition, so there is no way
17 to keep it out of the record. Moreover, it is woven throughout the record, precluding easy
18 redaction.²⁰ Further, the burden of redaction would inevitably fall on the government because
19 many petitioners are unrepresented, and imposing redaction requirements on *pro bono*
20 counsel could discourage such representation. DOJ represents that there is no simple
21 technological means presently available to redact all personal information in all the
22 immigration cases. It urges that any change to current limitations on remote public access
23 be deferred until technological advances facilitate redaction.

24
25 A compromise solution emerged at the Fordham Conference: maintaining existing
26 limitations on remote public access for immigration cases most likely to include sensitive
27 information, such as cases seeking asylum or relief under Convention Against Torture, but
28 removing the exemption for immigration cases involving transfer, detention, or deportation.
29 The Privacy Subcommittee agrees that a more nuanced approach to exempting immigration
30 cases from remote public access warrants further consideration. One area for investigation
31 is the plausibility of segregating cases by subject. For example, removal cases often present
32 claims for asylum. Another factor to be considered is a possible decline in the volume of
33 immigration cases, or types of immigration cases, which could lessen the burdens of
34 redaction. A third factor — referred to earlier in other sections of this Report — is the
35 possibility that advances in technology will ease the burdens of redaction.

36
37 The Privacy Subcommittee urges further research and consultation with interested

²⁰ A DOJ official estimated that one FOIA officer would have to spend an entire work day with one case to get the average asylum case moved to the Court of Appeals in redacted form.

1 parties before any decision is made to abrogate the exemption for immigration cases. But,
2 mindful of the significant public interest in open access generally, and in immigration policy
3 in particular, the Subcommittee suggests that the current approach to immigration cases be
4 subject to future review and possible modification.
5

6 7 **III. Summary of Findings and Recommendations**

8
9 The Privacy Subcommittee summarizes its findings and recommendations as follows:

10
11 1. The Privacy Rules are in place and are generally being implemented effectively
12 by courts and parties.
13

14 2. To ensure continued effective implementation, every other year the FJC should
15 undertake a random review of court filings for unredacted personal identifier information.
16

17 3. Also to ensure continued effective implementation of the Privacy Rules, the
18 courts should continue to educate their own staffs and members of the bar about (a)
19 redaction obligations under the Privacy Rules, (b) steps that can be taken to minimize the
20 appearance of private identifier information in court filings and transcripts, and (c) the need
21 to secure a court order under Fed. R. Civ. P. 5.2(e) or its counterparts before redacting any
22 information beyond that specifically identified in the Privacy Rules.
23

24 4. The AO should monitor technological developments and make courts and litigants
25 aware of software that would make it easier to search documents, transcripts, and court
26 records for unredacted personal identifier information.
27

28 5. At present, no best practice can be identified to support a uniform national rule
29 with respect to making plea and cooperation agreements publicly available. District courts
30 should, however, be encouraged to continue discussing their different approaches, and the
31 Standing Committee might request CACM to monitor these approaches to see if, at some
32 future time, a best practice emerges warranting a uniform rule.
33

34 6. To the extent district courts seal plea or cooperation agreements, consideration
35 might be given, where appropriate, to a “sunset provision” providing for their expiration
36 unless sealing is extended after further review and order of the court.
37

38 7. There is no need to amend the Privacy Rules either to expand or to contract the
39 type of information subject to redaction.
40

1 8. The exemption for Social Security cases should be retained in its current form.

2
3 9. The exemption for immigration cases should be retained in its current form.
4 Nevertheless, this exemption should be subject to future review in light of possible changes
5 in technology and case volumes that could ease the burden of redaction. Such review should
6 also consider whether the exemption might be narrowed to particular types of immigration
7 cases.

8
9
10
11 December, 2010

1 **Judicial Conference Standing Committee on the Federal Rules**
2 **Subcommittee on Privacy**

3
4 Hon. Reena Raggi, Chair

5
6
7 Hon. Robert L. Hinkle (Chair of Working Group on Rules Changes)

8
9 Hon. John G. Koeltl (Chair of Working Group on Transcripts)

10
11 Hon. Ronald B. Leighton (Chair of Working Group on Implementation)

12
13 Hon. Steven D. Merryday (Chair of Working Group on Criminal Cases)

14
15 Hon. David H. Coar

16
17 Hon. James B. Haines, Jr.

18
19 Hon. John R. Tunheim

20
21 James F. Bennett, Esq.

22
23 Leo P. Cunningham, Esq.

24
25 Elizabeth J. Shapiro, Esq., Department of Justice

26
27 Jonathan Wroblewski, Esq., Department of Justice

28
29 Professor Sara Sun Beale

30
31 Professor Edward H. Cooper

32
33 Professor S. Elizabeth Gibson

34
35 Professor Catherine T. Struve

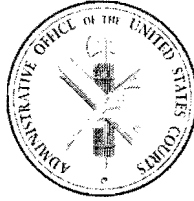
36
37 Professor Daniel J. Capra, Reporter

TAB
11-A

Attachment 1 to Privacy Subcommittee Report

Report by Administrative Office on Research into Unredacted

Social Security Numbers Reported by PublicResource.org



JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

August 24, 2009

Via E-mail

MEMORANDUM TO: PRIVACY SUBCOMMITTEE

FROM: HENRY WIGGLESWORTH & HEATHER WILLIAMS

SUBJECT: SOCIAL SECURITY NUMBERS IN DISTRICT COURT CASE FILES

BACKGROUND

On December 1, 2007, Federal Rule of Criminal Procedure 49.1 and Federal Rule of Civil Procedure 5.2 (“the privacy rules”) took effect, providing that any “electronic or paper filing” in district court that contains a social security number (SSN) must be redacted so that only the last four digits of the SSN appear in the filing. In October 2008, Carl Malamud, President of Public.Resource.Org, sent Judge Lee H. Rosenthal a letter concerning the appearance of unredacted SSN’s in the electronic case files of federal district courts – publicly available through PACER – notwithstanding the redaction requirement of the privacy rules. Mr. Malamud referred in his letter to having found 2,282 “suspect documents” in the case files of 32 different districts. He provided a CD to Judge Rosenthal containing a spreadsheet of these 32 districts. A copy of Mr. Malamud’s letter and spreadsheet are attached as **Appendix A**. This memorandum analyzes the post-2007 cases from Mr. Malamud’s list.

RESULTS OF ANALYSIS

As shown in **Table A** below, we found 217 documents containing 368 SSN’s filed after December 1, 2007. This number excludes 93 documents (30% of the 310 documents on Malamud’s list), which were inaccessible either because they were illegible or had been sealed by the district court after the court had become aware that the document contained one or more SSN’s. Table A also shows the number of SSN’s that were either waived by the party filing it (91 SSN’s) or exempted from the redaction requirement (23 SSN’s). Please note that, for the purposes of this analysis, multiple filings of the same document containing the same SSN were counted only once.

Approximately 70% of the SSN's we found (260 out of 368)¹ did not fall into either the waiver or exemption categories. Two thirds of this amount (178) appear to have been filed by a handful of actors in eight districts. For example, in Alaska, 10 of the 11 unredacted SSN's appeared in applications for writs of garnishment filed by the U.S. Attorney; in Massachusetts, all 7 SSN's were filed by defendants in a single case who were seeking to obtain the criminal history of plaintiff's witnesses; and in the Southern District of California, 81 out of 85 SSN's were filed as part of a list of shareholders by a defendant corporation. This information is detailed in **Table B**, below.

As Table A further demonstrates, 24% of the SSN's we located (91 out of 368) were filed by the possessor of the SSN and therefore constituted a waiver under the privacy rules. Of this amount, one tenth (9 out of 91) were filed by a party proceeding pro se. In addition, about 6% of the total number of SSN's (23 out of 368) were exempt from the redaction requirement. These exemptions fell largely into categories related to law enforcement: records of other courts or agencies, arrest or search warrants, and official records of state-court proceedings.

The remaining SSN's that were neither exempt from the redaction requirement, nor waived, nor filed by one of the handful of actors mentioned above, thus constituted 22% of the total (82 out of 368). They fell into a variety of categories, from pleadings themselves to various medical, financial, employment, and law-enforcement records. A specific break-down of *all* the SSN's is provided in **Table C**.

Finally, seven of the 32 districts on Malamud's list – the Districts of Arizona, Oregon, Southern Texas, Eastern Louisiana, Southern Ohio, Middle Pennsylvania, and Puerto Rico – had no SSN's filed after December 1, 2007. In addition, one district – the Central District of Illinois – did not list dates of filings and therefore could not be analyzed. Another – the Eastern District of Pennsylvania – had only one case, but that case was unavailable on PACER.

METHODOLOGY

We analyzed the data from the 32 district courts submitted by Mr. Malamud using PACER to access the electronic case file for each case that appeared to have had a SSN posted after December 1, 2007, the effective date of the privacy rules. We examined the specific document and page number cited by Mr. Malamud where one or more SSN's supposedly appeared. Once we located a document that contained one or more SSN's, we printed the page where the SSN appeared and also the first page of the document in which it appeared. These print-outs are attached as **Appendix B** and are numbered, sequentially within each district. These numbers correspond to handwritten numbers in the left-hand margin of the list provided by Mr. Malamud.

After locating the documents, we analyzed each appearance of a SSN to determine whether it fell into an exemption to the privacy rules. Due to the volume of SSN's, this determination was made based upon a plain reading of the rule, rather than extensive research

¹ There is a discrepancy of six SSN's between this amount (260), as reflected in Table C, and the number of non-exempt, non-waived SSN's that can be derived from Table A (254).

into case law interpreting the rule. The privacy rules exempt the following documents from the redaction requirement:

- (1) a financial account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Criminal Rule 49.1(d) ["Filings made Under Seal"] or Civil Rule 5.2(c) or (d) ["Social Security Appeals and Immigrations Cases"]
- (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;
- (7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;
- (8) an arrest or search warrant; and
- (9) a charging document and an affidavit filed in support of any charging document.

We also looked at each SSN to determine whether it fell under the waiver provision of the privacy rules, which provides that a person waives the protection of the rules as to that person's own information by filing it without redaction and not under seal. *See* Fed. Crim. P. 49.1(h); Fed. R. Civ. P. 5.2(h).

TABLE A: Incidence of SSN's in District Court Case Files

District Court	Documents on Malamud's List Filed After 12/01/07 That Contain SSN'S	Inaccessible Documents	Number of SSN's²	Waivers	Exemptions
M.D. Ala.	78	9	67	32	13
D. Alaska	11	0	11	0	0
N.D. Cal.	17	0	15	2	1
S.D. Cal.	14	0	93	7	1
D. Col.	2	0	2	2	0
D. Conn.	1	0	1	1	0
D. Del.	11	1	13	3	0
D.D.C.	25 ³	24	1	1	0
S.D. Fla.	1	0	2	0	0
D. Guam	5	1	4	0	0
D. Haw.	1	0	1	0	0
N.D. Ill.	19	0	71	6	1
D. Md.	2	0	2	2	0
D.N. Mar. I.	1	0	1	1	0
D. Mass.	14	11	7	0	0
D. Minn.	1	0	1	1	0
D. N.J.	3	0	3	2	0
S.D. N.Y.	41 ⁴	0	58	21	4
W.D. Pa.	4	1	2	0	2
D. R.I.	6	2	4	2	1
D. Vt.	1	1	N/A	N/A	N/A
E.D. Va.	9	0	9	8	0
Fed. Cl.	43	43	N/A	N/A	N/A
Total	310	93	368	91	23
% of Total	100%	30%	100%	24%	6%

² Approximately 24% (69) of these SSN's had been redacted by the court or parties. (Almost all redacted SSN's – 65 out of 69 -- were from the Middle District of Alabama).

³ Two of the SSN's on Malamud's list appear to be hearing numbers, not SSN's, and were not counted.

⁴ Several of the SSN's on Malamud's list appear to be inmate identification numbers and were not counted.

TABLE B: Multiple Filings of SSN's by Same Actor

District Court⁵	Number of SSN's Filed by One Actor Out of Total Number of Non-exempt, Non-waived SSN's Filed in This District	Type of Actor	Type of Filing
D. Alaska	10/11	United States Attorney	Applications for writ of garnishment
N.D. Cal.	6/12	Attorneys on both sides	Guaranty form as an exhibit to a variety of pleadings and motions
S.D. Cal.	81/85	Defendant corporation	Shareholder list
D. Del.	5/10	Represented plaintiff trustees of litigation trust	Creditor mailing list as an exhibit to an Affidavit of Mailing
D. Guam	3/4	United States Attorney	Exhibit Lists
N.D. Ill.	50/64	Two labor unions (two separate cases)	Exhibits to a variety of pleadings and motions
D. Mass.	7/7	Defendants in one case	Seeking to obtain the criminal history of plaintiff's witnesses
S.D. N.Y.	16/33	(1) Defendant company; (2) Attorney for defendant	(1) Payroll audit as an exhibit to a statement of damages; (2) Declarations of Service
Total	178/226	N/A	N/A

⁵ This chart does not contain all district courts from Malamud's list. It contains only those courts whose records included multiple filings of SSN's by the same actor.

TABLE C: Types of Filings with SSN's

Type of Filing	Number of Such Documents Filed After 12/01/07 That Contain SSN's ⁶	Number of SSN's in This Type of Document
Pleadings ⁷	24	29
Declaration/Affidavit of Service	14	18
Payroll Information	9	48
Guaranty Waiver	8	13
Criminal Offender Information	8	16
Medical Records	6	6
Personnel Records	5	10
Declaration of IRS Agent	4	4
Plaintiff Profile Form	3	4
Employee Service Record	3	3
Exhibit List	3	3
Subpoena	3	3
Report of Investigation	3	3
Report and Recommendation	2	3
Sharehold List	2	87
Income Tax Return	2	2
Accident Report	1	2
Inventory of Procured Evidence	1	1
Curriculum Vitae	1	1
Record of Arrest	1	1
Military Records	1	1
Record of Judgment	1	1
Authorization for Interpreting Services	1	1
Total	106	260

⁶ This column does not include documents that were sealed, waivers, or exemptions.

⁷ This category includes all SSN's that were located in a pleading, rather than in an exhibit.

Pleadings included writs of garnishment (10 documents, 11 SSN's), complaints (4 documents, 4 SSN's), replies to motions (4 documents, 5 SSN's), motions (3 documents and 3 SSN's), and one answer (1 document, 1 SSN).

**TAB
11-B**

Attachment 2 to Privacy Subcommittee Report

Report by Federal Judicial Center

**On Infrequency of Unredacted Social Security Numbers in
Federal Court Filings**

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

April 5 2010

Memorandum

To: Hon. Reena Raggi, Chair, Privacy Protection Subcommittee
From: George Cort and Joe Cecil, Federal Judicial Center
Subject: SOCIAL SECURITY NUMBERS IN FEDERAL COURT DOCUMENTS

Summary of Findings: The Center identified 2,899 documents with one or more unredacted Social Security numbers among the almost ten million documents filed in federal district and bankruptcy courts in a recent two-month period. Seventeen percent of these documents appeared to qualify for an exemption from the redaction requirement under the relevant privacy rules. An unknown number of the remaining documents may qualify for a waiver of the privacy protection under the rules, but we could not determine whether such a waiver applied to the documents identified in this study.

Search Methodology: Your Subcommittee asked the Center to identify unredacted Social Security numbers in recently filed federal court documents.¹ We first identified almost ten million unsealed documents filed during November and December 2009, in all 94 district courts and 92 of the 94 bankruptcy courts.² We

¹ The Federal Rules of Civil, Criminal, Bankruptcy, and Appellate Procedure were amended in December 2007 to protect privacy of individuals identified in court documents by requiring redaction of Social Security numbers, taxpayer-identification numbers, birth dates, the names of minors, and financial-account numbers. Our study sought to identify only documents containing Social Security numbers, including Social Security numbers designated in the document as taxpayer identification numbers, employee identification numbers, and financial account numbers. Generally, the privacy rules include exceptions from the redaction requirement for filings made under seal; official records of a state court; administrative or agency proceedings; financial account numbers identifying property that may be subject to forfeiture; court records filed before December, 2007; *pro se* filings in actions seeking a writ of *habeas corpus* or to set aside a criminal sentence; and actions for Social Security or immigration benefits or detention. The criminal privacy rule includes additional exceptions for documents related to a criminal investigation prepared before filing of a criminal charge; charging documents and affidavits prepared in support of charging documents; and arrest or search warrants. The bankruptcy privacy rule includes an additional exception recognizing the statutory requirement that the Social Security number of a non-attorney bankruptcy petition preparer appear on the proper form. All of the privacy rules recognize that a filer waives the protection as to the filer's own information by filing it without redaction and not under seal. These rules appear in Appendix A. This study did not examine documents filed in appellate cases or documents filed in paper form.

² One bankruptcy court did not maintain its documents in a format that permitted an electronic search of the text. A second bankruptcy court was not included in the study because of a miscommunication in our office that delayed our access to the court's data.

identified documents to search by using a computer scripting language to query bankruptcy and district court electronic case management data in the courts' CM/ECF backup databases. The Structure Query Language (SQL) program identified all documents filed in the bankruptcy and district courts from November 1 through December 31 2009. We excluded all sealed records and other documents that were designated as unavailable on the courts' electronic public access systems (PACER).

We then ran a Practical Extraction and Report Language (PERL) program to identify text that corresponded to the distinct Social Security number format (e.g., 123-45-6789). The PERL program was unable to convert certain types of non-text documents, such as PDF documents stored as static images, and we were unable to detect Social Security numbers that might reside within such documents. We then reviewed the search output files and visually reviewed over 3,200 filed documents to determine if the string of characters appeared to be a valid Social Security number. Where multiple numbers appeared in a document, we examined each number in order until we located a valid Social Security number. If the number appeared to be a valid Social Security number, we then examined the context of the number within the document to make a preliminary determination of the basis for a possible exemption from the redaction requirement under the privacy rules.

Incidence of Unredacted Social Security Numbers: As indicated in Table 1 below, we found 2,899 documents with unredacted Social Security numbers, which is approximately one out of every 3,400 court documents examined. We found a greater number of documents containing Social Security numbers filed in bankruptcy courts, which proportionally have more documents filed than in district courts.

Table 1: Documents with Unredacted Social Security Numbers

DOCUMENTS	Total	Bankruptcy	Civil + Criminal
Examined	9,830,721	7,738,541	2,092,080
With SSN numbers	2,899	2,244	655
Ratio SSN/Examined	1 : 3,391	1 : 3,448	1 : 3,194

Included among the documents with Social Security numbers were 71 instances of unsuccessfully redacted Social Security numbers. Such unsuccessful attempts

included strikeouts, scratchouts, blackouts, and use of word processing applications that remove sections of text. These unsuccessful redaction efforts still allowed the Center's electronic text search program to detect the full Social Security number. Of particular concern is the apparent use of word processing redaction techniques that retain the Social Security number in the metadata that are retained when the documents is converted to a PDF format for filing in court.³ The full Social Security number appeared when the apparently redacted text was cut and pasted into a word processing document.

Approximately 91% of the 2,899 documents (or 2,629 documents) contain entries that clearly appear to be Social Security numbers. Nine percent of the documents (or 270 documents) contain entries following the Social Security number format that were identified as taxpayer identification numbers, financial account numbers, or employee identification numbers. We believe these numbers are identical to the Social Security number of the person identified in the document.⁴

We counted only documents containing Social Security numbers and did not attempt to count the number of distinct Social Security numbers that appeared in the documents. Still, we were surprised by the prevalence of documents with Social Security numbers for more than one individual. We estimate that approximately 20% of the 2,899 documents included an unredacted Social Security number for more than one person, most often the Social Security number of a joint debtor. We also found numerous documents containing Social Security numbers for persons who were not part of the litigation. For example, some bankruptcy documents included the debtor's income tax return with the Social Security number of the tax preparer remaining unredacted. Some commercial bankruptcy documents listed the Social Security numbers of creditors, employees or investors in the bankrupt enterprise. One such bankruptcy document listed 122 Social Security numbers for creditors. The problem of Social Security numbers of third parties is not limited to bankruptcy documents. One document filed in an MDL product liability action, for example, listed unredacted Social Security numbers for over 300 of the claimants.

³ For a discussion of the problems of redacting metadata in electronically-filed court documents, see Guidance on Redacting Personal Data Identifiers in Electronically-Filed Documents ([http://www.cadc.uscourts.gov/internet/home.nsf/Content/Guidance%20on%20Redacting%20Personal%20Data%20Identifiers%20in%20Electronically%20Filed%20Documents/\\$FILE/ECF%20Redaction%20Guide.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/Content/Guidance%20on%20Redacting%20Personal%20Data%20Identifiers%20in%20Electronically%20Filed%20Documents/$FILE/ECF%20Redaction%20Guide.pdf)) and Effective Personal-Identity and Metadata Redaction Techniques for E-Filing (<http://www.njd.uscourts.gov/cm-ecf/RedactTips.pdf>).

⁴ We also believe that our results underestimate the extent to which Social Security numbers may be deduced from the documents examined in this sample. We did not count among the documents with Social Security numbers those documents that identified the suspect number as a general account number, student identification number, and other identification number, even if the suspect number conformed to the Social Security number format. Many of the excluded documents with commercial and personal services account numbers and student identification numbers appeared to be based on Social Security numbers and often shared the last four digits of the redacted Social Security number.

We noticed that full Social Security numbers in bankruptcy documents often appeared in response to a request on official bankruptcy forms for only the last four digits of the Social Security number. For example, we estimate that approximately 450 of the 2,899 documents we identified as containing unredacted Social Security numbers were *Bankruptcy Form 7: Statement of [Debtor's] Financial Affairs*. The form requires debtors to list the names of businesses of the debtor and the Social Security number or tax ID number associated with the business. Even though the current version of the form asks for only the last four digits of the Social Security number, these documents reported the full Social Security number. (Some of these forms also appeared to be outdated and asked for the full Social Security number instead of just the last four digits.) Social Security numbers also frequently appeared on the debtor's employee pay stubs submitted as exhibits in bankruptcy filings.

We also found Social Security numbers appearing on 284 submissions of *Bankruptcy Form 21: Statement of Social Security Number or Individual Tax Identification Number*. This form requires the debtor to enter the unredacted Social Security number and is not supposed to be filed as part of the court record. When such documents do appear with unredacted Social Security numbers, they often are inserted among numerous other documents that had been combined into a single bankruptcy filing.

Unredacted Social Security numbers in civil and criminal cases tend to show up in exhibits, depositions, and interrogatories. In criminal cases, Social Security numbers often appear in judgment and sentencing orders. Social Security numbers also appear in habeas corpus petitions filed by US attorneys seeking custody of an inmate serving a sentence in a state or local facility.

Exemptions to the Redaction Requirement: As indicated in Table 2 below, approximately 17% of the 2,899 documents (or 491 documents) we identified as containing Social Security numbers appear to qualify for an exemption from the redaction requirement under the rules. We made only a preliminary assessment of the basis for an exemption since we were able to examine only the specific document containing the Social Security number and were not able to interpret the role of this document in the larger context of the litigation. For example, we were unable to identify the party filing the document and were, therefore, unable to identify documents filed by *pro se* litigants that might be exempt from the redaction requirement. (We do note in the table those instances where the document on its face indicates that it was obviously filed by a *pro se* litigant, which more accurately can be regarded as a waiver of the privacy protection.)

Table 2: Preliminary Assessment of Documents with Social Security Numbers that May Qualify as Exemptions to the Redaction Requirement⁵

DOCUMENTS	TOTAL	BANKRUPTCY	CIVIL	CRIMINAL
Possible Basis for Exemption				
<i>State Court Proceeding</i>	160	98	58	4
<i>Non-Atty. Bankruptcy Preparer</i>	125	125	0	0
<i>Obviously Pro Se</i>	86	9	68	9
<i>Agency Proceeding</i>	56	13	40	3
<i>SSN of Filing Attorney</i>	34	28	5	1
<i>Charging Document/Affidavit</i>	17	0	0	17
<i>Filed before December, 2007</i>	4	0	0	4
<i>Arrest/Search Warrant</i>	4	0	0	4
<i>Criminal Investigation</i>	3	0	0	3
<i>Order Regarding SS Benefits</i>	1	0	0	1
<i>Forfeiture Account Number</i>	1	0	1	0
SUBTOTAL	491	273	172	46
No Apparent Basis for Exemption or Waiver	2,408 (83%)	1,971 (87%)	352 (67%)	85 (65%)
TOTAL	2,899	2,244	524	131

⁵ Although the privacy rules allow an exemption for an action for immigration benefits or detention, no such document was found.

The most common basis for an exemption was the filing of a record of a state court proceeding. In bankruptcy proceedings this occurred, for example, when a state court order resolving a previous dispute or granting a divorce was included among the filings. Criminal cases sometimes included state court records indicating state prosecution of previous criminal activity.

We found 125 documents that included the Social Security number for a non-attorney bankruptcy petition preparer. This number is required by statute to appear on the document in unredacted form.⁶ In addition we found 34 documents where the filing attorney included his or her Social Security number with the filing, even though no Social Security number was requested. Often this was the result of some request for payment for services rendered or to be rendered.

An unknown number of the 2,408 documents that do not appear to meet the standards for an exemption may still involve a waiver of protection under the privacy rules. Such a waiver arises when a person files his or her own private information without redaction and not under seal.⁷ As noted above, our search technique did not permit us to identify the party filing the document and accurately assess the likelihood of such a waiver. However, we did determine that among those documents containing Social Security numbers with no apparent basis for an exception to the redaction requirement were 248 documents from cases with one or more *pro se* litigants. (These are not included in the “obviously *pro se*” count in Table 2.) It is likely that some of these documents may involve a waiver of the redaction requirement.

⁶ 11 U.S.C. § 110.

⁷ A waiver also may arise when a party authorizes his or her attorney to file a document with the private information unredacted. We have no basis on which to assess whether such an explicit authorization was made in counseled cases.

Appendix A: Federal Procedural Rules Protecting Individual Privacy

Federal Rules of Civil Procedure

Rule 5.2. Privacy Protection for Filings Made with the Court

(a) Redacted Filings.

Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement.

The redaction requirement does not apply to the following:

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Rule 5.2(c) or (d); and
- (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases.

Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from

removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal.

The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders.

For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal.

A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List.

A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers.

A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

Federal Rules of Criminal Procedure

Rule 49.1. Privacy Protection For Filings Made with the Court

(a) Redacted Filings.

Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials;
- (4) the last four digits of the financial-account number; and
- (5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement.

The redaction requirement does not apply to the following:

- (1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record is not subject to the redaction requirement when originally filed;
- (5) a filing covered by Rule 49.1(d);
- (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;
- (7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;
- (8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) Immigration Cases.

A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) Filings Made Under Seal.

The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders.

For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal.

A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List.

A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers.

A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

Federal Rules of Bankruptcy Procedure

Rule 9037. Privacy Protection For Filings Made with the Court

(a) Redacted filings.

Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

(b) Exemptions from the redaction requirement.

The redaction requirement does not apply to the following:

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
 - (2) the record of an administrative or agency proceeding unless filed with a proof of claim;
 - (3) the official record of a state-court proceeding;
 - (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
 - (5) a filing covered by subdivision (c) of this rule; and
 - (6) a filing that is subject to § 110 of the Code.
- (c) Filings made under seal.**

The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.

(d) Protective orders.

For cause, the court may by order in a case under the Code:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(e) Option for additional unredacted filing under seal.

An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) Option for filing a reference list.

A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(g) Waiver of protection of identifiers.

An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

TAB
11-C

Attachment 3 to Privacy Subcommittee Report

Report by Administrative Office on Local Rules

on Redaction of Private Information

TO: Privacy Subcommittee
DATE: September 1, 2010
FROM: Heather L. Williams, Administrative Office
RE: Local Privacy Rules

MEMORANDUM

1. BACKGROUND.

In September 2009, Professor Capra requested that I complete a comprehensive survey of the redaction requirements found in the local civil and criminal rules of the ninety-four district courts. This survey was designed to focus particularly on reporting those rules that: (1) add redaction requirements that do not exist in the federal privacy rules; (2) subtract redaction requirements that exist in the federal rules; (3) modify other requirements or standards set forth in the federal rules; and (4) purport to replicate the federal rule, but state the standard in a different way. My original survey (completed in 2009) has been updated to include the most recent local rule amendments, many of which were made in January and February 2010.

2. PRELIMINARY FINDINGS.

My survey of local redaction rules produced a variety of interesting results, each of which is detailed at length in the appendices to this memorandum. To begin, fifty-nine districts do not include a stand-alone redaction provision in their local rules. (*See* Appendix 1.A for a list of these fifty-nine districts. A “stand-alone” redaction provision is a rule provision in which standards relating to redaction are discussed at some length.) Thirty-five districts *do*, however, include a stand-alone redaction provision in their local rules. (*See* Appendix 1.B for this list.)

Of the thirty-five districts whose local rules contain a stand-alone redaction provision, thirty districts have rules that outline standards for redacting pleadings, but do not mention redacting transcripts. Three districts have rules that outline standards for redacting transcripts, but do not mention redacting pleadings. Two districts have rules that outline standards for redacting pleadings *and* transcripts. (*See* Appendix 2 for a complete list of these districts.) Because transcript redaction is not explicitly mentioned in the federal privacy rules, local rules that outline standards for transcript redaction are excluded from the remainder of this report. Instead, the report focuses on those rules that satisfy one or more of the criteria listed above.

3. RULES THAT ADD REQUIREMENTS TO THE FEDERAL RULES.

My survey focused, first, on locating local rules that add redaction requirements not found in the federal rules. (Districts whose local rules suggest or recommend additional redactions or include warnings to use additional caution when filing certain types of documents are not included in this category. Only those districts whose local rules impose a *mandatory*

additional redaction requirement are included here.) Of the thirty-five districts that have local redaction rules, ten districts' local rules add one or more redaction requirements that are not included in the federal rules. These requirement-adding rules fall into one of two categories.

First, nine districts' local redaction rule includes "home address" in the redaction requirements for civil cases. The redaction of home addresses is required by Fed. R. Crim. P. 49.1. It is *not* required under Fed. R. Civ. P. 5.2. Therefore, any inclusion of a home address in a civil rule's redaction requirements, or in a rule that does not specify its type, but presumably applies to both civil and criminal cases, was counted as adding a requirement not found in the federal rules. (*See* Appendix 3.A for a list of these districts and their relevant rules.)

Second, one district has a local redaction rule that contains a unique redaction requirement not found in either the federal civil or criminal privacy rules. The District Court for the Southern District of Illinois requires that drivers' license numbers be redacted (so that only the last four digits of the number are used in filings). This requirement is not found in either Fed. R. Civ. P. 5.2 or Fed. R. Crim. P. 49.1 and is therefore a unique local rule addition.

4. RULES THAT SUBTRACT REDACTION REQUIREMENTS FROM THE FEDERAL RULES.

Of the thirty-five districts that have local redaction rules, seven districts' rules subtract one or more of the redaction requirements included in the federal rules. These requirement-subtracting rules fall into one of two categories. First, six districts' local redaction rule does not include "home address" in the redaction requirements for criminal cases. Fed. R. Crim. P. 49.1 requires that home addresses be redacted in criminal cases. Therefore, the absence of a statement requiring that "home addresses" be redacted in a local criminal rule or in a rule that applies to both criminal and civil cases (prefaced, as many districts do, by a statement such as "in criminal cases only") was counted as subtracting a requirement from the federal rule. (*See* Appendix 4.A. for a list of districts whose rules subtracted this element from the federal rule.)

Second, one district has a local redaction rule that eliminates a redaction requirement other than "home address" found in the federal rule. The District Court for the Eastern District of North Carolina only requires that minors' names be redacted. Therefore, the local rule subtracts the following elements from the federal rule: (1) social security numbers or taxpayer-identification numbers; (2) birth dates; (3) financial account numbers; and (4) home addresses in criminal cases. (*See* Appendix 8 for the full text of the local redaction rule from this district.)

5. RULES THAT MODIFY OTHER REQUIREMENTS FOUND IN THE FEDERAL RULES.

Excluding the addition or subtraction of the redaction requirements discussed above, the local rules differ from the federal rules in a variety of ways. Many local rules do not include or address the requirements specified in the other subsections of the federal privacy rules. For example, of the thirty-five districts with local redaction rules, twenty-six do not mention the requirements set out in subsection (b) of the federal rules. (Subsection (b) provides a list of certain kinds of documents that are exempt from the redaction requirement.) Three districts outline exemptions to the redaction requirement, but do not include all of the exemptions

provided for in the federal rules. (*See* Appendix 5.A. for a list of these districts.) Appendix 5 provides a comprehensive list of those local redaction rules that do not include or reference one or more of the various requirements found in subsections (b) through (h) of the federal rules.

6. OTHER DIFFERENCES OF INTEREST AND STATING THE STANDARDS DIFFERENTLY.

In six districts, the local redaction rule incorporates “suggestions” for exercising additional caution when filing certain kinds of documents. (*See* Appendix 6.A.) In two districts (the Central District of California and the District of Idaho), the local redaction rule includes a list of documents that must be excluded from the public case file. (*See* Appendix 6.B.) Three districts have included unique requirements in their local rules that are not included in the federal rules. (A list and brief description of each of these rules is provided in Appendix 6.C.)

In one district, the amount of information that must be redacted differs from the amount required under the federal rules. The local rules for the Eastern District of California require filers to use a minor’s initials in criminal actions. In civil actions, the local rule directs filers to use a minor’s initials “when federal or state law requires the use of initials, or when the specific identity of the minor is not necessary to the case or individual document.” The local rule also provides that the “the name or type of account and the financial institution where maintained” should be redacted, in addition to financial account numbers whenever the latter are included. (*See* Appendix 6.D. The full text of this rule (and all others) is available in Appendix 8.)

Twenty-five local rules explicitly state that lawyers are responsible for satisfying redaction requirements when filing documents. (*See* Appendix 6.E.) A statement of this nature is recommended by the “Proposed Guidelines for United States District Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files,” a copy of which is attached to this memorandum. Twenty local rules also include the additional language (typically stating that the rule is created “in compliance with the policy of the Judicial Conference) recommended by the “Proposed Guidelines” document. (*See* Appendix 6.F.).

Appendix 6 also lists those rules that either use a particularly unique format when stating their local redaction requirements, or follow a commonly-used format for local privacy rules. (Often, the formatting chosen affects the manner in which the redaction standard is stated.)

APPENDIX 1 – WHICH DISTRICTS HAVE LOCAL REDACTION RULES?

A. Districts Whose Local Rules Do *Not* Contain a Stand-Alone Redaction Provision:

1. Alabama Middle
2. Alabama Northern
3. Alabama Southern
4. Alaska
5. Arizona
6. Arkansas Eastern
7. Arkansas Western
8. California Northern
9. California Southern
10. Colorado
11. Delaware
12. Florida Middle
13. Florida Northern
14. Florida Southern
15. Georgia Northern
16. Guam
17. Hawaii
18. Central Illinois
19. Northern Illinois
20. Indiana Northern
21. Indiana Southern
22. Kansas
23. Kentucky Eastern
24. Kentucky Western
25. Maine
26. Maryland
27. Michigan Western
28. Missouri Eastern
29. Missouri Western
30. Montana
31. Nebraska
32. Nevada
33. New Hampshire
34. New Mexico
35. New York Eastern
36. New York Southern
37. New York Western
38. North Dakota
39. Ohio Southern
40. Oklahoma Eastern

41. Oregon
42. Pennsylvania Western
43. Rhode Island
44. South Carolina
45. South Dakota
46. Tennessee Eastern
47. Tennessee Middle
48. Tennessee Western
49. Texas Northern
50. Texas Southern
51. Texas Western
52. Federal Claims Court
53. Vermont
54. Virginia Eastern
55. Washington Eastern
56. Washington Western
57. West Virginia Southern
58. Wisconsin Eastern
59. Wisconsin Western

B. Districts Whose Local Rules Contain a Stand-Alone Redaction Provision:

1. California Central
2. California Eastern
3. Connecticut
4. District of Columbia
5. Georgia Middle
6. Georgia Southern
7. Idaho
8. Illinois Southern
9. Iowa Northern
10. Iowa Southern
11. Louisiana Eastern
12. Louisiana Middle
13. Louisiana Western
14. Massachusetts
15. Michigan Eastern
16. Minnesota
17. Mississippi Northern
18. Mississippi Southern
19. New Jersey
20. New York Northern
21. North Carolina Eastern
22. North Carolina Middle
23. North Carolina Western

24. Northern Mariana Islands
25. Ohio Northern
26. Oklahoma Northern
27. Oklahoma Western
28. Pennsylvania Eastern
29. Pennsylvania Middle
30. Puerto Rico
31. Texas Eastern
32. Utah
33. Virginia Western
34. Virgin Islands
35. West Virginia Northern

APPENDIX 2 – TOPICS COVERED BY THE LOCAL REDACTION RULES:

A. Districts Whose Redaction Rules Outline Standards for Redacting Pleadings:

1. California Central
2. California Eastern
3. Connecticut
4. District of Columbia
5. Georgia Middle
6. Georgia Southern
7. Idaho
8. Southern Illinois
9. Iowa Northern
10. Iowa Southern
11. Louisiana Eastern
12. Louisiana Middle
13. Louisiana Western
14. Massachusetts
15. Michigan Eastern
16. Mississippi Northern
17. Mississippi Southern
18. New Jersey
19. New York Northern
20. North Carolina Eastern
21. North Carolina Middle
22. North Carolina Western
23. Northern Mariana Islands
24. Ohio Northern
25. Oklahoma Northern
26. Pennsylvania Eastern
27. Pennsylvania Middle
28. Puerto Rico
29. Virginia Western
30. Virgin Islands

B. Districts Whose Redaction Rules Outline Standards for Redacting Transcripts:

1. Minnesota
2. Oklahoma Western
3. Texas Eastern

C. Districts Whose Redaction Rules Discuss Redacting Pleadings *and* Transcripts:

1. Utah

2. West Virginia Northern

APPENDIX 3 – ADDITIONAL REDACTION REQUIREMENTS:

- A. Districts Whose Local Redaction Rule Includes “Home Address” in its Requirements for Redaction in Civil Cases:**
 1. California Central – *L.R. 79-5.4*
 2. Georgia Southern – **LR 8**
 3. Idaho – **CIVIL RULE 5.5**
 4. Louisiana Eastern – **LR 5.7.12W**
 5. Louisiana Middle – **LR 5.7.12W**
 6. Louisiana Western – **LR 5.7.12W**
 7. New York Northern – **Rule 8.1**
 8. Northern Mariana Islands – **LR 5.2**
 9. Puerto Rico – **RULE 5.2**

- B. Districts Whose Local Redaction Rule Includes a Unique Requirement for Redaction That Does Not Exist in Either the Federal Civil or Criminal Rules.**
 1. Southern Illinois – **Rule 5.1(d)**

APPENDIX 4 – SUBTRACTED REDACTION REQUIREMENTS:

- A. Districts Whose Local Redaction Rule Does Not Include “Home Address” in the Redaction Requirements for Criminal Cases.**
1. Iowa Northern – **LR 10**
 2. Iowa Southern – **LR 10**
 3. Massachusetts – **RULE 5.3**
 4. North Carolina Middle – **LR 7.1**
 5. North Carolina Western – **LCrR 5.2**
 6. Virgin Islands – **Rule 5.4**
- B. Districts Whose Local Redaction Rule Subtracts Other Redaction Requirements.**
1. North Carolina Eastern – **Rule 17.1**

APPENDIX 5 – MODIFICATION OR OMISSION OF OTHER REQUIREMENTS:

A. Districts Whose Local Redaction Rule Does Not Include the Requirements Set out in Subsection (b) of the Federal Rules. Fed R. Civ. P. 5.2(b) and Fed. R. Crim. P. 5.2(b) provide a list of certain kinds of documents that are exempt from the redaction requirement. The federal civil and criminal rules do exempt different documents. Because by and large, the local rules do not include this requirement at all, I have not listed precisely which exemptions are missing from each local rule. Rules followed by an asterisk list *some* exemptions, but not all of the exemptions covered in the federal rules.

1. California Central – **L.R. 79-5.4**
2. California Eastern – **RULE 39-140***
3. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
4. District of Columbia – **LCvR 5.4**
5. Georgia Southern – **LR 8**
6. Idaho – **CIVIL RULE 5.5**
7. Southern Illinois – **RULE 5.1**
8. Iowa Northern – **LR 10**
9. Iowa Southern – **LR 10**
10. Louisiana Eastern – **LR 5.7.12W**
11. Louisiana Middle – **LR 5.7.12W**
12. Louisiana Western – **LR 5.7.12W**
13. Massachusetts – **Rule 5.3**
14. Mississippi Northern – **Rule 8.1**
15. Mississippi Southern – **Rule 8.1**
16. New Jersey – **ECF Policy 17.**
17. New York Northern – **Rule 8.1***
18. North Carolina Eastern – **Rule 17.1**
19. North Carolina Middle – **LR 7.1**
20. North Carolina Western – **LCrR 5.2**
21. Northern Mariana Islands – **LR 5.2**
22. Ohio Northern – **Local Civ Rule 8.1,* Crim Rule 49.1**
23. Oklahoma Northern – **L CvR 5.3**
24. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
25. Pennsylvania Middle – **LR 5.2**
26. Puerto Rico – **RULE 5.2**
27. Virginia Western – **Rule 8**
28. Virgin Islands – **Rule 5.4**
29. West Virginia Northern – **LR Gen P 5.08**

B. Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (c) of the Federal Rules. Fed. R. Civ. P. 5.2(c) provides information

about electronic files for immigration cases and social security appeal cases. Fed. R. Crim. P. 49.1(c) states that immigration-related filings are governed by Civil Rule 5.2(c).

1. California Central – **L.R. 79-5.4**
2. California Eastern – **RULE 39-140**
3. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
4. District of Columbia - **LCvR 5.4**
5. Georgia Middle – **Rule 5.4**
6. Georgia Southern – **LR 8**
7. Idaho – **CIVIL RULE 5.5**
8. Southern Illinois – **RULE 5.1**
9. Iowa Northern – **LR 10**
10. Iowa Southern – **LR 10**
11. Louisiana Eastern – **LR 5.7.12W**
12. Louisiana Middle – **LR 5.7.12W**
13. Louisiana Western – **LR 5.7.12W**
14. Massachusetts – **Rule 5.3**
15. Mississippi Northern – **Rule 8.1**
16. Mississippi Southern – **Rule 8.1**
17. New Jersey – **ECF Policy 17.**
18. New York Northern – **Rule 8.1**
19. North Carolina Eastern – **Rule 17.1**
20. North Carolina Middle – **LR 7.1**
21. North Carolina Western – **LCrR 5.2**
22. Northern Mariana Islands – **LR 5.2**
23. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
24. Oklahoma Northern – **L CvR 5.3**
25. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
26. Pennsylvania Middle – **LR 5.2**
27. Puerto Rico – **RULE 5.2**
28. Virginia Western – **Rule 8**
29. Virgin Islands – **Rule 5.4**
30. West Virginia Northern – **LR Gen P 5.08**

C. Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (d) of the Federal Rules. Fed R. Crim. P. 49.1(d) and Fed. R. Civ. P. 5.2(d) provide that the court may order a filing to be made under seal without redaction.

1. California Central – **L.R. 79-5.4**
2. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
3. Georgia Southern – **LR 8**
4. Idaho – **CIVIL RULE 5.5**
5. Southern Illinois – **RULE 5.1**
6. Louisiana Eastern – **LR 5.7.12W**
7. Louisiana Middle – **LR 5.7.12W**

8. Louisiana Western – **LR 5.7.12W**
9. Mississippi Northern – **Rule 8.1**
10. Mississippi Southern – **Rule 8.1**
11. New Jersey – **ECF Policy 17.**
12. New York Northern – **Rule 8.1**
13. North Carolina Eastern – **Rule 17.1**
14. North Carolina Middle – **LR 7.1**
15. North Carolina Western – **LCrR 5.2**
16. Northern Mariana Islands – **LR 5.2**
17. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
18. Pennsylvania Middle – **LR 5.2**
19. Puerto Rico – **RULE 5.2**
20. Virginia Western – **Rule 8**
21. Virgin Islands – **Rule 5.4**
22. West Virginia Northern – **LR Gen P 5.08**

D. Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (e) of the Federal Rules. Fed. R. Civ. P. 5.2(e) and Fed. R. Crim. P. 5.2(e) provide information relating to a court’s authority to grant a protective order.

1. California Central – **L.R. 79-5.4**
2. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
3. District of Columbia - **LCvR 5.4**
4. Georgia Southern – **LR 8**
5. Idaho – **CIVIL RULE 5.5**
6. Southern Illinois – **RULE 5.1**
7. Iowa Northern – **LR 10**
8. Iowa Southern – **LR 10**
9. Louisiana Eastern – **LR 5.7.12W**
10. Louisiana Middle – **LR 5.7.12W**
11. Louisiana Western – **LR 5.7.12W**
12. Massachusetts – **Rule 5.3**
13. Mississippi Northern – **Rule 8.1**
14. Mississippi Southern – **Rule 8.1**
15. New Jersey – **ECF Policy 17.**
16. New York Northern – **Rule 8.1**
17. North Carolina Eastern – **Rule 17.1**
18. North Carolina Middle – **LR 7.1**
19. North Carolina Western – **LCrR 5.2**
20. Northern Mariana Islands – **LR 5.2**
21. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
22. Oklahoma Northern – **L CvR 5.3**
23. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
24. Pennsylvania Middle – **LR 5.2**
25. Puerto Rico – **RULE 5.2**

26. Virgin Islands – **Rule 5.4**
27. Virginia Western – **Rule 8**
28. West Virginia Northern – **LR Gen P 5.08**

E. Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (f) of the Federal Rules. Fed R. Civ. P. 5.2(f) and Fed. R. Crim. P. 5.2(f) provide that a filer making a redacted filing has the option of filing an unredacted copy under seal, which the court must retain as part of the record.

1. California Central – **L.R. 79-5.4**
2. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
3. District of Columbia - **LCvR 5.4**
4. Iowa Northern – **LR 10**
5. Iowa Southern – **LR 10**
6. Massachusetts – **Rule 5.3**
7. North Carolina Eastern – **Rule 17.1**
8. Virginia Western – **Rule 8**

F. Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (g) of the Federal Rules. Fed R. Civ. P. 5.2(g) and Fed. R. Crim. P. 5.2(g) state that the filer has the option of filing a reference list along with a redacted filing.

1. California Eastern – **RULE 39-140**
2. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
3. District of Columbia - **LCvR 5.4**
4. Idaho – **CIVIL RULE 5.5**
5. Southern Illinois – **RULE 5.1**
6. Iowa Northern – **LR 10**
7. Iowa Southern – **LR 10**
8. Massachusetts – **Rule 5.3**
9. North Carolina Eastern – **Rule 17.1**
10. Northern Mariana Islands – **LR 5.2**
11. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
12. Puerto Rico – **RULE 5.2**
13. Virginia Western – **Rule 8**

G. Districts Whose Local Redaction Rule Does Not Include the Requirements Set Out in Subsection (h) of the Federal Rules. Fed R. Civ. P. 5.2(h) and Fed. R. Crim. P. 5.2(h) provide information about the waiver of the protection of personal identifiers.

1. California Central – **L.R. 79-5.4**
2. California Eastern – **RULE 39-140**
3. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57**
4. District of Columbia - **LCvR 5.4**
5. Georgia Southern – **LR 8**

6. Idaho – **CIVIL RULE 5.5**
7. Southern Illinois – **RULE 5.1**
8. Iowa Northern – **LR 10**
9. Iowa Southern – **LR 10**
10. Louisiana Eastern – **LR 5.7.12W**
11. Louisiana Middle – **LR 5.7.12W**
12. Louisiana Western – **LR 5.7.12W**
13. Massachusetts – **Rule 5.3**
14. Mississippi Northern – **Rule 8.1**
15. Mississippi Southern – **Rule 8.1**
16. New Jersey – **ECF Policy 17.**
17. New York Northern – **Rule 8.1**
18. North Carolina Eastern District Court – **Rule 17.1**
19. North Carolina Middle District Court – **LR 7.1**
20. North Carolina Western District Court – **LCrR 5.2**
21. Northern Mariana Islands District Court – **LR 5.2**
22. Ohio Northern District Court – **Civ Rule 8.1, Crim Rule 49.1**
23. Oklahoma Northern District Court – **L CvR 5.3**
24. Pennsylvania Eastern District Court – **CRIMINAL RULE 53.2**
25. Pennsylvania Middle District Court – **LR 5.2**
26. Puerto Rico District Court – **RULE 5.2**
27. Virginia Western – **Rule 8**
28. Virgin Islands District Court – **Rule 5.4**
29. West Virginia Northern – **LR Gen P 5.08**

APPENDIX 6 – OTHER DIFFERENCES BETWEEN THE LOCAL FEDERAL RULES:

A. Districts Whose Local Redaction Rule Incorporates “Suggestions” For Exercising Additional Caution in Filing Certain Kinds of Documents.

1. Idaho – **CIVIL RULE 5.5**
2. Iowa Northern – **LR 10**
3. Iowa Southern – **LR 10**
4. New Jersey – **ECF Policy 17.**
5. New York Northern – **Rule 8.1**
6. Oklahoma Northern – **L CvR 5.3**

B. Districts Whose Local Redaction Rule Includes a List of Documents to Be Excluded From the Public Case File.

1. California Central – **L.R. 79-5.4**
2. Idaho – **CIVIL RULE 5.5**

C. Districts Whose Local Redaction Rule Imposes Unique Requirements Not Found in the Federal Rules. *Note: Because these requirements may take a wide variety of forms, I have included the title of the specific section of the rule and a brief summary below.*

1. California Eastern – **RULE 39-140(e) – No Sua Sponte Sealing or Redaction** – stating that neither the Clerk nor the court is responsible for reviewing filed documents for compliance with the rule.
2. District of Columbia– **LCvR 5.4(f) – PRIVACY REQUIREMENTS** – the rule requires exclusion or redaction of personal identifiers “from all electronically filed documents.” The national rule, however, requires redaction for all “electronic or paper filings.”
3. Idaho– **CIVIL RULE 5.5(b)** – the rule states that “a party wishing to file a document containing [personal data identifiers ...] may file an unredacted document under seal only if the party believes maintenance of the unredacted material in the Court record is critical to the case.” The national rule, however, does not require that the filing party have any such belief that “maintenance is critical;” it states only that “A person making a redacted filing may also file an unredacted copy under seal.” (*See* Fed. R. Crim. P. 49.1(f) and Fed. R. Civ. P. 5.2(f)).

D. Districts Whose Local Redaction Rule Specifies Standards for Redaction That Are Different Than Those Specified in the National Rule.

1. California Eastern – **RULE 39-140**

E. Districts Whose Local Redaction Rule States That Lawyers Are Responsible For Ensuring That Their Filings Satisfy the Redaction Requirements.

1. California Central – *L.R. 79-5.4*
2. Georgia Southern – **LR 8**
3. Idaho – **CIVIL RULE 5.5**
4. Southern Illinois – **RULE 5.1**
5. Iowa Northern – **LR 10**
6. Iowa Southern – **LR 10**
7. Louisiana Eastern – **LR 5.7.12W**
8. Louisiana Middle – **LR 5.7.12W**
9. Louisiana Western – **LR 5.7.12W**
10. Massachusetts – **RULE 5.3**
11. Mississippi Northern – **Rule 8.1**
12. Mississippi Southern – **Rule 8.1**
13. New Jersey – **ECF Policy 17.**
14. New York Northern – **Rule 8.1**
15. North Carolina Middle – **LR 7.1**
16. North Carolina Western – **LCrR 5.2**
17. Northern Mariana Islands – **LR 5.2**
18. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
19. Oklahoma Northern – **L CvR 5.3**
20. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
21. Pennsylvania Middle – **LR 5.2**
22. Puerto Rico – **RULE 5.2**
23. Virginia Eastern – **Rule 8**
24. Virgin Islands – **Rule 5.4**
25. West Virginia Northern – **LR Gen P 5.08**

F. Districts Whose Local Redaction Rule Follows the Sample Format Provided in the “Proposed Guidelines” Document. A copy of the “Proposed Guidelines” is attached.

1. California Central – *L.R. 79-5.4*
2. California Eastern – **RULE 39-140**
3. Georgia Southern – **LR 8**
4. Idaho – **CIVIL RULE 5.5**
5. Southern Illinois – **RULE 5.1**
6. Louisiana Eastern – **LR 5.7.12W**
7. Louisiana Middle – **LR 5.7.12W**
8. Louisiana Western – **LR 5.7.12W**
9. Massachusetts – **RULE 5.3**
10. Mississippi Northern – **Rule 8.1**
11. Mississippi Southern – **Rule 8.1**
12. New Jersey – **EFC Policy 17.**

13. New York Northern – **Rule 8.1**
14. North Carolina Middle – **LR 7.1**
15. North Carolina Western – **LCrR 5.2**
16. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
17. Oklahoma Northern – **L CvR 5.3**
18. Pennsylvania Eastern – **CRIMINAL RULE 53.2**
19. Puerto Rico – **RULE 5.2**
20. West Virginia Northern – **LR Gen P 5.08**

G. Districts Whose Local Redaction Rules Have Particularly Unique Formatting and Have Therefore Stated the Standards of the Federal Rules in a Unique Manner.

1. Connecticut – **CIVIL RULE 5, CRIMINAL RULE 57** – these two rules begin with the following phrase: “Except as otherwise provided by federal statute or the Federal Rules of Civil/Criminal Procedure...” Each rule then goes on to list redaction requirements. It contains no further information beyond this list of redaction requirements.
2. District of Columbia – **LCvR 5.4** – perhaps because this rule is found as a subsection of a larger rule, it does not contain as much information as some of the other local rules from other districts. It also addresses only electronically filed documents, which may be a feature of its falling under a larger rule titled “CASES ASSIGNED TO CASE MANAGEMENT/ELECTRONIC CASE FILING (CM/ECF) SYSTEM.”
3. Michigan Eastern – **R20 E-Government Act of 2002** – this “rule” (found in an appendix to the local rules in this district) states only that: “Effective December 1, 2007, privacy protection for filings made with the Court is governed by Fed. R. Civ. P. 5.2 and Fed. R. Crim. P. 49.1. To supplement the federal rules, the Court has entered an administrative order (EXHIBIT E) which makes it clear that counsel and the parties are responsible for redacting filings with the Court. The Clerk’s Office will not review papers for compliance with the federal rules.”
4. North Carolina Eastern – **Rule 17.1** – this rule is titled “MINORS AND INCOMPETENTS AS PARTIES.” Most likely for that reason, it only addresses redaction of minors’ names. It is worth noting that this is the only redaction rule in the North Carolina Eastern District.

H. Districts Whose Local Rule Includes the Requirements of Fed. R. Civ. P. 5.2(f) and (g) and Fed. R. Crim. P. 49.1(f) and (g) in the Following Format:

“A party or person wishing to file a document containing the personal identifiers listed above may:

- (a) file an unredacted version of the document under seal, or
- (b) file a reference list under seal. [And then the rule typically goes on to describe the district's specific rules as to filing a sealed reference list.]”

Note: the exact language used in each of these rules is not always the same. However, all of the districts below use the format explained above, which combines the federal standards at subdivisions (f) and (g) into one section. This is fairly common, so I felt that it was worth noting this particular formatting choice.

1. Georgia Southern – **LR 8**
2. Louisiana Eastern – **LR 5.7.12W**
3. Louisiana Middle – **LR 5.7.12W**
4. Louisiana Western – **LR 5.7.12W**
5. New Jersey – **EFC Policy 17.**
6. New York Northern – **Rule 8.1**
7. Ohio Northern – **Civ Rule 8.1, Crim Rule 49.1**
8. Oklahoma Northern – **L CvR 5.3**
9. Pennsylvania Middle – **LR 5.2**
10. Virgin Islands – **Rule 5.4**
11. West Virginia Northern – **LR Gen P 5.08**

APPENDIX 7 – DISCREPANCIES BETWEEN THE LOCAL AND FEDERAL RULES, BY DISTRICT:

1. California Central District Court

- Local rule includes “home address” in the redaction requirement for civil cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (f) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule includes a specific list of documents to be excluded from the public case file
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

2. California Eastern District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Procedures specified for the redaction of minors names and financial account numbers are different than the redaction procedures specified in the national rule
- Section (e) imposes a unique requirement (about sua sponte sealing/redaction)
- Rule follows the sample format provided in the Proposed Guidelines Memo

3. Connecticut District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (f) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule has formatting particularly unique from national rule (please see full text)

4. District of Columbia District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (f) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules

- Section (f) implies that the rule applies only to electronic documents; the federal rule, however, specifically states that it applies to both electronic and paper filings
- Rule has formatting particularly unique from national rule (please see full text)

5. Georgia Middle District Court

- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule uses the exact language and formatting found in the national rules

6. Georgia Southern District Court

- Local rule includes “home address” in the redaction requirement for civil cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

7. Idaho District Court

- Local rule includes “home address” in the redaction requirement for civil cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule incorporates suggestions for exercising caution in filing certain documents
- Rule includes a specific list of documents to be excluded from the public case file
- Section (b) imposes a unique requirement (relating to a party’s ability to file a document under seal only if they believe so including it is critical to the case)
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

8. Southern Illinois District Court

- Rule includes “drivers’ license numbers” as an additional redaction requirement
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance

- Rule follows the sample format provided in the Proposed Guidelines Memo

9. Iowa Northern District Court

- Does not include “home address” in the redaction requirement for criminal cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (f) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule incorporates suggestions for exercising caution in filing certain documents
- Rule mentions who bears the responsibility of ensuring redaction compliance

10. Iowa Southern District Court

- Does not include “home address” in the redaction requirement for criminal cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (f) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule incorporates suggestions for exercising caution in filing certain documents
- Rule mentions who bears the responsibility of ensuring redaction compliance

11. Louisiana Eastern District Court

- Local rule includes “home address” in the redaction requirement for civil cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

12. Louisiana Middle District Court

- Local rule includes “home address” in the redaction requirement for civil cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance

- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

13. Louisiana Western District Court

- Local rule includes “home address” in the redaction requirement for civil cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

14. Massachusetts District Court

- Does not include “home address” in the redaction requirement for criminal cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (f) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

15. Michigan Eastern District Court

- Rule has formatting particularly unique from national rule (please see full text)

16. Mississippi Northern District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

17. Mississippi Southern District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules

- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

18. New Jersey District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule incorporates suggestions for exercising caution in filing certain documents
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

19. New York Northern District Court

- Local rule includes “home address” in the redaction requirement for civil cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule incorporates suggestions for exercising caution in filing certain documents
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

20. North Carolina Eastern District Court

- Rule does not include the following redaction requirements found in the national rule: (1) social security numbers or taxpayer-identification numbers in civil and criminal cases; (2) birth dates in civil and criminal cases; (3) financial account numbers in civil and criminal cases; and (4) home addresses in criminal cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (f) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule has formatting particularly unique from national rule (please see full text)

21. North Carolina Middle District Court

- Does not include “home address” in the redaction requirement for criminal cases
- Local rule does not include the requirements in subsection (b) of the national rules

- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

22. North Carolina Western District Court

- Does not include “home address” in the redaction requirement for criminal cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

23. Northern Mariana Islands District Court

- Local rule includes “home address” in the redaction requirement for civil cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance

24. Ohio Northern District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

25. Oklahoma Northern District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule incorporates suggestions for exercising caution in filing certain documents

- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

26. Pennsylvania Eastern District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

27. Pennsylvania Middle District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule combines subsections (f) and (g) into one (fairly common) format

28. Puerto Rico District Court

- Local rule includes “home address” in the redaction requirement for civil cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (g) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo

29. Virgin Islands District Court

- Does not include “home address” in the redaction requirement for criminal cases
- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule combines subsections (f) and (g) into one (fairly common) format

30. West Virginia Northern District Court

- Local rule does not include the requirements in subsection (b) of the national rules
- Local rule does not include the requirements in subsection (c) of the national rules
- Local rule does not include the requirements in subsection (d) of the national rules
- Local rule does not include the requirements in subsection (e) of the national rules
- Local rule does not include the requirements in subsection (h) of the national rules
- Rule mentions who bears the responsibility of ensuring redaction compliance
- Rule follows the sample format provided in the Proposed Guidelines Memo
- Rule combines subsections (f) and (g) into one (fairly common) format

APPENDIX 8 – FULL TEXT OF THE LOCAL REDACTION RULES:

California Central District Court:

L.R. 79-5.4 Responsibilities of Parties to Redact or Exclude Personal Identifiers. In compliance with the policy of the Judicial Conference of the United States and the E-Government Act of 2002 (as Amended), the parties shall refrain from including, and /or shall redact where inclusion is necessary, the following personal data identifiers from all documents, exhibits, and attachments filed with the Court, except as specifically excluded below.

- (a) **Social Security Numbers:** If an individual's Social Security Number must be included in a document, only the last four digits of that number should be used;
- (b) **Names of Minor Children:** If the involvement of a minor child must be mentioned, only the initials of that child should be used;
- (c) **Dates of Birth:** If an individual's date of birth must be included in a document, only the year should be used;
- (d) **Financial Account Numbers:** If financial account numbers are relevant, identify the name or type of account and the financial institution where maintained, and only indicate the last four digits of the account number;
- (e) **Home Address:** If a home address must be included, only the city and state should be listed.

A party who must file a document containing the personal data identifiers as listed above shall: 1) file a redacted version of the document excluding the personal data identifiers; or 2) file a redacted version of the document with unique identifiers (e.g., 1, 2, 3 or A, B, C) used in place of the personal data identifiers, along with a reference list, filed under seal, indicating the complete personal data identifiers and unique identifiers used in their place.

Parties shall carefully examine the documents, exhibits or attachments to be filed with the Court in order to protect any sensitive and private information. The responsibility for redacting or placing under seal these personal data identifiers rests solely with counsel and the parties. The Clerk will not review any pleadings or documents for compliance.

Counsel and the parties are cautioned that failure to redact or place under seal these personal data identifiers may subject them to the full disciplinary power of the Court. If a redacted version of the document is filed, counsel shall maintain the unredacted document in their office pending further order of the Court or resolution of the action (including the appeal, if any) and shall, at the request of opposing counsel or parties, provide a copy of the complete document.

Documents to be excluded. In accordance with the policy of the Judicial Conference of the United States, the documents listed below are not to be included in the public case file. These documents and all social security cases are excluded from this Local Rule, redaction requirement.

- (a) Unexecuted summonses or warrants, supporting applications, and affidavits;
- (b) Pretrial bail reports;
- (c) Presentence investigation reports;
- (d) Statements of reasons in the judgment of conviction;
- (e) Juvenile records;
- (f) Documents containing identifying information about jurors or potential jurors;
- (g) Financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- (h) Ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- (i) Sealed documents.

California Eastern District Court:

**RULE 39-140
PRIVACY CONCERNS AND REDACTION**

- (a) **Privacy in General.** Privacy In General. Except as set forth below, pursuant to the Judicial Conference Policy on Privacy and Electronic Access to Case Files, and the Egovernment Act of 2002, Pub. L. No. 107-347, effective April 16, 2003, when filing documents, counsel and the Court shall omit or, where reference is necessary, partially redact the following personal data identifiers from all pleadings, documents, and exhibits, whether filed electronically or on paper, unless the Court orders otherwise:
 - (i) Minors' names: In criminal actions, use the minors' initials; in civil actions use initials when federal or state law require the use of initials, or when the specific identity of the minor is not necessary to the case or individual document;

- (ii) Financial account numbers: Identify the name or type of account and the financial institution where maintained, but use only the last four numbers of the account number;
 - (iii) Social Security numbers: Use only the last four numbers;
 - (iv) Dates of birth: Use only the year;
 - (v) Home addresses in criminal cases only; use only the city and state; and
 - (vi) All other circumstances: Redact when federal law requires redaction.
- (b) **Order Required for Other Redactions.** No other redactions are permitted unless the Court has authorized the redaction. Counsel has the responsibility to be cognizant of federal privacy law and, when appropriate, state privacy law. Moreover, counsel should recognize proprietary or trade secret information that is protected from dissemination by law. When counsel seeks to submit protected information, a protective order or order authorizing redaction should be sought. A party that makes a redacted filing may also file an unredacted copy under seal if the Court so orders. The unredacted copy will be retained by the Court under seal as part of the record.
- (c) **Reference List for Redacted Documents.** If the Court so orders, a filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the action to the identifiers included in the reference list will be construed to refer to the corresponding items of information.
- (d) **Submission of Unredacted Documents.** Pursuant to the terms of a protective order or applicable law, counsel may seek to submit an unredacted document containing protected information for review by the Court. In such an event, counsel is required to file a motion to file the document under seal. See L.R. 39-141. If the Court grants the motion, counsel shall then submit the unredacted paper document to the Clerk's Office for review by the Court. The paper document must have a cover page with the caption and number of the action and a prominent designation stating the following: "Document filed under seal."
- (e) **No Sua Sponte Sealing or Redaction.** Neither the Clerk's Office nor the Court will review filed documents for compliance with privacy or other protective law, nor will the Court as a matter of course seal on its own motion documents containing personal data identifiers, or redact documents, whether filed electronically or on paper. No procedure set forth herein will excuse a violation of privacy or other law by counsel or party.

- (f) **Redaction Exceptions.** Filings of administrative transcripts, see L.R. 31-138(b), need not be redacted to comply with this Rule. Filings of official records of a state court proceeding in an action removed to federal court need not be redacted. In a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture need not be redacted.

Connecticut District Court:

CIVIL RULE 5 SERVING AND FILING PLEADINGS AND OTHER PAPERS

- ... 8. Except as otherwise provided by federal statute or the Federal Rules of Civil Procedure, the party filing any document that will or could become publicly available shall redact from that document:
- (a) Social Security numbers to the last four digits;
 - (b) Financial account numbers to the last four digits;
 - (c) Dates of birth to the year; and
 - (d) Names of minor children to the initials.

CRIMINAL RULE 57 RULES BY DISTRICT COURTS

10. Except as otherwise provided by federal statute or the Federal Rules of Criminal Procedure, the party filing any document that will or could become publicly available shall redact from that document:
- (a) Social Security numbers to the last four digits;
 - (b) Financial account numbers to the last four digits;
 - (c) Dates of birth to the year; and
 - (d) Names of minor children to the initials.

District of Columbia District Court:

LCvR 5.4

**CASES ASSIGNED TO CASE MANAGEMENT/ELECTRONIC
CASE FILING (CM/ECF) SYSTEM**

... (f) PRIVACY REQUIREMENTS

The following personal identifiers shall be excluded, or redacted where inclusion is necessary, from all electronically filed documents unless otherwise ordered by the Court.

- (1) Social Security numbers. If an individual's Social Security number must be included in a pleading, only the last four digits of that number should be used.
- (2) Names of minor children. If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- (3) Dates of birth. If an individual's date of birth must be included in a pleading, only the year should be used.
- (4) Financial account numbers. If a financial account number is relevant, only the last four digits should be used.

A party wishing to file a document containing unredacted personal identifiers listed in LCvR 5.4 (f) (1)-(4) may file an unredacted document under seal. This document shall be retained by the Court as part of the record.

Georgia Middle District Court:

5.4 PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT.

- a. Redacted Filings.** Unless the court orders otherwise in an electronic or paper filing with the court that contains an individual's social security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

- (1) The last four digits of the social security number and taxpayer-identification number;
- (2) The year of the individual's birth;

- (3) The minor's initials;
- (4) The last four digits of the financial-account number; and
- (5) The city and state of the home address. (This restriction applies only in criminal cases.)

b. Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

- (1) A financial account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) The record of an administrative or agency proceeding;
- (3) The official record of a state-court proceeding;
- (4) The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) A filing covered by Rule 5.4(c);
- (6) A pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;
- (7) A court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;
- (8) An arrest or search warrant; and
- (9) A crime charging document and an affidavit filed in support of any such charging document.

c. Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing Social Security Appeals and Immigration cases are subject to the limitations set forth in Rule 5.2(c), Fed.R.Civ.P., effective December 1, 2007.

d. Protective Orders. For good cause, the court may by order in a case:

- (1) Require redaction of additional information; or

- (2) Limit or prohibit a nonparty's remote electronic access to a document filed with the court.
- e. **Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.
- f. **Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as a right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.
- g. **Waiver of Protection of Identifiers.** A person waives the protection of Rule 5.4a or corresponding Local Criminal Rule 49.2 as to the person's own information by filing it without redaction and not under seal.

Georgia Southern District Court:

LR 8. In compliance with the policy of the Judicial Conference of the United States and the E-Government Act of 2002, as amended, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, any party or person filing pleadings or other documents with the Court shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all such pleadings or documents, including exhibits thereto, whether filed electronically or conventionally in paper form, unless otherwise ordered by the Court:

- a. **Social Security numbers.** If an individual's Social Security number must be included in a pleading or document, only the last four digits of that number should be used.
- b. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- c. **Dates of birth.** If an individual's date of birth must be included, only the year should be used.
- d. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.
- e. **Home addresses.** If a home address must be included, only the city and state should be listed.

A party or person wishing to file a document containing the personal data identifiers listed above may:

- a. file an unredacted version of the document under seal, or
- b. file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal and may be amended as of right.

The unredacted version of the document or the reference list shall be retained by the Court as part of the record. A party or person filing under seal an unredacted document containing personal data identifiers shall file simultaneously a redacted copy of the document for the public file.

The responsibility for redacting these personal identifiers rests solely with counsel and the filing party or person. The Clerk will not review each pleading or document for compliance with this rule.

Idaho District Court:

CIVIL RULE 5.5 PROTECTION OF PERSONAL PRIVACY

- (a) In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including or shall partially redact, where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court:
 - (1) **Social Security numbers.** If an individual's social security number must be included in a pleading, only the last four digits of that number should be used.
 - (2) **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
 - (3) **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used.

- (4) **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.
- (5) **Home addresses.** Only the city and state shall be identified.
- (b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal only if the party believes maintenance of the unredacted material in the Court record is critical to the case. The document must contain the following heading in the document, "SEALED DOCUMENT PURSUANT TO E-GOVERNMENT ACT OF 2002". This document shall be retained by the Court as part of the record until further order of the Court. The party must also electronically file a redacted copy of this document for the official record.
- (c) In order to comply with the Judicial Conference Policy, in addition to the items listed in section (a) above, the Court shall not provide public access to the following documents: unexecuted warrants of any kind; pretrial bail or presentence investigation reports; statement of reasons in the judgment of conviction; juvenile records, documents containing identifying information about jurors or potential jurors; financial affidavits filed in seeking representation pursuant to the Criminal Justice Act; ex parte requests for expert or investigative services at Court expense; and sealed documents.
- (d) In addition to the redaction procedures outlined above, the Judicial Conference policy requires Counsel to redact the personal identifiers noted in (a), which are contained in any transcripts filed with the Court. Counsel should follow the transcript redaction procedures outlined on the Court's website at: <http://www.id.uscourts.gov/CourtReporter/Transcripts.pdf>
- (e) You are advised to exercise caution when filing documents that contain the following:
- (1) Personal identification number, such as driver's license number;
 - (2) Medical records, treatment and diagnosis;
 - (3) Employment history;
 - (4) Individual financial information;
 - (5) Proprietary or trade secret information;
 - (6) Information regarding an individual's cooperation with the government;

- (7) Information regarding the victim of any criminal activity;
 - (8) National security information;
 - (9) Sensitive security information as described in 49 U.S.C. section 114(s).
- (f) Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion of certain materials may be made. If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that the redaction of personal identifiers is done. The clerk will not review each pleading for redaction.

Southern Illinois District Court:

**RULE 5.1 SERVING AND FILING PLEADINGS AND OTHER PAPERS
(See FED. R. CIV. P. 5, 7.1, 11)**

... (d) Privacy Policy

In order to protect personal privacy and other legitimate interests, parties shall refrain from including, or shall redact where inclusion is necessary, the following personal identifiers from all pleadings filed with the court, which includes exhibits attached thereto, unless otherwise ordered by the court.

- (1) Social Security Numbers. If an individual's social security number must be included, only the last four digits of that number should be used.
- (2) Names of Minor Children. If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- (3) Dates of Birth. If an individual's date of birth must be included in a document, only the year should be used.
- (4) Drivers' License Numbers. If a driver's license number must be included, only the last four digits should be used.
- (5) Financial Account Numbers. If financial account numbers are relevant, only the last four digits should be used.
- (6) Home Addresses. If home addresses must be used, only the city and state should be used.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review each pleading for compliance with this rule.

Counsel and the parties are cautioned that failure to redact these personal identifiers may subject them to the full disciplinary power of the court.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy for the public file.

Iowa Northern and Iowa Southern District Courts:

The Northern and Southern Districts of Iowa share a uniform set of local rules.

**LR 10 FORM OF DOCUMENTS FILED WITH THE COURT;
CITATIONS TO STATUTES; PERSONAL IDENTIFIERS**

... **h. Personal Data Identifiers.** Unless otherwise permitted or required by law, a party filing a document containing personal data identifiers should, unless the document is filed under seal, modify or partially redact the document to prevent disclosure of the identifiers. (See Fed. R. Civ. P. 5.2(a).) Personal data identifiers include the following:

1. Social Security numbers;
2. Dates of birth
3. Names of minor children; and
4. Financial account numbers.

By way of example, and not limitation, if the Social Security number of an individual must be included in a document, only the last four digits of that number should be used. If an individual's date of birth is necessary, only the year should be used. If a minor child must be mentioned, only that child's initials should be used. If financial account numbers are relevant, only incomplete numbers should be recited in the document. In addition, parties should exercise caution when filing unsealed documents that contain the following information:

5. Other personal identifying numbers, such as driver's license numbers;
6. Information concerning medical treatment or diagnosis;
7. Employment history;
8. Personal financial information;
9. Proprietary or trade secret information;

10. Information concerning a person's cooperation with the government;
11. Information concerning crime victims;
12. Sensitive security information; and
13. Home addresses.

It is the responsibility of counsel and the parties to assure that appropriate redactions from documents have been made before they are filed; the Clerk of Court will not review filings to determine whether such redactions have been made.

Louisiana Eastern, Louisiana Middle and Louisiana Western District Courts:
The Eastern, Middle and Western Districts of Louisiana share a uniform set of local rules.

LR 5.7.12W Public Access

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court.

- a. **Social Security numbers.** If an individual's Social Security number must be included in a pleading, only the last four digits of that number should be used.
- b. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- c. **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used.
- d. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.
- e. **Home Addresses.** If home addresses are relevant, only the city and state should be used.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may:

- a. file an unredacted version of the document under seal, or

- b. file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifiers. The reference list must be under seal, and may be amended as of right.

The unredacted version of the filing or the reference list shall be retained by the Court. The Court may require the party to file a redacted copy for the public record.

The responsibility for redacting personal identifiers rests solely with counsel and the parties. The Clerk will not review filing for compliance with this rule. [Adopted April 21, 2005]

Massachusetts District Court:

RULE 5.3 PERSONAL DATA IDENTIFIERS

(a) Restrictions on Personal Identifiers in Filings

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all filings submitted to the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court.

- (1) *Social Security numbers.* If an individual's social security number must be included in a filing, only the last four digits of that number should be used.
- (2) *Names of minor children.* If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- (3) *Dates of birth.* If an individual's date of birth must be included in a pleading, only the year should be used.
- (4) *Financial account numbers.* If financial account numbers are relevant, only the last four digits of these numbers should be used.

(b) Non-Redacted Filings under Seal

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal, pursuant to Local Rule 7.2. This document shall be retained by the court as

part of the record. The court may, however, still require the party to file a redacted copy for the public file.

(c) Responsibility for Redaction

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each pleading for compliance with this rule.

Michigan Eastern District Court:

The following is from the Electronic Filing Policies and Procedures Appendix to the local rules.

R20 E-Government Act of 2002

Effective December 1, 2007, privacy protection for filings made with the Court is governed by Fed.R.Civ.P. 5.2 and Fed.R.Crim.P. 49.1. To supplement the federal rules, the Court has entered an administrative order (EXHIBIT E) which makes it clear that counsel and the parties are responsible for redacting filings with the Court. The Clerk's Office will not review papers for compliance with the federal rules.

Minnesota District Court:

LR 5.5 Redaction of Transcripts

(a) Review of Transcript for Personal Data Identifiers. After a transcript of any Court proceeding has been filed under LR 80.1(a), the attorneys of record, including attorneys serving as "standby" counsel appointed to assist a pro se defendant in his or her defense in a criminal case, and unrepresented parties shall determine whether redaction of personal data identifiers in the transcript is necessary to comply with Fed. R. Crim. P. 49.1 or Fed. R. Civ. P. 5.2. Attorneys of record or unrepresented parties are responsible to request redaction of personal data identifiers in the following portions of the transcript, unless otherwise ordered by the Court:

- (1) Statements by the party or made on the party's behalf;
- (2) The testimony of any witness called by the party;
- (3) Sentencing proceedings; and
- (4) Any other portion of the transcript as ordered by the Court.

(b) **Notice of Intent to Request Redaction.** If any portion of the transcript reviewed in accordance with subsection (a) of this rule is required to be redacted to comply with Fed. R. Crim. P. 49.1 or Fed. R. Civ. P. 5.2, a Notice of Intent to Request Redaction shall be filed within seven (7) calendar days from the date the transcript was filed. The Court will assume redaction of personal data identifiers from the transcript is not necessary if a Notice of Intent to Request Redaction is not filed.

(c) **Statement of Redaction.** If a Notice of Intent to Request Redaction is filed, the party shall file a Statement of Redaction within 21 calendar days from the date the transcript was filed. The Statement of Redaction shall consist of the following information:

- (1) Type of personal data identifier to be redacted, e.g., “social security number”;
- (2) Page number and line number of transcript on which the personal data identifier to be redacted is located; and
- (3) How the transcript should read after redaction, e.g., “social security number to read as XXX-XX-1234.”

The Statement of Redaction shall not disclose the personal data identifier to be redacted.

(d) **Redacted Transcript.** After the Statement of Redaction is filed, the court reporter has 31 calendar days from the date the original transcript was filed to file the redacted transcript. The court reporter shall not charge any fees for redaction services.

(e) **Extensions of Transcript Redaction Deadlines.** Any extensions of the redaction deadlines may be granted only by Court order. If an attorney of record or a party fails to timely file a Statement of Redaction after a timely Notice of Intent to Request Redaction was filed, the attorney or party shall:

- (1) File a motion with the Court to request redaction; or
- (2) Withdraw the Notice of Intent to Request Redaction.

The Court may issue an order to show cause as to why the attorney or party has not met the requirements of this rule.

Mississippi Northern and Mississippi Southern District Courts:

The Districts of Northern and Southern Mississippi share a uniform set of local rules.

Rule 5.2. PROTECTION OF PERSONAL AND SENSITIVE INFORMATION; PUBLIC ACCESS TO COURT FILES; REDACTED INFORMATION; SEALED INFORMATION.

Responsibilities of Counsel and Parties. Counsel should advise clients of the provisions of this rule and Fed.R.Civ.P. 5.2 so that an informed decision may be made about the inclusion of protected information.

- (a) Counsel and parties must consider that the *E-Government Act of 2002* (as amended) and the policies of the Judicial Conference of the United States require federal courts eventually to make *all* pleadings, orders, judgments, and other filed documents available in electronic formats accessible over the Internet and the courts' PACER [Public Access to Court Electronic Records] systems. Consequently, personal and sensitive information and data that formerly were available only by a review of the court's physical case files will be available to the world, openly, publicly, and near-instantaneously.
- (b) If a redacted document is filed, it is the sole responsibility of counsel and the parties to ensure that all pleadings conform to the redaction-related standards of this rule.
- (c) Neither the court nor the clerk will review pleadings or other documents for compliance with this rule.

New Jersey District Court:

ELECTRONIC CASE FILING POLICIES AND PROCEDURES

... 17. Sensitive Information

As the public may access case information through the Court's ECF System, sensitive information should not be included in any document filed unless the Court orders otherwise. As required under Federal Rule of Civil Procedure 5.2(a) and Federal Rule of Criminal Procedure 49.1(a), when making any electronic or Paper Filing with the Court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the Social-Security number and tax-identification number;

- (2) the last four digits of the financial account numbers;
- (3) the minor's initials;
- (4) the year of the individual's birth; and
- (5) In criminal cases for home addresses, use only the city and state.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may either:

- (1) File an unredacted version of the document under seal, or;
- (2) File a redacted version of the document and file a reference list under seal. The reference list shall contain the complete personal identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list may be amended as of right. The Court may still require the party to file a redacted copy for the public file.

In addition, caution must be exercised when filing documents that contain the following:

- (1) Personal identifying numbers, such as a driver's license number;
- (2) Medical records, treatment, and diagnoses;
- (3) Employment history;
- (4) Individual financial information; and
- (5) Proprietary or trade secret information.

Additional items for criminal cases only:

- (1) Information regarding an individual's cooperation with the government;
- (2) Information regarding the victim of any criminal activity;
- (3) National security information; and
- (4) Sensitive security information as described in 49 U.S.C. § 114(s).

Counsel are strongly urged to share this information with all clients so that an informed decision about the inclusion of certain material may be made. If a redacted document is filed, it

is the sole responsibility of counsel and the parties to be sure that pleadings and other papers comply with the rules and orders of this Court requiring redaction of personal identifiers. The Clerk will **not** review each filing for redaction.

Counsel and the parties are cautioned that failure to redact personal identifiers and/or the inclusion of irrelevant personal information in a document filed with the Court may subject them to the full disciplinary and remedial power of the Court, including sanctions pursuant to Federal Rule of Civil Procedure 11.

New York Northern District Court:

8.1 Personal Privacy Protection

Parties shall refrain from including, or shall redact where inclusion is necessary, the following personal identifiers from all pleadings that they file with the Court, including exhibits thereto, whether filed electronically or in paper form, unless the Court orders otherwise.

1. **Social security numbers.** If an individual's social security number must be included in a document, use only the last four digits of that number.
2. **Names of minor children.** If the involvement of a minor child must be mentioned, use only the initials of that child.
3. **Dates of birth.** If an individual's date of birth must be included in a document, use only the year.
4. **Financial account numbers.** If financial account numbers are relevant, use only the last four digits of those numbers.
5. **Home Addresses.** If a home address must be used, use only the City and State.

In addition, caution shall be exercised when filing documents that contain the following:

1. personal identifying number, such as a driver's license number;
2. medical records, treatment and diagnosis;
3. employment history;
4. individual financial information; and
5. proprietary or trade secret information.

In compliance with the E-Government Act of 2002, a party wishing to file a document

containing the personal data identifiers listed above may

1. file an unredacted version of the document under seal, or
2. file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal and may be amended as of right.

Counsel is strongly urged to discuss this issue with all their clients so that they can make an informed decision about the inclusion of certain information. The responsibility for redacting these personal identifiers **rests solely with counsel and the parties**. The Clerk will not review each pleading for compliance with this Rule. Counsel and the parties are cautioned that failure to redact these personal identifiers may subject them to the Court's full disciplinary power.

Exception: Transcripts of the administrative record in social security proceedings and state court records relating to a *habeas corpus* petitions are exempt from this requirement.

North Carolina Eastern District Court:

Rule 17.1 MINORS AND INCOMPETENTS AS PARTIES

- ... (d) In compliance with the E-Government Act of 2002, and to promote electronic access to case files while also protecting personal privacy and other legitimate interest, all parties to any litigation in which minor is a party, with the exception of the paper administrative records in Social Security cases filed with the court, shall redact the minor child's name from all documents filed with the court. If the name of the minor must be included in a document, including the caption, only the initials of the child should be used.

North Carolina Middle District Court:

LR7.1 FORM OF PLEADINGS AND PAPERS

- (b) **Personal Data Identifiers.** In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court:

- (1) **Social Security numbers.** If an individual's social security number must be included in a pleading, only the last four digits of that number should be used.
- (2) **Names of minor children.** If the involvement of a minor child must be mentioned in a pleading, only the initials of that child should be used.
- (3) **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used.
- (4) **Financial account numbers.** If financial account numbers are relevant and must be included in a pleading, only the last four digits of the financial account number should be used.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted version of the document under seal, or file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right. The court may, however, still require a redacted copy for the public file. The redacted version of the document or the reference list shall be retained by the court as part of the record and disposed of in accordance with Local Rule 79.4.

Counsel who file personal identifier data under seal should be mindful that the confidentiality of sealed documents transferred to the General Services Administration for holding after the case is closed cannot be assured.

The responsibility for redacting these personal identifiers rests solely with counsel and parties. The Clerk will not review each pleading for compliance with this rule.

North Carolina Western District Court:

LCrR 5.2 FILING OF PAPERS, PRESENTING JUDGMENTS, ORDERS, AND COMMUNICATIONS TO JUDGE.

- ... (E) ***Filing of a Redacted Pleading is Permitted to Eliminate Personal Data Identifiers.*** In compliance with the Policy of the Judicial Conference of the United States and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper form, unless otherwise ordered by the Court:

- (1) ***Social Security Numbers.*** If the individual's Social Security number must be included in a pleading, only the last four digits of that number should be used.
- (2) ***Names of Minor Children.*** If the involvement of a minor child must be mentioned in a pleading, only the initials of that child should be used.
- (3) ***Dates of Birth.*** If the individual's date of birth must be included in a pleading, only the year should be used.
- (4) ***Financial Account Numbers.*** If financial account numbers are relevant and must be included in a pleading, only the last four digits of the financial account number should be used.
- (5) ***Other Identifying Information.*** Counsel may also redact any other personal identifier information which they deem appropriate.

This redacted document will be made available in electronic format to the public. A reference list containing the redacted personal information may be filed under seal. LCrR 55.1

The responsibility for redacting these personal identifiers rests solely with counsel and parties. The Clerk of Court will not review each pleading for compliance with this rule.

Northern Mariana Islands District Court:

LR 5.2 - General Format of Papers Presented for Filing.

- ... j. **Information to be Redacted.** The parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or on paper, unless otherwise ordered by the court:
1. **Social Security Numbers.** If an individual's social security number must be included in a pleading, only the last four digits of the number shall be used.
 2. **Names of Minor Children.** If the involvement of a minor must be mentioned, only the initials of the child shall be used.
 3. **Dates of Birth.** If an individual's date of birth must be included in a pleading, only the year shall be used.

4. Financial Account Numbers. If financial account numbers are relevant, only the last four digits of the numbers shall be used.
5. Home Addresses. If an individual's home address must be included in a pleading, only the city and state shall be given.

A party wishing to file a document containing the personal identifiers listed above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy of the public file. The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk's Office will not review each pleading for compliance with this rule.

Ohio Northern District Court:

Local Civil Rule 8.1 General Rules of Pleading

- (a) In compliance with the policy of the Judicial Conference of the United States, and the EGovernment Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the Court, including exhibits thereto, whether filed electronically or on paper, unless otherwise ordered by the Court.
 - (1) **Social Security numbers.** If an individual's Social Security number must be included in a document, only the last four digits of that number should be used.
 - (2) **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
 - (3) **Dates of birth.** If an individual's date of birth must be included in a document, only the year should be used.
 - (4) **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be in the document used.
- (b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may
 - (1) file a redacted document in the public record and file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the

filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right, or

- (2) file an unredacted version of the document under seal.
- (c) The unredacted version of the document or the reference list shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy for the public file. The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each document for compliance with this rule.
- (d) Exceptions: Transcripts of the administrative record in social security proceedings and state court records relating to habeas corpus petitions will be exempt from these redaction provisions because those documents will not be made available online.

Local Criminal Rule 49.1.1 General Rules of Pleading

- (a) In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the Court, including exhibits thereto, whether filed electronically or on paper, unless otherwise ordered by the Court.
 - (1) **Social Security numbers.** If an individual's Social Security number must be included in a document, only the last four digits of that number should be used.
 - (2) **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
 - (3) **Dates of birth.** If an individual's date of birth must be included in a document, only the year should be used.
 - (4) **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.
 - (5) **Home addresses.** If a home address must be included, only the city and state should be listed.

- (b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may
- (1) file a redacted document in the public record and file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right, or
 - (2) file an unredacted version of the document under seal.
- (c) The unredacted version of the document or the reference list shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy for the public file. The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each document for compliance with this rule.

Oklahoma Northern District Court:

L CvR 5.3 Redaction of Personal Data Identifiers

- (a) In compliance with the policy of the Judicial Conference of the United States and the EGovernment Act of 2002 (Pub. L. 107-347, which was enacted on December 17, 2002), and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court:
- **Social Security Numbers (in civil and criminal cases).** If an individual's Social Security number must be included in a pleading, only the last four digits of that number shall be used.
 - **Names of Minor Children (in civil and criminal cases).** If the involvement of a minor child must be mentioned, only the initials of that child shall be used.
 - **Dates of Birth (in civil and criminal cases).** If an individual's date of birth must be included in a pleading, only the year shall be used.

- **Financial Account Numbers (in civil and criminal cases).** If financial account numbers are relevant, only the last four digits of these numbers shall be used.
- **Home Addresses (in criminal cases only).** If a home address must be included, only the city and state shall be used.

The responsibility for redacting these personal data identifiers rests solely with counsel and the parties. The clerk will not review each pleading for compliance with this general rule.

In addition, parties should exercise caution when filing a document that contains any of the following information and should consider filing such document under seal, or may refrain from including, or may partially redact where inclusion is necessary: personal identifying numbers such as driver's license numbers; medical records, treatment and diagnosis; employment history; individual financial information; proprietary or trade secret information; information regarding an individual's cooperation with the government; information regarding the victim of any criminal activity; national security information; and sensitive security information as described in 49 U.S.C. § 114(s).

- (b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers or other confidential information listed above may:
- File an unredacted version of the document under seal, which shall be retained by the Court as part of the record; **or**
 - File a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete identifier. The reference list must be filed under seal, and may be amended as of right. The reference list shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy of the document for the public file. The unredacted version of the document or the reference list shall be marked underneath the case number "SEALED UNREDACTED VERSION" or "SEALED REFERENCE LIST."

Oklahoma Western District Court:

L CvRS.2.1 Redaction of Official Transcripts Prior to Remote Electronic Availability

- (a) **Responsibility for Identifying Personal Data Identifiers to be Redacted from Transcripts.** Once an official transcript is filed with the Court Clerk, the attorneys in the case and pro se parties are responsible for identifying the personal data identifiers that must be redacted from filings pursuant to Fed. R. Civ. P. 5.2. Unless otherwise ordered by the Court, the attorney for a party and each pro se party are responsible for identifying redactions required in the following portions of the transcript:

- (1) opening and closing statements made on that party's behalf;
- (2) statements of the party; and
- (3) the testimony of any witnesses called by the party.

The Court may also direct that an attorney or pro se party be responsible for identifying redactions in other portions of an official transcript.

- (b) **Redaction Request.** To request redaction of personal data identifiers from an official transcript, the attorney or pro se party must file a redaction request, using the form in Appendix VII, within 21 days of the filing of the transcript. The request shall identify the redactions to be made with respect to:

- (1) social security numbers and taxpayer-identification numbers: use only the last four digits;
- (2) financial account numbers: use only the last four digits;
- (3) dates of birth: use only the year; and
- (4) a minor's name: redact in the manner that most effectively shields the identity of the minor in the context of the proceeding.

- (c) **Request for Additional Redactions.** For any redactions to a transcript other than the personal data identifiers listed above, a separate Motion for Redaction must be filed within 21 days of the filing of the transcript, unless otherwise ordered by the Court.

L CrR49.1.1 Redaction of Official Transcripts Prior to Remote Electronic Availability.

- (a) **Responsibility for Identifying Personal Data Identifiers to be Redacted from Transcripts.** Once an official transcript is filed with the Court Clerk, the attorneys in the

case and pro se parties are responsible for identifying the personal data identifiers that must be redacted from filings pursuant to Fed. R. Crim. P. 49.1. Unless otherwise ordered by the Court, the attorney for a party and each pro se party are responsible for identifying redactions required in the following portions of the transcript:

- (1) opening and closing statements made on that party's behalf;
- (2) statements of the party;
- (3) the testimony of any witnesses called by the party; and
- (4) sentencing proceedings.

The Court may also direct that an attorney or pro se party be responsible for identifying redactions in other portions of an official transcript.

(b) **Redaction Request.** To request redaction of personal data identifiers from an official transcript, the attorney or pro se party must file a redaction request, using the form in Appendix VII, within 21 days of the filing of the transcript. The request shall identify the redactions to be made with respect to:

- (1) social security numbers and taxpayer-identification numbers: use only the last four digits;
- (2) financial account numbers: use only the last four digits;
- (3) dates of birth: use only the year;
- (4) a minor's name: redact in the manner that most effectively shields the identity of the minor in the context of the proceeding; and
- (5) home address: use only the city and state.

(c) **Request for Additional Redactions.** For any redactions to a transcript other than the personal data identifiers listed above, a separate Motion for Redaction must be filed within 21 days of the filing of the transcript, unless otherwise ordered by the Court.

(d) **Stand-By Counsel.** An attorney appointed as "stand-by" counsel for a party is responsible for identifying and requesting on behalf of that party any redactions of personal data identifiers in the transcript, as required by this Rule.

Pennsylvania Eastern District Court:

CRIMINAL RULE 53.2 ELECTRONIC CASE FILE PRIVACY

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to documents in the criminal case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court:

- a. Social Security numbers. If an individual's Social Security number must be included, only the last four digits of that number should be used.
- b. Names of minor children. If the involvement of a minor child must be mentioned, only the initials of the child should be used.
- c. Dates of birth. If an individual's date of birth must be included, only the year should be used.
- d. Financial account numbers. If financial account numbers are relevant, only the last four digits of the number should be used.
- e. Home addresses. If a home address must be included, only the city and state should be listed.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court, may, however, still require the party to file a redacted copy for the public file. Trial exhibits may be safeguarded by means other than redaction, and the court may modify this rule to fit the requirements of particular cases.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk need not review filings for compliance with this rule.

Pennsylvania Middle District Court:

LR 5.2 Documents to be Filed with the Clerk.

- ... (d) A filed document in a case (other than a social security case) shall not contain any of the personal data identifiers listed in this rule unless permitted by an order of

the court or unless redacted in conformity with this rule. The personal data identifiers covered by this rule and the required redactions are as follows:

1. **Social Security Numbers.** If an individual's Social Security Number must be included in a document, only the last four digits of that number shall be used;
2. **Names of minor children.** If the involvement of a minor child must be mentioned, only that child's initials shall be used;
3. **Dates of birth.** If an individual's date of birth must be included, only the year shall be used;
4. **Financial account numbers.** If financial account numbers must be included, only the last four digits shall be used.

Additional personal data identifier in a criminal case document only:

5. **Home addresses.** If a home address must be included, only the city and state shall be listed.

(e) A party wishing to file a document containing the personal data identifiers listed above may file in addition to the required redacted document:

1. a sealed and otherwise identical document containing the unredacted personal data identifiers, or
2. a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right. The sealed unredacted version of the document or the sealed reference list shall be retained by the court as a part of the record.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review each document for redaction.

Puerto Rico District Court:

RULE 5.2 PERSONAL DATA IDENTIFIERS

(a) Restrictions on Personal Identifiers in Filings

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court:

- (1) Social Security Numbers. If an individual's social security number must be included in a pleadings, only the last four digits of that number should be used.
- (2) Names of Minor Children. If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- (3) Dates of Birth. If an individual's date of birth must be included in a pleading, only the year should be used.
- (4) Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used.
- (5) Home address. Limited to city and state.

(b) Non-Redacted Filings Under Seal

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal. This document shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy for the public file.

(c) Responsibility for Redaction

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk of Court will not review each pleading for compliance with this rule.

Texas Eastern District Court:

LOCAL RULE CV-5.2 Privacy Protections For Filings Made with the Court

- ... (b) **Availability of Transcripts of Court Proceedings.** Electronically-filed transcripts of court proceedings are subject to the following rules:
- (1) A transcript provided to a court by a court reporter or transcriber will be available at the clerk's office for inspection for a period of 90 days after it is electronically filed with the clerk. During the 90-day inspection period, access to the transcript in CM/ECF is limited to the following users: (a) court staff; (b) public terminal users; (c) attorneys of record or parties who have purchased the transcript from the court reporter or transcriber; and (d) other persons as directed by the court. Court staff may not copy or print transcripts for a requester during the 90-day inspection period.
 - (2) During the 90-day period, a copy of the transcript may be obtained from the court reporter or transcriber at the rate established by the Judicial Conference. The transcript will also be available within the court for internal use, and an attorney who obtains the transcript from the court reporter or transcriber may obtain remote electronic access to the transcript through the court's CM/ECF system for purposes of creating hyperlinks to the transcript in court filings and for other purposes.
 - (3) Within seven business days of the filing of the transcript in CM/ECF, each party wishing to redact a transcript must inform the court, by filing the attached "Notice of Intent to Request Redaction," of the party's intent to redact personal data identifiers from the transcript as required by Fed.R.Civ.P 5.2. If no such notice is filed within the allotted time, the court will assume redaction of personal data identifiers from the transcript is not necessary.
 - (4) If redaction is requested, a party is to submit to the court reporter or transcriber and file with the court, within 21 calendar days of the transcript's delivery to the clerk, or longer if a court so orders, a statement indicating where the personal data identifiers to be redacted appear in the transcript. The court reporter or transcriber must redact the identifiers as directed by the party. These procedures are limited to the redaction of the specific personal identifiers listed in Fed.R.Civ.P. 5.2. If an attorney wishes to redact additional information, he or she may make a motion to the court. The transcript will not be remotely electronically available until the court has ruled on any such motion.
 - (5) The court reporter or transcriber must, within 31 calendar days of the filing of the transcript, or longer if the court so orders, perform the

requested redactions and file a redacted version of the transcript with the clerk of court. Redacted transcripts are subject to the same access restrictions as outlined above during the initial 90 days after the first transcript has been filed. The original unredacted electronic transcript shall be retained by the clerk of court as a restricted document.

- (6) If, after the 90-day period has ended, there are no redaction documents or motions linked to the transcript, the clerk will remove the public access restrictions and make the unredacted transcript available for inspection and copying in the clerk's office and for download from the PACER system.
- (7) If, after the 90-day period has ended, a redacted transcript has been filed with the court, the clerk will remove the access restrictions as appropriate and make the redacted transcript available for inspection and copying in the clerk's office and for download from the PACER system, or from the court reporter or transcriber.

LOCAL RULE CR-49.1 Privacy Protection for Filings Made With the Court

... (b) **Availability of Transcripts of Court Proceedings.** Electronically-filed transcripts of criminal court proceedings are subject to the following rules:

- (1) A transcript provided to a court by a court reporter or transcriber will be available at the clerk's office for inspection for a period of 90 days after it is electronically filed with the clerk. During the 90-day inspection period, access to the transcript in CM/ECF is limited to the following users: (a) court staff; (b) public terminal users; (c) attorneys of record or parties who have purchased the transcript from the court reporter or transcriber; and (d) other persons as directed by the court. Court staff may not copy or print transcripts for a requester during the 90-day inspection period.
- (2) During the 90-day period, a copy of the transcript may be obtained from the court reporter or transcriber at the rate established by the Judicial Conference. The transcript will also be available within the court for internal use, and an attorney who obtains the transcript from the court reporter or transcriber may obtain remote electronic access to the transcript through the court's CM/ECF system for purposes of creating hyperlinks to the transcript in court filings and for other purposes.
- (3) Within seven business days of the filing of the transcript in CM/ECF, each party wishing to redact a transcript must inform the court, by filing the attached "Notice of Intent to Request Redaction," of the party's intent to redact personal data identifiers from the transcript as required by

Fed.R.Crim.P 49.1, If no such notice is filed within the allotted time, the court will assume redaction of personal data identifiers from the transcript is not necessary.

- (4) If redaction is requested, a party is to submit to the court reporter or transcriber and file with the court, within 21 calendar days of the transcript's delivery to the clerk, or longer if a court so orders, a statement indicating where the personal data identifiers to be redacted appear in the transcript. The court reporter or transcriber must redact the identifiers as directed by the party. These procedures are limited to the redaction of the specific personal identifiers listed in Fed.R.Civ.P. 5.2. If an attorney wishes to redact additional information, he or she may make a motion to the court. The transcript will not be electronically available until the court has ruled on any such motion.
- (5) The court reporter or transcriber must, within 31 calendar days of the filing of the transcript, or longer if the court so orders, perform the requested redactions and file a redacted version of the transcript with the clerk of court. The original unredacted electronic transcript shall be retained by the clerk of court as a restricted document.
- (6) If, after the 90-day period has ended, there are no redaction documents or motions linked to the transcript, the clerk will remove the public access restrictions and make the unredacted transcript available for inspection and copying in the clerk's office and for download from the PACER system.
- (7) If, after the 90-day period has ended, a redacted transcript has been filed with the court, the clerk will remove the access restrictions as appropriate and make the redacted transcript available for inspection and copying in the clerk's office and for download from the PACER system, or from the court reporter or transcriber.

Utah District Court:

DUCivR 5.2 - REDACTING PERSONAL IDENTIFIERS

- (a) **Redacting Personal Identifiers in Pleadings.** The filer shall redact personal information in filings with the court, as required by Fed.R. Civ. P 5.2. The court may order redaction of additional personal identifiers by motion and order in a specific case or as to a specific document or documents. Any protective order under Fed.R. Civ.P 26 (c) may include redaction requirements for public filings.

(b) **Redacting Personal Identifiers in Transcripts.** Attorneys are responsible to review transcripts for personal information which is required to be redacted under Fed. R. Civ. P 5.2 and provide notice to the court reporter of the redactions which must be made before the transcript becomes available through PACER. Unless otherwise ordered by the court, the attorney must review the following portions of the transcript:

- (1) opening and closing statements made on the party's behalf;
- (2) statements of the party;
- (3) the testimony of any witnesses called by the party; and
- (4) any other portion of the transcript as ordered by the court.

Redaction responsibilities apply to the attorneys even if the requestor of the transcript is the court or a member of the public including the media.

(c) **Procedure for Reviewing and Redacting Transcripts.** Upon notice of the filing of a transcript with the court, the attorneys shall within seven (7) business days review the transcript and file, if necessary, a Notice of Intent to Request Redaction of the Transcript. Within twenty-one (21) calendar days of the filing of the transcript, the attorneys shall file a notice of redactions to be made. The redactions shall be made by the court reporter within thirty-one (31) calendar days of the filing of the transcript and a redacted copy of the transcript promptly be filed with the clerk. Transcripts which do not require redactions and redacted transcripts shall be electronically available on PACER ninety days (90) after filing of the original transcript by the court reporter.

DUCrimR 49.1 REDACTING PERSONAL IDENTIFIERS

(a) **Redacting Personal Identifiers in Pleadings.** The filer shall redact personal information in filings with the court, as required by Fed.R. Crim. P 49.1. The court may order redaction of additional personal identifiers by motion and order in a specific case or as to a specific document or documents.

(b) **Redacting Personal Identifiers in Transcripts.** Attorneys are responsible to review transcripts for personal information which is required to be redacted under Fed. R. Crim. P 49.1 and provide notice to the court reporter of the redactions which must be made before the transcript becomes available through PACER. Unless otherwise ordered by the court, the attorney must review the following portions of the transcript:

- (1) opening and closing statements made on the party's behalf;

- (2) statements of the party;
- (3) the testimony of any witnesses called by the party; and
- (4) any other portion of the transcript as ordered by the court.

Redaction responsibilities apply to the attorneys even if the requestor of the transcript is the court or a member of the public including the media.

- (c) **Procedure for Reviewing and Redacting Transcripts.** Upon notice of the filing of a transcript with the court, the attorneys shall within seven (7) business days review the transcript and, if necessary, file a Notice of Intent to Request Redaction of the Transcript. Within twenty-one (21) calendar days of the filing of the transcript the attorneys shall file a notice of redactions to be made. The redactions shall be made by the court reporter within thirty-one (31) calendar days of the filing of the transcript and a redacted copy of the transcript promptly be filed with the clerk. Transcripts which do not require redactions and redacted transcripts shall be electronically available on PACER ninety (90) days after filing of the original transcript by the court reporter.

Virginia Western District Court:

Rule 8. Redaction of Personal Data Identifiers from Pleadings

The responsibility for redacting personal identifiers as required by the federal rules of procedure rests solely with counsel or with the pro se party. The Clerk will not review each pleading for compliance.

Virgin Islands District Court:

Rule 5.4 Electronic Filing

... (l) PUBLIC ACCESS

- (1) Parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the Court, including exhibits, whether filed electronically or on paper, unless otherwise ordered by the Court:
 - (A) Social Security numbers. If an individual's Social Security number must be included, only the last four digits of that number should be used.

- (B) Names of minor children. If the involvement of a minor child must be mentioned, only the initials of that child should be used.
 - (C) Dates of birth. If an individual's date of birth must be included, only the year should be used.
 - (D) Financial account numbers. If financial account numbers are relevant, only the last four digits should be used.
- (2) A party wishing to file a document containing the personal data identifiers listed above may:
- (A) file an unredacted version of the document under seal, or
 - (B) file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal and may be amended as of right.
- (3) The unredacted version of the document or the reference list shall be retained by the Court as part of the record. The Court may, however, still require the party to file a redacted copy for the public file.
- (4) The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review documents for compliance with this Rule.

West Virginia Northern District Court:

LR Gen P 5.08. E-Government Act.

- (a) Documents: In compliance with the policy of the Judicial Conference of the United States and the E-Government Act of 2002, consistent with Fed.R.Cr.P. 49.1, and to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the Court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court

TAB
11-D

Attachment 4 to Privacy Subcommittee Report

Federal Judicial Center Surveys of Judges, Clerks and Practitioners

on Managing Private Information in Court Filings

Survey of Privacy Practices in Judicial Proceedings

1) What type of judge are you? (N = 424)

Chief district judge:	37 (8.7%)
Active district judge:	118 (27.8%)
Magistrate judge:	138 (32.5%)
Chief bankruptcy judge:	48 (11.3%)
Bankruptcy judge:	83 (19.6%)
District/Magistrate judges:	293 (69.1%)
Bankruptcy judges:	131 (30.7%)

2) In which district do you sit?

See Appendix A

3) How long have you been on the federal bench? (N = 424)

2 years or fewer:	49 (11.6%)
3-5 years:	55 (13.0%)
6-10 years:	100 (23.5%)
11-20 years:	144 (34.0%)
More than 20 years:	76 (17.9%)

REDACTION IN GENERAL

4) Have you received any complaints or requests for changes regarding private information appearing in transcripts generally? N = 424

Yes: **86 (20.3%)**
 No: **338 (79.7%)**

What type of judge are you? * Have you received any complaints or requests for changes regarding private information appearing in transcripts generally?

			Have you received any complaints or requests for changes regarding private information appearing in transcripts generally?		Total
			No	Yes	
What type of judge are you?	Active district judge	Count	89	29	118
		% of Total	21.0%	6.8%	27.8%
	Bankruptcy judge	Count	60	23	83
		% of Total	14.2%	5.4%	19.6%
	Chief bankruptcy judge	Count	41	7	48
		% of Total	9.7%	1.7%	11.3%
	Chief district judge	Count	33	4	37
		% of Total	7.8%	.9%	8.7%
	Magistrate judge	Count	115	23	138
		% of Total	27.1%	5.4%	32.5%
Total		Count	338	86	424
		% of Total	79.7%	20.3%	100.0%

Judges Privacy Survey – 11/19/09

5) Do you keep a record of complaints and requested changes? N = 86

Yes: **11 (2.6%)**
 No: **75 (17.7%)**

What type of judge are you? * Do you keep a record of complaints and requested changes?

			Do you keep a record of complaints and requested changes?			Total
			No	Yes		
What type of judge are you?	Active district judge	Count	89	28	1	118
		% of Total	21.0%	6.6%	.2%	27.8%
	Bankruptcy judge	Count	60	18	5	83
		% of Total	14.2%	4.2%	1.2%	19.6%
	Chief bankruptcy judge	Count	41	4	3	48
		% of Total	9.7%	.9%	.7%	11.3%
	Chief district judge	Count	33	4	0	37
		% of Total	7.8%	.9%	.0%	8.7%
	Magistrate judge	Count	115	21	2	138
		% of Total	27.1%	5.0%	.5%	32.5%
	Total	Count	338	75	11	424
		% of Total	79.7%	17.7%	2.6%	100.0%

6) Was the private information available through PACER? N= 86

Yes: **63 (14.9%)**
 No: **20 (4.7%)**

What type of judge are you? * Was the private information available through PACER?

			Was the private information available through PACER?			Total
			No	Yes		
What type of judge are you?	Active district judge	Count	92	11	15	118
		% of Total	21.7%	2.6%	3.5%	27.8%
	Bankruptcy judge	Count	60	2	21	83
		% of Total	14.2%	.5%	5.0%	19.6%
	Chief bankruptcy judge	Count	41	1	6	48
		% of Total	9.7%	.2%	1.4%	11.3%
	Chief district judge	Count	33	1	3	37
		% of Total	7.8%	.2%	.7%	8.7%
	Magistrate judge	Count	115	5	18	138
		% of Total	27.1%	1.2%	4.2%	32.5%
	Total	Count	341	20	63	424
		% of Total	80.4%	4.7%	14.9%	100.0%

7) Do you do anything to ensure that personal identifier information is not raised unnecessarily in a proceeding, so that transcripts will not have to be redacted?

N = 424

Yes **258 (60.8%)**
 No **149 (35.1%)**
 Don't Know **17 (4.0%)**

			Do you do anything to ensure that personal identifier information is not raised unnecessarily in a proceeding?			Total
			Don't Know	No	Yes	
What type of judge are you?	Active district judge	Count	5	36	77	118
		% of Total	1.2%	8.5%	18.2%	27.8%
	Bankruptcy judge	Count	1	37	45	83
		% of Total	.2%	8.7%	10.6%	19.6%
	Chief bankruptcy judge	Count	1	15	32	48
		% of Total	.2%	3.5%	7.5%	11.3%
	Chief district judge	Count	2	8	27	37
		% of Total	.5%	1.9%	6.4%	8.7%
	Magistrate judge	Count	8	53	77	138
		% of Total	1.9%	12.5%	18.2%	32.5%
Total		Count	17	149	258	424
		% of Total	4.0%	35.1%	60.8%	100.0%

8) You indicated that you do something to ensure that personal identifier information is not raised unnecessarily in a proceeding. Please describe the measure(s) you take.

See Appendix B

9) In your court, which documents containing personal identifier information about individual jurors -- including the juror's name or background information -- are made publicly available through PACER? Please check all that apply.

- 46 (10.8%) Grand jury indictment (including foreman's signature)
- 10 (2.4%) Jury panel list
- 50 (11.8%) Transcripts of voir dire proceedings
- 20 (4.7%) Strikes by parties of identifiable jurors
- 28 (6.6%) Notes from jurors (either on a deliberating jury or not)
- 42 (9.9%) Verdict forms with juror names
- 161 (38.0%) No identifiable information about individual jurors available through PACER
- 103 (24.3%) Other (please specify)

If you selected other, please specify

See Appendix C

10) Do you or your court offer instructions to counsel regarding redaction of personal identifier or other private information in transcripts? N = 424

Yes: **240 (56.6%)**
 No **104 (24.5%)**
 Don't Know **77 (18.2%)**

What type of judge are you? * Offer instructions to counsel regarding redaction of private information in transcripts?

			Offer instructions to counsel regarding redaction of private information in transcripts?				Total
				Don't Know	No	Yes	
Type of judge	Active district judge	Count	2	17	29	70	118
		% of Total	.5%	4.0%	6.8%	16.5%	27.8%
	Bankruptcy judge	Count	0	21	29	33	83
		% of Total	.0%	5.0%	6.8%	7.8%	19.6%
	Chief bankruptcy judge	Count	0	6	15	27	48
		% of Total	.0%	1.4%	3.5%	6.4%	11.3%
	Chief district judge	Count	0	3	3	31	37
		% of Total	.0%	.7%	.7%	7.3%	8.7%
	Magistrate judge	Count	1	30	28	79	138
		% of Total	.2%	7.1%	6.6%	18.6%	32.5%
Total		Count	3	77	104	240	424
		% of Total	.7%	18.2%	24.5%	56.6%	100.0%

11) You indicated that you or your court offer instructions to counsel regarding redactions of personal identifier or other private information in transcripts. Please describe or provide an example of those instructions.

See Appendix D

12) In your personal experience, does counsel generally attempt to redact personal identifier information from a transcript before it is posted on PACER? N = 424

Yes **178 (42.0%)**
 No **70 (16.5%)**
 Don't Know **175 (41.3%)**

Judges Privacy Survey – 11/19/09

			Does counsel generally attempt to redact personal identifier information from a transcript before it is posted on PACER?				Total
				Don't Know	No	Yes	
Judge Type	Active district judge	Count	0	43	23	52	118
		% of Total	.0%	10.1%	5.4%	12.3%	27.8%
	Bankruptcy judge	Count	0	43	12	28	83
		% of Total	.0%	10.1%	2.8%	6.6%	19.6%
	Chief bankruptcy judge	Count	1	20	8	19	48
		% of Total	.2%	4.7%	1.9%	4.5%	11.3%
	Chief district judge	Count	0	13	3	21	37
		% of Total	.0%	3.1%	.7%	5.0%	8.7%
	Magistrate judge	Count	0	56	24	58	138
		% of Total	.0%	13.2%	5.7%	13.7%	32.5%
Total		Count	1	175	70	178	424
		% of Total	.2%	41.3%	16.5%	42.0%	100.0%

13) Have you had personal experience with counsel redacting transcripts to delete other than personal identifier information? N = 424

Yes 47 (11.1%)
 No 340 (80.2%)
 Don't know 33 (7.%)

What type of judge are you? * Have you had personal experience with counsel redacting transcripts to delete other than personal identifier information? Crosstabulation

			Have you had personal experience with counsel redacting transcripts to delete other than personal identifier information?				Total
				Don't know	No	Yes	
What type of judge are you?	Active district judge	Count	0	6	90	22	118
		% of Total	.0%	1.4%	21.2%	5.2%	27.8%
	Bankruptcy judge	Count	1	9	65	8	83
		% of Total	.2%	2.1%	15.3%	1.9%	19.6%
	Chief bankruptcy judge	Count	1	4	41	2	48
		% of Total	.2%	.9%	9.7%	.5%	11.3%
	Chief district judge	Count	1	2	32	2	37
		% of Total	.2%	.5%	7.5%	.5%	8.7%
	Magistrate judge	Count	1	12	112	13	138
		% of Total	.2%	2.8%	26.4%	3.1%	32.5%
Total		Count	4	33	340	47	424
		% of Total	.9%	7.8%	80.2%	11.1%	100.0%

14) Are you aware of any reasons for noncompliance with the redaction requirements? N = 424

Yes 35 (8.3%)
 No 334 (78.8%)
 Don't Know 53 (12.5%)

What type of judge are you? * Are you aware of any reasons for noncompliance with the redaction requirements?

			Are you aware of any reasons for noncompliance with the redaction requirements?				Total
				Don't Know	No	Yes	
What type of judge are you?	Active district judge	Count	0	12	95	11	118
		% of Total	.0%	2.8%	22.4%	2.6%	27.8%
	Bankruptcy judge	Count	0	13	66	4	83
		% of Total	.0%	3.1%	15.6%	.9%	19.6%
	Chief bankruptcy judge	Count	2	4	38	4	48
		% of Total	.5%	.9%	9.0%	.9%	11.3%
	Chief district judge	Count	0	2	31	4	37
		% of Total	.0%	.5%	7.3%	.9%	8.7%
	Magistrate judge	Count	0	22	104	12	138
		% of Total	.0%	5.2%	24.5%	2.8%	32.5%
Total		Count	2	53	334	35	424
		% of Total	.5%	12.5%	78.8%	8.3%	100.0%

15) What reasons were given?

See Appendix E

16) How were those matters resolved?

See Appendix E

17) When you learn about a violation of the redaction requirements, how do you respond? Please check all that apply. N = 424

Impose sanctions 9 (2.1%)
 Threaten to impose sanctions 30 (7.1%)
 Direct party to revise filing 210 (49.5%)
 Direct clerk to advise party to revise filing 174 (41.0%)
 Other (please specify) 113 (26.7%)

If you selected other, please specify

See Appendix F

REDACTION IN BANKRUPTCY CASES N = 131 Bankruptcy Judges

18) Has your court experienced problems with failures to comply with redaction requirements in filed documents -- including petitions, schedules proofs of claim, and adversary proceeding pleadings?

Yes	89 (67.9%)
No	33 (25.2%)
Don't Know	9 (6.9%)

19) How frequently does this occur? (N = 89)

Often	11 (12.4%)
Sometimes	35 (39.3%)
Rarely	43 (48.3%)

20) In what kinds of bankruptcy filings does this occur? (N = 89)

[Note: Respondents were only able to check one of these options, but in text responses indicated that there were multiple applicable answers. The text responses have been incorporated into the numbers below, and the "please specify" responses only show the answers that were not covered by the response selections.]

<input type="radio"/> Petitions	24 (27.0%)
<input type="radio"/> Schedules	32 (36.0%)
<input type="radio"/> Proof of Claims	68 (76.4%)
<input type="radio"/> Adversary Proceeding Pleadings	17 (19.1%)
<input type="radio"/> Other (please specify)	11 (12.4%)

If you selected other, please specify (11 responses)

1. Filings by pro se litigants
2. In exhibits attached to proofs of claim and also in motions in the estate case and in adversary proceedings and in trial and hearing exhibits and exhibits attached to motions and pleadings
3. Proof of claims are a real problem Creditors do file claims with credit identifying numbers and social security numbers this happens most often with unsophisticated creditors. Once filed the information
4. schedules, proofs of claim and exhibits in evidentiary hearings
5. Employee Income Records, Schedules, Petitions, Proofs of Claims.
6. exhibits to pleadings
7. Petitions, form 21, bank statements, tax returns
8. PAY ADVICES
9. Exhibits to motions and responses
10. We have a large pro se population, and they sometimes file documents or information that contains person identifier information.
11. Failure to redact to also occur in attachments, exhibits, motions and other pleadings. Such failure to redact is becoming less of a problem

Note: From here until the end of the survey, only District, Chief district and Magistrate judges answered the questions, because they are not relevant to Bankruptcy Judges. N = 293, unless otherwise specified.

VOIR DIRE TRANSCRIPTS

21) Have you used any of the following procedures to protect juror privacy in either the voir dire proceeding itself or any resulting transcripts? Please check all that apply.

- 203 (69.3%)** Informed jurors that they have the right to share personal information at the bench in an in camera conference with the attorneys
- 54 (18.4%)** Questioned all jurors individually
- 101 (34.5%)** Made efforts to limit references to potential jurors' names by, for example, referring to them by their juror number
- 62 (21.2%)** Reminded court reporters the transcripts of voir dire proceedings are to be prepared only if the appropriate section of the transcript request form is completed
- 29 (9.2%)** Sealed a voir dire transcript
- 72 (42.6%)** Sealed juror questionnaires
- 10 (3.4%)** Allowed public access to voir dire transcripts only at the courthouse through the public access terminal
- 57 (18.4%)** None of the above

22) Did these procedures appear to be effective in protecting juror privacy? N = 237

Yes	183 (62.5%)
No	4 (1.4%)
Don't Know	50 (17.1%)

23) Comments:

See Appendix G

24) Have you experienced any problems or complaints in protecting private information in voir dire transcripts from access through PACER?

Yes	3 (1.0%)
No	238 (81.2%)
Don't Know/Not Applicable	52 (17.7%)

25) You indicated that you experience problems or complaints in protecting private information in voir dire transcripts from access through PACER. Please describe those problems or complaints.

Failure of employees in the clerk's office to be diligent in protecting the private information.
(Active district judge)

A newspaper reporter accessed pacer and obtained a criminal filing from the US Attorney's Office that contained improper personal information, and wrote a story that contained some of the personal information. The story brought this issue to light. (Magistrate judge)

In criminal felony plea proceedings, I always ask the defendant to provide his/her name and year of birth. Often times, I will say, "please let me have the year of your birth, not the date." Even with that admonition, from time-to-time a defendant will provide the full date. As proceedings are electronically recorded, we have no ability to redact that confidential information. Thus, the problem arises when a defendant fails to follow my instruction.
(Magistrate judge)

SEALING DOCUMENTS

26) Have you sealed or otherwise restricted access to documents that have not been redacted in accordance with the privacy rules?

Yes	162 (55.3%)
No	90 (30.7%)
Don't Know	41 (14.0%)

27) How often does this occur? N = 162

Often	11 (6.8%)
Sometimes	49 (30.2%)
Rarely	101 (62.3%)
Missing data	1 (0.6%)

28) You indicated that you have sealed or otherwise restricted access to documents that have not been redacted in accordance with the privacy rules. Please explain.

See Appendix H

REDACTION IN GENERAL

29) Is there information in case files, not currently redacted, that should be subject to categorical redaction?

Yes	26 (8.9%)
No	71 (24.2%)
Don't Know	195 (66.6%)

30) What types of information? Please check all that apply. N = 222 ("yes" and "don't know" in response to Q29)

- | | |
|---|------------|
| <input type="checkbox"/> Driver's license number | 43 (19.4%) |
| <input type="checkbox"/> Passport number | 41 (18.5%) |
| <input type="checkbox"/> State identification number | 31 (14.0%) |
| <input type="checkbox"/> Health insurance identification number | 37 (16.7%) |
| <input type="checkbox"/> Alien registration number | 34 (15.3%) |
| <input type="checkbox"/> Other (please specify) | 20 (9.0%) |

For "Other, please specify", see Appendix I

31) Comments

See Appendix J

IMMIGRATION RECORDS

32) With respect to immigration cases, do you believe PACER access to additional forms of private information, such as alien registration numbers, should be restricted?

72 (24.6%) Yes, PACER access to such private information should be limited in all immigration cases.

4 (1.4%) PACER access should be limited in certain types of immigration cases.

33 (11.3%) No, PACER access should not be limited in immigration cases.

184 (62.8%) Don't Know/No opinion

33) Which types of immigration cases should require limited access?

1. Cases involving requests for asylum if there involves a physical threat to an individual or sexual matters. (Active district judge)
2. That can't be predicted. (Active district judge)
3. Situations involving existing or potential asylum requests/petitions and where accused may be involved in an investigation or pending case and could be a witness (Magistrate judge)

REDACTION OF CRIMINAL RECORDS

The Committee Note to Criminal Rule 49.1 lists documents that are not to be included in the public criminal case file. Those documents are the following:

- Unexecuted summons or warrants of any kind
- Pretrial bail or presentence investigation reports
- Statements of reasons in the judgment of conviction
- Juvenile records
- Documents containing identifying information about jurors or potential jurors
- Financial affidavits filed in seeking representation pursuant to CJA
- Ex parte requests for authorization of investigative, expert or other services under the CJA
- Sealed documents

34) In your opinion, are there categories of material that should be deleted from the current list of documents and included in the public criminal case file?

- | | |
|----------------------------------|-------------|
| <input type="radio"/> Yes | 15 (5.1%) |
| <input type="radio"/> No | 235 (80.2%) |
| <input type="radio"/> Don't Know | 43 (14.7%) |

35) You indicated that there are categories of material that should be deleted from the current list of documents excluded from the public case file. Please note which categories should be deleted, and explain why you think the information should be included in the file.

See Appendix K

36) In your opinion, are there additional categories of materials that should be added to the list of documents that are not be included in the public criminal case file?

- | | |
|----------------------------------|-------------|
| <input type="radio"/> Yes | 23 (7.8%) |
| <input type="radio"/> No | 169 (57.7%) |
| <input type="radio"/> Don't Know | 99 (33.8%) |
| Missing Data | 2 (0.7%) |

37) You indicated that there are additional categories of materials that should be added to the list of documents not to be included in the public case file. Please describe those categories, and explain why you think this information should not appear in the public case file.

See Appendix L

38) Does your court seal, or otherwise limit public access to, plea agreements?

- Yes 159 (54.3%)
- No 99 (33.8%)
- Don't Know 34 (11.6%)

39) Does your court have a policy or a practice to eventually unseal (or consider unsealing) such agreements? N = 159

- Yes 41 (25.8%)
- No 76 (47.8%)
- Don't Know 41 (25.8%)

40) You indicated that your court has a policy or practice to unseal plea agreements. Please describe the policy or practice, referring specifically to any event or circumstance (e.g., imposition of sentence, remand to custody) that generally triggers unsealing or opening access.

See Appendix M

41) Please select the option that best describes your practice regarding posting of plea agreements:

- 145 (49.5%) Plea agreements are generally available to the public, but are sealed as needed, on a case-by-case basis.
- 19 (6.5%) Plea agreements are not available to the public through PACER, but are publicly available through the public access terminal in the Clerk's office.
- 29 (9.9%) Plea agreements are available to the public, but the cooperation information has been transferred from the plea agreement to a sealed document.
- 20 (6.8%) Plea agreements are available to the public, but the cooperation information has been transferred from the plea agreement to a document kept outside of the public case file.
- 26 (8.9%) Plea agreements are not filed.
- 44 (15.0%) Other (please specify)
- 10 (3.4%) Missing data

For "other, please specify", see Appendix N

42) What is done with the cooperation agreement?

See Appendix O

43) Do you follow the same practices with cooperation agreements?

- Yes 229 (78.2%)
- No 40 (13.7%)
- Missing Data 24 (8.2%)

44) You indicated that you follow a different practice for cooperation agreements. Please describe the different practice for cooperation agreements.

See Appendix P

45) Do you or others in your court review decisions to restrict PACER access to plea or cooperation agreements after a certain point in time?

<input type="radio"/> Yes	16 (5.5%)
<input type="radio"/> No	134 (45.7%)
<input type="radio"/> Don't Know	134 (45.7%)
Missing data	9 (3.1%)

46) You indicated that you or others in your court review decisions to restrict PACER access to plea or cooperation agreements after a certain point in time. Please describe the process that is used.

See Appendix Q

47) Have you had any problems implementing the court's policy regarding posting of plea and cooperation agreements?

<input type="radio"/> Yes	3 (1.0%)
<input type="radio"/> No	242 (82.6%)
<input type="radio"/> Don't Know	42 (14.3%)
Missing data	6 (2.3%)

48) You indicated that you have had problems implementing the court's policy regarding posting of plea and cooperation agreements. Please explain those problems.

1. As to my (not the court's) policy requiring the government to notify the court as soon as the need for sealing no longer exists, I rarely receive such notice. (Active district judge)
2. There have been attempts to have separate side, substantial assistance agreements, not a physical part of the plea agreement and not filed, to avoid public disclosure. In Feb. 2009, our court voted to make plea agreements public; I have tried to follow that vote by only accepting side substantial assistance agreements that become public. There have only been a few exceptions where concrete, credible threats have caused me to seal a plea agreement and/or side, substantial assistance agreement. No body has been killed yet, but I fear it is only a matter of time. (Active district judge)
3. use of them in another case (Active district judge)

49) In your opinion, has the court's policy regarding posting of plea and cooperation agreements been successful in protecting the privacy and security of individuals signing such an agreement?

<input type="radio"/> Yes	176 (60.1%)
<input type="radio"/> No	5 (1.7%)
<input type="radio"/> Don't Know	105 (35.8%)
Missing data	7 (2.4%)

50) You indicated that the court's policy regarding posting of plea and cooperation agreements has not been successful in protecting the privacy and security of individuals signing such agreements. Please explain.

1. Anyone can go on Pacer and see if a Defendant has pled guilty, and if so, whether cooperation is contemplated. The Public's right to know has trumped safety concerns. (Active district judge)
2. Docket entries entitled "sealed" in criminal cases have resulted in retaliation against the defendants named in the case. Because the public has access to these cases, these people are exposed. (Active district judge)
3. I do not believe that these records should be sealed, and our court does not seal them as a general rule. (Active district judge)
4. I don't know what you mean by posting plea and cooperation agreements. We don't post them we seal them. (Active district judge)
5. The entry of the sealed docket item is enough in cases where threats against the cooperating defendant have been made to signal that such an agreement is in place. There needs to be an alternative in which the cooperation agreement is not apparent on PACER. (Active district judge)
6. When a plea agreement is sealed, it is apparent that someone is cooperating with the government. Web sites like "who's a rat," publically list the sealed agreements. Thus, the very fact of sealing could be detrimental. I am unaware of any actual adverse consequence as a result of postings on "who's a rat." (Magistrate judge)

51) Have you or your court considered alternative policies governing access to plea agreements and cooperation agreements?

<input type="radio"/> Yes	58 (19.8%)
<input type="radio"/> No	93 (31.7%)
<input type="radio"/> Don't Know	136 (46.4%)
Missing data	6 (2.0%)

52) Please describe any alternatives that have been considered.

See Appendix R

53) Have those alternatives been implemented? N = 58

<input type="radio"/> Yes	9 (15.5%)
<input type="radio"/> No	42 (72.4%)
<input type="radio"/> Don't Know	7 (12.1%)

54) Have those alternatives been successful? N = 58

- Yes 4 (6.9%)
- No 1 (1.7%)
- Don't Know 5 (8.6%)

55) In cases involving cooperation, have you had experience in: (please check all that apply)

- 161 (54.9%) Closing a courtroom
- 116 (39.6%) Sealing a record in whole
- 177 (60.4%) Sealing a record in part
- 118 (40.3%) Sealing the transcript of a hearing in whole (if different from the record)
- 138 (47.1%) Sealing the transcript of a hearing in part (if different from the record)
- 121 (41.3%) Sealing docket entries (if different from the record)
- 54 (18.4%) None of the above

56) Are you aware of any instance of harm or credible threat to a witness or defendant, arising from a perception that the witness or defendant was cooperating (either through language in plea agreement/cooperation agreement or a sealed document on a docket sheet)?

- Yes, in plea agreement cases 16 (5.5%)
- Yes, in cooperation agreement cases 26 (8.9%)
- Yes, in both plea agreement and cooperation agreement cases 57 (19.5%)
- No 142 (48.5%)
- Don't Know 47 (16.0%)
- Missing data 5 (1.7%)

57) In those instances, what circumstances gave rise to such suspicion or knowledge? Please check all that apply. N = 99

- 18 (18.2%) Access to case files on the internet
- 15 (15.2%) Access to case files at the courthouse
- 35 (35.4%) Attendance at pretrial proceedings
- 22 (22.2%) Attendance at trials
- 42 (42.4%) Don't know
- 23 (23.2%) Other (please specify)

For "Other, please specify", see Appendix S

58) If you have any other comments or suggestions about the privacy rules that have not been covered in this questionnaire, please provide them here.

See Appendix T

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Appendix A (Question 2: In which district do you sit)

District Courts

	Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1	.3	.3	.3
ALMD	3	1.0	1.0	1.4
ALND	2	.7	.7	2.0
ALSD	1	.3	.3	2.4
ARED	3	1.0	1.0	3.4
ARWD	1	.3	.3	3.8
AZD	5	1.7	1.7	5.5
CACD	10	3.4	3.4	8.9
CAED	2	.7	.7	9.6
CAND	2	.7	.7	10.2
CASD	5	1.7	1.7	11.9
COD	5	1.7	1.7	13.7
CTD	3	1.0	1.0	14.7
DCD	3	1.0	1.0	15.7
DED	2	.7	.7	16.4
FLMD	8	2.7	2.7	19.1
FLND	2	.7	.7	19.8
FLSD	3	1.0	1.0	20.8
GAND	4	1.4	1.4	22.2
GASD	1	.3	.3	22.5
HID	1	.3	.3	22.9
IAND	1	.3	.3	23.2
IASD	2	.7	.7	23.9
ILCD	4	1.4	1.4	25.3
ILND	7	2.4	2.4	27.6
ILSD	4	1.4	1.4	29.0
INND	2	.7	.7	29.7
KSD	4	1.4	1.4	31.1
KYED	1	.3	.3	31.4
KYWD	2	.7	.7	32.1
LAED	3	1.0	1.0	33.1
LAWD	2	.7	.7	33.8
MAD	6	2.0	2.0	35.8
MDD	2	.7	.7	36.5
MED	1	.3	.3	36.9
MIED	2	.7	.7	37.5
MIWD	3	1.0	1.0	38.6
MND	1	.3	.3	38.9
MOED	2	.7	.7	39.6
MOWD	2	.7	.7	40.3
MSND	2	.7	.7	41.0
MSSD	2	.7	.7	41.6
MTD	2	.7	.7	42.3

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NCED	1	.3	.3	42.7
NCMD	3	1.0	1.0	43.7
NCWD	3	1.0	1.0	44.7
NDD	1	.3	.3	45.1
NED	4	1.4	1.4	46.4
NHD	2	.7	.7	47.1
NJD	2	.7	.7	47.8
NMD	4	1.4	1.4	49.1
NMID	1	.3	.3	49.5
NVD	3	1.0	1.0	50.5
NVSD	1	.3	.3	50.9
NYED	11	3.8	3.8	54.6
NYND	4	1.4	1.4	56.0
NYSD	10	3.4	3.4	59.4
NYWD	4	1.4	1.4	60.8
OHND	6	2.0	2.0	62.8
OHSD	4	1.4	1.4	64.2
OKED	3	1.0	1.0	65.2
OKND	3	1.0	1.0	66.2
OKWD	4	1.4	1.4	67.6
ORD	1	.3	.3	67.9
PAED	2	.7	.7	68.6
PAMD	4	1.4	1.4	70.0
PAWD	5	1.7	1.7	71.7
PRD	3	1.0	1.0	72.7
RID	2	.7	.7	73.4
SCD	5	1.7	1.7	75.1
SDD	1	.3	.3	75.4
TNED	4	1.4	1.4	76.8
TNMD	2	.7	.7	77.5
TNWD	2	.7	.7	78.2
TXED	8	2.7	2.7	80.9
TXND	6	2.0	2.0	82.9
TXSD	9	3.1	3.1	86.0
TXWD	9	3.1	3.1	89.1
UTD	4	1.4	1.4	90.4
VAED	6	2.0	2.0	92.5
VAWD	3	1.0	1.0	93.5
VTD	2	.7	.7	94.2
WAED	1	.3	.3	94.5
WAWD	5	1.7	1.7	96.2
WIED	3	1.0	1.0	97.3
WIWD	1	.3	.3	97.6
WVND	3	1.0	1.0	98.6
WVSD	1	.3	.3	99.0
WYD	3	1.0	1.0	100.0
Total	293	100.0	100.0	

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**Question 2: District
Bankruptcy Districts**

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	AKB	1	.8	.8	.8
	ALMB	1	.8	.8	1.5
	ALSB	1	.8	.8	2.3
	AREB	1	.8	.8	3.1
	CACB	5	3.8	3.8	6.9
	CAEB	3	2.3	2.3	9.2
	CANB	3	2.3	2.3	11.5
	CASB	1	.8	.8	12.2
	COB	4	3.1	3.1	15.3
	CTB	1	.8	.8	16.0
	DEB	6	4.6	4.6	20.6
	FLMB	2	1.5	1.5	22.1
	FLSB	2	1.5	1.5	23.7
	GANB	2	1.5	1.5	25.2
	HIB	1	.8	.8	26.0
	IDB	2	1.5	1.5	27.5
	ILCB	2	1.5	1.5	29.0
	ILNB	6	4.6	4.6	33.6
	INNB	2	1.5	1.5	35.1
	KSB	2	1.5	1.5	36.6
	KYEB	2	1.5	1.5	38.2
	LAED	1	.8	.8	38.9
	LAMB	1	.8	.8	39.7
	LAWD	1	.8	.8	40.5
	MAB	2	1.5	1.5	42.0
	MDB	2	1.5	1.5	43.5
	MEB	2	1.5	1.5	45.0
	MIEB	1	.8	.8	45.8
	MNB	3	2.3	2.3	48.1
	MSNB	1	.8	.8	48.9
	MSSB	1	.8	.8	49.6
	MTB	1	.8	.8	50.4
	NCEB	1	.8	.8	51.1
	NCMB	3	2.3	2.3	53.4
	NCWB	2	1.5	1.5	55.0
	NDB	1	.8	.8	55.7
	NEB	2	1.5	1.5	57.3
	NHB	1	.8	.8	58.0
	NJB	2	1.5	1.5	59.5
	NVB	1	.8	.8	60.3
	NYEB	5	3.8	3.8	64.1
	NYSB	6	4.6	4.6	68.7
	NYWB	1	.8	.8	69.5

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- Active district judge I alert the attorneys at the beginning of the case and we advise them in the Clerk's office
- Active district judge I am generally careful about not including any such information in opinions. Also, in voir dire, we tell the jury panel not to disclose their addresses, although we do use names.
- Active district judge I attempt to deflect by speaking with counsel.
- Active district judge I avoid asking questions in plea colloquys that may call for personal identifier information.
- Active district judge I carefully remind counsel of the applicable rules before an evidentiary proceeding.
- Active district judge I direct the parties to make appropriate redactions, consistent with the rules.
- Active district judge I discourage lawyers from asking questions about personal identifier information.
- Active district judge I discuss the privacy policy with counsel at the limine conference I conduct before trial and caution counsel not to elicit answers which would disclose such information unless it is actually relevant to a material issue -- and if it is, to request a redaction of the transcript contemporaneously with the issue arising at the trial. I follow essentially the same procedure for other evidentiary hearings, such as contested sentencings, suppression hearings and the like. In addition, when counsel inadvertently elicit such information I spontaneously ask leave to redact on the spot.
- Active district judge I do not have witnesses provide street addresses, ss# or DOB. I use numbers instead of names for jury selection,
- Active district judge I mention the issue to counsel before court proceedings if I think the privacy concerns may arise.
- Active district judge I often inform attorneys at the beginning of evidentiary hearings not to ask witnesses questions that would elicit such information.
- Active district judge I provide jurors with numbers and make all references to jurors through those numbers. Questions directed to witnesses which call for personal identifier information are not allowed unless counsel indicates the relevance and need for such information to be placed on the record.
- Active district judge I remind counsel to redact such information, and not state it on the record. If I see it in an exhibit or pleading or hear it in court I order it redacted.
- Active district judge I sometimes remind the parties prior to proceeding.
- Active district judge I tell the lawyers to be mindful of their responsibility to not inject into the proceedings the type of information referenced in the civil and criminal rules that is deemed "private".

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Active district judge	I try to advise counsel prior to a trial regarding the requirements of FRCrP 49.1 / FRCP 5.2 If an identifier comes out during testimony or a question, I strike it from the record, explain why, and direct counsel to avoid such questions.
Active district judge	I try to make sure that this information is not elicited in questioning
Active district judge	I warn the attorneys during trials and during hearings not to mention personal identifiers.
Active district judge	If I recognize the problem, I redact the information and also order the parties to redact it.
Active district judge	If lawyers refer to such information in open court, I remind them not to.
Active district judge	In the earlier years I made a practice of discussing these matters at pre-trial . The word is "out" and it hasn't been a problem of late.
Active district judge	Instruct all court personnel not to disclose any personal identifier information
Active district judge	Instruct counsel
Active district judge	Instruct counsel on proper procedures. Seal pleadings done improperly and require proper form.
Active district judge	Instruct lawyers to remove identifying information
Active district judge	Instructions to counsel before transcribed proceedings.
Active district judge	Jurors and witnesses are told that is not necessary to state their address.
Active district judge	Lawyers are given written notice as a part of our normal practice to be careful with personal information
Active district judge	local rules require redaction
Active district judge	My law clerks and judicial assistant are aware of the sensitive nature of this information and when necessary steps are taken to protect it.
Active district judge	Point it out to the lawyers in pre-trial and status conferences that they need to be mindful so that readaction will not have to occur
Active district judge	Pretrial orders in civil cases and orders setting trials in criminal cases remind lawyers of the need to limit personal information in testimony and to redact such information from exhibits. My staff -- court room deputy, court reporter, and myself -- are vigilant in checking exhibits and reminding lawyers about the need for redactions. My court reporter will bring to my attention information in a transcript that may need to be redacted before filling.
Active district judge	Pre-trial or pre-hearing redaction
Active district judge	prohibit reference unless absolutely necessary

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- Active district judge Pursuant to local rule, complaints and other pleadings specifically do not require personal identifiers
- Active district judge refer to venirewo/men by their number; instruct witnesses to refer to minors by initials.
- Active district judge Remind counsel of our privacy rules and need to protect sensitive information from public disclosure.
- Active district judge Remind the parties through counsel at the CMC to take the necessary steps to redact.
- Active district judge Request lawyers to omit such information if possible and if not place it under seal.
- Active district judge Require counsel not to refer to such information in specific terms unless necessary to an issue in the case. When necessary, the record is sealed. Occassionally, counsel will include private information in documents filed in the docket and the pleading is replaced with the information omitted.
- Active district judge Sometimes attorneys examining a witness will be instructed not to elicit such information. When pro se refer to individual minors with respect to child abuse, the reference is redacted and the Clerk's office directs the pro se to amend the document.
- Active district judge The issue does not arise generally in day to day proceedings before the Court. It seems to be more of an issue at the trial of a case. Therefore, at the pretrial status conference, we discuss how to avoid using personal identifier information during the trial.
- Active district judge The parties are all aware that they do not need to refer to any personal information that can lead to harm to any person. If such information is necessary, the parties approach the bench with the information.
- Active district judge The parties redact information. For example, if a Social Security Number is to listed on a document, usually the first five numbers are covered with "X's".
- Active district judge use of initials for minors
- Active district judge Warn the attorneys not to use it. The attorneys are already quite careful.
- Active district judge We have a local rule that requires redaction of certain personal identifiers and I at times have motions filed to remove personal identifier which I respond to immediately. In proceedings I have had to require the redaction of personal information from exhibits and I am moving toward not using panel or jury members names in the proceedings. I review all voir dire personally and prohibit questions that seek identifier or identifier like information. Finally, in making challenges we do so in a manner that does not disclose personal information

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- Active district judge We make a conscious effort to address each document as it is considered.
- Active district judge We notify counsel of the prohibited privacy information in every case and halt counsel if they make a mistake. If they persist, I treat it as a waiver.
- Active district judge We tell the parties early on that they are to redact such information.
Active district judge We warn the parties to avoid the issue.
- Active district judge When a question is raised that asks for personal identifier information (or a litigant, prospective juror, or witness starts to volunteer such information), I try to remember to avoid having them put such information on the record unless it is necessary. Often it is sufficient to get the city (not the address) or the last four digits of an SS number (instead of the entire number).
- Active district judge When an attorney asks for protected information, I stop the witness from providing it (when I remember).
- Active district judge when it is clear at the beginning of a proceeding that this is a potential problem, I bring it up and ask counsel to limit (or eliminate) mention on the record...substituting some other (agree upon) identifier in its place.
- Active district judge While I have not had to enter an order yet, in court we will usually follow the redactions that have appeared in the pleadings. Generally, the indictments or other pleadings with personal identifiers are redacted in part, like a credit card receipt. Either by implication or otherwise, we usually follow that in court unless there is an issue specific to the case that requires full disclosure.
- Active district judge WITNESSES ARE CAUTIONED NOT TO PROVIDE SUCH INFORMATION
- Bankruptcy judge (1) We have a Local Rule that has adopted the Judicial Conference's policy on personal information and states that parties should not elicit such information in testimony or include it in exhibits. (2) My scheduling order specifically requires counsel to
- Bankruptcy judge admonish counsel against eliciting personal information from witnesses not necessary to adjudication of issues.
- Bankruptcy judge Advise parties to redact personal identifiers from exhibits before submitting or filing them and advise counsel not to refer to social security numbers of people or ages of children on the record.
- Bankruptcy judge As parties may be presenting issues before the Court and may offer documents I remind them of the privacy requirements.
- Bankruptcy judge Ask parties not to read SSNs and the like into the record, check that exhibits are redacted before accepting in court, telling parties to redact if they file documents with identifiers

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Bankruptcy judge	During hearings, I block unnecessary disclosures
Bankruptcy judge	During questioning I request that no complete addresses nor other personal identifier information be included in testimony.
Bankruptcy judge	I advise parties at hearings to be careful in putting personal identifiers on the record.
Bankruptcy judge	I call attention to such information whe it is included in exhibits and ask that it be redacted before exhibits are introduced and admitted.
Bankruptcy judge	I caution the attorneys/litigants at the commencement of the proceedings not to ask the type of questions that will need to be redacted.
Bankruptcy judge	I do not allow personally identifiable information to be requested of witnesses.
Bankruptcy judge	I have asked counsel not to pursue questioning that will elicit this information during a hearing or trial.
Bankruptcy judge	I have consistently intervened when the routine background questions are asked to advise counsel that questions eliciting personal identifier information should not be asked. Slowly, but surely, the practice is changing.
Bankruptcy judge	I inform counsel on the record that home addresses should not be requested of witnesses
Bankruptcy judge	I insure that such information is never made part of the record by causing such information to be redacted in documents and insuring it is never read into the record.
Bankruptcy judge	I read a prepared speech. If you would like a copy, please call me.
Bankruptcy judge	I remind the attorneys that the transcript will be accessible to the public and, thfore, to consider the content of statements and documents.
Bankruptcy judge	I warn lawyers and parties not to put such informaton on the record.
Bankruptcy judge	If a court filing or exhibit has a social security number in it, I will have that redacted upon request of any party before it becomes part of the trial record.
Bankruptcy judge	If a statement of private information is requested of a witness in a proceeding, I try to caution the witness not to provide same.
Bankruptcy judge	If I see that some personal information, such as a Social Security number, is on an exhibit that is being offered into admission at trial, I will suggest that the exhibit be redacted. I have required some exhibits to be redacted as a condition for admission.
Bankruptcy judge	If in testimony, I strike the information on the spot. If on an exhibit, I instruct counsel to redact the information and supply a redacted copy.

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Bankruptcy judge	There is a notice on counsel table and I try to interrupt an attorney or witness if he or she is about to disclose inappropriate info.
Bankruptcy judge	This has not yet come up but based upon the privacy rules am not paying special attention to testimony and will interrupt a witness if s/he appears to be moving toward giving PII on the record.
Bankruptcy judge	Try to be aware of rules and guide parties in their questioning, as appropriate
Bankruptcy judge	We follow the policy from the AO. Any transcripts that are transmitted to th court electronically are not accessible to the public for a period of time (I believe 90 days). This allows the parties an oppurtunity to request that certain information be redacted prior to downloading the transcript to the court's file.
Bankruptcy judge	We have notices on counsel table and I mention it to counsel at the commencement of testimonial hearings.
Bankruptcy judge	when discovered block access to the offending document
Bankruptcy judge	When it appears the issue may arise, I caution counsel about using exhibits or referring on the record to social security numbers.
Chief bankruptcy judge	As necessary, reminders are given to counsel and participants to ensure that private information is redacted.
Chief bankruptcy judge	Ask parties at pre-trial conference whether they have redacted all personal identifiers.
Chief bankruptcy judge	automaticly done
Chief bankruptcy judge	Caution attorneys who are introducing documentary evidence to redact before submitting the exhibit.
Chief bankruptcy judge	caution counsel during the hearing
Chief bankruptcy judge	Court e-filing web page has a warning notice about redaction of personal identifier information that must be acknowledged before e-filer can proceed.
Chief bankruptcy judge	During trials, I ask lawyers and witnesses not to put confidential information like full social security numbers or rull account numbers on the record unless absolutely necessary (which is almost never).
Chief bankruptcy judge	I advise the witness not to provide the information if the question appears designed to elicit it, and cut off the witness if he or she is about to provide it.
Chief bankruptcy judge	I mention the problem the first time counsel asks a question that would require disclosure; the reminder is generally sufficient.

Chief bankruptcy judge	I remind attorneys in open court, post notices on the attorney's tables, include notices within our Order setting deadlines, and I return any exhibits which contain personal identifying information in order for the information to be removed.
Chief bankruptcy judge	If such information inadvertently is stated on the record I immediately direct that the record be redacted. Also such information is be redacted in all filings and exhibits. By local rule, 9037-1 we have incorporated the federal rule.
Chief bankruptcy judge	If testimony is getting into an area which could invlve personal identifier information, I would caution the witness. However this rarely happens.
Chief bankruptcy judge	Laminated cards cautioning counsel about the use of protected information are placed on counsel's table in the courtroom. Also, cautionary warnings are prominently displayed on the court's CM/ECF site at log-in, and on the court's webpage.
Chief bankruptcy judge	Monitoring during the hearing
Chief bankruptcy judge	My courtroom deputy reads a prepared statement before any witness testifies alerting the witness to the problem.
Chief bankruptcy judge	Note for the parties, especially if requested by one of the hearing participants, that the record should be modified or purged of the personal identifier.
Chief bankruptcy judge	ORAL ADMONITION TO LITIGANTS. ALSO SCHEDULING ORDERS FOR TRIALS AND MANY OTHER (THOUGH NOT NECESSARILY ALL) EVIDENTIARY HEARINGS WARN COUNSEL ABOUT JUDICIARY PRIVACY POLICY.
Chief bankruptcy judge	our case managers, as a part of their quality control, are on the lookout for personal identified information; if they find any, they will notify the presding judge
Chief bankruptcy judge	Our clerk's staff screens documents carefully.
Chief bankruptcy judge	Our trial orders require that attorneys avoid introduction of personal identifiers in argument or in testimony. We also post privacy reminders on all counsel tables in courtrooms.
Chief bankruptcy judge	Remind counsel and parties
Chief bankruptcy judge	Remind counsel at beginning of hearings by flyers posted on counsel tables to not divulge personal information such as family names, children's names, account numbers, social security numbers, etc.
Chief bankruptcy judge	Reminder in standard scheduling order Oral reminder on the record at points where it appears such information may come out

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Chief bankruptcy judge	Return exhibits unless appeal is filed, in which case redaction is required. POC's with such information is removed from public view, and an amended claim is required.
Chief bankruptcy judge	Transcript reviewed by a case manager to determine if any personal identifier information is included.
Chief bankruptcy judge	try to interrupt when PII is approached in testimony and will review proffered documents.
Chief bankruptcy judge	Try to limit reference to addresses, minors' names, etc. in open court.
Chief bankruptcy judge	We alert the parties to the privacy issues in GPOs and LBRs regarding the subject. At hearings, if testimony or exhibits in the court's public files raises identifier problems we tell the parties to redact. In some cases, we will seal the document from public access and order that a redacted amended copy be filed
Chief bankruptcy judge	We remind counsel not to ask for home address, to refer only to the last 4 digits of account numbers, not to refer to minor children by name.
Chief bankruptcy judge	We track and review redaction requests
Chief bankruptcy judge	When appropriate, I advise witnesses and counsel to refrain from placing personal identifier information on the record.
Chief bankruptcy judge	When PII is brought up, I instruct the parties to limit the testimony so that (for example) full social security numbers are not given in open court.
Chief district judge	Complete identifiers are not used on the record. Exhibits are redacted to meet this requirement. Regarding transcripts attorneys have the responsibility for redaction.
Chief district judge	Counsel are advised to limit the introduction of personal information when questioning witnesses and making statements in court. We do this by 1) posting an Advisory for Limiting Personal Information on our web site (http://www.ohnd.uscourts.gov/Electronic_Filing/Advisory_for_Limiting_Personal_Information_in_Transcripts.pdf) and 2) placing a laminated copy of the Advisory on the counsel tables in each of our courtrooms. The topic has also been mentioned in our bar association newsletters and during Federal Practice CLE programs.
Chief district judge	Counsel are reminded to speak appropriately and avoid use of personal identifying information.
Chief district judge	Do not identify jurors by name. Do not use minors names in pleadings.
Chief district judge	During the pretrial conference, I cover this topic with counsel, and I advise jurors at the commencement of voir dire.

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Chief district judge	I ask the attorneys to avoid using the personal identifiers unless absolutely necessary. I have no problem with this procedure.
Chief district judge	I have asked the attorneys to "sanitize" their filings of items such as bank account numbers, social security numbers, etc. before those items are introduced into the record.
Chief district judge	I provide situational guidance to counsel in cases in which personal identifier information is at issue or may be referred to as the evidence is presented. In those situations, I instruct counsel to refrain from asking questions containing, or that would solicit answers disclosing, personal identifier information.
Chief district judge	I tell witnesses they are not required to answer such questions and then advise the lawyers to refrain as well. I also ask the lawyers to redact any exhibits that may be filed.
Chief district judge	I try to catch questions that include or seek personal identifier information and ask that they be rephrased to avoid answers that include such information. I also stop witnesses who are including such information in their responses.
Chief district judge	I would instruct the Counsel to frame their questions so as not to raise the personal identifiers in open Court - I would also instruct the court reporter not to disclose personal identifiers in the transcript.
Chief district judge	In hearings, if such information is provided, I strike the response and require that only initials be used. We review filings to be sure that they are not providing such information.
Chief district judge	In major criminal cases, I have had jurors referred to by number.
Chief district judge	Intensive training of court users and the bar has resulted in a first class operation Docket Clerks (quality analysts), pick up any mistake for instant correction.
Chief district judge	My staff and our Clerk's Office always look for any failure in complying with the redaction rules.
Chief district judge	Nothing other than try to stay alert to the possibility and head it off.
Chief district judge	Our court has advised attorneys in writing and I orally advise them if I believe that such information may come up.
Chief district judge	raise it with lawyers during hearings when personal identifiers are being put in evidence
Chief district judge	remind lawyers to black out such info
Chief district judge	Remind lawyers verbally as needed; local court rule/administrative order.
Chief district judge	request counsel not use jurors names during voir dire
Chief district judge	strike it from the record and direct court reporter not to transcribe
Chief district judge	very careful that home addresses, social security #'s, etc. are never asked for or revealed so that redaction would be necessary

Chief district judge	Website informs lawyers. Docketing clerks check pleadings. Lawyers are often called by clerk's office.
Chief district judge	When a lawyer solicits such information, I stop the proceedings and ask him or her if she really needs this question answered. If not, I ask the court reporter to not include this information if the witness has already answered the question.
Chief district judge	When something is said on the record that falls in this category, I either have it stricken, redacted or that part put under seal. Jury voir is always sealed from public access.
Magistrate judge	I simply remind counsel of the applicable rules during the final pretrial and limine conferences.
Magistrate judge	Address issue at the Case Management Conference and the Pretrial Conference. Encourage parties to redact during discovery and to reach agreements, if possible, on the presentation of evidence in a manner that would minimize any need to redact.
Magistrate judge	Admonish counsel
Magistrate judge	Admonish counsel
Magistrate judge	Admonish counsel and/or witness
Magistrate judge	Advise counsel not to disclose such information during any proceedings that are on the record.
Magistrate judge	advise the parties prior to hearing to be aware and keep personal identifiers out.
Magistrate judge	Ask counsel not to state personal identification information on the record. If stated inadvertently, strike it from the record and instruct court reporter when transcribing the hearing to redact the information from the transcript.
Magistrate judge	At pretrial or at beginning of a proceeding I remind counsel of their obligation to protect personally identifiable information.
Magistrate judge	Avoid reading it and advising the parties to do the same.
Magistrate judge	Before voir dire, I remind counsel to refer to jurors by their number and not their names.
Magistrate judge	clerk review
Magistrate judge	confirming that documents filed and issued do not contain such information consciously do not state addresses, dates of birth, etc. during hearing, refer to reports.
Magistrate judge	Counsel and the parties are advised prior to the proceedings that such information is to be avoided and if necessary will be under seal.
Magistrate judge	Direct it be redacted or stricken, remind the parties to avoid such references on-the-record unless material to issues in the case.
Magistrate judge	Discuss issues with parties at initial conferences and other proceedings to make them aware of the issue.

Magistrate judge	Filing documents with limited access to the parties and public terminal only; redacting portions (if not burdensome); sealing documents with private information if redaction would be burdensome
Magistrate judge	I do not ask it.
Magistrate judge	I generally do not mention such specific information in open court.
Magistrate judge	I have close communication with my docket clerk to flag and discuss any problems which appear.
Magistrate judge	I have the attorneys review the documents and redact if necessary
Magistrate judge	I instruct counsel prior to questioning witnesses, as necessary; I review grand jury indictments for victim information when I do returns; and I issue protective orders in criminal discovery matters.
Magistrate judge	I instruct witnesses not to provide personal identifier information in response to counsel questions. If a witness or counsel inadvertently refers to such information on the record, I note on the record that any court reporter transcribing the proceeding to redact the information. I also instruct criminal defendants not to list the information on forms required to be filled out (e.g. financial affidavits).
Magistrate judge	I interrupt when necessary to prevent inclusion in the record.
Magistrate judge	I make every attempt to ensure that personal identifier information is not raised unnecessarily in a proceeding.
Magistrate judge	I normally instruct the lawyers to redact the document before entry of the document into evidence.
Magistrate judge	I occasionally remind the lawyers not to include unnecessarily such personal identifiers, or to truncate them to fewer than all the digits in numerical identifiers. But it is an occasional thing, not routine.
Magistrate judge	I purposely do not allow testimony regarding personal information into the record. Even with guilty pleas, I only ask the year of their birth, not the date.
Magistrate judge	I remind counsel
Magistrate judge	I send a form order to counsel prior to the hearing which instructs them to refrain from using personal and/or private information unnecessarily. It also instructs them to submit any such information in advance of the hearing either under seal (pursuant to Local Rules) or by email to my chambers with copies to opposing counsel.
Magistrate judge	I simply make sure that counsel do not inquire into these matters unnecessarily.

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- Magistrate judge I tell them it is not necessary to recite personal identifiers in the record and encourage the attorneys to redact. I also redact personal identifiers from proposed orders
- Magistrate judge I tried to prevent testimony or statements on the record where personal information is going to be revealed and is unnecessary for the proceeding.
- Magistrate judge I try to make a point of advising attorneys that personal identifiers should, if at all possible, not be used in proceedings before me.
- Magistrate judge I warn the parties orally at the initial conference particularly in cases where infants may be involved
- Magistrate judge I will ask during plea hearings that personal identifiers not be placed on the record.
- Magistrate judge I will request on the record that the parties and attorneys try to discuss the matter without referring to individuals' social security numbers or other similar private information.
- Magistrate judge If a question being asked (and recorded by the court reporter) calls for such information, I direct counsel to withdraw the question or reframe it to exclude the information.
- Magistrate judge If I am concerned that personal identifier information will be addressed during a hearing, I caution counsel. If it appears that such information is about to be disclosed, I caution counsel.
- Magistrate judge In all proceedings, such as first appearances, arraignments, and pleas, I allow only year of birth, last four of Social Security numbers, etc.
- Magistrate judge In civil cases, I try to anticipate situations where personal identifier information may be disclosed and, depending on the stage of the case, try to address the issue at the initial conference or, if necessary, convene a conference to ensure proper safeguards are in place. In Section 1983 cases, where personnel records, etc., are often at issue, I have standing orders to protect privacy. The issue arises rarely often (for me) in criminal cases
- Magistrate judge In criminal cases, my staff insures that case agents do not include personal identifiers in criminal complaints and other papers that are presented.
- Magistrate judge In criminal proceedings when asking a defendant who is preparing to plea, I ask for name and year (not date) of birth; I ask for the last 4 digits of the ss#.
- Magistrate judge In guilty plea colloquys, when I ask whether you provide financial support to anyone, I ask that names not be mentioned. CJA form 23 affidavits requesting appointment of counsel at first appearance are filed under seal. Pretrial release orders no longer contain the address of the Defendant.

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Magistrate judge	In hearings, I instruct counsel not to mention the material in the hearing. In pleadings, I require that the material be filed under seal.
Magistrate judge	In pro se cases we advise the litigant not to include such personal information in any filings or on the record in open court proceedings. Similiar advice is given to attorneys when the subject matter suggests that this may be an issue.
Magistrate judge	Instead of asking defendants their DOB, I ask how old they are and if they start to give a date of birth, I stop them before they complete it. If an attorney asks a witness for personally identifying information, I stop them before the witness answers and I explain why I do not want that information on the record. We also redact pleadings, such as complaints, affidavits for warrants, etc., and remove this information prior to filing the document "of record."
Magistrate judge	Instruct counsel/witnesses not to disclose personal data identifiers and if they do, order the reporter to strike it.
Magistrate judge	Instruct witness re answering such questions
Magistrate judge	It is impractical to ask lawyers & witnesses to speak in code during trials and hearings. It is also extremely time-consuming to review transcripts for PI info after the fact. Instead, we ask the parties to stipulate before the hearing to automatic redaction by the court reporter of pre-identified PI info when the transcript is being prepared.
Magistrate judge	Language included in initial notice of pretrial conference reminding attorneys not to mention personal identifiers in open court
Magistrate judge	limit revealing speech and writings
Magistrate judge	Local Rule and practice of the clerk's office.
Magistrate judge	Local Rules and the court's web page set forth limitations for the placement of certain information in pleadings and on the record. If necessary, parties are reminded during the course of court proceedings
Magistrate judge	Local Rules provide counsel notice that such information should not be used.
Magistrate judge	Local Rules require redaction of personal identifier information by the attorneys in any document filed with the Court. Attorneys know not to reference personal identifier information during a public hearing. Documents submitted for consideration in Court are expected to be redacted beforehand or they will not be admitted until after redaction has occurred.

Magistrate judge	Maintain an awareness of the sensitivity of such information and remain diligent in assuring that the information is not disclosed or, if necessary to disclose, is protected.
Magistrate judge	Minimize referring to such matters when possible.
Magistrate judge	my in-court deputy has modified forms & other materials to redact this info
Magistrate judge	My staff -- law clerks & Courtroom Deputies -- are aware of privacy matters and double-check every document
Magistrate judge	No street addresses given, only towns.
Magistrate judge	Notice to Counsel on CM/ECF and Notices posted on podiums in the Courtrooms
Magistrate judge	on cases where the problem is likely to arise we discuss it at the Rule 16 conference and clerk's office is especially vigilant
Magistrate judge	Our local rules have provisions of which I remind the parties.
Magistrate judge	Our local rules require that the information be redacted. And if not, parties are instructed to do so and refile.
Magistrate judge	Prompt attorneys in advance not to disclose any p/i/i on the record of the proceeding in which we are participating
Magistrate judge	Receive any personal identifier information, e.g., address, telephone number, either prior to or subsequent to the hearing.
Magistrate judge	Redacted from filings with the court
Magistrate judge	Require the filing of redacted filings if counsel has mistakenly included Social Security numbers.
Magistrate judge	The Clerk has placed a laminated reminder at each counsel table, clerks desk and on the bench that warns that the personal identifier information should not be used in court without permission. The personal identifiers are specifically set out in bold on the notice. I also verbally warn parties of the restrictions on the use of personal identifiers at the beginning of the hearing if I think there is a possibility that a reference may be made to this information.
Magistrate judge	The Clerk's Office has a General Order to redact personal information
Magistrate judge	The Court reminds the parties that the proceedings are public and that they should be mindful of the type of information that is placed on the public record and evaluate if it is necessary to include the information.
Magistrate judge	Warn attys at court confs not to say things on record that are "private" so I don't have to seal part of a conf or trial transcript.
Magistrate judge	We are proactive in making sure the information does not get into the record in the first place. We also have written instructions on the trial table.

Magistrate judge We require that witness lists be filed under seal. We require attorneys to redact personal identifier information from depositions and other documents containing such information prior to filing, and we require that certain types of cases, such as social security appeals, be filed under restricted access

Magistrate judge We reviewed and revised all forms we used to eliminate including personal information ("PI"), we have notified counsel of the need to eliminate PI in pleadings, and we are careful during court proceedings to insure that exhibits and testimony do not include PI (unless essential to resolving an issue) and strike from the record any inadvertent mentioning of PI. This issue also has been discussed at bench meetings to insure all our judges are aware of this issue.

Appendix C (Q9): Which documents are publicly available through PACER (other, please specify)

What type of judge are you?

Documents available through PACER? : OtherText

Active district judge	I don't know
Active district judge	Don't know
Active district judge	don't know
Active district judge	foreperson's signature only on verdict form and notes
Active district judge	I am not entirely certain about our District's full policy in this regard.
Active district judge	I am not sure, but I believe none of this information is available on pacer.
Active district judge	I am unaware of PACER practice. In most voir dres, juror candidates are referred to by number. The transcript would reflect any identifier mentioned during voir dire.
Active district judge	I cannot answer with certainty but to my knowledge, none of this is available on PACER
Active district judge	I do not use Pacer and do not know what information is posted.
Active district judge	I don't know - ask the Clerk
Active district judge	I don't know.
Active district judge	If there is a challenge to extraneous information, I will hold a voir dire of the jurors. This has only happened twice.
Active district judge	It is possible that a transcript of voir dire might be prepared and filed electronically, but efforts are taken to redact juror names in that event.
Active district judge	Mainly exhibits filed in 2254 cases
Active district judge	Names of jurors only get on PACER when mentioned during voir dire
Active district judge	Signature of jury foreperson on verdict form is only document available online.
Active district judge	This is handled by the clerk
Active district judge	Verdict form may have the foreperson's name.
Bankruptcy judge	As a bankruptcy court, we have never had a jury trial or sought to empanel a jury.
Bankruptcy judge	credit apps, certain medical info forms
Bankruptcy judge	do not deal with juries
Bankruptcy judge	Do not do jury trials.
Bankruptcy judge	do not have jury trials
Bankruptcy judge	don't know what, if any, information about jurors is available through PACER
Bankruptcy judge	Don't know; jury trials are very rare in our court.

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Bankruptcy judge	Have not had a jury trial.
Bankruptcy judge	I do not deal with Juries
Bankruptcy judge	I have conducted no bankruptcy jury trials
Bankruptcy judge	I have had no jury tials in all my years on the bench.
Bankruptcy judge	I have never conducted a jury trial in bankruptcy court.
Bankruptcy judge	Juries in bankruptcy are only theoretical
Bankruptcy judge	jurors not regularly used in Bankruptcy Ct
Bankruptcy judge	n/a
Bankruptcy judge	N/A
Bankruptcy judge	N/A
Bankruptcy judge	N/A - I have not conducted a jury trial.
Bankruptcy judge	n/a, no jury trials
Bankruptcy judge	na
Bankruptcy judge	No juries
Bankruptcy judge	no juries in bankruptcy
Bankruptcy judge	no juries used in bankruptcy
Bankruptcy judge	No jurors
Bankruptcy judge	No jurors in this court
Bankruptcy judge	No jury trials
Bankruptcy judge	No jury trials
Bankruptcy judge	No jury trials conducted in my courtroom yet
Bankruptcy judge	No jury trials have been conducted in the bankruptcy court.
Bankruptcy judge	No jury trials to date
Bankruptcy judge	No juryies in my court
Bankruptcy judge	Not applicable
Bankruptcy judge	Not applicable
Bankruptcy judge	not applicable
Bankruptcy judge	Not applicable
Bankruptcy judge	Not Applicable - No jury trials
Bankruptcy judge	Not applicable since trials are by the court
Bankruptcy judge	Not applicable to our court.
Bankruptcy judge	Not applicable.
Bankruptcy judge	possibly debtor's schedules
Bankruptcy judge	Proofs of Claim
Bankruptcy judge	proofs of claim
Bankruptcy judge	We do not conduct jury trials.
Bankruptcy judge	We do not deal with jurors
Bankruptcy judge	We don't generally use juries in bankruptcy court
Bankruptcy judge	We have not had a jury trial
Bankruptcy judge	We rarely if ever have juries in bankruptcy court.
Bankruptcy judge	We've never had a jury trial.
Chief bankruptcy judge	Almost never have jury trials
Chief bankruptcy judge	Bk. ct. doesn't do jury trials here

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Chief bankruptcy judge	don't have jury trials--bankruptcy
Chief bankruptcy judge	Haven't had a jury trial since enactment
Chief bankruptcy judge	I DO NOT CONDUCT JURY TRIALS.
Chief bankruptcy judge	I've held no jury trials (bankruptcy court).
	n/a - We have not had a jury trial in the Massachusetts
Chief bankruptcy judge	bankruptcy court for many years
Chief bankruptcy judge	N/A. No current jury experience
Chief bankruptcy judge	NA--don't use juries
Chief bankruptcy judge	No juries in bankruptcy
Chief bankruptcy judge	No jury in bankruptcy court
Chief bankruptcy judge	No jury trials conducted so far
Chief bankruptcy judge	no jurys
Chief bankruptcy judge	Not applicable
Chief bankruptcy judge	Not applicable
Chief bankruptcy judge	Not applicable
Chief bankruptcy judge	Not applicable.
Chief bankruptcy judge	Not applicable; jury panel is maintained by the district court
Chief bankruptcy judge	Our court does not try jury cases
Chief bankruptcy judge	proof of claim index; pleadings in ECF
	Rarely applies in bankruptcy; and my position would be that
	no personal information be publicly available through
Chief bankruptcy judge	PACER
Chief bankruptcy judge	To date, have not conducted jury trial
	transcripts (with oport to redact); proofs of claim; exhibits
Chief bankruptcy judge	to pleadings
Chief bankruptcy judge	We do not conduct jury trials
Chief bankruptcy judge	We do not have jurors.
Chief bankruptcy judge	We don't have jurors.
Chief bankruptcy judge	We generally don't do jury trials in bankruptcy court.
Chief bankruptcy judge	We have no jury trials
	We have not had a jury trial since the implementation of the
Chief bankruptcy judge	new rules.
Chief bankruptcy judge	we have not had any jury trials, so this is N/A
Chief bankruptcy judge	We have not held a jury trial in years.
	Civil cases: verdict form includes name of presiding juror
	and the preemptory strikes are publically filed. In criminal
	cases, the name of the presiding juror is redacted from the
	verdict form and the names of jury strikes are not publically
	filed.
Chief district judge	Don't know
Chief district judge	The verdict form will have the name of the foreperson.
Chief district judge	Verdict form with presiding juror's signature.
Magistrate judge	Do not personally deal with juror information.

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Magistrate judge	don't know
	Generally, none are supposed to include such information. Sometimes there are slips and we act then to redact or delete them.
Magistrate judge	I am rarely involved in this aspect of criminal matters.
Magistrate judge	Consequently my knowledge is limited.
Magistrate judge	I do not know the answers to all the above
Magistrate judge	I do not know.
Magistrate judge	I do not work with juries.
Magistrate judge	I don't know
Magistrate judge	I have not had a jury trial so I do not know.
	if trial transcript is filed, jury selection information could be made publically available
Magistrate judge	In response to this question, I assumed that you are referring to transcripts of proceedings that have been ordered and have been filed on cm/ecf.
Magistrate judge	No jury trials as of 11/13/09
Magistrate judge	not familiar with this
Magistrate judge	Orders Setting Conditions of Release
	signature of jury foreperson on jury questions and verdict and signiature of grand jury foreperson on kindictments.
Magistrate judge	some indictments have forepersons name blacked out, some do not.
Magistrate judge	that I am aware of
	Transcripts of voir dire, strikes, and notes from jurors are available with juror names only
Magistrate judge	Unknown
Magistrate judge	We do not have jury trials.
Magistrate judge	We generally do not have jury cases.

Appendix D (Q11): Please describe or provide an example of those instructions to counsel regarding redaction.

What type of judge are you?	Please describe or provide an example of those instructions to counsel regarding redaction.
Active district judge	any filing with personal identifiers is discouraged. My Court reporter provides notice to counsel to regarding redactions requested before filing a transcript.
Active district judge	Just instructed to redact same
Active district judge	A printed card is on counsel table reminding attorneys not to use personal identifiers and telling attorneys how to ask for a redaction if they do. The Court's website also includes instructions (I believe).
Active district judge	a sheet of paper has been placed under the glass on counsel tables in the courtrooms that provide information about transcripts, and the need to identify redaction in a period of time after the reporter first discloses the transcript to the appearing attorneys.
Active district judge	All but last 4 digit of SS# Initials only of minor children Street name, no number No bank account numbers Year of birth only, no date
Active district judge	All counsel are directed to the rules
Active district judge	an instruction sheet is placed on each counsel table and we orally instruct counsel
Active district judge	Announcement from bench or written orders.
Active district judge	Anonymous jury questionnaires- jurors are given basic instructions in the questionnaire not to reveal information that could identify them. If juror requests to speak to me privately, I will hear the juror ex parte and make a record of the colloquy. The county of residence for the juror and the type of employment the juror has are elicited in very general terms.
Active district judge	as stated above.
Active district judge	Counsel are provided a period of time to request redaction of information in transcripts prior to the transcript being made public.
Active district judge	Counsel are required to review for redactions before transcripts are filed.
Active district judge	Counsel contact the court reporter with the information needed to be redacted. Copies of the advisories are provided to the Court.
Active district judge	Counsel have been instructed to avoid questions that call for this type of information.
Active district judge	Counsel is notified of the deadline for requesting redactions at time transcript is filed. Transcript is unavailable to public until time has expired.
Active district judge	Court Clerk is responsible for informing counsel and parties not to disclose peronal identifier information

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Active district judge	Court reporter provides info and instructions
Active district judge	General informal advice from court staff.
	I advise counsel during proceedings our standing order 04-02 prohibits the appearance of Social Security numbers, names of minor children, dates of birth, financial account numbers and home address in records and pleadings filed publically. A copy of the order will be provided if requested.
Active district judge	I advise them of privacy and confidential rights and then point to our court policies re: redaction.
Active district judge	I believe that they are told this by the court reporters.
Active district judge	I direct parties to consult the rules and make appropriate redactions.
Active district judge	I handle the issue as it arises. I am not certain whether the court as an institution has any policies in this area.
Active district judge	I instruct them orally in court.
Active district judge	I tell them that our court requires same at the CMC; at pretrial and at trial.
Active district judge	I use informal instructions.
Active district judge	In addition to what I described above, there is a notice on our public website.
	In April of 2008, an e-mail was sent to all registered CM/ECF attorneys containing an attachment entitled Q&A on the Electronic Availability of Transcripts and Transcript Redaction Procedures.
Active district judge	Instructions are provided during training for electronic filing for all attorneys.
Active district judge	It is in our local rules, I think.
Active district judge	just a reminder to counsel by the court reporter
Active district judge	law clerks and in court deputy remind parties
Active district judge	Lawyer training and notice
Active district judge	Local court Rule
	Local Rule 5.2-1 provides instructions on redacting personal identifiers and a procedure to address such concerns.
Active district judge	local rules
Active district judge	local rules
Active district judge	Local Rules contain instructions on what to delete or redact information
Active district judge	not sure
	Notice is given counsel of her right to redact certain info, the time constraints and how to go about doing it.
Active district judge	On CM/ECF we notify the parties.
Active district judge	on the court website
Active district judge	Oral at pre-trialconference

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Active district judge	Orally remind counsel of privacy rules and need to protect sensitive information. Court procedures posted on my court web site also remind attorneys.
Active district judge	Our ECF homepage carries a reminder.
Active district judge	Our local rules and handouts provide instructions.
Active district judge	Our Local Rules remind counsel and I verbally remind them.
Active district judge	our web site contains these instructions Personnel at the Clerk's office give instructions to counsel when they review the transcripts pursuant to our district rules.
Active district judge	PLEASE STATE ONLY YOUR CITY OF RESIDENCE
Active district judge	previously discussed
Active district judge	See above.
Active district judge	see previous page
Active district judge	set out in local court rules
Active district judge	Simply to avoid any reference to such information to the extent possible.
Active district judge	The clerks office provides information to attorneys
Active district judge	they are in our ECF policies and procedures
Active district judge	This is handled by the clerk
Active district judge	Through local rules and clerk monitoring. We have a deadline for redaction requests, after which time transcripts are available on PACER. We also have a link on the Court's web page that discusses the redaction process.
Active district judge	we have a general order requiring redaction
Active district judge	we have an ecf policy concerning requesting redaction from the transcript We have general instructions in every courtroom. Most common, witnesses start to give their home address. I stop them and explain.
Active district judge	That's usually a sufficient warning to counsel.
Active district judge	We have instructions and explanatory information on our web site. We include reminders during some proceedings and cover the topic in court sponsored continuing legal education seminars. Also, I believe we post information on our website
Active district judge	We shred juror notes and always refer to jurors by their number. Juror lists and panel strike lists are restricted documents.

Active district judge	When a transcript is filed, CM/ECF participants receive an electronic notice of a docket entry containing the following: NOTICE RE REDACTION OF TRANSCRIPTS: The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.vawd.uscourts.gov Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 11/13/2009. Redacted Transcript Deadline set for 11/23/2009. Release of Transcript Restriction set for 1/21/2010.
Active district judge	When transcripts are filed, the docket entry includes instructions. We also have adopted a local rule (7.1) that addresses personal identifiers.
Bankruptcy judge	At times warn litigants not to use information that will need to be redacted. Also warning is on our court web page.
Bankruptcy judge	Attorneys often file requests to correct a Social Security number on the electronic filing system. As quickly as discovered, staff takes corrective action and the lawyer is informed, hopeful taught, that is is not acceptable.
Bankruptcy judge	Caution counsel not to use full social security numbers, full bank account numbers, full credit card account identifiers.
Bankruptcy judge	Contained in Local Rules
Bankruptcy judge	counsel receive notice when a transcript is docketed and blocked from access. Counsel are advised of time frames for redaction requests.
Bankruptcy judge	Court's website sets forth a redaction policy.
Bankruptcy judge	During in court proceedings, instructions given from bench if issue arises
Bankruptcy judge	electronic filing is mandatory. Filers are instructed to redact. Court administrators review filings and take corrective action where necessary
Bankruptcy judge	General instructions and local rules.
Bankruptcy judge	General Order
Bankruptcy judge	I ask parties to be careful not to disclose personal information. Our bankruptcy rules allow for the redaction of information on PACER>
Bankruptcy judge	I believe that our Clerk's Office has information available or will inform counsel of what type information is private information and how to not disclose.

Bankruptcy judge	I believe the Clerk's office advising counsel about the use of Social Security Number on certain documents.
Bankruptcy judge	I believe there is a note that pops up prior to one's uploading to our CM/ECF system. I also read a preprepared speech before a trial starts. we also make announcements at bar associations meetings e.g., when rule 9037 was adopted, when we change a procedure, etc.)
Bankruptcy judge	I believe this is done in conjunction with the procedure I outlined above.
Bankruptcy judge	At time a transcript is submitted, I believe counsel are advised of the opportunity to have information redacted prior to publication.
Bankruptcy judge	If we notice it, we tell them to redact.
Bankruptcy judge	on web site
Bankruptcy judge	Our Clerk of Court has a procedure in place
Bankruptcy judge	Our Local Bankruptcy Rules and court website instruct counsel and the parties to redact all personal identifiers before filing any documents and when a transcript is ordered, the parties are given instructions as to redacting personal identifiers, with the initial burden being on the party that has requested the transcript.
Bankruptcy judge	Our Local Rule 9018-1(b) provides a detailed description of the redaction procedures recommended by the Judicial Conference. When any transcript is filed, a notice is issued that the parties must review it for personal information and it is withheld from public view pending that procedure.
Bankruptcy judge	refile excluding the personal identifier
Bankruptcy judge	see above
Bankruptcy judge	Specific instructions can be found on our website by searching redaction personal info
Bankruptcy judge	The above-referenced General Order is posted on the court's website and, also, has been distributed to all of the court's ECF attorneys.
Bankruptcy judge	The CMECF guidelines provide instructions on filing documents that remind filers not to include personal identifiers.
Bankruptcy judge	There are instructions concerning redaction posted on our court's website.
Bankruptcy judge	They are on our website and in a notice on counsel tables.
Bankruptcy judge	They are provided by the Clerk's office
Bankruptcy judge	We have a detailed process specified in our local rules that is effective before the public is able to access the document or transcript.

Bankruptcy judge Bankruptcy judge	We have enacted a local rule, and posted it conspicuously on the Court's website, that offers guidelines for protecting PII. It is posted as follows: Vt. LBR 5007 - RECORD OF PROCEEDINGS & TRANSCRIPTS; ENSURING PRIVACY IN TRANSCRIPTS for guidelines regarding redaction procedures. web site
Chief bankruptcy judge	A letter is sent to the party ordering the transcript describing the Judicial Conference policy re transcripts including deadlines for redaction.
Chief bankruptcy judge Chief bankruptcy judge	An identification of a personal identifier has been made on the record; I order that such personal identifier be redacted from the transcript. At periodic bench and bar meetings.
Chief bankruptcy judge Chief bankruptcy judge	Below is the script for Standard Redaction Policy Announcement.... "I have a brief announcement before we get started. The Court has a policy called the "Policy and Procedure Regarding Electronic Availability of Transcripts of Court Proceedings" that allows you to remove certain personal information from the public copy of the transcript of this proceeding if one is ever made. Information about this new Policy is posted on the bulletin board outside this courtroom and you can ask me for copies of the forms you must file with the Court to remove personal information from the transcript. You can also find this information and the forms on the Court's website and in the Clerk's Office." Clerk's Office provided notice when the issue first arose Cm/ECF training and in web page. Also information appears in log on screen.
Chief bankruptcy judge Chief bankruptcy judge	emphasis in Local Rules (adopted prior to changes in national rules)
Chief bankruptcy judge Chief bankruptcy judge	I thought we adopted a judicial conference policy for having personal information redacted from transcripts before they are posted on the dockets but I am unable to locate it (and also unable to figure out how to go backwards in this survey to change my previous response!). Inform them of need/right to redact certain information.
Chief bankruptcy judge	Information about redaction is available on our website and I routinely remind parties and counsel in the courtroom that redaction is their primary responsibility.
Chief bankruptcy judge	Information on our website. Sent e-amisl to bar at time of rule and local rule promulgation. Reminders during CLE's.
Chief bankruptcy judge	My law clerk will make available the form of order that will accomplish the necessary redaction.

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Chief bankruptcy judge	Once a transcript is filed, notice and a deadline is provided to counsel reminding them of redaction requirements and a time frame within which accomplish redaction.
Chief bankruptcy judge	operating oredor 08-04- adopts judicial conference policy- 90 days after transcript is ordered, ordering party may identify what needs to be redacted
Chief bankruptcy judge	Our administrative procedures contain instructions regarding the redaction of personal identifiers from transcripts.
Chief bankruptcy judge	Our notice of filing of transcript includes a warning with time frames and instructions for redaction.
Chief bankruptcy judge	our web site has information on personal identifier information
Chief bankruptcy judge	Policy and Procedures Regarding Electronic Availability of Transcripts effective February 17, 2009 posted on court website
Chief bankruptcy judge	Reminder at beginning of a proceeding and during when necessary
Chief bankruptcy judge	See earlier response.
Chief bankruptcy judge	The full instructions are accessible through the court's web site. They identify the potentially redactable information, require a party or its attorney to file a notice of request for redaction within five days of the delivery of the transcript to the Clerk, and then give the requestor 21 days to identify to the court reporter the information that must be redacted. The instructions also include the following warning: "Attorneys should be diligent in altering courtroom behavior so that unnecessary information is not elicited in the proceeding, unless necessary to prove an element of the case."
Chief bankruptcy judge	VERbal for most part
Chief bankruptcy judge	We have a general order that describes the procedures for redacting private info from transcripts.
Chief bankruptcy judge	We have a GPO and the court's new LBRs effective Dec. 1, 2009 have warnings about the privacy rules and the need to comply.
Chief bankruptcy judge	We have court rules and policies that deal with privacy issues.
Chief bankruptcy judge	we post notices on the attorney's tables and in the order setting deadlines in adversary proceedings.
Chief bankruptcy judge	Website has reminder.
Chief district judge	cite to local rules
Chief district judge	Constant training and notices to counsel
Chief district judge	Examples of instructions are on our website, in accordance with Judicial Conference policy.

First, we have modified our Notice of Electronic Filing for docketed transcripts to inform counsel of their obligation to request redaction of personal identifiers within a specified time frame. Second, we have posted a sample "Transcript Redaction Request Form" on our website forms page. Third, we have developed an informational piece on the transcript redaction rules that we have circulated using the court's list serve and published in the state bar newspaper. Fourth, that informational piece, as well as additional transcript redaction information, is notoriously posted on the court's website. The instructions can be found at this link: <http://www.nhd.uscourts.gov/pdf/USDC-NH-Public%20Notice.pdf>. The general information section of the website dedicated to redaction can be found here: <http://www.nhd.uscourts.gov/ecf/cmecf/default.asp#redact>.

Chief district judge

General Order 514, entered in May 2002 and revised on several occasions since then, provides guidance on redaction of personal identifying information in all court documents

Chief district judge

I tell counsel orally on the record not to include home addresses, account numbers, or social security numbers in statements on the record, but, if such matters are included, I instruct them that they must physically black out material on the transcripts that are filed.

Chief district judge

Just that they are responsible for identifying necessary redactions because court reporters will not be able to do so.

Chief district judge

Local court rule/administrative order; verbal reminders as needed.

Chief district judge

Local Rule 5.2 lists the types of information that must be redacted.

Chief district judge

LR CV 5.2; LR CR 49.1

My staff and the Clerk's Office point out to offending parties the Rules regarding redaction and request compliance.

Chief district judge

Once a transcript is electronically filed, counsel has a period of time to review the transcript, and if counsel wishes to redact, they file a "Notice of Intent to Redact." If counsel does file that notice of intent to redact, they must then submit to the reporter a statement outlining where the personal identifiers appear in the transcript that they wish be redacted. On docket sheets where a transcript has been filed it sets out the deadlines for the notice of intent to redact, the actual redaction deadline, and the release of the transcript to the public.

Chief district judge

Our webpage contains information on personal identifiers - also our pretrial orders contain information on the Federal Rules and Local Rules concerning personal identifiers.

Chief district judge

Policy posted on District of Mt web page

Chief district judge

redact names of minors.

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Chief district judge	Reminder notes on CM/ECF Reminder notice on podiums in courtrooms
Chief district judge	Rules on electronic filing instructs filers on privacy issues
Chief district judge	rules published on our website
Chief district judge	see above
Chief district judge	See above answer
Chief district judge	Some time ago, our court circulated a written notice. I also advise attorneys during hearings on occasion.
Chief district judge	Such instructions are contained in our local rules.
Chief district judge	the clerk of the court and deputy clerk address this particular issue
Chief district judge	The clerk's office advises all attorneys regarding the redaction requirement.
Chief district judge	The Clerk's office provides information.
Chief district judge	The policy is on our homepage and describes specifically what should be redacted and how.
Chief district judge	The procedure/instructions for redacting personal identifiers from transcripts is set forth in "Electronic Availability of Transcripts of Court Proceedings" on our web site at http://www.ohnd.uscourts.gov/Electronic_Filing/transcript-notice.pdf . In addition, an "Advisory for Limiting Personal Information in Transcripts" (http://www.ohnd.uscourts.gov/Electronic_Filing/Advisory_for_Limiting_Personal_Information_in_Transcripts.pdf) is placed on counsel tables in each courtroom and is published on our web site. Local Civil Rule 8.1 and Local Criminal Rule 49.1.1 set forth the personal identifiers that are to be redacted from documents, including transcripts. The Court has also published on its web site "Questions and Answers re: Electronic Availability of Transcripts and Transcript Redaction Procedures" (http://www.ohnd.uscourts.gov/Electronic_Filing/Q__A_for_attorneys.pdf).
Chief district judge	Through miscellaneous order addressing trial transcripts, via the practices of individual judges (see my prior response re my practices), and through warnings on the court website.
Chief district judge	We have a notice on the system which reminds the attorneys of their obligation to review the transcript within the specified time frame.
Chief district judge	We provide a specific notice to counsel that transcripts are locked for first 90 days to allow counsel to notify of need for redactions. Transcripts are unlocked if there is no request for redaction. Otherwise our Local Rule 7.1(b) cover the redaction policy.
Chief district judge	Website and phone calls
Chief district judge	Website and phone calls
Magistrate judge	Appears on splash page of ECF filing system

Magistrate judge	As mentioned above, I cover this during the the final pretrial and limine conferences.
Magistrate judge	As previously noted, I try to advise counsel to keep personal identifiers out of court proceedings, if possible.
Magistrate judge	by local rule
Magistrate judge	By reference to Rule 49.1
Magistrate judge	Case by case basis, identify certain information which needs to be redacted in accordance with the rules.
Magistrate judge	Clerk's office availability for responding to inquiries
Magistrate judge	Clerk's office handles that
Magistrate judge	Comply with the Federal Rules
Magistrate judge	Counsel are informed that it is their responsibility to remove personal identifiers.
Magistrate judge	Counsel is reminded that the transcripts will be publicly filed and that they should consider the need for including such information.
Magistrate judge	e government act info on web site
Magistrate judge	Have informed the practicing bar about not putting personal information indetifiers in their filings with the court.
Magistrate judge	http://www.scd.uscourts.gov/CMECF/DOCS/Transcript_Redaction__Instractions.pdf
Magistrate judge	I explain the procedure. It is also on our web site.
Magistrate judge	I inform the attorneys thatif there is any sensitive information that they redact their submissions.
Magistrate judge	I meet with counsel at a pre-voir dire conference before each jury selection and instruct counsel directly
Magistrate judge	I suggest those portions of the record containing identifiers be sealed.
Magistrate judge	I understand that there are instructions provided upon an attorney's signing up for electronic filing.
Magistrate judge	If redaction is determined to be necessary, a party must file a Notice of Intent to Request Redaction within seven business days of the filing of the official transcript. If a party files a Notice of Intent to Request Redaction, the transcript will not be made remotely available to the general public until the redactions have been made. A copy of the officially filed transcript will be available for reviewing in the Clerk's Office or may be purchased from the court reporter during this time.
Magistrate judge	In jury selection, I do not tell counsel not to identify a juror by name, nor do I take measures during trial not to identify a juror. In hearings, in which sensitive information is at issue, I instruct counsel not to talk about the specific information on the record.
Magistrate judge	In trial instructions and on counsel table are reminders not to refer to personal identifiers other than name.

Magistrate judge	Individual in clerk's office is available for consult and guidelines are on website.
Magistrate judge	information is not to be shared with defendant or placed on the record.
Magistrate judge	Instructions appear on the court's web page.
Magistrate judge	Instructions are contained in the CM-ECF Manual.
Magistrate judge	It is on the District website
Magistrate judge	local rule 5.2 which directs excluding social security numbers, names of minor children, dates of birth, financial account numbers, home address
Magistrate judge	Local Rule 5.3 requires filers to omit or, where inclusion is necessary, partially redact personal data identifiers from all filed pleadings, papers, and exhibits, unless otherwise ordered. A party filing a redacted document may at the same time file under seal a document containing the unredacted personal data identifiers or file a reference list without requiring a specific court order. Said document must indicate in the heading or style that it is an "UNREDACTED VERSION OR REFERENCE LIST pursuant to Local Rule 5.3." The responsibility for redacting personal data identifiers rests solely with counsel and the parties. The Clerk will not routinely review documents for compliance with this rule, seal documents containing personal data identifiers, or redact documents.
Magistrate judge	Local Rule 79-5.4 (Responsibilities of Parties to Redact or Exclude Personal Identifiers) tells counsel which personal identifiers must be redacted and which documents must be excluded from the public case file.
Magistrate judge	Local rules
Magistrate judge	local rules
Magistrate judge	local rules and CM/ECF guidelines
Magistrate judge	Local Rules inform counsel of redaction policy.
Magistrate judge	Local Rules require redaction of personal identifier info.
Magistrate judge	Local Rules; personal contact; court orders
Magistrate judge	Notice to Counsel on CM/ECF
Magistrate judge	Occasionally in criminal proceedings (e.g., bond hearings) personal identifiers are brought up in open court. I may direct that those excerpts or direct counsel to take appropriate steps for redactions.
Magistrate judge	Only if they call and request information regarding redaction. The Court is not proactive in this issue.
Magistrate judge	our court has a transcript redaction policy and it is posted on our website at www.mssd.uscourts.gov
Magistrate judge	Our scheduling orders and other communications from the court provide these instructions.

Magistrate judge	Parties are advised of their responsibility to keep personal identifiers out of transcripts, pleadings and documents.
Magistrate judge	Parties are instructed no to file documents containing personal identifiers such as social security numbers, dates of birth, etc., unless the identifiers are redacted or blacked out.
Magistrate judge	Prior to the amendment of the rule, if personal information was presented in a pleading, I would seal the pleading and direct an amended pleading. However, prior to my sealing of the pleading, it was available on Pacer.
Magistrate judge	Reference to our Local Rules
Magistrate judge	Reminders at hearings and orders to redact
Magistrate judge	See above. In addition, the clerk's office post a notice about redaction of transcripts.
Magistrate judge	see prior answer
Magistrate judge	Social Security Administrative Reocrds are not accessible to the public.
Magistrate judge	The Clerk has a General Order
Magistrate judge	The Clerk's office has material available for counsel to review on the District's website.
Magistrate judge	The Clerk's office provides this information
Magistrate judge	The court adopted a written policy establishing redaction procedures.
Magistrate judge	The Court has a redaction policy in the form of a Local Rule.
Magistrate judge	The court has posted a notice on its web site.
Magistrate judge	The court's web site
Magistrate judge	The docket event directs parties to file motions to redact the transcript
Magistrate judge	The form order I referenced previously informs counsel to redact personal or private information from all exhibits and other publicly-available documents.
Magistrate judge	the instructions are on the district web site. Lawyers are instructed to redact and are advised it is their responsibility to redact private information. The description of "private information" is on the web site.
Magistrate judge	The instructions are part of our cm/ecf training, and there are warning boxes in cm/ecf which remind lawyers to redact when they're filing.
Magistrate judge	The issue arose on my notice to show cause why there should not be sanctions for leaving personal identifiers in a motion
Magistrate judge	The local rules have requirements as well as notices sent out with the complaint and summons. See also the notice metioned in previous answer that is placed

Magistrate judge Magistrate judge	<p>The privacy policy is posted on the website and on the attorney log in page for CM/ECF. When attorneys log into CM/ECF, they must certify that they have read the policy. When there is a violation, a notice is posted on the docket requiring the attorney to correct the violation.</p> <p>They are published on the Court's web site</p>
Magistrate judge Magistrate judge Magistrate judge	<p>This arises with most frequency in cases brought on behalf of infants. Whenever I see reference to an infant's full name in pleadings or other documents, I convene a telephone conference and alert counsel to the need for redaction. It comes up less often but from time to time with respect to SSNs and medical information</p> <p>This is done primarily through the Clerk's Office via General Order issued by chief judge</p>
Magistrate judge	<p>We direct counsel and pro se litigants beforehand when possible not to make such disclosures. However if such does occur, counsel is instructed to redact any documents that must be filed before filing.</p>
Magistrate judge Magistrate judge	<p>We have a local court rule that requires attorneys or pro se parties to redact personal data identifiers from transcripts before filing and our policy and procedures manual for electronic filing requires redaction</p> <p>We have a local rule that addresses this.</p>
Magistrate judge	<p>We have a standing order available to counsel that incorporates the Judicial conference policy on personal data identifiers. We provide for such redactions in individual protective orders entered in civil matters.</p>
Magistrate judge	<p>We have an Administrative Order that sets forth a procedure for redaction</p>
Magistrate judge	<p>We have instructions in our CM/ECF Administration Manual, Rule 15 at page 12 which is available on our court's external website: www.nmcourt.fed.us. The rule requires counsel to review the transcript for information that should be redacted under the Judic</p>
Magistrate judge Magistrate judge	<p>We use Standing Orders and published administrative procedures to notify counsel of the Court's requirements and offer the option of filing completed documents under seal when necessary but the only document published is the redacted document.</p> <p>website</p>
Magistrate judge	<p>When transcript is available, the clerks office generates notice which informs attorneys of the redaction requirements</p>
Magistrate judge	<p>When transcript is filed, system automatically notifies attorneys regarding redaction and gives information regarding time limit to do so.</p>

Magistrate judge	Where the information is material to legal argument to be submitted in conjunction with motion practice, the parties agree to redacted submission or identification of specific portion (e.g. transcript) to be filed under seal.
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Appendix E (Q15 and Q16): Reasons for noncompliance and resolution of matters

What type of judge ?	What reasons were given? (for noncompliance with redaction requirements)	How were those matters resolved?
Active district judge	too difficult and time consuming	required it, but in some cases (e.g., wiretaps, redacting cell #s and addresses was not feasible)
Active district judge	Inadvertence, negligence, counsel unaware of restriction. We have a significant problem in this area with pro se litigants.	When the problem is identified it is immediately brought to the offending party's attention and they usually take immediate corrective action and we take action to make sure the information is not available on the docket.
Active district judge	Attorneys do not understand their obligation, the law, or the interplay between the two. Nor, do they understand the interplay between the court's obligation and counsel's obligation.	They have not been resolved. However, I am unaware of any instances where something should have been redacted that was not. Although responsibility solely with the attorney under the E-government Act, our court and court personnel point out needed redactions should they see them.
Active district judge Active district judge	Carelessness. inadvertance	It only happened once. We had the transcript redacted. it was corrected
Active district judge	Lack of awareness of rule or inattention	Referred to rules or pleadings returned
Active district judge Active district judge	Not paying attention; not aware. mistake	By proper redactions redaction
Active district judge	Unfamiliarity with the redaction requirement.	One matter is pending. In another case I think I sealed the document and required a redacted document be filed in its place.
Active district judge	My assumption is that counsel was unaware of the redaction requirement	One matter is pending. In another case I think I sealed the document and required a redacted document be filed in its place.
Active district judge	Our District does not currently post transcripts on Pacer and therefore there is no occasion for redaction to comply with the privacy	One matter is pending. In another case I think I sealed the document and required a redacted document be filed in its place.

	rules.	
Bankruptcy judge	unaware of the requirement	education and monitoring Through motion and sealing document from external review through CM/ECF, or, if at trial, substitution of exhibits.
Bankruptcy judge	Inadvertance. Oversight.	motion and order to seal the erroneous item and and refile the item with proper redactions
Bankruptcy judge	Inadvertent error	
Bankruptcy judge	1. Sloppy staff; 2. Did not notice the information was contained in the document.	Motion to Redact or Substitute
Chief bankruptcy judge	Lack of knowledge that there was a requirement to do so.	post-facto redaction
Chief bankruptcy judge	Lack of awareness of redaction requirement and implications of failure to redact.	
Chief bankruptcy judge	Inadvertance by counsel	Clerk notices defective document. Electronically served on attorney.
Chief bankruptcy judge	It is often inadvertance by creditors filing proofs of claims without redacting identifier info.	If clerk spots it in normal processing for filing, the pleading filer will be advised of the problem. However, it usually arises with an action to seal the pleading and a request for sanctions for violation of the privacy rules.
Chief district judge	Attorney Ignorance of the Rules. Usually by pretitioners who rarely practice in Federal Court	By my staff and the Clerk's Office bringing the Rules to the attention of the ignorant attorney.
Chief district judge	lack of knowledge	yes
Chief district judge	Ignorance--despite educational attempts--on the part of counsel and clients.	I cannot provide a uniform answer to this question.

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Chief district judge	Depositions are difficult. Most lawyers who abuse, either don't know or are too lazy.	Calls.
Magistrate judge	overwhelming amount of material	on one occasion material was withdrawn. I recall accepting some information in camera.
Magistrate judge	some lawyers are not aware of the rule	the filed documents are redacted
Magistrate judge	The primary reason is inadvertence.	Many times, counsel catch themselves, but at times orders must be entered.
Magistrate judge	Ignorance--didn't know about the redaction requirement.	Provided counsel with a copy of court's administrative procedures manual for CM/ECF, which contains the redaction requirement. The manual is posted on the court's website for anyone to obtain.
Magistrate judge	counsel mistake	strike offending filings and order proper refileing
Magistrate judge	Counsel were not aware of the changes or had forgotten them	Reminders to counsel from the court
Magistrate judge	Lack of familiarity with the rules	I direct that the filing with identifiers be filed under seal and a new filing with appropriate redactions be submitted.
Magistrate judge	Most common reason is that counsel forgets.	When a document is filed with the court containing personal information is discovered either by court personnel or otherwise brought to the court's attention, the document is put under seal or the document is redacted by the court or counsel.
Magistrate judge	Pro se litigant did not realize before filing. Attorney filed without properly screening.	Issued order directing Clerk to strike the document and directed attorney and or party to refile a redacted form.

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Magistrate judge	Lack on attention, ignorance, laziness	By catching their mistakes, either in my office or in our clerk's office, and ordering redaction or other corrective action
Magistrate judge	Inadvertent failure to act to redact.	Having first submitted document(s) taken down from PACER and replaced with redacted copy
Magistrate judge	A pro se plaintiff wanted her address redacted from a transcript but it was also on the docket sheet because she was a party	Refused her request to redact transcript

Appendix F (Q17, other please specify): How do you respond to violation of redaction requirements? : OtherText

What type of judge are you?	How do you respond to violation of redaction requirements? : OtherText
Active district judge	Court contacts the party they did not redact and need to comply.
Active district judge	direct stenographer to advise party to revise
Active district judge	Directed party to adopt practice not to put full SSN in indictments
Active district judge	Has not arisen.
Active district judge	Has not occurred yet, to my knowledge
Active district judge	Hasn't happened
Active district judge	Hasn't happened in any of my cases
Active district judge	Hasn't occurred
Active district judge	Have not learned about a violation.
Active district judge	Have not learned of any violation.
Active district judge	Haven't been advised of any problems with transcripts.
Active district judge	Haven't had a problem to my knowledge
Active district judge	I cannot recall any violations
Active district judge	I direct the clerk to remove the image of the filing from CMECF.
Active district judge	I do not know as I have not had to address that yet.
Active district judge	I have never faced this issue.
Active district judge	I have never learned of a violation
Active district judge	I have no redaction issues because I do not post transcripts on Pacer.
Active district judge	I have not been faced with such violation
Active district judge	I have not had a problem and thus have taken no action.
Active district judge	I have not had this come up in transcript context
Active district judge	I have not had this problem occur.
Active district judge	I have not learned of any violation of the redaction requirement.
Active district judge	inform and educate
Active district judge	It hasn't come up in any matters before me
Active district judge	Never has occurred
Active district judge	No action
Active district judge	No claim of violation has ever been brought to my attention.
Active district judge	No known violations.
Active district judge	this has not occurred
Bankruptcy judge	Advise clerk to bar access to any filed doc containing priVATE INFO.
Bankruptcy judge	An appropriate show cause order will issue, if the matter is brought to the court's attention.
Bankruptcy judge	As explained above, I issue an order to show cause why the offending filing should not be stricken and give the filing party 14 days to refile the document with the offending information redacted. I strike the original if that does not happen.

Bankruptcy judge	Convene a hearing to better facilitate communication. it is usually not necessary to do this more than once with any attorney.
Bankruptcy judge	Court's website states that it is the responsibility of counsel to request redaction of personal identifier information. To date, not aware of an instance where we have seen unredacted personal identifier information in a filed transcript.
Bankruptcy judge	direct atty to file motion to redact.
Bankruptcy judge	Has not occurred.
Bankruptcy judge	Have not had any violations alleged
Bankruptcy judge	Have not learned of any violation.
Bankruptcy judge	I have not encountered a violation of redaction requirements.
Bankruptcy judge	i try to take into considered the circumstances of the individual issue
Bankruptcy judge	If Clerk sees if before it is entered they black the personal info out. If document is entered in the system with personal info then Clerk calls offending party directs them to file a motion to redact
Bankruptcy judge	Issue had not arisen
Bankruptcy judge	n/a
Bankruptcy judge	n/a
Bankruptcy judge	na
Bankruptcy judge	Never had to address the problem
Bankruptcy judge	no experience
Bankruptcy judge	not applicable
Bankruptcy judge	not applicable in any matter before me yet
Bankruptcy judge	Notify the clerk's office of the need to redact and follow up with counsel to ensure a revision in filed immediately. Would sanction if the matter was not corrected within 24 hours.
Bankruptcy judge	Redact filing and refile redacted document
Bankruptcy judge	sanctions for repeat offenders
Bankruptcy judge	see answer to previous question
Bankruptcy judge	Sometimes the attorney comes forward before we know of the problem.
Bankruptcy judge	Sua sponte restrict access
Bankruptcy judge	The issue has not been raised in court.
Bankruptcy judge	Ususally comes as motion to redact.
Bankruptcy judge	wait for objection from interested party
Bankruptcy judge	we have had no problems whatsoever w/ transcri
Chief bankruptcy judge	direct clerk to redact the info
Chief bankruptcy judge	Has never come up
Chief bankruptcy judge	I don't recall learning of a violation
Chief bankruptcy judge	I haven't had the opportunity.

Chief bankruptcy judge	If a petition, tax return, or similar document containing unredacted personal identifiers is presented at the counter for filing, the clerk will point this out and direct the filer to redact.
Chief bankruptcy judge	If the violation is inadvertent I direct that such violation not occur again; if the violation is intentional I would threaten sanctions on the first violation and on the second violation I would impose sanctions
Chief bankruptcy judge	Issue order sealing erroneous filing and directing replacement to be filed
Chief bankruptcy judge	IT A VIOLATION COMES TO MY ATTENTION, I STRIKE THE FILING WITH ORDER TO REFILE REDACTED DOCUMENT. THE CLERK ALSO DOES THIS AS IN SOME CASES WHEN VIOLATIONS ARE DISCOVERED.
Chief bankruptcy judge	Matter set for hearing. Sanctions imposed only if merited.
Chief bankruptcy judge	no occurrence
Chief bankruptcy judge	Seal the offending document to allow amended, redacted filing
Chief bankruptcy judge	Strike pleading with personal information
Chief bankruptcy judge	sua sponte, have the clerk's office delete the image
Chief bankruptcy judge	The situation has never arisen.
Chief bankruptcy judge	To date, redaction requirements have not been violated
Chief district judge	Direct clerk to restrict public access to the filing until violation is cured
Chief district judge	Has never come up
Chief district judge	Have not had any violations
Chief district judge	have not learned of a violation
Chief district judge	None. I consider it the parties' obligation.
Chief district judge	Not aware of any violations
Chief district judge	Seal the document and order counsel to file a redacted copy.
Chief district judge	Some offending documents are sealed.
Chief district judge	sua sponte correction by quality control analysts.
Chief district judge	The issue has not arisen.
Chief district judge	This issue has not occurred.
Chief district judge	we seal or delete the non-complying pdf
Magistrate judge	any of the above depending upon how egregious
Magistrate judge	clerk redacts documents
Magistrate judge	Contact parties and suggested a resolution by stipulation.
Magistrate judge	Generally, I do none of the above.
Magistrate judge	Has not happened
Magistrate judge	Has not happened
Magistrate judge	Has not occurred yet.
Magistrate judge	Have never had it happen
Magistrate judge	Have not had the issue arise.
Magistrate judge	Have not had the issue come up

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Magistrate judge	Have not had this problem yet
Magistrate judge	Have not learned of any such violations.
Magistrate judge	I am a part-time magistrate judge - I don't conduct trials
Magistrate judge	I am not aware of any violations
Magistrate judge	I don't generally deal with transcripts
	I had not been aware that this was an issue and that I was supposed to deal with it, other than what I have already discussed above.
Magistrate judge	I have had no experience with a violation
Magistrate judge	I have never been so notified.
Magistrate judge	I have never had a violation brought to
Magistrate judge	I have never had a violation brought to my attention.
Magistrate judge	I have not been made aware of a violation to date.
Magistrate judge	I have not had the matter come up
Magistrate judge	I have not learned of any.
Magistrate judge	I have not learned of such violations.
	I will impose sanctions if the request for redaction is not promptly addressed.
Magistrate judge	If I were to learn about a violation of the redaction requirements, I would direct clerk to advise party to revise filing.
Magistrate judge	Issue has not surfaced.
Magistrate judge	It has not come up.
Magistrate judge	Meet with counsel to assure counsel is aware of the problem.
Magistrate judge	never had that situation arise
Magistrate judge	No substantial violation has arisen
Magistrate judge	not applicable
Magistrate judge	Not aware of this problem arising
Magistrate judge	Not faced this situation
Magistrate judge	Sealing or redaction orders
Magistrate judge	The Clerk also directs corrections sua sponte.
	Withdraw document from PACER pending submission of redacted document.
Magistrate judge	

Appendix G (Q23): Comments [regarding Voir Dire Transcripts; Q23]

What type of judge are you?

Comments [regarding Voir Dire Transcripts; Q23]

Active district judge	Generally, the voir dire portion of the transcript is not transcribed. I question venirepersons at the side bar on bases for "cause" challenges.
Active district judge	I don't think the lawyers, parties or the court catch everything and pro se filings are sometimes incapable of being sufficiently reviewed. Pro se actions are increasingly being filed. But, I think our sensitivity and efforts to limit personal information is generally effective.
Active district judge	I have experienced no over-reaching by counsel to learn or use personal identifier material during voir dire.
Active district judge	I have never received a complaint from a juror that his/her privacy has been compromised
Active district judge	I have taken extreme steps to protect juror privacy in one capital case.
Active district judge	I know of no problems to date
Active district judge	I think these measures are sufficient.
Active district judge	Jury panel members are increasingly complaining about concern for their safety in criminal cases, esp. drug cases.
Active district judge	My approach has not been focused on the transcripts.
Active district judge	No known problems have occurred or been reported.
Active district judge	However, that does not mean that problematic contacts have not occurred.
Active district judge	This District places all voir dire transcripts under seal.
Active district judge	with exceptions, because lawyers had info and may have given it to media
Active district judge	Yes they do appear to work and while jurors names are available to the press for its in person review that rarely occurs and there are no addresses given only general location.
Chief district judge	Our district does not publically file juror questionnaires.
Chief district judge	Sealing the transcript gives control over access to personal information about jurors.
Chief district judge	voir dire transcripts are not available through PACER
Chief district judge	What "privacy" rights do jurors even have? We are sensitive to not making them discuss private issues in front of the entire panel.

Chief district judge	Yes. In this district, court reporters only transcribe voir dire if requested by counsel. When that occurs, the matter is brought to the attention of the presiding judge who has the option of sealing the voir dire portion of the transcript, sealing the bench conference only separately from the rest of the voir dire transcript, or not sealing the transcript at all. We also do not allow the public access to juror questionnaires. We also redact juror names from indictments, empaneled jury lists, jury questions and jury verdicts. Thus, we have developed procedures that I believe effectively protect juror privacy.
Magistrate judge	Bench conferences greatly protect jurors' privacy when discussing personally sensitive or embarrassing issues.
Magistrate judge	I answered yes but in a high profile trial I believe more stringent protections would be required.
Magistrate judge	I pick very few juries, so I cannot comment on this.
Magistrate judge	Most important is the redaction of foreperson's name from indictment.
Magistrate judge	Most, if not all of juror information dealing with personal identifiers, are not available in our District to the public.
Magistrate judge	My answers are exclusively concerning grand jurors. Our judges are all sensitive to risks to jurors in particular cases. Steps unique to the circumstances have been implemented, e.g. juror anonymity in gang related cases.
Magistrate judge	The transcript of jury selection will either be redacted or sealed.

Magistrate judge

we shred the jury questionnaires, after all are collected from counsel, and we keep a record of how many copies are made, and all are destroyed. that agreement is reached with prior to the court agreeing to the questionnaire

Appendix H (Q28): Explain how you sealed or restricted access to docs not redacted.

What type of judge are you?

Explain how you sealed or restricted access to docs not redacted.

Active district judge

actually, I generally order them redacted, allow the redacted version to be accessed, but seal the unredacted version (for appellate purposes)

Active district judge

An example would be a conference with a juror at the bench during voir dire.

Active district judge

Cooperation agreements entered as an addendum to plea agreements are regularly sealed. The portion of the plea hearing in which the addendum is discussed is also sealed.

Active district judge

Cooperation plea agreements in criminal cases as well as pleadings that reference cooperation.&CR;&LF;Trade secret information file pursuant to a confidentiality order.

Active district judge

Court has need to know the information.

Active district judge

Documents are sealed for reasons other than privacy in criminal cases.

Active district judge

Documents containiing such information often are supplied in connections with sentencing, e.g., psychiatric or medical reports. I order such documents sealed and, at times depending on the nature of discussion on the record, the accompanying transcript as well.

Active district judge

For example Juror Questionnaires are stored in a secure area for seven years and then they are destroyed

Active district judge

I can not remember the details, but I recall addressing a violation of the rule in past by a sealing order, and an order requiring a redacted copy filed on the public docket.

Active district judge

I have an IDEA case where the parents are proceeding pro se. The plaintiffs and defendants in that case have submitted documents that contained personal identifiers that were not redacted in accordance with an order that the plaintiffs obtained at the outset of the case.

Active district judge

I have learned of complaints or documents filed by counsel which contain social security or other private information. We then seal the documents and order the attorney to redact.

Active district judge

I have sealed declarations where attachments contain "private" information

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Active district judge	I have sealed portions of transcripts for reasons, e.g., related to a deft's cooperation
Active district judge	I have sealed the documents and ordered counsel to file redacted copies for public view
Active district judge	I may misunderstand this question, but I occasionally seal papers and proceedings in criminal cases involving cooperating individuals; and a variety of matters in civil cases on a showing of good cause.
Active district judge	I prefer to require a redacted filing
Active district judge	I seal any document containing private information that should have been redacted.
Active district judge	I will advise the clerk to seal the filing until the attorney can submit a revised document
Active district judge	If private information is included in a pleading or exhibit, I order it placed under seal and then order the filing party to submit the pleading after appropriate redaction.
Active district judge	In a health care fraud case, the govt. produced patient file information, and I directed it be sealed (after notice was given on pacer).
Active district judge	In both civil and criminal cases, parties may seek to file certain information under seal. I review those requests personally, and often grant them either in whole or in part.
Active district judge	In intellectual property cases and those involving trade secrets or other proprietary information documents are filed under seal.
Active district judge	In limited instances I have sealed records
Active district judge	In one case I can recall personal information was necessary in deciding a motion and that matter was filed under seal but a redacted document was publicly available
Active district judge	In the event that the document contains too much information that would make it overly burdensome to redact, the document is otherwise sealed.
Active district judge	innocent error
Active district judge	medical records are sealed for privacy reasons.
Active district judge	Mental health information or sensitive personal information in civil cases. information re cooperation in criminal cases.
Active district judge	On one occasion, when I became aware a document containing private information was filed electronically, I directed the clerk to restrict it from public view until I could determine whether it should be redacted or sealed

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Active district judge	on request of counsel or motion for protective order
Active district judge Active district judge	Parties have requested documents with private information be sealed. Plea agreements ; cooperaton agreements
Active district judge	Pro se litigant filed documents containing personal information
Active district judge Active district judge Active district judge Active district judge	pursuant to our General Orders and Motions to seal under local rules required temporary sealing until redacted sealed until refiled see earlier comments
Active district judge Active district judge	Some documents are simply "un-redactable" as a practical matter. It is easier to seal those documents than to direct attorneys to redact them. temporary sealing until redactions done
Active district judge	The Clerk will make the electrnically filed documents unavailable to the public temporarily until redactions have been made or the party has waived redaction.
Active district judge Active district judge	The issue arises most often in sentencing submissions that include specific information such as the names of minor children and home addresses. Sometimes the parties agree to redact the informaton. Other times, the informaiton is sufficiently extensive that the parties agree to seal the submission along with the Pre-Sentence Report. The only occasion I can recall was undertaken at the suggestion of counsel.
Active district judge	The parties ask and I agree to have the documents sealed. This occurs in connection with deposition transcripts and exhibits in summary judgment motion or other motion circumstances most often.
Active district judge Active district judge Active district judge	They are sealed until a redacted document can be substituted. This usually happens in a pleading filed electronically by an incomptent lawyer or a pro se litigant. upon request from counsel
Active district judge	Upon request of counsel, plea agreements of cooperating witnesses are sealed. Side bars during trial that identify targets or cooperators upon request are sealed.

Active district judge	Virtually all substantial assistance motions are filed under seal. Jury questionnaires are never made publicly available and are destroyed unless counsel moves for good cause shown to preserve a specific juror's questionnaire.
Active district judge	We routinely seal guilty plea and related papers in criminal cases.
Active district judge	When a privacy problem is brought to my attention by the Clerk's office, I will take action.
Active district judge	When I become aware that disclosure has been made (for example, to the press), I have sealed documents, such as plea agreements.
Active district judge	when information needs to be redacted the filing is sealed and the filing party is instructed to refile a redacted pleading
Active district judge	When it is not possible to redact, the materials are under seal.
Active district judge	when sealing is appropriate, I order a document sealed.
Active district judge	When the parties fail to redact, I order it sealed.
Active district judge	Where information might be pertinent to an appeal I have sealed the unredacted copy of the document.
Bankruptcy judge	Grant an application to strike and file a revised document.
Chief bankruptcy judge	Require amended proof of claim to be filed with redaction and then seal the previous proof of claim
Chief bankruptcy judge	We have restricted Pacer access to proofs of claims that have personal identifying information.
Chief district judge	At times when trade secrets were discussed in court testimony or injunction hearings, I have, at the request of the parties sealed or restricted access.
Chief district judge	by filing underseal jury information
Chief district judge	confidential informants in criminal cases
Chief district judge	Depending on the issue involved, temporary sealing is issued until matter is resolved.
Chief district judge	either seal or strike inappropriate filings
Chief district judge	I have directed the clerk to seal the document.
Chief district judge	I have sealed complete documents and required that redacted documents be filed that are public.
Chief district judge	I have sealed documents that contained personal identifiers and ordered the party to file a redacted copy.
Chief district judge	In response to requests to seal pleadings and opinions that refer to information in sealed documents.
Chief district judge	Juror Questionnaires are sealed.

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Chief district judge	Jury questionnaires are restricted to the lawyers and are not to be provided to the clients; especially criminal defendants
Chief district judge	Local Rule sealing all Criminal cases until defendant makes first appearance in District
Chief district judge	Numerous personal disclosures, including medical or psychological reports as an example.
Chief district judge	On a few occasions, when it has come to my attention that there is personal identifying information in documents filed in CM/ECF, I have directed the Clerk to enter minutes restricting or sealing the materials as appropriate.
Chief district judge	Plea agreements containing cooperation agreements are sealed as well as offers of proof; also change of plea and sentencing transcripts involving cooperation agreements are sealed
Chief district judge	see above. we seal the non-complying pdf and direct counsel to file a redacted pdf
Chief district judge	Sensitive criminal investigations.
Chief district judge	sometimes a voir dire transcript has contained personal identifiers and I have sealed
Chief district judge	Sometimes parties file personal medical information unsealed inadvertently.
Chief district judge	Sometimes the personal identifies are relevant to the evidence and can not be redacted. In those cases we seal the exhibit.
Chief district judge	We recently had a case in which a juveniles name was in the case caption and a number of documents had been filed using the caption. These documents were redacted when possible; others were sealed.
Chief district judge	We seal the documents from Pacer access until the appropriate redaction has been completed.
Chief district judge	when the problem arises, we either seal or restrict access to the document and instruct counsel to file a redacted document.
Magistrate judge	A document may have been prepared by a police officer new to his task in an investigation, or an attorney may be new to federal practice.
Magistrate judge	A redacted copy may be publicly available. The unredacted sealed copy may later be made available to a court if there is an appeal.
Magistrate judge	Access has been restricted for affidavits submitted in support of criminal complaints

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Magistrate judge	Any documents that include personal identifiers such as address, date of birth or social security number are filed as non-public documents.
Magistrate judge	As indicated above, I have sealed unredacted copies of documents submitted in cases in which the plaintiff is an infant referred to by his or her full name.
Magistrate judge	As indicated, if an attorney makes a mistake and inadvertently includes private information in a pleading, if I catch it, I will seal the pleading and require an amendment.
Magistrate judge	At times, federal agents will submit documents (such as search warrants) with personal identifiers, which must, thereafter, be redacted. In addition, on civil matters, if there are personal identifiers being made available to the public, a telephone call has been made by the Court to advise the attorney to correct the filing.
Magistrate judge	Attorney attached personal medical records of client to his summary judgment motion. Sealed it when I saw what it was. Yikes!! His client would have killed him if she knew what had been filed. Had hearing later and he agreed to seal it. No opposition from the other side.
Magistrate judge	by striking
Magistrate judge	Certain ex-parte matters that generally become unsealed at some time where certain parts need to be redacted
Magistrate judge	confidential proprietary or financial information
Magistrate judge	Confidential trade secrets.
Magistrate judge	Either directing portion of the document to be sealed or having the document taken down, redacted, and re-filed
Magistrate judge	Have sealed some documents at request of parties for this reason.
Magistrate judge	I first instruct the Clerk's office to redact the information, but if there is so much personal information in the document that redacting it makes the document nonsensical then I instruct the Clerk's office to seal the document.
Magistrate judge	I have ordered documents to be sealed until a proper redaction can occur.
Magistrate judge	I have ordered sealing of documents with information subject to redaction requirements or otherwise of a private nature.

Magistrate judge	I have sealed transcripts where release of the information could create danger to persons and redaction had not been accomplished or was not feasible given the nature of the information.
Magistrate judge	I will order the party to refile a redacted version, keeping the original under seal
Magistrate judge	If the information to be redacted is so extensive that redaction is not practical, then I will simply order that that the document be sealed.
Magistrate judge	In civil cases, parties often tender a stipulated protective order which provides for sealing certain information, then don't follow it. I make them follow it.
Magistrate judge	in employment cases when employment files are part of the discovery provided
Magistrate judge	Inadvertent disclosures regarding cooperation with the government have been sealed.
Magistrate judge	informant pleas of guilty
Magistrate judge	Local Rule sealing Criminal cases until defendant has made first appearance in District
Magistrate judge	Mental health evaluation reports for defendants are routinely sealed.
Magistrate judge	Very sensitive exhibits, such as bank records, are often sealed.
Magistrate judge	Names of minors
Magistrate judge	Occasionally in Social Security cases, I have sealed some filings that discuss highly confidential or personal items (such as rape, incest, etc.)
Magistrate judge	Occasionally the information is relevant and should be part of the record, i.e. redaction does not work, so I seal as narrow a portion of the record as possible.
Magistrate judge	Occasionally we will receive a filing where counsel failed to redact personal identifiers. Once we observe the violation we direct that the document be sealed and tell counsel to file a redacted version.
Magistrate judge	On occasion I have sealed materials that implicate or unnecessarily invade the privacy rights of litigants or others (i.e. personnel records of non parties in an employment discrimination case.)
Magistrate judge	On occasions when a party accidentally left personal identifier information in a document I either ordered revision before filing (e.g., search warrant) or order the document sealed until a redacted version was provided.

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Magistrate judge	On occasion state probation reports are submitted for habeas cases, and are filed under seal due to the information they contain.
Magistrate judge	once counsel has filed redacted copies of documents, the prior unredacted copies are restricted from view on Pacer
Magistrate judge	Only in search warrant affidavits where specific information is necessary to establish probable cause. The private portions of the affidavit would be redacted before it was disclosed
Magistrate judge	Perhaps a dozen times a year, information that should be redacted under R. 5.2 is filed on PACER by a party. Either by motion of a party, if they self-monitor, or on order of the court, the document is sealed with a redacted version ordered filed.
Magistrate judge	Please refer to prior comments.
Magistrate judge	Prisoner pro se cases where prisoner files medical data or similiar personal information with the Clerk.
Magistrate judge	Pro se filers providing personal information
Magistrate judge	Pursuant to a stipulated protective order in a commercial IP case.
Magistrate judge	Received a pleading that gave a child's personal information and talked about the child being sexually abused. The pleading included a picture. Immediately sealed until further Order of the Court could be generaged.
Magistrate judge	Recently the Assistant Attorney Generals in state habeas cases have been askling us to seal state criminal records because trial transcripts contain all manner of personal identifiers, including names of sexual assault victims among other things. I have denied their requests, since the material is already public, but have also restricted access to the files to the parties and the public terminal at the courthouse. Therefore, none of the information is available on the internet. The state always has the option of cleaning up their transcripts.
Magistrate judge	Sealed the filing and instructed the lawyer to file a redacted version search warrant affidavits with sensitive material
Magistrate judge	search warrants, attachments to informations, pen registers
Magistrate judge	Social Security and other administrative records. Mental and physical evluations of both civil and criminal parties and witnesses.

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Magistrate judge	Sometimes attachments to motions will contain SS nos, bank acct nos. etc.
Magistrate judge	sometimes we accept documents as sealed documents if the exhibits are too cumbersome to redact.
Magistrate judge	Sometimes we use this as an interim measure to protect privacy until the redaction can be done.
Magistrate judge	The District of New Jersey has a local rule that addresses sealing of information submitted in connection with requests for nondiscovery relief and if the predicates are satisfied, permits sealing of information that may not be limited to personal identifying information.
Magistrate judge	The occurrence sometimes happens in a complaint, supporting affidavit, or search warrant affidavit. The AUSA & agent are requested to make the redaction.
Magistrate judge	Upon request by counsel, some documents are filed under seal when it is necessary to provide the Court with the personal identifiers.
Magistrate judge	We authorize counsel to include protected information when necessary but use the process of sealing the complete document and publishing the redacted document.
Magistrate judge	We file unredacted documents containing private information as "Court Only" access and then file the same document with redactions for public and party access.
Magistrate judge	We have limited access to transcripts involving child victims; we have sealed documents relating to private health and financial information.
Magistrate judge	when mistakes are seen, clerk corrects
Magistrate judge	When we become aware of such filings, as a matter of caution, we seal the record and then conduct proceedings to determine whether it should remain sealed.

Appendix I (Q30): What types of information should be subject to categorical redaction?OtherText

What type of judge are you?	What types of information should be subject to categorical redaction?OtherText
Active district judge	Home addresses. private information about children
Active district judge	I have found three social security numbers in exhibits filed by counsel in civil matters. internet screen names and passwords, internet retailer account numbers--various things that personally identify one's personal accounts and commercial activity
Active district judge	Sensitive medical information
Active district judge	Social Security number.
Active district judge	Social Security Numbers
Active district judge	Social security numbers, birth dates
Chief district judge	Trade secrets
Magistrate judge	Address, Date of Birth, Social Security Number
Magistrate judge	As a rule, our District does redact all of the above.
Magistrate judge	credit card numbers
Magistrate judge	Do not understand the question
Magistrate judge	Don't know
Magistrate judge	I am not aware of any
Magistrate judge	I do not know of any
Magistrate judge	In pro se pleadings financial information was provided Jurors' personal information obtained during voir dire, i.e., personal family issues, medical issues, etc.
Magistrate judge	medical records
Magistrate judge	Names of minors
Magistrate judge	Place of employment
Magistrate judge	social security - home addresses and helth ins info
Magistrate judge	Social security no.
Magistrate judge	Social Security Number

Appendix J (Q31): Comments about Redaction in General

What type of judge are you?

Comments [to Redaction in General, Q31]

Active district judge

Many search warrants filed 2 or more years ago contain this type of information.

Active district judge

Various criminal filings run the risk of exposing such information when a document is attached as an exhibit especially.

Magistrate judge

To the best of my knowledge, all of these are currently being redacted. Certainly, state identification and alien registration numbers are being redacted.

Magistrate judge

can be managed on individual basis

Magistrate judge

don't know

Magistrate judge

Generally this is an issue of counsel's not redacting information about their own clients

Magistrate judge

I am far more concerned about over-sealing than under-redacting.

Magistrate judge

I have no experience with this, but all of the above would qualify.

Magistrate judge

I'm not sure many women would want their OB-GYN records available on PACER

Magistrate judge

Social Security appeals focus on sensitive health issues and often include information about substance addictions. Very sensitive information is discussed. Yet, the pleadings are not restricted to participants. When filed, they are available to anyone

Magistrate judge

Some court documents still included personal information even after the court determined no personal information should be included in any court pleadings.

Magistrate judge

Sorry, I do not understand the question.

Magistrate judge

unless there is a need for the information to prove a claim or defense in the case or if it is relevant to proving an element of a criminal offense.

Appendix K (Q35): Which categories should be deleted, and explain why you think the information should be included in the file.

What type of judge are you?	Which categories should be deleted, and explain why you think the information should be included in the file.
Active district judge	I see no reason why the SORs shouldn't be publicly available
Active district judge	I think there are some matters that initially are not filed should be available after a case is concluded, such as requests for requests under CJA.
Active district judge	Statements of reasons in the judgment of conviction
Active district judge	Statements of reasons in the judgment. Sentencing is a core judicial function. Nothing is more deserving of public scrutiny than the judge's reasons for imposing a sentence.
Active district judge	The public has an interest in sentencing. The statement of reasons should not be sealed except in rare circumstances (E.g. mention of minor child's medical conditions.)
Active district judge	The statement of reasons for a sentence is an integral part of the sentence and should be public
Active district judge	The statement of reasons should be public under the First Amendment unless there is cooperation.
Chief district judge	Documents containing identifying information about jurors or potential jurors&CR;&LF;Financial affidavits filed in seeking representation pursuant to CJA
Chief district judge	Financial records re: requests for CJA representation. No reason for that not to be public information.
Magistrate judge	Affidavit seeking CJA representation should be public since public funds are being sought and expended.

Magistrate judge	Financial affidavits. All too often, especially in drug cases, defendants indicate no gainful employment for years and no other source of income but manage to own expensive autos and support themselves raising serious doubts about the legitimacy of the affidavit. Public scrutiny may assist in exposing what appears to be a fraudulent practice with a hopeful deterrent effect.
Magistrate judge	Pretrial bail/presentence investigation reports, ex parte requests and otherwise properly sealed documents should remain excluded. Otherwise, I believe all court files (and most all court proceedings) should be available to the public.
Magistrate judge	Statement of reasons in the judgment of conviction
Magistrate judge	Statement of reasons in the judgment of conviction. Financial affidavits filed in seeking representation pursuant to CJA.
Magistrate judge	Statements of reasons in the judgment of conviction

Appendix L (Q37): Describe those categories, and explain why you think this information should not appear in the public case file.

What type of judge are you?	Describe those categories, and explain why you think this information should not appear in the public case file.
Active district judge	Docket entries listed as "sealed" in criminal cases have resulted in retaliation against defendants because it is obvious that the document is sealed because a defendant is cooperating.
Active district judge	Generally, I favor sealing sentencing memoranda because the memos often reference facts or other information contained in the PSR.
Active district judge	I am generally reluctant to make it easy to access the names, addresses and substantive content of witnesses in criminal matters. Much harm can flow from easy access.
Active district judge	Indictment redacting grand jury foreman's signature; confidential plea agreements; cooperation agreements
Active district judge	Many guilty plea/sentencing memoranda---in order to protect cooperating persons from potential retribution a la "Who's A Rat. com"
Active district judge	Plea agreement under certain circumstances
Active district judge	Plea agreements with cooperation clauses
Active district judge	Plea agreements, 5K1.1 Motions, Requests to permit debriefing/cooperation
Active district judge	Plea agreements. 5K motions.
Active district judge	Sensitive medical information.
Active district judge	verdict forms containing jurors' names, psychological ,medical and psyc hiatric reports, sentencing recommendations, CJA vouchers certified for payment, correspondence from defendants relating to cooperation for substantial assistance purposes

Active district judge	When the probation department seeks a modification of release terms or a violation of probation or supervised release, it typically presents a narrative description of a defendant's behavior during probation or supervised release. This narrative should not be filed publicly.
Chief district judge	plea agreements that contain cooperation or 5k(1) applications
Chief district judge	Plea agreements; search warrant affidavits;
Magistrate judge	1) Inventories of personal property taken from defendants upon arrest for safekeeping rather than pursuant to warrant, as often occurs when a defendant is arrested at an airport; applications to lift travel restrictions imposed as a bail condition when the travel is to a funeral or the hospital bed of a family member.
Magistrate judge	forensic evaluations for competency proceedings
Magistrate judge	pen registers/trap and trace orders should remain sealed even if executed because there may not be an indicted case associated with the order. Should not alert a person that they were under investigation at one time
Magistrate judge	Plea agreements containing cooperation agreements. Safety concerns.
Magistrate judge	Psychiatric and/or psychological reports prepared pursuant to 18 U.S.C. Section 4247.
Magistrate judge	Section 4241 and 4242 mental health evaluations.
Magistrate judge	Sentencing memorandum
Magistrate judge	under certain circumstances, plea agreements and letters submitted in connection with sentencing.

Appendix M (Q40): Describe the policy or practice of unsealing pleas agreements, referring to any event or circumstance that triggers unsealing or opening access.

What type of judge are you?	Describe the policy or practice, referring to any event or circumstance that triggers unsealing or opening access.
Active district judge	30 days afer sentencing
Active district judge	After cooperation is complete.
Active district judge	Case by case basis upon motion.
Active district judge	Closing of case file
Active district judge	discuss with attorneys
Active district judge	Generally in response to a request from counsel the Court will seal for a time and then unseal when disclosure would no longer threaten harm or death to a defendant, co-defendant or cooperating witness.
Active district judge	Generally, a time limit is placed on the sealing, with the U.S. Attorney's Office requiired to take action to unseal.
Active district judge	I don't know of a court-wide practice.
Active district judge	I generally seal plea agreements. Many of them invovle cooperation agreements. When the needs change and the court is notified (or otherwise requestedd to do so it will recondiier its decision)
Active district judge	imposition of sentence or apprehension of co-defendants (fugitives)
Active district judge	It is my (not the Court's) policy to direct the government to let the court know, after consultation with the defense, as soon as the need for sealing no longer exists so that we may unseal.
Active district judge	Judges are required to put an unsealing date on the sealing envelope. We review sealed matters as a matter of course every two to three years.
Active district judge	Plea agreements are not filed and a copy is retained in the judges' file for sentence and the government retains the original.
Active district judge	The response was directed to limiting access, not sealing.

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Active district judge	there is a preliminary plea agreement or SOR and there is an ammended one that is sealed
Active district judge	upon request of the parties
Active district judge	Usually it's a matter of 2 years with notice to AUSA first in case defendant has been threatened or harmed
Active district judge	When the reason for the sealing has expired and there is no further reason for keeping the document under seal.
Chief district judge	All cooperation clauses or safety valve considerations are placed in a plea addendum that is sealed.In csas with no cooperation or safety valve a negative sealed addendum is also filed.
Chief district judge	At the time of sentencing all plea agreements are unsealed if they have been previously been sealed for any reason.
Chief district judge	attorney representing same defendant in subsequent case
Chief district judge	in every case with a plea agreement, there is a sealed plea agreement supplement describing the cooperation agreement,if any
Chief district judge	sometimes they are unsealed to permit access by co-defendants for impeachment.
Chief district judge	Unseal in conspiracy cases to enable defense counsel to utilize the plea agreements during cross-exam of a cooperating co-conspirator.
Chief district judge	We wait until the case is ready for shipment to NARA, at which time we issue an Order to Show Cause as to why the document or case should not be unsealed.
Magistrate judge	Generally when all defendants have been sentenced.
Magistrate judge	If a plea agreement is sealed and the Government ask that it be unsealed as long as there is no opposition, then it is unsealed without the necessity of a hearing to consider unsealing
Magistrate judge	Not done automatically, motion required.
Magistrate judge	On motion of the Government
Magistrate judge	The Clerk's Office periodically inventories sealed documents and aks sealing judge to reconsider continued need for sealing.

Magistrate judge The documents are subject to being unsealed upon a showing of good cause and court order. Otherwise, they remain sealed as far as I know. Not all plea agreements are sealed - - only those where a defendant may be seeking a 5K reduction for cooperating.

Appendix N (Q41, other, please specify): Select the option that best describes your practice on posting of plea agreements: : OtherText

What type of judge are you?	Select the option that best describes your practice on posting of plea agreements: : OtherText
Active district judge	Agreements are NOT made available to the public.
Active district judge	all plea agreements are public including cooperation sections unless requested to be sealed by the parties
Active district judge	Don't know
Active district judge	don't know
Active district judge	I do not know how such documents are made available. In any event, all cooperation agreements are filed under seal and are not publicly available in any form.
Active district judge	I don't have a chambers policy -- whatever the clerk does I do.
Active district judge	i don't know
Active district judge	If a sealing order is requested, I issue it.
Active district judge	on a case by case basis
Active district judge	plea agreements and the part of the transcript of a plea hearing which recites the terms of the agreement are sealed.
Active district judge	Plea agreements are always sealed and not available to the public.
Active district judge	Plea agreements are filed, but they are sealed.
Active district judge	Plea agreements are publically available unless sealed due to cooperation agreement.

Active district judge	Plea agreements not available through PACER, but publicly available through public access terminal in Clerk's office. Cooperation information filed as a separate, sealed document
Active district judge	see above
Active district judge	the docket reflects that a plea agreement has been filed, but the actual plea agreement is not available to the public.
Active district judge	The second option is the most applicable to our Court's policy. However, agreements are also sealed as needed. We seem to have a combination of options 1 and 2.
Active district judge	Upon application of the government in an appropriate case, the cooperation portion of a plea agreement is redacted from the publically available plea agreement and the unredacted plea agreement is filed under seal
Chief district judge	only available to public after order
Chief district judge	Our plea agreements do not contain much information about cooperation
Chief district judge	Plea Agreements are non public documents available only to parties and court personnel
Chief district judge	Plea agreements are publicly available through PACER. We do not docket any cooperation agreements, but we do receive 5K motions when applicable, which most often are requested to be placed under seal.
Chief district judge	Plea agreements are sealed.

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Chief district judge	Some plea agreements are placed under seal
Magistrate judge	As a magistrate judge, I rarely deal with plea agreements.
Magistrate judge	As a part-time magistrate judge I only take pleas in misdemeanors. I have not had a plea agreement case
Magistrate judge	As of Dec 1.
Magistrate judge	Don't know
Magistrate judge	Don't know
Magistrate judge	Generally sealed and not available
Magistrate judge	I am unsure of which option describes our court's policy, other than a general sense that plea agreements are not publically available absent court order
Magistrate judge	I do not work with written plea agreements.
Magistrate judge	I don't believe they are available to the public generally
Magistrate judge	I don't get involved in these types of agreements as a Magistrate Judge, so I don't know
Magistrate judge	I don't handle plea agreements
Magistrate judge	Ple agreements are always available
Magistrate judge	Plea Agreements are filed and available to the public
Magistrate judge	Plea Agreements are filed as non-public documents.
Magistrate judge	Plea agreements are filed but remain sealed
Magistrate judge	Plea agreements are filed under seal.
Magistrate judge	Plea agreements are maintained in the record under seal
Magistrate judge	Plea Agreements are not available to public
Magistrate judge	plea agreements indicating cooperation are sealed
Magistrate judge	Plea agreements remain sealed

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Magistrate judge	rarely an issue before me as a Magistrate judge
Magistrate judge	sealed and not available to the public
Magistrate judge	Sometimes plea agreements are filed, sometimes they are not, cooperation information is never filed.
Magistrate judge	They are filed, but sealed.

Appendix O (Q42): What is done with the cooperation agreement?

What type of judge are you?

What is done with the cooperation agreement?

Active district judge
Active district judge
Active district judge
Active district judge

A cooperation agreement should be sealed.
filed but sealed
Filed on the docket, but sealed.
filed under seal

Active district judge

Filed under seal. With physical original returned to the office of the U.S. Attorney.

Active district judge

Filed with the Judge's file and not available to public.

Active district judge

It is a separate contract with the USA and sealed

Active district judge
Active district judge

IT IS FILED AND MAINTAINED UNDER SEAL
It is filed in a vault under seal.

Active district judge

It is maintained in Chambers until sentencing (if not earlier) when the question of whether it should be filed publically or under seal is addressed

Active district judge

It is not filed on ECF but the court keeps a chamber's copy.
It is placed in an envelope kept separate from the plea agreement.

Active district judge

Active district judge
Active district judge
Active district judge
Active district judge

It is sealed on the docket and a document addressing this is filed in every case so no one is able to learn, without looking at the document, whether there was or was not cooperation
It is sealed.
Kept under seal by the Clerk's office
Kept under seal in the record.

Active district judge

Memorialized in a side letter of understanding between the parties which is not filed in the case.

Active district judge

placed in a document called a "plea supplement" which is filed and sealed in every case

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Active district judge	Plea agreements including cooperation agreements are filed.
Active district judge	plea supplements are filed in every case, whether cooperative or not, and are filed under seal
Active district judge	The practice varies and this seldom occurs. Cooperation agreements are often in the plea agreement which is publicly available. Sometimes--seldom--there is a separate agreement which sometimes is filed under seal and sometimes kept in chambers.
Chief district judge	filed under seal and shows as a sealed document on the docket sheet with no pdf
Chief district judge	filed under seal as an attachment to the plea agreement.If there is no cooperation,a sealed attachment is also filed stating no cooperation.All plea agreement therefore have such sealed attachment ann the public cannot tell one from the other.
Chief district judge	It is filed under seal as a "plea agreement supplement."
Chief district judge	It is treated as a Court Exhibit and returned to the Government at the conclusion of the Plea.
Chief district judge	Sealed.
Magistrate judge	Filed under seal
Magistrate judge	Filed under seal and not available to the public.
Magistrate judge	Filed under seal.
Magistrate judge	filed under seal.
Magistrate judge	Filed with non-public access.
Magistrate judge	I believe that are retained by the Government and/or kept in the Chambers file of the sentencing judge.
Magistrate judge	I do not deal with these agreements
Magistrate judge	I have had none

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Magistrate judge	I understand that it is sealed, but have not yet had direct experience with cooperation agreements and so defer to our clerk's office.
Magistrate judge	If they are filed, they are filed as a sealed document.
Magistrate judge	It is a document separate from the Plea Agreement. The Plea Agreement is filed in the public record, the cooperation agreement is filed separately and under seal.
Magistrate judge	It is filed as a separate document under seal.
Magistrate judge	it is sealed
Magistrate judge	It's filed under seal.
Magistrate judge	Kept by government and defense counsel
Magistrate judge	prosecutor or probation keeps agreement
Magistrate judge	Sealed
Magistrate judge	Sealed
Magistrate judge	sealed
Magistrate judge	sealed
Magistrate judge	sealed, until further order fo the court
Magistrate judge	unfiled

Appendix P (Q44): Describe the different practice for cooperation agreements.

What type of judge are you?	Describe the different practice for cooperation agreements.
Active district judge	Agreements are sealed
Active district judge	Any such agreements are not filed with the clerk
Active district judge	As a matter of custom and practice separate cooperation agreements are not filed
Active district judge	Cooperation agreements and the transcript of the accompanying plea hearing are filed under seal.&CR;&LF;
Active district judge	Cooperation agreements are always sealed, at least for some period. Rarely, they can be unsealed at sentencing (if the cooperator testified in open court) but the USAO sentencing memo is kept sealed
Active district judge	Cooperation agreements are sealed absent court order unsealing them
Active district judge	Cooperation agreements are usually maintained by the probation department, but, if filed, they are sealed by court order
Active district judge	Cooperation agreements not filed.
Active district judge	Don't know how treated
Active district judge	filed under seal, if received by court at all
Active district judge	generally we don't see cooperation agreements filed separately from plea agreements
Active district judge	have not dealt with cooperations yet -- on federal bench only 14 months
Active district judge	I don't believe cooperation agreements are ever filed.
Active district judge	Motions are sealed proffers are taken at sidebar and are sealed
Active district judge	See previous answer
Active district judge	the US Attorney's Office in this District does not utilize separate cooperation agreements. Rather cooperation provisions are incorporated into the plea agreement.
Active district judge	These are under seal
Active district judge	They are routinely sealed if counsel so request.
Active district judge	they are sealed
Active district judge	Whenever the U.S. Attorney or the defendant requests, I seal the cooperation portion of the plea agreement, and also take that portion of the plea colloquy under seal
Chief district judge	Cooperation agreements are sealed, maintained in paper, and not publicly available
Chief district judge	Cooperation agreements tend to be placed under seal.
Chief district judge	generally plea agreements that contain cooperation agreements are filed under seal.
Chief district judge	They are filed under seal.

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Chief district judge	They are generally sealed until the need for sealing is over.
Chief district judge	We do not currently docket cooperation agreements as part of the court record.
Chief district judge	We don't have cooperation agreements.
Chief district judge	We don't receive from US Attorney's office
Magistrate judge	Always sealed unless good cause shown.
Magistrate judge	coop agr not usually filed
Magistrate judge	cooperation agreements are sealed
Magistrate judge	Cooperation agreements are usually not filed but held by counsel
Magistrate judge	I believe these are either not filed or sealed.
Magistrate judge	I didn't answer the last questions yes or no because I don't get involved in these types of agreements as a Magistrate Judge, so I don't know.
Magistrate judge	I do not know what the practice is with respect to cooperation agreements. The term cooperation agreements is not generally used in this district.
Magistrate judge	I do not work with these either.
Magistrate judge	If I was dealing with an agreement between the government and the the defendant for co-operation, I would require the document to be retained UNDER SEAL until such time as it could be made public without harm to the defendant.
Magistrate judge	If there is a separate cooperation agreement we do not require that be filed
Magistrate judge	I've never seen a cooperation agreement filed as part of the record
Magistrate judge	Never made public
Magistrate judge	not filed
Magistrate judge	Not filed or under seal.
Magistrate judge	There are no "cooperation agreements" that I am aware of separate from plea agreements that are presented to the Court.
Magistrate judge	They are not filed in CM/ECF
Magistrate judge	They are sealed
Magistrate judge	Those are generally filed under seal (though I don't see a lot of them because I am a magistrate judge).
Magistrate judge	We don't have cooperation agreements. All our plea agreements include a requirement that the defendant cooperate.

Appendix Q (Q46): Describe the process used to review decision to restrict PACER access

What type of judge are you?	Describe the process used to review decision to restrict PACER access
Active district judge	Case by case
Active district judge	Don't know it exactly; performed in clerk's office
Active district judge	Generally, if I enter an order sealing a plea agreement I require the attorneys to notify me when the need for sealing an otherwise public record has passed.
Active district judge	I do so on a periodic basis when reviewing semi-annually the status of my docket.
Active district judge	I think the clerk's docketing clerks check periodically during quality control.
Active district judge	Usually at the request of the government.
Active district judge	When the case is closed all documents are unsealed unless a motion is filed and granted to keep selected documents sealed.
Chief district judge	As I said before, all plea agreements, if sealed, will be unsealed at the time the defendant is sentenced.
Chief district judge	case by case basis and dependent upon the reason for access
Chief district judge	Our court has a committee with jurisdiction to review such matters and will review the policy periodically.
Chief district judge Magistrate judge	We do not seal plea agreements and we do not docket cooperation agreements in this district. Thus, we have no occasion to review their seal status. We do, however, frequently seal 5K motions for a specific duration. Those 5K motions are subsequently reviewed at the conclusion of the ordered seal duration to determine whether to extend their sealed status or to make them publicly available. seal at the time of plea

Magistrate judge

We do not restrict access to plea agreements. I am not aware of written cooperation agreements. From time to time, a portion of a bond hearing may be sealed if counsel address defendant's anticipated cooperation

Appendix R (Q52): Please describe alternative policies governing access to plea and cooperation agreements.

What type of judge are you?	Please describe any alternatives that have been considered. [alternative policies governing plea and cooperation agreements]
Active district judge	Changing the way sealed documents appear on the docket is being considered.
Active district judge	cooperation info transferred to a sealed document or to a document kept outside of public case file
Active district judge	Filing all plea agreements with a sealed supplement. The supplement would contain the cooperation agreement, or a statement that there was no cooperation agreement. All filings would look the same and under seal filings would not flag cooperation.
Active district judge	FPD and USAAtty are working on proposed alternative procedures
Active district judge	Full range of alternatives have been considered.
Active district judge	I have been on the job just over one year and have only heard discussions about this. I do not have enough information to give an informed answer.
Active district judge	not filing
Active district judge	Not filing plea agreements
Active district judge	Not referring to cooperation agreement in public proceeding; and filed with the Court only and not available to public.
Active district judge	putting plea agreements on PACER
Active district judge	Sealing all documents in certain cases
Active district judge	sealing all plea agreemnts
Active district judge	Sealing only certain plea agreements, but easier to seal all of them to ensure safety and privacy
Active district judge	Sealing Plea agreements and transcripts or not filing them.
Active district judge	see above
Active district judge	Some judges apparently are allowing side substantial assistance agreements to be unfiled or sealed.
Active district judge	Some judges reveal the statement of reasons with cooperation where the cooperation has already become public
Active district judge	The court has previously followed a practice of filing all plea agreements under seal, but has abandoned that procedure.

Active district judge	The matter has been raised, to our full court, for comprehensive discussion and debate multiple times. It would be impossible to delineate each suggestion. However, at each discussion BOP and BOP's concerns, as well as probation and probation's concerns, factored in heavily.
Active district judge	The rules committee has discussed several alternatives. One is to attach a sealed addendum to every plea agreement. The issue remains unresolved.
Active district judge	We carefully reviewed other district's practices and studied the issue in a special committee. We have recommended that no plea or cooperation agreements be filed.
Active district judge	We considered and rejected allowing side agreements.
Active district judge	We considered not filing them.
Active district judge	We established a small committee made up of one District Court Judge, One Magistrate Judge, the US Attorney, the Federal Public Defender and Probation Office.
Active district judge	We have a committee of judges, court staff, and lawyers working to draft a district-wide policy.
Active district judge	We have considered, but rejected the notion of sealing all plea agreements.
Active district judge	We have discussed all the options.
Active district judge	We have discussed and rejected not filing them at all or removing cooperation or other sensitive information and placing it in a separate sealed document.
Active district judge	We have discussed what is done in various jurisdictions.
Active district judge	We have discussed what other districts have done.
Chief district judge	Considered all alternatives in developing existing policy
Chief district judge	Considered sealing all plea agreements.
Chief district judge	Currently the government is including the same substantial assistance language in every plea agreement filed in this district. In sum, the language says "if" the defendant provides substantial assistance, the government "may" file a 5K motion. If a defendant having cooperation agreements as filing separate from the plea agreement
Chief district judge	I am unaware of the specific alternatives, but I know our court committee reviewed them before recommending the policy we adopted.

Chief district judge	Partial redaction is sometimes ordered (taking out cooperation provisions from what is publicly filed) on a case-by-case basis.
Chief district judge	Plea agreements available to the public, but cooperation information has been transferred from the plea agreement to a sealed document.
Chief district judge	Sealing all plea agreements
Chief district judge	There is some disagreement among our court concerning sealing of cooperation clause and having each plea agreement have two filings so no one would know whether there was a cooperation agreement
Chief district judge	We have considered keeping all plea agreements restricted--to avoid the situation that a partial sealing indicates there is a cooperation provision in the agreement. However we felt it would be inappropriate to seal every plea/cooperation agreement.
Chief district judge	We have discussed limiting public access to plea agreements and some judges have done so on an ad hoc basis.
Chief district judge	We have discussed placing the cooperation agreements and offers of proof in separate documents
Chief district judge	We have held meetings to examine other alternatives, but have found none.
Chief district judge	When the Court discussed web sites that seek to publicize the names of cooperating defendants (i.e. Whosearat.com), it considered making all plea agreements publicly available but requiring that the U.S. Attorney file a separate cooperating language statement under seal in each case (regardless of whether a defendant cooperated or not) to avoid creating any inference regarding whether the defendant cooperated. After discussing the matter with the U.S. Attorney's Office, the Federal Defender's Office and representative defense counsel, the Court decided against adopting that approach.
Magistrate judge	Different recommendations from advisory groups that were considered
Magistrate judge	Dummy filings in all cases.
Magistrate judge	Initially public counter access was not available. that practice has been abandoned after issuance of Judicial Conference policy.
Magistrate judge	Plea agreements are not always filed, particularly if they do not become court exhibits.

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Magistrate judge	Separate document called plea supplement entered in all plea cases to contain cooperation agreement, if any.
Magistrate judge	the ones mentioned in your earlier listing
Magistrate judge	We have considered sealing additional portions of the plea agreements such as restitution.
Magistrate judge	We have talked about what other courts are doing
Magistrate judge	While alternatives have been discussed, we have not come up with an efficient alternative.

Appendix S (Q57, other, please specify): What gave rise to such suspicion or knowledge?: OtherText

What type of judge are you?	What gave rise to such suspicion or knowledge?: OtherText
Active district judge	A cooperation agreement was obtained by a codefendant from another codefendant.
Active district judge	A defendant's stated suspicion or knowledge.
Active district judge	Access via internet prior to policy change
Active district judge	AUSA reported defense counsel or defendant's freinds and family track case to see if defendant cooperating.
Active district judge	Based on prosecutor/agent's affirmation.
Active district judge	Concerns articulated by the AUSA and/or defense counsel.
Active district judge	cooperation can be inferred from something as simple as a defendant being taken from the holding area to meet with the federal prosecutor. I cannot know how, exactly, knowlege of cooperation was obtained.
Active district judge	counsel providing clients with copies
Active district judge	Government informed court at pretrial hearing, based on Defendant's motion to compel name of confidential informant.
Active district judge	jailhouse rumors
Active district judge	Not sure where the information came out.
Active district judge	Press release from USAO !!
Active district judge	Rat.com
Active district judge	Things which happened outside the court--prison conversations and defendants sharing presentence investigation reports
Active district judge	Threats and Death
Active district judge	Word of mouth based on rumor and innuendo.
Active district judge	Written threats sent to the cooperating defendant
Chief district judge	Communications in jail facilities and during transportation to and from court.
Chief district judge	Counsel have informed the court that third parties have made threats against defendants based on cooperation. In those instances, the genesis of this information has not been the court's records.
Chief district judge	Pretrial discovery and word on the street
Magistrate judge	access to discovery materials
Magistrate judge	I was a public defender prior to being appointed, and we knew of cases that persons were harmed for cooperating once they had a written plea agreement

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Magistrate judge

Knowledge of co-defendants

Originally gov't moved to detain def. Thereafter def agreed to cooperate; gov't and defense moved jointly to allow def on bail in drug case. After def was released, in short period of time he was killed.

Magistrate judge

Magistrate judge

reports of counsel

Appendix T (Q58): Any other comments about privacy rules?

What type of judge are you?

Any other comments?

Active district judge	I am relatively new, so I do not know much of the background in this court on these issues. However, I will say that this whole process of protecting this information is a work in progress for judges and attorneys. When I have reminded attorneys not to use such identifiers, some of them seem to not know what I am talking about until after I tell them that transcripts are posted on PACER. I suspect that it will take time to sensitize attorneys to the issue.
Active district judge	I favor a practice in which an sealed addendum is placed in the file for every plea agreement.
Active district judge	I have a small criminal docket less than 10% of my case load so I don't believe my experience is "statisically significant". Sorry to be tardy in my response.
Active district judge	I have many comments regarding civil matters, but this survey has concentrated on criminal proceedings, and I have nothing to add on that topic.
Active district judge	It is always best to err on the side of caution in making identifying information available to the public because of the ease of dissemination over the internet.
Active district judge	None.
Active district judge	our court addressed this last week and we opted to seal th supplemental plea agreemnt that wll befiled in every case ,evn when thert is no cooperation
Active district judge	Public substantial assistance agreements are a problem that will eventually assist individuals in obstructing justice. Balancing the public's right to know should rarely outweigh safety concerns, even if those concerns are only generalized in nature.
Active district judge	Rarely and only in the most extreme cases, I have been asked to refrain from docketing the entry that a defendant has taken a plea. This situation has occurred when a defendant's safety would be extremely comprised.

Active district judge	The Administrative Office should develop software to provide certifications by counsel that they have screened all documents before posting them on Pacer. We had a horrible situation where an attorney attached the social security numbers of multiple plaintiffs in a MDL. A docket clerk cannot screen all attachments. We should also have computer software to screen for social security numbers.
Active district judge	The judge needs to be ever vigilant and defense counsel need to feel the judge is open to their concerns as to the safety of their clients.
Active district judge	The privacy issue is overblown. Nothing need to be done. In particular, the public has a need to know more, and not less, about what goes on in our courts. This is especially true of criminal cases.
Active district judge	The results of this survey should be provided to the Committee on Court Administration and Case Management for any follow up action in order to preserve the continuity of the work that Committee has done on this subject.
Active district judge	We should have a best practices document
Active district judge	We should place protecting people above ready access to court files.
Active district judge	While the privacy rules are fairly simple, logical, and workable, the redaction rules are labyrinthine, unworkable, and impose an undue burden on court reporters. Far better for judges to take an active hand in enforcing them during trial and having a general waiver rule when they're ignored. No redactions.
Bankruptcy judge	I believe the privacy rules are a complete waste of judicial time. We are talking about public records and possible harmful access comes with the territory. Who would wish to steal the identity of someone who just filed bankruptcy? The private information supposedly protected is available in several public domains. All our efforts will always be bandaids.
Bankruptcy judge	I have no further comment or suggestion at this time.
Bankruptcy judge	I may not be aware of what the rules are in this area.
Bankruptcy judge	I wanted to check proofs of claims too, but the system would not allow it.
Bankruptcy judge	It appears that counsel practicing in this Court are generally sensitive to protecting PII; failures to comply appear to be inadvertent and are promptly remedied.

Bankruptcy judge	It seems counterproductive to require debtor's to remove SSN and other personal identifier information in all bankruptcy court filings but to require inclusion of full SSN in § 341 (creditors meeting) notices.
Bankruptcy judge	No other comments.
Bankruptcy judge	On our court website, we have posted the Administrative Procedures for Electronic Case Filings which sets out the privacy warnings.
Bankruptcy judge	Our court staff is very busy given the numbers of filings. The attorneys should be responsible for correcting the problem that they create, not us.
Bankruptcy judge	Our Florida State courts will implement redactions in real time upon receipt of a phone call. Our court requires a written motion.
Bankruptcy judge	The main problem this court has encountered is with exhibits for trials and hearings and exhibits attached to proofs of claim and filings containing personal identifiers. The problem is more significant with pro se filers, but attorneys also overlook redaction on occasions.
Bankruptcy judge	The problem that I have encountered is not covered in the Rules at all. Unless a decision is marked "not for publication" it can be obtained if the right Google inquiry is made. In student loans cases (always the debtors are individuals) the information
Bankruptcy judge	the redaction policy is a commendable endeavor, but in bk cases, where so much personal info is implicated, it is naive to expect that there will not be frequent, serious issues.
Bankruptcy judge	They are generally working if we keep reminding parties and counsel
Bankruptcy judge	This has been a concern for my division. We deal with a volume of consumer debtors with their financial life made 'public'. Damage to these individuals can be dramatic. We find the 'problems' arise msot often with the uneducated (pro se) users of the system (also with attorney unfamiliar with federal rules. Without an alert and active quality control oriented clerks' office this problem could become even more of an issue. Vigilance to privacy concern by the 'front-line' and resources to that end, I feel, is important. '

Bankruptcy judge
This issue comes up with some frequency in my court, and we try to be very vigilant about finding problems and correcting them. The first line of defense, of course, is the parties themselves. I find that as counsel become familiar with the redaction procedures and our methods of addressing this problem, they become more proactive in seeking relief when their clients' personal information is included in filings.

Chief bankruptcy judge
Consideration should be given to incorporating the Judiciary's redaction policy into the FRBP's. Any rule should make it clear that the responsibility for redaction lies with the filing party, and that clerk's of court should not be responsible for redacting information from documents once filed. Please note: this survey was completed by R.G. Heltzel, Clerk, U.S.B.C, CA(E).
Creditors routinely file proofs of claim with personal identifiers like social security numbers and account numbers. Because debtor's and their counsel don't always see those right away, the proofs of claim go uncorrected. It is a continuing challenge to educate creditors about this problem. To correct the problem, the clerk's office has to block the claim from public view and the filer has to refile the claim.

Chief bankruptcy judge
I have also found problems arise when, even though counsel remembers to eliminate personal identifiers in pleadings they draft, they attach voluminous documents as exhibits and the identifiers are in those, evidently unreviewed, exhibits.

Chief bankruptcy judge
I have had cases - and I'm told by the office of the United State Trustee's Office in Colorado that there are a good number more - where a debtor files bankruptcy using a previously stolen or purchased SSN of another person. In other words, an ill

Chief bankruptcy judge
I STRONGLY URGE THE COMMITTEE TO RESIST MAKING THE CLERK RESPONSIBLE FOR IDENTIFYING AND REDACTING PERSONAL IDENTIFIERS AND OTHER PROTECTED INFORMATION, IF THIS IS BEING CONSIDERED.

Chief bankruptcy judge
I think the rules exist to alert parties to the requirements and issues involved. It is a matter of parties putting internal procedures in place to ensure compliance with those rules.

Chief bankruptcy judge	In general, these are difficult to police and enforce. Creditors' counsel and claims filers need to be better educated on this than they currently appear to be.
Chief bankruptcy judge	None
Chief bankruptcy judge	The COurt has entered General Order #2008-6 which adopts the Judicial Conference policy on electronic availability of transcripts.
Chief bankruptcy judge	The inclusion of confidential information in documents filed with the court in violation of Bankruptcy Rule 9037 is a very serious problem in bankruptcy court. It is most often violated by creditors who file proofs of claim containing prohibited informat
Chief district judge	no
Chief district judge	None that I can think of at this time.
Chief district judge	None.
Chief district judge	While I am aware of witnesses who suffer retaliation in criminal cases, I am not aware of any cases where it can be traced back to public records.
Magistrate judge	Again, I am far more worried about the institutional trend toward court secrecy than I am about inadvertent disclosures of private information in a handful of cases. As a magistrate judge my participation in plea and cooperation agreements is limited because our district judges generally take their own pleas. Personally I think plea agreements and cooperation agreements should be separate and the cooperation part kept private, but I haven't seen either the prosecution or the defense ask for that.
Magistrate judge	Educating lawyers is the key to the problem in civil cases.
Magistrate judge	Many of the questions concerned PACER. I do not use PACER, and I am not familiar with what documents are accessible by using it. My sense is that many of these questions would be better directed to court personnel who are familiar with PACER and what information is available through it.
Magistrate judge	My answers were limited to my experience as a new judge. Many of the questions would have been answered differently if I included my time as a criminal defense lawyer.
Magistrate judge	no other comments
Magistrate judge	No.
Magistrate judge	The U S Attorney's office has complained about the burdensome nature of the trial transcript redaction

process.

Magistrate judge this survey is difficult because of the number of variations in judicial practice. I am a USMJ and many of the questions do not pertain to my cases.

Magistrate judge While I recognize the need to protect private information, it is often necessary to discuss private information in rendering decisions. How does the committee propose that judge's decision be made publicly available while still protecting privacy (example, request for review of denial of request for child's social security disability benefits)

Clerks Survey of Privacy Practices in Judicial Proceedings

Responses to this survey will aid Subcommittee on Privacy of the Judicial Conference's Committee on Rules of Practice and Procedure in its evaluation of the effectiveness of the federal courts' rules and procedures to protect private information in court filings. If you have questions about this survey, please contact Professor Daniel Capra (212-636-6855; dcapra@law.fordham.edu)

TYPE OF COURT:

	Frequency	Percent
Bankruptcy	73	50.3
District	72	49.7
Total	145	100.0

1) In which district do you serve?

(This information is not reported since it would identify individual clerks who responded and those clerks who did not respond.)

2) What is your position?

	Frequency	Percent
Missing	4	2.8
Bankruptcy Court Clerk	65	44.8
District Court Clerk	52	35.9
District Executive	2	1.4
Other	22	15.2
Total	145	100.0

If you selected other, please specify

See Appendix A.

For the purposes of this survey, the term "personal identifier information" refers to those forms of personal information requiring protection under the national privacy rules (namely Civil Rule 5.2, Criminal Rule 49.1 and Bankruptcy Rule 9037), including the following:

- Social-security number**
- Taxpayer-identification number**
- Financial-account number**
- Birth date**
- Home address in criminal cases, and**
- The name of an individual known to be a minor.**

The term "private information" is broader than personal identifier information, and includes other sensitive personal information not covered by the rules that you think deserves restricted access.

JUROR RECORDS

3) In your court, which documents containing personal identifier information about individual jurors -- including the juror's name or background information -- are made publicly available through PACER? Please check all that apply.

District Court Clerks Only

- 9 (12.5%) Grand jury indictment (including foreman's signature)
- 1 (1.4%) Jury panel list
- 11 (15.3%) Transcripts of voir dire proceedings
- 3 (4.2%) Strikes by parties of identifiable jurors
- 8 (11.1%) Notes from jurors (either on a deliberating jury or not)
- 10 (13.9%) Verdict forms with juror names
- 49 (68.1%) No identifiable information about individual jurors available through PACER
- 9 (12.5%) Other (please specify)

If you selected other, please specify

See Appendix B.

4) In your court, which documents containing personal identifier information about individual jurors, if any, is made available through the public access terminal in the clerk's office? Please check all that apply.

District Court Clerks Only

- | | | |
|------------|--------------------------|--|
| 10 (13.9%) | <input type="checkbox"/> | Grand jury indictment (including foreman's signature) |
| 0 (0.0%) | <input type="checkbox"/> | Jury panel list |
| 14 (19.4%) | <input type="checkbox"/> | Transcripts of voir dire proceedings |
| 3 (4.2%) | <input type="checkbox"/> | Strikes by parties of identifiable jurors |
| 9 (12.5%) | <input type="checkbox"/> | Notes from jurors (either on a deliberating jury or not) |
| 13 (18.1%) | <input type="checkbox"/> | Verdict forms with juror names |
| 47 (65.3%) | <input type="checkbox"/> | No identifiable information about individual jurors is made available through the public access terminal in the clerk's office |
| 6 (8.3%) | <input type="checkbox"/> | Other (please specify) |

If you selected other, please specify

See Appendix C

TRANSCRIPTS IN GENERAL

5) The Judicial Conference has established a policy that transcripts are to be posted on PACER 90 days after delivery to the clerk of court. When did your court begin posting transcripts on PACER?

_____ (month and year)

Districts courts answers ranged from June 2002 to Pending

Bankruptcy courts answers ranged from January 2001 to December 2009

6) Has your court established local rules or policies about posting criminal and civil case transcripts on PACER to address perceived privacy concerns?

(Please note: This survey is not intended to suggest that the current Judicial Conference policy is to be altered or negated in any way.)

	Frequency	Percent
Missing	5	3.4
Don't Know	5	3.4
No	58	40.0
Yes	77	53.1
Total	145	100.0

7) What is the local rule or policy for criminal cases?

See Appendix D

8) What is the local rule or policy for civil cases?

See Appendix E

9) Have you received any complaints or requests for changes regarding private information appearing in transcripts generally?

	Frequency	Percent
Missing	3	2.1
No	133	91.7
Yes	9	6.2
Total	145	100.0

District Clerks Only

	Frequency	Percent
Missing	2	2.8
No	65	90.3
Yes	5	6.9
Total	72	100.0

Bankruptcy Clerks Only

	Frequency	Percent
Missing	1	1.4
No	68	93.2
Yes	4	5.5
Total	73	100.0

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10) Was the private information available through PACER?

	Frequency	Percent
Missing	136	93.8
No	3	2.1
Yes	6	4.1
Total	145	100.0

District Clerks Only

	Frequency	Percent
Missing	67	93.1
No	3	4.2
Yes	2	2.8
Total	72	100.0

Bankruptcy Clerks Only

	Frequency	Percent
Missing	69	94.5
Yes	4	5.5
Total	73	100.0

VOIR DIRE TRANSCRIPTS

11) Does your court place voir dire transcripts on PACER?

District Clerks Only

	Frequency	Percent
Missing	3	4.2
No	43	59.7
Yes, both civil and criminal voir dire transcripts	23	31.9
Yes, civil voir dire transcripts	2	2.8
Yes, criminal voir dire transcripts	1	1.4
Total	72	100.0

12) Have you experienced any problems or complaints in protecting private information in voir dire transcripts from access through PACER?

District Clerks Only

	Frequency	Percent
Missing	44	61.1
Don't Know/Not Applicable	3	4.2
No	24	33.3
Yes	1	1.4
Total	72	100.0

13) You indicated that you have experienced problems or complaints in protecting private information in voir transcripts. Please describe those problems or complaints.

See Appendix F

DEPOSITION TRANSCRIPTS

14) Does your court post depositions on PACER?

	Frequency	Percent
Missing	3	2.1
Don't Know	8	5.5
No	96	66.2
Yes, the court allows them to be posted in certain circumstances	32	22.1
Yes, the court requires them to be posted	6	4.1
Total	145	100.0

15) You indicated that your court posts depositions on PACER in certain circumstances. Please explain those circumstances.

See Appendix G

REDACTION IN GENERAL

16) Are you aware of ways to make it easier and more efficient for lawyers to search or review transcripts for personal identifier information that must be redacted?

	Frequency	Percent
Missing	2	1.4
Don't Know	30	20.7
No	85	58.6
Yes	28	19.3
Total	145	100.0

17) Please indicate the techniques currently used. (Check all that apply)

- 23 (15.9%) Requiring the transcripts be filed as text-searchable PDFs
- 7 (4.8%) Allowing attorneys to review their notes of the proceeding to make the initial determination as to whether redactable information was mentioned
- 7 (4.8%) Using software programs developed to identify personal identifier information
- 4 (2.8%) Other (please specify)

If you selected other, please specify

See Appendix H

18) Do you have any suggestions for improving the process of redacting personal identifier or other private information from transcripts?

See Appendix I

19) Does your court keep a record of complaints and requested changes regarding redacting transcripts that contain private information? (This includes both the

Clerks Privacy Survey – 11/19/09

redaction of personal identifier information as required by the rules and possible over-redaction of information not protected by the privacy rules.)

	Frequency	Percent
Missing	3	2.1
Don't Know	6	4.1
No	94	64.8
Yes	42	29.0
Total	145	100.0

District Clerks

	Frequency	Percent
Missing	2	2.8
Don't Know	2	2.8
No	45	62.5
Yes	23	31.9
Total	72	100.0

Bankruptcy Clerks

	Frequency	Percent
Missing	1	1.4
Don't Know	4	5.5
No	49	67.1
Yes	19	26.0
Total	73	100.0

REDACTION IN BANKRUPTCY CASES

20) Has your court experienced problems with failures to comply with redaction requirements in filed documents -- including petitions, schedules, proofs of claim, and adversary proceeding pleadings?

Bankruptcy Clerks Only

	Frequency	Percent
Missing	8	11.0
Don't Know	1	1.4
No	9	12.3
Yes	55	75.3
Total	73	100.0

21) How frequently does this occur?

Bankruptcy Clerks Only

	Frequency	Percent
Missing	18	24.7
Often	11	15.1
Rarely	11	15.1
Sometimes	33	45.2
Total	73	100.0

22) What kinds of bankruptcy filings? Please check all that apply.

Bankruptcy Clerks Only

- 29 (39.7%) Petitions
- 35 (47.9%) Schedules
- 54 (74.0%) Proof of Claims
- 13 (17.8%) Adversary Proceeding Pleadings
- 21 (28.8%) Other (please specify)

If you selected other, please specify

See Appendix J

REDACTION IN GENERAL

23) Are you aware of any reasons for noncompliance with the redaction requirements?

	Frequency	Percent
Missing	67	46.2
Don't Know	2	1.4
No	71	49.0
Yes	5	3.4
Total	145	100.0

24) What reasons were given?

See Appendix K

25) How have those matters been resolved?

See Appendix L

REDACTION OF CRIMINAL RECORDS

26) Does your district have a policy with respect to posting plea agreements and cooperation agreements on PACER?

District Clerks Only

	Frequency	Percent
Missing	1	1.4
Don't Know	2	2.8
No, it is up to the individual judge	37	51.4
Yes	32	44.4
Total	72	100.0

27) You indicated that your district has a policy with regard to posting plea agreements and cooperation agreements on PACER. Please describe the policy or post a link to your district's policy.

See Appendix M

28) Does your district have a policy with respect to posting plea agreements and cooperation agreements on the public access terminal in the courthouse?

District Clerks Only

	Frequency	Percent
Missing	1	1.4
Don't Know	1	1.4
No, it is up to the individual judge	41	56.9
Yes	29	40.3
Total	72	100.0

29) You indicated that your district has a policy with regard to posting plea agreements and cooperation agreements on the public access terminal in the courthouse. Please describe the policy or post a link to your district's policy.

See Appendix N

30) Do you or others in your court review decisions to restrict PACER access to plea or cooperation agreements after a certain point in time?

District Clerks Only

	Frequency	Percent
Missing	1	1.4
Don't Know	1	1.4
No	67	93.1
Yes	3	4.2
Total	72	100.0

31) You indicated that you or others in your court review decision to restrict PACER access after a certain point in time. Please describe the process that is used.

See Appendix O

32) Have you had any problems implementing the court's policy regarding posting of plea and cooperation agreements?

District Clerks Only

	Frequency	Percent
Missing	1	1.4
Don't Know	2	2.8
No	66	91.7
Yes	3	4.2
Total	72	100.0

33) You indicated that you have had problems implementing the court's policy regarding posting of plea and cooperation agreements. Please explain those problems.

See Appendix P

IMMIGRATION RECORDS

34) With respect to immigration cases, do you believe PACER access to additional forms of private information, such as alien registration numbers, should be restricted?

District Clerks Only

	Frequency	Percent
Missing	1	1.4
Don't Know/No opinion	43	59.7
No, PACER access should not be limited in immigration cases.	5	6.9
PACER access should be limited in certain types of immigration cases.	2	2.8
Yes, PACER access to such private information should be limited in all immigration cases.	21	29.2
Total	72	100.0

35) Which types of immigration cases should require limited access?

See Appendix Q

36) If you have any other comments or suggestions about the privacy rules that have not been covered in this questionnaire, please provide them here:

See Appendix R

Thank you for completing the survey. If you have any questions, please contact Professor Daniel Capra (212-636-6855; dcapra@law.fordham.edu)

**Appendices to Clerks Survey of
Privacy Practices in Judicial Proceedings**

11/19/09

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Appendix A:

2) What is your position?

If you selected other, please specify

District Court Respondents:

	Frequency	Percent
Missing	54	75.0
Chief Deputy	4	5.6
Chief Deputy Clerk	8	11.1
Chief Deputy for Administration - District Court	1	1.4
Deputy in Charge, District Court	1	1.4
District Court Clerk, responding on behalf of the Court after consultation with the Judges to review our current practices and procedures	1	1.4
Operations Manager	2	2.8
Staff Attorney	1	1.4
Total	72	100.0

Bankruptcy Court Respondents:

	Frequency	Percent
Missing	66	90.4
[XXXXX for] XXX Clerk	1	1.4
Bankruptcy Chief Deputy	1	1.4
Chief Deputy	1	1.4
Chief Deputy of Operations	1	1.4
Operations Manager	2	2.7
Operations Mgr on behalf of BK Clerk	1	1.4
Total	73	100.0

Appendix B

3) In your court, which documents containing personal identifier information about individual jurors -- including the juror's name or background information -- are made publicly available through PACER? Please check all that apply.

If you selected other, please specify
District Clerks Only

Foreperson name available on verdict form in civil cases only

Juror information in civil cases is available on PACER for jury panel lists, notes and verdict forms. In criminal cases, these are sealed and therefore not available. Court is presently considering not having information about jurors public.
n/a - Bankruptcy Court

Note: The signature of the jury foreperson is available through PACER unless the presiding judge directs the clerk's office to redact it. Often the signature is illegible.

Notes from jurors are only made publicly available only in civil cases

Some Judges allow the foreperson's name to be publicly available on the verdict form. Otherwise, no other identifying information is available in this District.

trial transcripts might have a name

Verdict forms Civil only

Verdict Forms contain only foreperson's name and juror notes are available only in civil cases. Voir dire proceedings are sealed by some judges.

We redact or seal any document in a criminal case that contains a juror's name. We do not do the same in civil cases. We don't make publicly available any other personal identifier other than names in civil cases.

Appendix C

4) In your court, which documents containing personal identifier information about individual jurors, if any, is made available through the public access terminal in the clerk's office? Please check all that apply.

If you selected other, please specify

District Clerks Only

Civil voir dire transcripts are available at the public terminals, criminal is not. Civil verdict forms are available at public terminals, criminal verdict forms in redacted form are available at the public terminals.

Foreperson name available on verdict form in civil cases

Same as above

trial transcripts might have a name

Verdict forms Civil only

Appendix D

7) What is the local rule or policy for criminal cases?

District Clerks:

#1) Local Rule 49.1.1 codifying current procedure to go into effect on 12/01/2009: (b) Transcripts of Hearings. If information is listed in Section (a) of this rule is elicited during testimony or other court proceedings (i.e., personal identifiers

Administrative Order 08-35 establishes general policy; policy supplemented by Administrative Order 09-09 to exclude voir dire hearing transcripts

Administrative Order 08-9
[http://www.iand.uscourts.gov/web/documents.nsf/0/C7DB007CCDFD0E5862574980053A4A8/\\$File/Admin+Order+08+AO+0009.pdf](http://www.iand.uscourts.gov/web/documents.nsf/0/C7DB007CCDFD0E5862574980053A4A8/$File/Admin+Order+08+AO+0009.pdf)

Administrative policy - Counsel will file a Notice of Intent to Redact within 5 days of transcript being delivered to the clerk. Counsel will then follow-up, within 21 days of initial delivery of the transcript to the clerk, with a specific request for redaction

adopts national policy; Admin Order 2008-31 (available on our web site)

Central District of Illinois
United States District Court
Notice to Members of the Bar
Electronic Availability of Transcripts of Proceedings Before U.S. District and Magistrate Judges

Criminal transcripts are filed with restricted access (available at public terminal in the clerk's office, but not remotely). During that time the transcripts cannot be printed. They go through the redaction period, then at 90 days if no requests for redaction

Criminal Voir Dire must be filed in a separate volume and is always sealed. With unsealed transcript, official court reporter and clerk's staff provide parties with remote access. Notice of Intent to Redact due 10 days after transcript filed; Request for redaction

Electronic transcripts will be e-filed and available for viewing at the Clerk's Office public terminal, but may NOT be copied or reproduced by the Clerk's Office for a period of 90 days. If there are no redactions to be made

rest
For both civil and criminal, we have internal policy regarding juror voir dire transcript access.

GO-08-03

<http://www.cod.uscourts.gov/Documents/CMECF/ElectronicTranscriptPolicyStatement.pdf>

http://www.mow.uscourts.gov/district/rules/ecf_transcript_policy.pdf

<http://www.txs.uscourts.gov/transcripts/newpolicy.htm>

Judicial Conference policy plus voir dire proceedings may not be transcribed without permission of the presiding judge.

Jurors are identified in transcripts by a juror number and initials.

Local Criminal Rule 49.1.1 identifies the privacy items to be redacted. General Order 2008-16 (http://www.ohnd.uscourts.gov/Clerk_s_Office/Local_Rules/General_Orders/2008-16.pdf) states that voir dire transcripts will be filed as part

Local policy is that we do not ask for any privacy act information while on record.

Local Rule 5.2

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LR 80.1&CR;&LF;b) Access Restrictions After Transcript Filed.&CR;&LF;&CR;&LF; &CR;&LF;&CR;&LF;(1) Access to a transcript provided to the Court by a court reporter will be restricted in accordance with this rule. &CR;&LF;&CR;&LF;(B) Transcript
LR CR-49.1

LR Gen P 5.08

Mirrors JC policy

Miscellaneous Order No. 61, which is available on the court's website at http://www.txnd.uscourts.gov/pdf/Miscorder61_10210

Note: " . . . This policy establishes a procedure for counsel to request the redaction from the transcript of specific personal data identifiers before the transcript is made electronically available to the general public. Counsel are strongly urged to sh

Only redacted copies of transcripts are available via PACER.

Our policy is contained in a "Notice to Members of the Bar" issued on 5/9/08 and contained in the CM/ECF section of the Court website.

Pending local criminal rule. Now covered by General Order #8-02

Policy is transcripts are sealed for 90 days pending redaction notification by attorney.

Provides guidelines for attorneys to review and file notices to redact transcripts. Sets forth procedures for the release of transcripts for public view on PACER

redaction policy

Rule 5.1.2 Electronic Case Filing ("ECF") Procedures - Transcript of criminal proceedings shall not be placed on CM/ECF or PACER, unless the presiding judge otherwise directs after giving the prosecution and defense counsel an opportunity to be heard same as Judicial Conference

Standing Order 08-02 and Section VI to Appendix H to Local Rules: Adopts Judicial Conference policy.

The Court's ECF Policies and Procedures which include the redaction policy.

The same as the JCUS policy

Transcripts of voir dire conducted at sidebar are sealed and not publicly available

Transcripts provided by the Court Reporter will be filed in electronic form into CM/ECF and will not be available on the Court's PACER system for a period of 90 days. During that time it is the responsibility of the attorney who requested the transcript to

voir dire is not filed. Transcripts not available for viewing except at the public terminal for the first 90 days. Attorney Redaction Statement is due within 21 days of the filing of the transcript. If no redaction requested, the transcript is available

We have a local rule that covers civil and criminal case redaction of personal identifiers in General, which is LR 5.2(d) that reads:&CR;&LF;LR 5.2(d) A filed document in a case (other than a social security case) shall not contain any of&CR;&LF;the

When a transcript is filed with the Court by a court reporter, the transcript will be available at the Clerks Office for 90 days for inspection only. During the 90-day period, a copy of the transcript may be obtained from the court reporter at the rate e

Clerks Privacy Survey – 11/19/09

Within 7 days of the filing of transcript, parties wishing to redact identifiers pursuant to FRCP 49.1 must file a Notice of Intent Redact. If the Notice of Intent is filed, the filing party must then file a Redaction Statement within 21 calendar day

Bankruptcy Clerks:

Bankruptcy Court - no criminal cases

Bankruptcy Court has no policy for criminal cases!

Bankruptcy Court so N/A

Civil L.R. 3-17

n/a - Bankruptcy Court

n/a

N/A

N/A.

n?a

NA- Bankruptcy

NA

not applicable

Not applicable

Not applicable to Bankruptcy Court

Not applicable.

Our current transcript redaction policy is on our website
at: http://www.alsd.uscourts.gov/documents/index.cfm?docs=general_docs

See Transcript Redaction Procedure at http://www.ned.uscourts.gov/pom/transcript_redaction_procedure.pdf

Appendix E

8) What is the local rule or policy for civil cases?

District Clerks

Clerks Privacy Survey – 11/19/09

#1) Same local rule as criminal, but labeled LR Civ P 5.2.1.&CR;&LF;#2) Same policy regarding filing of voir dire transcripts as a separate volume with access restricted to case participants and the public terminal;&CR;&LF;#3) Same as criminal set forth a

Administrative Order 08-35 establishes general policy; policy supplemented by Administrative Order 09-09 to exclude voir dire hearing transcripts

Administrative Order 08-9&CR;&LF;&CR;&LF;[http://www.iand.uscourts.gov/e-web/documents.nsf/0/C7DB007CCDFFD0E5862574980053A4A8/\\$File/Admin+Order+08+AO+0009.pdf](http://www.iand.uscourts.gov/e-web/documents.nsf/0/C7DB007CCDFFD0E5862574980053A4A8/$File/Admin+Order+08+AO+0009.pdf)

Administrative policy-Counsel will file a Notice of Intent to Redact within 5 days of transcript being delivered to the clerk. Counsel will then follow-up, within 21 days of initial delivery of the transcript to the clerk, with a specific request for redaction

adopts national policy; Admin Order 2008-31

Civil Voir Dire is filed in separate volume and sealed only upon Court order. Otherwise procedures are same as for criminal cases.

Electronic transcripts will be e-filed and&CR;&LF;available for viewing at the Clerk's Office public terminal, but may NOT be&CR;&LF;copied or reproduced by the Clerk's Office for a period of 90 days. If there are&CR;&LF;no redactions to be made, the rest

For both civil and criminal, we have internal policy regarding juror voir dire transcript access.

GO-08-03

<http://www.cod.uscourts.gov/Documents/CMECF/ElectronicTranscriptPolicyStatement.pdf>

http://www.mow.uscourts.gov/district/rules/ecf_transcript_policy.pdf

Judicial Conference policy plus voir dire proceedings may not be transcribed without permission of the presiding judge.

Jurors are identified in transcripts by a juror number and initials.

Local Civil Rule 5.2 - and General Order #8-02

Local Civil Rule 8.1 identifies the privacy items to be redacted.&CR;&LF;&CR;&LF;General Order 2008-16 (http://www.ohnd.uscourts.gov/Clerk_s_Office/Local_Rules/General_Orders/2008-16.pdf) states that voir dire transcripts will not be filed as part of the

Local Rule 5.2

LR 80.1 (b)(1)&CR;&LF;(C) Remote electronic access to transcripts of civil voir dire proceedings shall remain restricted to the users identified in subsection (b)(2) of this rule indefinitely, unless otherwise ordered by the court.&CR;&LF;

LR CV-5.2

Clerks Privacy Survey – 11/19/09

LR Gen P 5;08

Mirrors JC policy

Miscellaneous Order No. 61, which is available on the court's website at http://www.txnd.uscourts.gov/pdf/Miscorder61_102108.pdf.

Only redacted copies of transcripts are available via PACER.

Our policy is contained in a "Notice to Members of the Bar" issued on 5/9/08 and contained in the CM/ECF section of the Court's website.

Policy is transcripts are sealed for 90 days pending redaction notification by attorney.

redaction policy

Rule 5.1.2 Electronic Case Filing ("ECF") Procedures - Transcript of civil proceedings shall be placed on CM/ECF or PACER, unless the presiding judge otherwise directs.

same as above

Same as above

SAME AS ABOVE

Same as above with the exception of "Home Addresses to the city and state (criminal only)." &CR;&LF;

Same as above.

Same as criminal listed above.

Same as for criminal transcripts.

same as Judicial Conference

Same as the policy for criminal cases, with the exception that it references FRCvP 5.2.

Sameas Criminal.

Clerks Privacy Survey – 11/19/09

The Court's ECF Policies and Procedures which include the redaction policy.

The same as the JCUS policy

Transcript is not available for public inspection for 90 day period following delivery/docketing of transcript into Electronic Case Filing system.

Transcripts of voire dire conducted at sidebar are sealed and not publicly available

When a transcript is filed with the Court by a court reporter, the transcript will be available at the Clerks Office for 90 days for inspection only. During the 90-day period, a copy of the transcript may be obtained from the court reporter at the rate e

Bankruptcy Clerks:

(Adversary Proceedings in Bankruptcy) Our procedural manual (on Intranet) addresses our requirement that counsel remain responsible for the content of transcripts. Our proposed local rules likewise reveal the court's requirements and judicial conference p

5003-1

All filers must redact: Social Security or tax-payer identification numbers; dates of birth; names of minor children; and financial account numbers, in compliance with Fed. R. Bankr. P. 9037. This requirement applies to all documents, including attachmen

Bankruptcy: Standing Order No. 09-3&CR;&LF;http://www.vaeb.uscourts.gov/files/SO_9-3.pdf&CR;&LF;

CANB Transcription Policy & Procedure, September, 2008

Civil L.R. 3-17

Contained in General Order 08-09, entered 9/12/08

Follow Judicial Conference policy for posting. Add an opportunity for opposing side to respond to request for redaction.

For bankruptcy cases and proceedings, we use an advisory that provides a cautionary statement as recommended by the J.C., plus we have a GPO that authorizes the clerk to replace an original transcript previously entered in CM/ECF with a redacted transcript

General Order #2008-6

Clerks Privacy Survey – 11/19/09

I am the Bankruptcy Clerk for the SDNY. Our Court has adopted Local Rule 5005-1(A)(2)(b) and has issued Court Guidelines on Electronic Availability of Transcripts of Court Proceedings (effective 12/01/09).

In addition to following the Conference policy on availability of transcripts on PACER, counsel and parties are routinely reminded (by judges and also by reminder notices throughout the courtroom) to be cautious about what is said on the record.

It is the attorney's responsibility to redact personal identifiers from documents and transcripts.

Local Rule 9018-1

NA - Bankruptcy

No transcripts posted publicly until 90 days. Parties have seven days from notice sent out by court to request redactions.

Not applicable.

Notice of the filing of the transcript is sent, including deadlines for seeking redaction of any private data contained in the transcript. However, trial orders and notices posted in the courtroom remind attorneys they should avoid the introduction of pr

Order dated 2/23/2009, to be superseded by LBR 5077-1 eff. 12/1/2009

Our current transcript redaction policy is on our website
at: http://www.uscourts.gov/documents/index.cfm?docs=general_docs

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
GUIDELINES FOR IMPLEMENTATION OF THE UNITED STATES
JUDICIAL CONFERENCE POLICIES ON ELECTRONIC AVAILABILITY AND REDACTION OF
TRANSCRIPTS OF COURT PRO

Participants are offered an opportunity to redact personal identifiers prior to public access to the transcript.

Policy for bankruptcy cases is same as civil cases:
<http://www.tx.uscourts.gov/transcripts/newpolicy.htm>

PUBLIC NOTICE REGARDING REDACTION PROCEDURES FOR TRANSCRIPTS

See Transcript Redaction Procedure at http://www.ned.uscourts.gov/pom/transcript_redaction_procedure.pdf

Standing Order entered whereby parties have opportunity to redact before transcript is posted along with process to redact after posting if something missed.

The procedures implement the Judicial Conference Policy.

Clerks Privacy Survey – 11/19/09

There is a sign in the courtroom not to ask questions or refer to private information during questioning.
&CR;&LF;&CR;&LF;Procedure is as follows:&CR;&LF;Procedure Regarding the Availability of Transcripts of
Court Proceeding&CR;&LF;&CR;&LF;&CR;&LF;Backg

Transcripts are posted for review by limited parties to have personal identifiers redacted for a time certain.
After this time runs, transcripts are released to PACER.

Transcripts are restricted from PACER viewing for 90 days after trascript is filed, except at the public viewing
computer and those parties that have purchased a transcript.

We basically reinforce/publicize the JCUS policy in our bankruptcy matters.

We entered a standing order in 2008 that restricts access to transcripts during the first 90 days on the docket
and sets forth procedures that should result in the redaction of any of the type of personal identifiers listed in
BR 9037(a).

We follow JC policy

We implemented the Judicial Conference policy on redaction and transcript availability via General Order.

Appendix F

13) You indicated that you have experienced problems or complaints in protecting private information in voir transcripts. Please describe those problems or complaints.

US Attorney's and Court Reporters have identified materials that should be redacted or removed.

Appendix G

15) You indicated that your court posts depositions on PACER in certain circumstances. Please explain those circumstances.

District Clerks

#1) If the depositions are read into the record at trial;&CR;&LF;#2) If the deposition, or a portion thereof, is attached as an exhibit to a motion pursuant to Local Rule 26.3:&CR;&LF;(a) Non-filing of discovery materials other than certificates of service

Attorneys may efile a deposition, but if not efiled by an attorney, we scan and upload the cover page. Once electronic appeals are available, entire deposition will be uploaded.

Depositions are not filed of record unless otherwise ordered.

Depositions read during trial that are not recorded are sometimes filed in the court record.

Designation of testimony for trial. Some portions for summary judgment.

If the deposition is an attachment or exhibit related to another filing, the deposition (or pertinent parts) would be allowed to be filed.

If the deposition is filed in support of a Motion, then it is filed and included on PACER.

IF they are exhibits to motions, such as summary judgment motions.

It allows it when filed as a public record.

Only excerpts which are germane to a matter under consideration, e.g., attachments to briefs or trial exhibits.

Only if the parties file the depositions.

Only posted if in support of motion. Redaction required by moving attorney.

Parties may file depositions in support of summary judgment motions.

require excerpts only are filed with document.

Sometimes depositions are included in attachments to motions, and thus end up filed as such.

Sometimes depositions in pro se cases are posted.

The Court discourages the filing of depositions and other discovery. However, if the permits believe it is necessary to do so, the court does not object.

When approved by court.

When attachments or parts of exhibits associated with a pleading.

Clerks Privacy Survey – 11/19/09

When discovery requests are contested, and counsel must apply to a judicial officer, transcripts of depositions relevant to that dispute may be filed electronically by counsel.

When it is used as testimony at trial.

When submitted by the parties in support of requests for relief, motions for summary judgement, etc.

When used at trial

Bankruptcy Clerks

A deposition transcript (or a portion thereof) could be attached as an exhibit in support of a motion.

after redaction period

Attorney's may include excerpts of deposition transcripts as necessary to support motions.

Counsel may file depositions supporting or opposing motions. Deposition transcripts are subject to the rules and redaction requirements that apply to other filings by parties. See Transcript Redaction Procedure at <http://www.ned.uscourts.gov/pom/transcr>
If requested as part of the record on appeal

If the deposition is used at trial.

Occasionally, an attorney will attach a deposition transcript or portion thereof, to a pleading that is electronically filed.

We allow attorneys to file most anything electronically, including depositions, if they wish, prior to trial subject to Court review.

When portions of depositions are filed as exhibits or attachments to other pleadings.

Appendix H

17) Please indicate the techniques currently used. (Check all that apply)

If you selected other, please specify

District Clerks

Perhaps redaction processing software can be used to (1) identify sensitive data found in a transcript and (2) generate a list that could be provided to counsel. In turn, counsel would review the list and identify the personal identifiers to be removed.

The attorneys elect the technique(s) to be used.

We post signs in courtroom not to go on the record with redactable information.

Bankruptcy Clerks

Counsel should obtain e-copies of transcripts and if excerpts are necessary they should be filed electronically and with search capability. Our court doesn't have a written requirement regarding text-searchability, but the 11th Circuit does.

Notice sent to all parties of any hearing when a transcript of hearing is filed with clerk allowing parties opportunity to review for potential redaction prior to public display of transcript.

Appendix I

18) Do you have any suggestions for improving the process of redacting personal identifier or other private information from transcripts?

District Clerks

No

Current policy and procedure sufficient

Develop routine within ECF that scans electronic documents for personal identifiers, and warns filer of any potential identifiers found before document is officially entered into the record.

Do a SEARCH for personal identifiers to find all.

Don't ask the question to elicit the information to begin with

Hasn't been a problem to date

I believe there is software being developed that will help filter identifiers. We are concerned about sensitive information being in transcripts because of multiple party accountability.

I have heard of software that will search, but not confident it is foolproof.

no

No

No suggestions at this time. However, having the transcripts "text searchable" would make the process easier.

No, except that physical obscuration, as by marker, is ineffective for efiled documents.

No.

No. On the question below, we do not record complaints because we haven't had any. If we started getting them, we probably would track them.

No. The duty to redact rests with counsel.

No. We give USA copies of transcripts with US as a party when they do not file the appeal.

None

Not at this time.

Our focus has been on eliminating, to the greatest extent possible, the inclusion of private information in transcripts. This is done via training and outreach to the bar.

Clerks Privacy Survey – 11/19/09

Our judges routinely remind attorneys in open court of the privacy requirements and there is a real attempt to keep those personal identifiers out of the transcript.

Require all documents to be text searchable at the time of filing... we realize that if the document is PDF'd properly, this is not an issue.

The burden must be placed on the filing party. If there was a mechanism to mark improperly submitted documents (failure to comply with FRCP 5.2, for example) and then allow a Clerk's Office to restrict access by placing the document under seal on PACER un

To constantly advise counsel to limit the introduction of personal information when questioning witness and making statements in court. Northern Ohio does this by 1) posting an Advisory for Limiting Personal Information on its web site (<http://www.ohnd.us>)

Use juror numbers and initials rather than names.

We feel this is the attorney's call.

Bankruptcy Clerks

NO

Allow case parties to access the transcript through PACER during the first 90 days. Making them buy the transcript or come to the Clerk's Office during that period almost ensures that they will not inspect the transcript for personal identifiers.

Continue to have judges be very proactive in court to advise attorneys/litigants about this, and to avoid inclusion of private data in court hearings.

Emphasize the importance of redaction to attorneys filing electronically, in conferences, training and seminars

Involve the transcriber, "at the front end," so to speak. Perhaps there's a way transcribers could flag possible personal identifiers and notice provided to the "offending" party. I suspect this extra work might need to be compensated. A small surcharg

no

No

No.

No. I think the procedures that the AO spelled out, and that our court followed are pretty good. Would be hard to come up with something more efficient.

None

None at this time.

Our court does not have any suggestions for improvement at this time.

Our current policy seems to work well. Parties receive notice of time frame to redact.

Clerks Privacy Survey – 11/19/09

Our Judges do a very good job of taking steps to ensure personal identifiers don't get into transcripts (i.e., reminding attorneys about privacy restrictions during court proceedings).

Requiring that the transcriber/court reporter provide both full and redacted transcripts. CM/ECF could provide a mechanism for limiting public access to the redacted copy.

The best practice is to keep personal information out of the transcript in the first place. Counsel should take this into account when questioning witnesses or making other statements in court. If information subject to this policy is mentioned

The best way to address this is to avoid the introduction of the information in the first place. Vigilance on the part of the judge and the attorneys can achieve this.

The most effective way to avoid personal identifiers in the court records (transcripts and pleadings) is to educate attorneys as to proper protocols.

The new notice in ECF 4.0 requiring counsel to check the box agreeing that they must comply with the redaction rules may help.

This has been a very rare issue for the Bankruptcy Court. The larger problem is personal information (e.g. loan applications) attached to Proof of Claims.

WE HAVE NO SUGGESTIONS.

We have sent out e-mail reminders to all CM/ECF filers regarding privacy information. This seems to raise the awareness to all filers.

We have signs posted at all counsel tables in each judge's courtroom reminding attorneys not to illicit testimony that include personal identifier or other private information. Our judges are also mindful of this requirement and remind attorneys of the

Appendix J

22) What kinds of bankruptcy filings? Please check all that apply.

If you selected other, please specify

Bankruptcy Clerks Only

attachments and supportive docs to filings such as pay advices

Attachments to documents

Attachments to proof of claims

Attachments to proofs of claim

attachments to stay relief motions

Documents filed pursuant to 11 USC 521(a) such as pay stubs.

Employee wage statements

Exhibits

Exhibits and attachments

Exhibits on Motions to Lift Stay

motions- loan documents with financial account numbers can be attached

Motions

Motions for Unclaimed Funds or certain attachments to pleadings

pay stubs

payment advices

Payment advices

PAYMENT ADVICES

Protected information appears in motions, and in supporting attachments to pleadings.

reaffirmation agreements, motions to lift stay

Clerks Privacy Survey – 11/19/09

Social security statement

Statement of Social Security - wrong event

Tax returns, pay stubs, motion with exhibits



Appendix K

24) [Are you aware of any reasons for noncompliance with the redaction requirements?] What reasons were given?

District Clerks

1) If it was public in the paper world, then it should be public in the electronic world. If it was sealed in the paper world, then it should be sealed in the electronic world. (2) Redaction is burdensome and unnecessary. The information is already pu

attorney lack of knowledge of requirements

personal information is essential to pleading, so unredacted copy filed under seal.

Bankruptcy Clerks

From attorneys - inadvertance. Pro se litigants - unaware of policy

The person making the actual filing is not fully aware of what should be redacted; filer forgot to review; filer missed a personal identifier within a document

Appendix L

25) How have those matters been resolved?

District Clerks

once the matters are in the court record, normally a motion seeking court authorization to redact must be filed

The court determines on a case by case basis whether redaction or sealing is required as the matter arises before an individual judge, with a presumption in favor of public disclosure.

Unredacted copy filed under seal.

Bankruptcy Clerks

Attorneys and pro se parties continue to include private identifiers in documents from time to time.

We require a motion to strike the document be filed.

Appendix M

27) You indicated that your district has a policy with regard to posting plea agreements and cooperation agreements on PACER. Please describe the policy or post a link to your district's policy.

District Clerks Only

All plea agreements are filed in paper in the clerk's office. They are available for viewing by the public, if requested. The documents are not on the public terminals, nor on PACER. A docket entry entitled "Plea Agreement" is posted to ECF, without an

All plea agreements are posted. Plea agreement supplements (which are filed with every plea agreement) contain cooperation information. All plea agreement supplements are sealed under the court's Special Order No. 19. (See Special Order No. 19 on the cour

All plea agreements shall be filed electronically by the U.S. Atty. The US Atty. shall retain orig. documents for future production, if necessary, for two years after the expiration of the time for filing a timely appeal of the final judgment or order or a

All pleas are filed unsealed with no information regarding cooperation. All pleas have a sealed cooperation agreement filed that may or may not have language indicating a defendant's cooperation. All pleas look the same whether or not defendant cooperate

Court policy requires two documents: a public plea agreement which is filed of record and a sealed plea supplement which contains cooperation information and other private matters as may be indicated.

Criminal Protocol - All documents on the ECF system related to pleas and sentencing and orders relating to these documents, will be designated on the docket as Plea Documents, Sentencing Documents and Judicial Documents respectively, no matter their conte

General Order 2007-14 Electronic Access to Plea Agreements and Related Documents in Criminal Cases (http://www.ohnd.uscourts.gov/Clerk_s_Office/Local_Rules/General_Orders/2007-14.pdf) states that no plea agreements filed pursuant to &S.S.G. Section 5k1.1

Local Rule requiring Sealed Supplement to Plea filed with every Plea Agreement effective 12/01/2009

Our business practice is to notify attorneys that these documents are not available on PACER.
Link:&CR;&LF;<http://www.txwd.uscourts.gov/ecf/docs/efileprocd.pdf>

Our procedures allow for the Plea Agreement ("main document") to be filed and made part of the record since it does not make any reference to the defendant's cooperation with the government. It also requires that a Plea Agreement Addendum be filed under

Plea agreements and cooperation agreements are not accessible on PACER... they are restricted events.

Plea Agreements and Sentencing Memos are not available on PACER. Access is limited to Court staff, Gov't, defense counsel and at Clerk's Office Public Terminals.

Plea agreements are posted on PACER unsealed unless a judge in a particular case orders the plea agreement sealed. Cooperation agreements have historically never been filed with the court in this district.

plea agreements are public and available, unless a motion to seal is filed and granted in advance of filing

Plea agreements are required to be done in two parts - first document is available on PACER and contains NO cooperation information; second document is NOT available on PACER and contains all cooperation information, including when there is no cooperation

Clerks Privacy Survey – 11/19/09

Plea agreements are sealed in our District.

Plea agreements are sealed. The only thing that is public is a "notice of plea agreement" docket entry.&CR;&LF;

Plea agreements do not contain details of cooperation. Cooperation letters are executed by the parties and kept by the US Attorney and Probation Offices.

Plea agreements with cooperation are sealed.

Plea agreements with substantial assistance are filed as restricted documents and they are not available on PACER.

The agreements do not specify any cooperation. All plea agreements are available through PACER unless sealed on motion of parties.

The court files plea agreements only.

The normal plea agreement is set up as a "Case Participants and Public Terminal Access" in CM/ECF. Some plea agreements are ordered to be filed as "SEALED DOCUMENT" by the presiding judge.

The plea agreement is posted on PACER unless there is a Motion to Seal the Plea Agreement. Most plea agreements in our District do not outline cooperation with specificity and, therefore, do not require sealing. Anyone who watches a crime show on TV know

The plea and statement of reasons are public and therefore are posted.

The policy is that these documents are filed under seal.

These are publicly available unless filed under seal

They are not on PACER but are at the public terminals

They are restricted.

Verbal Order from the Chief Judge

We do not post them on PACER

We have a local rule (LR 111) which requires counsel to file a plea agreement and a plea agreement supplement for every guilty plea. The plea agreement supplement details the agreements re the plea. The docket entry for the plea agreement supplement is p

Appendix N

29) You indicated that your district has a policy with regard to posting plea agreements and cooperation agreements on the public access terminal in the courthouse. Please describe the policy or post a link to your district's policy.

District Clerks Only

A cooperation agreement is filed under seal with every plea (even if no cooperation agreement is reached with defendant);&CR;&LF;http://www.ndd.uscourts.gov/pdf/Plea_Agreements.pdf

actually no policy - they are posted as are all other documents

As explained in previous question we have two documents: public and sealed plea supplement.

As indicated above, plea agreements are public, but plea agreement supplements are sealed under Special Order No. 19.

If available on PACER it is also available on the public access terminal.

Plea agreements and statement of reasons are public and therefore are posted.

Plea agreements and plea agreement addenda are treated in the same manner at our public access terminals as they are in PACER. That is, the plea agreement (main document) is docketed and the pdf of the plea agreement is available at the public access terminal.

Plea agreements are at the public terminals similar to social security cases.

Plea Agreements are available at public access terminals unless specifically ordered as sealed by the Court.

Plea agreements are available at the public terminals unless they are sealed. Cooperation agreements are not available.

Plea agreements are available on the public access terminal in the courthouse, as they are on PACER, unless they are sealed by order of the Court.

Plea agreements are sealed. The only thing that is public is a "notice of plea agreement" docket entry.

Plea agreements only are filed.

Plea agreements with cooperation are sealed.

Plea agreements with substantial assistance are filed as restricted documents and they are not available at the Public Terminal.

Please see preceding link.

same access as through PACER on our public terminals

Same as above

Same as policy for PACER - public unless plea agreement is sealed by order of the judge.

Same as previous answer

Clerks Privacy Survey – 11/19/09

see prior answer.

The normal plea agreement is set up as a "Case Participants and Public Terminal Access" in CM/ECF. Some plea agreements are ordered to be filed as "SEALED DOCUMENT" by the presiding judge.

These are publicly available unless filed under seal

These documents are filed under seal.

They are not available on PACER.

Verbal Order from our Chief Judge

We don't make them available on the public access terminal

We have a local rule (LR 111) which requires counsel to file a plea agreement and a plea agreement supplement for every guilty plea. The plea agreement supplement details the agreements re the plea. The docket entry for the plea agreement supplement is p

Appendix O

District Clerks Only

All sealed documents are reviewed periodically to determine the need to continue the seal

Substantial assistant motions are sealed from the public for two years.

This has been a topic from time to time at our quarterly Judges' Meetings. Since implementing the present plan, we have decided it works best for our district.

Appendix P

33) You indicated that you have had problems implementing the court's policy regarding posting of plea and cooperation agreements. Please explain those problems.

District Clerks Only

one time we had an Assistant US Attorney from another district make an appearance and refuse to follow local policy.

the process was quite involved. Initially, we restricted remote access. Ultimately, the topic was the subject of a public report through our Local Rules committee, and after public comment and an en banc, the Court adopted the policy of complete access

We wanted to adopt a policy similar to North Dakota where a sealed document was filed in every case so that to the public there would be no indication of a sealed plea agreement with cooperation. However, we were unable to adopt such a policy because of

Appendix Q

35) Which types of immigration cases should require limited access?

District Clerks Only

All immigration nature of suit codes

Limited access should be granted to those cases affecting detention/custody.

Appendix R

36) If you have any other comments or suggestions about the privacy rules that have not been covered in this questionnaire, please provide them here:

District Clerks

Please disregard the incomplete survey from the District of Connecticut submitted earlier today. Please call if you have any questions. Robin Tabora, Clerk, 203-773-2141 [earlier survey Deleted by MD]

1. I am concerned that some attorneys still do not take the redaction requirement seriously. 2. Many of our court reporters have expressed concern about making transcripts available on PACER. Part of the concern is financial, but the court reporters are a

By local rule the court has expanded private information that must be redacted. Includes immigration identifiers.

Court reporters are aware of the requirements to redact, but are somewhat unsure that the parties will move for redaction. I believe current federal rules do not permit reporters or others to redact a document without a party making the request. I do not

I am concerned about transcripts being posted on PACER as we do not get many redaction notices. Attorneys have an affirmative duty and I think the policy on accountability is confusing. Maybe we should restrict as an added protection in these cases.

I love the new message in CM/ECF. It should be the filers responsibility to make sure that their documents do not contain privacy information.

I strongly believe the responsibility for removing personal identifiers must stay with the filing party, and hope that the steps being taken now prevent any shifting of that responsibility to us. The word 'nightmare' comes to mind if anyone tries to shif

it's all about educating the bar about breaking old habits. rarely is the personal identifying information relevant.

My suspicion is that most attorneys are not reviewing transcripts for redaction. We receive very few requests for reporters to redact.

no

No :-)

None

None at this time.

on behalf of all of the district court judges for the District of Maine:&CR;&LF;&CR;&LF;Most privacy issues occur in civil cases regularly - counsel elicit privacy information from witnesses, frequently file documents that contain privacy information and

The exclusion in Crim.R. 49.1(b)(9) is difficult for us to understand. Personal identifiers must be redacted in all documents except for charging documents. Therefore, most often, personal identifiers are made public in every criminal case via the charg

The language below is taken from our Jury Plan - the committee notes to Rule 49.1 (e) discuss access to juror names - we have included this language in our Jury Plan and will also incorporate the language into our Local Rules in 2010.&CR;&LF;&CR;&LF;Pursu

There are some concerns from ERISA lawyers about the redaction requirements applying to their case files, including voluminous medical records. We've received a recommendation that ERISA records be treated as Social Security cases under FRCP 5.2. &CR;&L

There should be more of a national policy for all Courts, with a presumption in favor of public disclosure.

Clerks Privacy Survey – 11/19/09

We are conducting the public's business and therefore should take great care in making decisions as to what documents the public should have access. Personal identifiers should be redacted. "Personal information" however is a very broad category and may

We still a lot of personal information such as dates of birth and defendant addresses coming in on forms generated by the U.S. Marshal and U.S. Attorney offices. Perhaps revisions to forms used by these agencies may be appropriate to assist in compliance

With regard to Immigration Records, I'm not quite sure why this was asked as the CM/ECF software restricts Nature of Suits 462, 463 and 465, which are the nature of suits for immigration cases. Any case with these nature of suits is restricted to court us

Bankruptcy Clerks

A notice has been added to the "CM/ECF Filer or PACER Login" screen, on version 3.3.2, reminding electronic filers of their responsibility to eliminate all personal identifiers from a document before filing it in CM/ECF. User is not allowed to log into the

Education is the most important component. Attorneys need to remain alert to the procedures and staff can assist by being mindful of the rules and advising filers when violations occur.

For Bankruptcy Court specifically, if the petition and schedules did not require personal information, it would reduce the frequency of the privacy acts violations and, therefore, individuals would be better protected. In other words, better clarify to t

I am not sure if Bankruptcy Court's were supposed to respond to the Civil questions. Many of those questions do apply to Bankruptcy cases but since there was a separate set of Bankruptcy questions I did not answer the Civil ?s.

None

See our local rule: http://www.miwb.uscourts.gov/content/services/rules/adminOrder_2008-02.pdf

The privacy rules should also address the filing of medical information covered by HIPAA. In Bankruptcy, creditors often include protected medical information as attachments to the proofs of claim. In our court, we have a local rule that provides for a s

This survey primarily pertains to USDC matters. Most of the questions are not applicable in bankruptcy court.

We appreciate the opportunity to provide input. Thank you for working to insure privacy to our citizens. We can always do better.

WE BELIEVE THAT THE CLERK SHOULD NOT BE RESPONSIBLE FOR REDACTING PERSONAL IDENTIFIERS FROM DOCUMENTS, AND POSSIBLY HAVE LIABILITY FOR OVERSIGHTS. THE RESPONSIBILITY SHOULD REMAIN WITH THE DEBTOR'S LAWYERS AND CREDITORS FILING PROOFS OF CLAIM.

We have had a request to limit the appearance of the full social security number on creditors' versions of the 341 Notice.

We routinely monitor pleadings for violations of BK Rule 9037. Typically, we see violations that involve SSNs and financial account numbers not being redacted. We inform counsel of the violation. If counsel repeatedly violates Rule 9037, we notify the

We send attorneys a deficiency notice when they include private information in documents that are filed, but it is already. Is cumbersome for the Clerk's Office to have to remove it, and the burden is rightly placed on the attorneys to redact it in the f

We should reconsider our decision to redact the first five of a social security number. Industry standard is to redact last four and display first five. By displaying the last four numbers it is easy to guess the first three because they are related to the

Clerks Privacy Survey – 11/19/09

Whatever is done, DON'T place any more of a burden on the Clerk's Office to monitor and fix errors, etc.!

Would be helpful to have official guidance on what to do with PDFs of scanned documents that are later 'pulled' because of personal identifiers - we have been destroying those PDFs to avoid any risk of disclosure internally

Attorney Survey of Privacy Practices in Judicial Proceedings

(N = 624, unless otherwise specified.)

REDACTION OF TRANSCRIPTS

1) Do you attempt to redact personal identifier information from a transcript before it is posted on PACER?

Yes:	415 (66.5%)
No	105 (16.8%)
Don't Know	97 (15.5%)
Blank/missing:	7 (1.1%)

2) Do you redact transcripts to delete other than personal identifier information?

Yes	201 (32.2%)
No	314 (50.3%)
Don't know	101 (16.2%)
Blank/Missing:	8 (1.3%)

3) Do you have any suggestions for improving the process of redacting personal identifier or other private information from transcripts?

See Appendix A

REDACTION IN GENERAL

4) Are you aware of any reasons for noncompliance with the redaction requirements?

Yes	74 (11.9%)
No	471 (75.5%)
Don't Know	76 (12.2%)
Blank/Missing:	3 (0.5%)

5) You indicated you were aware of reasons for noncompliance with the redaction requirements. What reasons were given?

See Appendix B

6) How have those matters been resolved?

See Appendix C

REDACTION OF TRANSCRIPTS

7) Have you done anything to ensure that personal identifier information is not raised unnecessarily in a proceeding, so that transcripts will not have to be redacted?

Yes	295 (47.3%)
No	249 (39.9%)
Don't Know	75 (12.0%)
Blank/Missing:	5 (0.8%)

8) You indicated that you have done something to ensure that personal identifier information is not raised unnecessarily. Please describe those measures.

See Appendix D

REDACTION IN GENERAL

9) Is there information in case files, not currently redacted, that should be subject to categorical redaction?

Yes	98 (15.7%)
No	185 (29.6%)
Don't Know	334 (53.5%)
Blank/Missing	7 (1.1%)

10) What types of information currently in the files should be redacted? Please check all that apply. (N = 98; only those who answered "Yes" to Question 9, above)

78 (79.6%)	Driver's license number
68 (69.4%)	Passport number
54 (55.1%)	State identification number
54 (55.1%)	Health insurance identification number
51 (52.0%)	Alien registration number
47 (48.0%)	Other (please specify)

If you selected other, please specify

See Appendix E

11) Comments

1. A client's Social Security file has multiple documents containing the person's SSN. In addition, the medical records contain minor children's names.
2. Again, goes to documents filed by USA in criminal case on the docket.
3. also hiv status, etc. is often in medical records that are attached to motion papers

4. Also, As to the public filings I think children should not have their full names listed with their ages, they are not the "parties" and the pleadings do not surround their conduct so I don't think their full names and birthdates should be listed, but rather age and year would be all, a separate document could be filed that the judge sees only as to their personal info. They do that in Juvenile and adoption court proceedings so I believe it should also apply in divorce court and family law.
5. Any statement indicating cooperation with the government by any person should be sealed/redacted.
6. Anything that is requested to verify identity by medical, financial or government institutions should be redacted.
7. Before the rules required the redaction of personal information, many complaints were filed including the names, addresses and social security number of plaintiffs.
8. By should, I mean according to the rules. It is so easy to get this information in other ways that redaction is a waste of time
9. Certain employment/personnel files should be reviewed for privacy information, some subject to the Rule, other info that should be subject to the Rule.
10. Defendants' medical information, including that pertaining to infectious diseases and mental health condition does not seem to be routinely redacted before being posted.
11. Fed. R. Crim. P. 49.1(b)(8)&(9) filings should not be made public until after redaction within a reasonable time such as 72 or 48 hours. (8) an arrest or search warrant; and (9) a charging document and an affidavit filed in support of any charging document.
12. I am thinking about docket entries that disclose confidential information to a judge who while he/she treats it in confidence, his court room clerk does not.
13. If you are redacting to eliminate a minor's name, you should also redact the parents' names and substitute initials. Otherwise it is very easy to identify the minor.
14. In my world, the presentence report in a criminal proceeding is forwarded to the BOP after sentencing. The BOP evidently uses the information contained in the PSR to determine where an individual is housed/placed. The problem is that some of the information should not be made available to the BOP because the BOP does not secure that information. In short, the BOP seems to share with everyone making the information virtually public.
15. In this age of identity theft and lack of privacy, this information should be protected.
16. Individuals in asylum hearings fear persecution and torture. Those who apply for asylum, withholding of removal or Protection under the Torture Convention should have the records sealed or all identifying information redacted. These hearings are confidential at the immigration court and board of immigration appeals level but not at the circuit court level. They should be.
17. some of previous questions were not understood & responses thereto marked as "don't know"
18. somehow information about cooperation by the defendant needs to be redacted, because disclosure of such information while the defendant is incarcerated (or afterwards for that matter) raises a serious risk of personal injury or worse
19. the names of child victims in sexual assault cases
20. The phone numbers and addresses of the debtors sometimes allows persons to harrass the debtor. These should be removed from documents. However we have had cases where stalking spouses looked through the court records for such indentifiers.
21. he types of information routinely established to come within FOIA exemptions should be a starting point for information that should be redacted from public files. In Florida, we have additional exemptions under our state records laws (for domestic violence victims, for example) that also should be considered when evaluating the types of information to be redacted, in my view.
22. These should apply to civil cases since in the majority of cases this information is irrelevant to the case.
23. Unless relevant to the dispute this information is largely irrelevant.
24. We would redact before putting in a public file.

IMMIGRATION RECORDS

12) With respect to immigration cases, do you believe PACER access to additional forms of private information, such as alien registration numbers, should be restricted?

Yes, PACER access to such private information should be limited in all immigration cases. 58 (9.3%)

PACER access should be limited in certain types of immigration cases. 11 (1.8%)

No, PACER access should not be limited in immigration cases. 31 (5.0%)

Don't Know/No opinion 49 (7.9%)

I do not practice immigration law. 471 (75.5%)

Blank/Missing: 4 (0.6%)

13) Which types of immigration cases should require limited access?

1. 1325 and some 1326 cases.
2. Asylum
3. Asylum cases. Perhaps others. We routinely remove it unless it is a specific piece of evidence.
4. Cases involving VAWA issues, asylum, and Cancellation of Removal based on the family relationship.
5. Where the immigrant is neither a witness nor a party to an action, the information can be protected. The information is necessary to do a thorough investigation for impeachment.
6. Where there are corollary proceedings going on involving an alien, such as, federal criminal charges.

14) Do you practice criminal law?

Yes 181 (29.0%)

No 442 (70.8%)

Blank/Missing 1 (0.2%)

REDACTION OF CRIMINAL RECORDS

* All the questions in the section about Redaction of Criminal Records were answered only by those respondents who indicated they practice criminal law in Question 14 (above). Thus, there are 181 respondents in this section, instead of 624.

N = 181 (all who indicated they practice criminal law)

The Committee Note to Criminal Rule 49.1 lists documents that are not to be included in the public criminal case file.

15) In your opinion, are there categories of material that should be deleted from the current list of documents and included in the public criminal case file?

Yes 44 (24.3%)

No 114 (63.0%)

Don't Know 23 (12.7%)

16) Please note which categories should be deleted from the current list of documents excluded from the public case file, and explain why you think the information should be included in the file.

See Appendix F

17) In your opinion, are there additional categories of materials that should be added to the list of documents that are not be included in the public criminal case file?

Yes	35 (19.3%)
No	96 (53.0%)
Don't Know	50 (27.6%)

18) Please describe those categories of materials that should not be included in the public case file, and explain why they should not be included.

See Appendix G

19) Are you aware of any instance of harm or credible threat to a witness or defendant, arising from a perception that the witness or defendant was cooperating (either through language in plea agreement/cooperation agreement or a sealed document on a docket sheet)?

Yes, in plea agreement cases	9 (5.0%)
Yes, in cooperation agreement cases	16 (8.8%)
Yes, in both plea agreement and cooperation agreement cases	54 (29.8%)
No	86 (47.5%)
Don't Know	16 (8.8%)

20) In those instances, what circumstances gave rise to such suspicion or knowledge? Please check all that apply.

36 (19.9%)	Access to case files on the internet
25 (13.8%)	Access to case files at the courthouse
27 (14.9%)	Attendance at pretrial proceedings
23 (12.7%)	Attendance at trials
16 (8.8%)	Don't know
19 (10.5%)	Other (please specify)

If you selected other, please specify

See Appendix H

21) In your opinion, has the court's policy regarding posting of plea and cooperation agreements been successful in protecting the privacy and security of individuals signing such an agreement?

Yes	64 (35.4%)
No	42 (23.2%)
Don't Know	75 (41.4)

22) You indicated that the court's policy regarding posting of plea and cooperation agreements has not been successful in protecting the privacy and security of individuals signing those agreements. Please explain.

See Appendix I

23) In cases involving cooperation, have you participated in a case that involved any of the following: (please check all that apply)

- 79 (43.6%) Closing a courtroom
- 50 (27.6%) Sealing a record in whole
- 107 (59.1%) Sealing a record in part
- 58 (32.0%) Sealing the transcript of a hearing in whole (if different from the record)
- 59 (32.6%) Sealing the transcript of a hearing in part (if different from the record)
- 62 (34.3%) Sealing docket entries (if different from the record)
- 51 (28.2%) None of the above

DEMOGRAPHICS

N = 624

***The rest of the questionnaire was answered by all 624 respondents, not just criminal attorneys**

24) In which federal district do you primarily practice? If you practice in more than one, please indicate the one in which you spend the most time.

See Appendix J

25) For how many years have you practiced law?

Mean: 21 years
Range: Minimum of 0 years, Maximum of 50 years
Median: 21 years

26) Which of the following types of clients do you primarily represent in federal court?

- 243 (38.9%) Plaintiff in a civil case
- 298 (47.8%) Defendant in a civil case
- 10 (1.6%) Prosecution in a criminal case
- 147 (23.6%) Defendant in a criminal case
- 74 (11.9%) Other (please specify)

If you selected other, please specify

See Appendix K

27) If you have any other comments or suggestions about the privacy rules that have not been covered in this questionnaire, please provide them here:

See Appendix L

A note about the Appendices: All text in the appendices was taken directly from the survey responses and may contain spelling errors or appear incomplete.

Appendix A

Question 3: Do you have any suggestions for improving the process of redacting private information from transcripts?

Do you have any suggestions for improving the process of redacting private information from transcripts?

A method to electronically redact portions of a filed transcript that contains private information inadvertently left or subsequently determined to be private information would be helpful.

A reminder during electronic filing that pops up asking the filer to make sure that personal information is redacted would be helpful.

Actually I don't submit transcripts, but your question did not allow me to answer the question in the fashion

Actually, I contend redacting should be prohibited except for matters of national security. Redacting documents and filing under seal does not provide for a democracy because as limits are placed upon the freedom of information, so shall tyranny exist and blossom.

allow "non redaction" in cases where identity is a key issue for defendant (i.e., mistaken identity, alibi, etc.)

Allow the portion of the transcript which is confidential to be sealed

Any information that can potentially lead to the disclosure of "personal identifier" information. As my firm is in the industry of foreclosure, we have access to loan numbers and things of that nature. Disclosure of such information may potentially lead to searches that can reveal information such as social security numbers, birth date, etc. Therefore, we redact this information out of documents as necessary.

As a CJA attorney having 7 days to review transcripts I've never seen before is unrealistic. Fortunately, most attorneys don't include identifying information in testimony anymore.

As counsel appointed in the first instance on appeal in criminal cases, I order transcripts without any clue as to whether they may have private information in them. Furthermore, as I have a statewide practice, it is not feasible for me to go to the courts to read every unredacted transcript. Hence, the redaction duty should be placed on trial counsel who knows first hand what will be in the transcript. Alternatively or additionally, the court reporter, who may be in the best position to catch personal identifiers, should be required to alert counsel to the potential need for redaction.

As part of the the Rule 26(f) conference, the attorneys could agree on a procedure to employ so that the court reporters could automatically redact those items that are pre-determined

At start of depo, establish protocol with reporter so all such info is in bold or italics, etc

At the time the transcript order form is filed, appellate counsel should have to certify that they have reviewed the relevant privacy rule and certify that they have complied with it at the time they file the Joint Appendix.

At times I feel that the government over-redacts. I'm not sure if this is for privacy or a more general "err on the side of caution" rule, but at times, redacted portions of transcripts and other materials have gone over-the-top.

bankruptcy court notices of meeting of creditors, containing debtors' SSN still are mailed to all creditors & parties on debtors schedules - very unprotected dissemination.

be thorough

Because I have not encountered this yet, I would ensure that the PACER system have a prompt that asks whether personal information has been redacted from the filing (it may).

Before a document is allowed to be filed via PACER, the program could utilize a prompt asking the online filer to confirm that all private and confidential information has been redacted, similar to the prompts used by some companies to confirm that a user in fact wants to "reply all" to an e-mail.

cases our agency handled required certain personally identifying info be accessible, per court rules

Consider attention that may need to be given to avoid abuse of the process by using "privacy" concerns to hide wrongdoing.

Courts' web sites should include information regarding the requirements of Rule 5.2 with their information about the electronic filing process. It would also be helpful to have information about the use of proper tools (Acrobat's redaction tool) and the errors made by lawyers who improperly try other methods of redaction.

Create a "redacting tool so that we can redact after the documents are scanned in for CME/CF filing--similar to creating an "eraser" function or a "marker" function or any mother function that allows us to highlight and redact the highlighted areas.

Do not include personal identifier information in the transcripts unless requested to do so.

Drivers License Numbers. Tag numbers.

Education about the existence of the Rule. I think many attorneys try to follow the practices set forth in this Rule instinctively, but many are not aware that there is a specific Federal Rule governing the issue.

First, better education of what happens in the Pacer system, and how it may be used outside of intended purposes. Second, communicate the rule to us attorneys so that we learn of the rule rather than later at a seminar, etc.

For what the reporters charge for transcripts, why can they not provide a copy for filing with the identifiers already redacted and a separate copy with complete information for the attorneys?

From now on, I will redact personal identifier information.

have not been involved in redactions

Have not yet posted a transcript. I would redact if required.

Have the court reporter do it! Identify the need for redaction at the time of entry so the court reporter can easily flag it. Have adobe support a redaction function in acrobat so it is fast and easy to redact transcripts and pdfs through adobe. Make redaction everyone's responsibility.

Have the reporter instructed to index such information to make removal easier.

Haven't had to do it yet but would.

Having a program that scans for account numbers and SSNs prior to displaying to stop them from being made public and giving the clerks the power to suspend the filing would be helpful. Once the information is out there, it cannot be retracted from all sources.

having an alert to inform filer right away that there are personal identifier information.

Having some restricted access seems to be working, i.e. restricted access in Social Security suits

I am not certain what you mean by transcripts. If you are referring to court transcripts, they are public documents and I would not recact them.

I am retired

I ask the court reporter in advance to mark the lines where personal information or private information protected by HIPAA, etc. to save the time when designations are required. I also reach agreements with the opposing parties in advance as to what should be redacted.

I believe that the court should send a notice after every evidentiary hearing informing the parties of the opportunity to redact private information.

I cannot recall in my practice filing a transcript with any Court. Were I to do so, however, I would redact from it any personal identifier information and so indicate when uploading the transcript with any Court. In addition to the current reminder to redact that is given to counsel when logging into ECF for filing documents with the US Bankruptcy Court, this same reminder - "Is the Document Redacted to Delete Personal Identification Information?" --could appear at the header of each transaction category (answers, motions, notices, miscellaneous, etc.) as well as each itemized category of documents.

I do not, I have not had an active practice in federal court for some time now.

I don't permit my witnesses (City employees) to provide personal information during depositions.

I don't redact this information because I avoid having the information in the transcript. I have not yet had a case in which it was unavoidable. However, if it were, redaction would be more appropos by the Court Reporter, who can scan the transcript at the time of creation for this limited information.

I handle criminal cases. The transcripts are filed by the court reporter or the district court, not by me. Since I don't see them until after they are filed, and I was not trial counsel (I usually handle only appeals), I don't know if there is any personal identifier information in the transcript until I read it -- after it has been filed.

I have no experience with redaction from transcripts - my concern is the over-use of filing under seal that is causing great problems in a case I have.

I have not been involved in a case so far in which it has been necessary to redact anything from a transcript.

I have not filed any documents using Pacer.

I have not had occasion to post documents on Pacer containing such information.

I HAVE NOT HAD OCCASION TO POST TRANSCRIPTS ON PACER.

I have not had to do this yet, but will do so if such info is in the portion of a transcript I am e-filing

I have not had to redact a transcript, only records being filed with motions or responses.

I have not seen a transcript from any hearing - so far

I haven't had an occasion to do this. I'm not sure how I'm supposed to answer these questions, since there's no block for N/A.

I just started private practice, so I have no experience with redacting personal identifier information from transcripts.

I really don't know what this means. I haven't gotten transcripts from Pacer and have no idea how a party would redact such information. Wouldn't that be up to the court or court reporter?

I really have no experience in dealing with this type of filing.

I represent claimants in Social Security appeals. I redact all personal identifier information from my pleadings. The public does not have access to Social Security files unless they are at the courthouse computers and then they are able to access Social Security files if they know the social security number of the party. These files should all be sealed or people should not be able to access the files unless they are one of the parties or they are representing one of the parties.

I think it should be the attorney's responsibility to comply with the rules and to redact transcript information. Rule 11 will protect opposing parties from abuse and we do not want to remove the value of the transcript from the attorneys who buy them and use them in Court.

I think that no full account numbers should be listed. Nor should full birthdates or social security numbers be listed. These are all things a criminal can use for extensions of credit.

I think that the new reminder for redacted information that requires acknowledgment before e-filing is quite helpful

I think there needs to be a greater awareness among attorneys about it, just as lawyers had been previously unaware of Litigation Hold Letters

I try intellectual property cases and transcripts are regularly redacted for confidential information but rarely involve personally identifier information. Typically, it is commercial trade secret information.

I try to ask the social security number off the record so I do not have to worry about redaction.

I would prefer that home addresses in civil cases be provided under oath but off the record. The only purpose for them in the usual case is service of process.

If possible, use the "find" function because reading alone frequently misses some private information or personal identifier information.

I'm not sure the Court can do anything more - but in our office, we use paralegals to handle this, and rely on them to be familiar with the rules.

In bankruptcy, although filings must have Social Security Numbers redacted, nonetheless, the Form B9A, Notice of Bankruptcy Case, that is mailed to creditors does have the full unredacted Social Security Number of the debtor. This has always seemed to me at odds with the purpose of the redaction rules.

In order to log on to Pacer we have to constantly click on the sign in that we know about the rule to redact. Clicking on that block was perhaps necessary the first 100 times. However it has become a nuisance. Also it is impossible to redact the social security number from the statement of social security number that must be filed with the bankruptcy petition. Could someone quit asking us to redact the social security number from the form that asks us what the complete social security number is??? That just seems insane.

Include a reminder on the electronic filing system.

Issue has not come up in any of my cases which tend to be based on administrative records rather than witness testimony

It has never been a big issue.

It is a difficult process and all redactions should be agreed upon by opposing counsel if possible.

it is an arduous process, but I know of no effective way to minimize the burden

It is often difficult to find all the identifiers on exhibits as often the info is not on the header of things like notes, mortgages, security agreements, etc.

It is performed manually. If soft ware were developed that allowed redacting on a .pdf file, it could decrease some of the efforts in now takes to redact from documents.

It is very rare that Social Security numbers are revealed in a transcript.

It would be helpful if we could work with the court reporters to produce and order redacted and non-redacted versions, because defense counsel is often not the party posting the transcript on PACER.

I've abandoned all hope of protecting privacy intersts.

Just an FYI - I am not sure this is a big issue, as it is not my practice to ask such personal identifying information during a deposition (other than during the introduction), which usually is never attached in full for submission to the Court. However, in candor, I am not sure I consciously considered the issue before.

knowledge of the rules as it becomes better known the parties will just know certain information is deemed sealed

Lawyers should not routinely ask witnesses for their social security numbers at depositions.

Make it a rule for court reporters to highlight the personal identifier.

Making sure that all AUSAs and staff consistently follow the redaction procedure. Perhaps, the Civil Chief should review all transcripts before they are filed. Presently, our AUSAs individually are responsible that the redactions occur.

medical or health info should be redacted

More publicity with respect to requirements

Much personal information, such as addresses, SSN, Driver's license, phone numbers and the like could be identified by Court Reporters and automatically redacted, or marked by the reporter and suggested. That would make life easier.

My approach, as a litigation attorney, is to limit personal identifier information in depositions to distinguishable parts thereof and I do not include these in filings. When I file a document, as part of a motion for summary judgment, I will try to exclude it whenever possible, or obtain that information from another type of document.

Need to have the rules required of court reporters. Lawyers have so many rules to remember that sometimes certain technical rules are not remembered. To ensure against this - the rule should directly impact the folks who earn a living from getting it right. Ask them to redact the information in the final form.

Never posted a transcript on Pacer before

No experience with redacting from transcripts.

no qualifying experience on this issue

No. The process is easy, as we tend to use the new version of Adobe Professional for our redactions.

No. I am not familiar with the process.

No. My experience is the practice is usually agreed upon with counsel or pursuant to a protective order.

Not so much a suggestion as an important point. Redaction is something that must be considered well in advance of a filing deadline. Often attorneys may run into trouble because they have neglected to consider the redaction rules before the day of the filing. Attorneys should have a system whereby personal identifier or other redactable information is identified well in advance, and the redaction process is accomplished prior to a filing deadline.

OFTEN, THERE ARE PERSONAL ITEMS THAT MUST BE LISTED AND MENTIONED IN CORRESPONDENCE THAT ARE EMBARRASING. WHEN I HAD BREAST SURGERY AND REQUESTED AN ADJOURNMENT, I HAD TO STATE THAT I CORRESPONDENCE FOR AN ADJOURNMENT. IS THERE ANY WAY OF AVOIDING THIS? WE ARE ATTORNEYS YET WE ARE ALL HUMAN BEINGS, AND AS FEMALES, WE FACE A GREAT RISK OF BREAST CANCER. MY MOTHER DIED WHEN I WAS THREE YEARS OF AGE (SHE WAS 29) AND SO I AM A TARGET. I OFTEN HAVE TO EXPLAIN THIS IN LETTERS AS I OFTEN HAVE MEDICAL PROBLEMS. BEING A SOLO PRACTITIONER IS EVEN MORE DIFFICULT. HELP IS APPRECIATED AND OFTEN DOES NOT OCCUR. PERHAPS THE SOLUTION IS NOT REQUIRING THAT PERSONAL LETTERS CONTAINING SENSITIVE INFORMATION BE PLACED ON THE ECF.

Only that at time of transcript we agree on the redactions.

Paystubs and payroll information could be sent directly to the Trustee rather than posting on computer.

Perhaps allowing (and instructing) court reporters to automatically redact personal identifiers, unless the parties specifically require the information. For example, the default would be to only include the last four of social security numbers, account numbers, and the year on dates of birth.

Perhaps each individual judge's rules should remind counsel of this requirement.

Perhaps when an exhibit is attached to a filing, there could be a prompt, that asks whether the document has any personal identifier information that the filer must answer before filing.

Provide attorneys ANNUALLY with a list of all the categories of items, and ask them to electronically accept this as a term and condition of PACER use. I had never seen the list of documents before, and had only redacted SSNs on a recent set of exhibits filed in support of SJM. I was up against a deadline and had no ability to go back and redact out all the other things that the disclaimer requested, and had no choice but to file as is. It included first names of minor children listed on leases, which in hindsight, bothers me.

Rather than handling redaction of personal or otherwise protected information during transcript review, it would make sense to have attorneys notify the Court Reporter that the answers to the following for example, two questions might require redaction. So, the transcript can signal areas for the attorneys to focus on during review.

Redact irrelevant personal info.

Redax

Reminder during electronic filing process.

Reminders on PACER that must be noted before filing.

Reporters should be trained to automatically highlight such information for redaction.

Require that personal identifiers be automatically placed into a confidential appendix to the transcript. Allow filing under seal without the need for court approval.

Require the court reporter to notify counsel before a transcript is posted to inquire if there is personal information to be redacted

Seemed to go well

Seems to work OK as is

Sorry I have never had the opportunity to come into contact with anything that may need to be redacted and don't file hardly anything at all in Federal Court

Specific identification as to redaction requirements to allow support personnel to review info. Too broad terms mean lawyer time is required to evaluate

Standardize a notice on page that it need be done per rule so as to minimize mistake of including it.

stop posting filings on PACER

Survey design is defective - you have yes/no/don't know, but not "not applicable" for those of us for whom the need to redact transcripts hasn't arisen.

that information should be included in a separate part of the transcript

The Anglo-American court system is open to the public. As we take steps to close it off we are threatening the basis of public confidence in the process. If transcripts are filed, the whole transcript should be filed.

The attorneys need to become aware of the information they are attempting to elicit and to avoid the personal information if possible. This is difficult if you are challenging the validity of a search warrant where the description of the house to be searched is at issue.

The biggest help could come from court reporters. Even in the window given for redaction, we are not always able to personally review each line, each word, to feel confident nothing is getting through. If court reporters were to note when personal identifiers were reported, it could really help.

The Court Reporter could redact the information under the rules prior to filing on Pacer. If relevant, the attorney could file a Motion requesting a supplement to the record with the relevant information.

The court reporters should do it before the transcript is filed. Litigants should avoid using this information on the record unnecessarily.

The easier process is simply attempting to be mindful of FRCP 5.2 during the examination. I.e., instead of having a witness state a social security number or bank account number, ask him or her to identify the last four digits. It doesn't come up that often, but it's an easier way to resolve the problem than redaction after the fact.

The majority of information that requires redaction occurs in jury selection and the local district court judges have done a fairly good job of keeping that information out of the record.

The personal information is part of the record. I do not redact as the information is already public record unless the transcript/filings have been sealed.

The process for redacting and under seal filings is such a burden that I try to avoid collecting such information in the first place.

The redaction may pose a problem in terms of if the subject of the redacted material is the focus of the motion. That should be an exception to the redaction rule: i.e., if the subject person or information is considered in good faith to be relevant to the motion or pleading then it does not have to be redacted.

The rules could limit deposition questions which call for private information to a separated portion of the transcript which would be labeled confidential. It would make it possible for the parties to submit most transcripts for lodging or filing without the confidential segment but without a need to redact or to place only the confidential portion under seal.

The transcript should be sent to counsel by E-mail with adequate time to review and redact. Counsel then should be able to forward the redacted transcript to the appropriate parties.

The transcripts I use are from pretrial hearings and trials where the information already has been protected. I do not redact, delete or otherwise alter a transcript

The use of the "black out" in Adobe products should be banned. It often does not work because documents are not secured properly. Rather, redacted documents likely should be printed to paper and scanned as images to insure that the redacted information is not recovered by a simple "undo."

This would be more of a burden for court reporters, but perhaps court reporters could be required to flag obvious personal identifiers (e.g., SSN, address, etc.) when they are transcribing so that there is a presumption that these items will be redacted when posted on PACER.

To the extent PACER filings move toward word-searchable pdf formats, certain key word searches could routinely filter for personal identifier information.

To the extent personal identifier information may be needed to press a legal issue, it can be addressed by filings under seal, which has been my experience.

To the extent possible, I suggest that all parties classify the "typical" personal identifiers (for example SS#'s) and agree that such identifiers do not need to be made part of any court records, but rather be available to parties as needed.

Train Court Reporters to do so ahead of time and provide unredacted pages only for eyes of counsel

Typically do not personally handle it so do not have any information about it.

Unfortunately, Court Reporters are not bound by the rules as are attorneys. Nonetheless, the easiest means of redacting a transcript is to work with a Court Reporter who is familiar with the rules such that he or she can produce an original and a redacted copy of the transcript. Also, having the witness read the transcript (as opposed to waiving signature) with a focus on spotting personal information is important. In the end, the only true means of ensuring proper redaction is for the attorney to read each deposition under an agreement with opposing counsel that personal identifier information will be redacted from the original before any deposition is filed with the Court. Without following at least one of these methods, it is unlikely that an unredacted version of the transcript will be filed.

Use of advanced technology for automatic and expedited, nonmanual redaction

We can only redact if we are willing to pay for the transcript. This doesn't make sense, since we rarely order transcripts.

We do not allow our clients to give their social security numbers on the record in depositions.

We have not actually posted a transcript online, but are aware of the redaction rules.

We try to remove all personal information, for example, names of family members, that is not relevant to the action. Other personal information is provided under seal, if necessary.

When a transcript is scanned and saved in PDF format, the user can use the field tool, to create a field in a solid color without borders. The attorney can then copy that field and paste it over any other item he or she wishes to redact. It is useful, and works quite well. You will need the Adobe Acrobat Professional version; other third party PDF software makers have similar features.

who has the obligation to redact the info???

Yes, do not put it in the transcript to start with and redaction is not an issue

Yes, when the court reported is creating the record, maybe there can be an agreement of parties to redact such information.

Yes. Someone needs to have Adobe Acrobat software capable of applying a color to cover personal information, rather than us blacking it out, then scanning it into a pdf for filing.

Appendix B

Question 5: What reasons were given for noncompliance with the redaction requirements?

Laziness; convenience.

1) Time and effort necessary to remove all of the personal information; and 2) lawyer for client did not care if the confidential information remained on the documents.

1. lack of knowledge of the requirements 2. technical problems

All my cases concern Erisa Trust Funds and my proof as to what is owed to the Funds on behalf of each employee is Employee pay stubs and Employer remittance reports that I submit on Pacer.

burden

Burden of locating and tracking such info.

cases our agency handled required certain personally identifying info be accessible, per court rules

Certain information, motions, etc. filed under seal or otherwise protected. E.g. Presentence Reports, or Objects to PSRs.

concern over redacting an original deposition transcript

Death penalty Habeas case information that is over 10 years old.

Defense counsel needs personal identifiers to effectively find and interview State witnesses

Documents filed in paper format only.

Failure to consider issue before a posting

From pro se litigants, ignorance. From others, simple oversight.

given the voluminous nature of some documents, sometimes the identifier information may slip by a reviewer and go unredacted.

Human error/oversight.

I don't think the requirements are well known or understood. I would suggest more public information.

I have been told that too much relevant data, pertaining to arguments is lost, if redaction rules are complied with.

I have not made a legal challenge to any redaction rule, but I would if the opportunity presents itself.

I have often seen items designated as confidential and subject to a protective order filed without redactions. The usual reason given is that the filing party does not know how to get the items, often exhibits to a declaration or motion, timely filed without redacting the confidential information.

I think there may be confusion about what references to a juvenile need to be redacted.

I was referring to the exceptions under Rule 9037. I have not been involved where the "exception" has been invoked.

If the information were germane to the case

Ignorance of rules Inadvertance

Ignorance of the rule requiring redaction.

ignorance of the rules

In general, there is a delay in the compliance with rules and, in particular, rules relating to changes in technology. For example, I still see counsel using their initials and social security numbers on papers filed in federal court.

Inadvertent failure to do so.

Lack of awareness.

lack of knowledge

Lack of knowledge. No penalties. No procedure for it/laziness.

Laziness, dependence on the other side

Many lawyers attach unredacted personnel or medical records to filings; I think because they don't take the time to think about the private information that may be disclosed.

Mistake

Mistake

Mistake, editing errors.

More veteran attorneys who are used to not having to redact tend not to redact. Also, it not always clear what information should be redacted.

Not being aware of the rule.

Not willing to pay for transcripts.

Notice is often not given of the opportunity to redact.

Often creditor notifications and demand letters to clients contain several references to account numbers, particularly where the account has been assigned for collection and the collection agency has its own internal number. The inclusion of all of the account information in the bankruptcy schedules assists us in identifying the account when, sometimes months, later we receive an inquiry from a creditor, whereas typing only, say, the last 4 digits might not identify the account or the creditor.

Often there are huge document productions or long depositions where the parties have agreed to a protective order so some personal identifier is not initially redacted; and then at a later time there is a related filing that includes the information.

Poor communication to the Defense Bar about ECF rules.

Prior to the new rules, we did often include dates of birth in filings related to Age Discrimination in Employment Act claims, where age was a key factor.

Problems in identifying particular accounts with multiple accounts in bankruptcy matters

Redaction creates significant problems in benefit plan litigation, in which a great deal of the evidence consists precisely of names, ages, social security numbers and account balances.

Redaction of creditor account numbers makes it difficult to identify and pay creditors in bankruptcy distributions.

See above. It is a rare occurrence when personal identifying information will be asked during a deposition. (It has, however, been done on occasion.)

See answers to previous question.

See my earlier comment box - lack of information about the expectations by the court.

Seizure warrants, for ex, specifically list account info. when filed under seal, redaction isn't necessary, but often they are unsealed or otherwise become part of criminal proceeding w/o involvement of atty involved in preparing warrant. Very difficult to monitor, prepare "public" and "nonpublic" versions, e tc.

Simply forget that the information is contained in the document, which usually results in a subsequent motion to correct the filing.

Sloppy lawyering

Social Security case transcripts would be impossible to redact.

Some attorneys not knowing what is required of them. Also, there may be ambiguities as to what information must be redacted.

Sometimes you may not know the age of a person who turns out to be a minor.

Takes too much time/cost.

The most frequent excuse I hear is simply that someone missed personal information in the course of reviewing and submitting hundreds or thousands of pages.

The only reason I have heard of is inadvertence. Not all lawyers are acclimated to the practice of regularly redacting this information. I wouldn't consider it a valid reason, but it does happen.

The Social Security Administration needs Social Security numbers and dates of birth to remain unredacted to insure that the often voluminous medical reports are kept in order and to insure that the correct information for each claimant/plaintiff is placed in the transcript.

The U.S. District Court for the N.D. of GA wants law firms to include their FEIN number on any proposed financial order authorizing a disbursement of funds on deposit with the Registry of the Court. Some District Courts request an out-of-state attorney disclose his or her home address in its Application to Appear Pro Hac Vice.

They don't accomplish what they are designed to accomplish.

Those responsible for actually preparing and filing matters with the court have not always been aware of the redaction requirements. These seems to be particularly true for attorneys who are not technology savvy and leave filings to their secretaries and other legal assistants, who do not always have the sophistication to recognize information that should be redacted before filing. A second reason for noncompliance that I am aware of has been due to ineffective redactions and a lack of knowledge that some electronic redactions (such as in Word) can easily be undone.

Time constraints.

To keep personal information private so that someone does not steal other's private information and identity.

To review a months worth of transcripts in 7 days to cull identifying information is not enough time.

Too much trouble. Mistakes. SS#, or other information that is being used for other purposes and not indexed that way.

Traditional to supply all relevant information and not yet used to redaction.

Unaware of requirements. Inadvertant disclosures.

Unawareness of the rule. Lack of familiarity with proper redaction tools and techniques.

Unfamiliarity with rules, technical inability or difficulties (including rules against "scanned" versus "published" PDF electronically filed documents, if possible.

UNFAMILIARITY WITH THE REDACTION STATUTE, CUMBERSOMNESS OF REDACTING DEPOSITION TRANSCRIPTS.

We made mistakes early before full understanding of the Rule

Witnesses inadvertently give information in depositions, and lawyers don't catch it.

Appendix C

Question 6: How have those matters been resolved?

1) Call the ECF clerk's office and request that the PACER document be locked. 2) Motion to remove incorrectly filed document. 3) Filing of corrected version.

1) The effort was made to redact the confidential information; and 2) the documents were filed with the confidential information on the documents.

1. education 2. help from office.

Adequately.

Almost invariably, this situation is resolved by calling the situation to the attention of opposing counsel and obtaining leave of court to substitute a redacted page or pages for the originally-filed pages containing personal identifier information.

Bankruptcy claims distributions are sent to creditors without complete account identification.

By a telephone call.

Contacting the clerk and deleting the filing.

Court usually removes file from electronic docket and orders re-filing

Do it anyway.

Documents filed in paper formant only.

filed under seal

Filing large numbers of otherwise public documents under seal, often unnecessarily (e.g. ERISA information returns)

Generally court or counsel remind counsel of requirements. Inadvertant disclosures are generally corrected.

Grabbing the records back from the court as quickly as possible once it is clear that the problems arose.

I do not have a particular instance in mind.

I have not had any matters like this yet.

I have not seen either in any of my cases, but I understand that the documents is pulled from the docket and resubmitted.

I initially try to submit summaries of what is owed that do not contain information regarding the employee, however, certain Judges insist that I submit more proof before the Court will award damages.

I instruct my clients not to provide personal identifying information on the record.

I intend to contact the court to ask whether I can re-submit the exhibits.

Informally between counsel. Most attorneys will discuss and agree to what should be redacted.

it is a constant struggle that requires diligence.

Most courts allow the agency to file our records under seal and in other courts, the transcript can only be viewed by individuals who walk into the courthouse and use the court's computer terminals, which I am told never happens.

Never had an issue.

No

no

Nope.

Not well. The parties involved often elect not to press the issue because that would only draw more attention to the information. It is difficult to interest a district court judge in such matters. On a few occasions, when the problem was brought to the attention of opposing counsel, a stipulation and order resolved the matter.

not yet

Our Defender Office tries through email/ annual Seminar to keep the Bar updated.

PDF searches in the hope that nothing is missed.

Prosecutor filed a motion for redaction

see above

See above.

Someone makes the person aware.

Substitute redacted text when necessary.

Such transcripts are not available electronically except to those who physically go to the clerk of court's office.

The obligation in logging on to EM/ECF in some federal districts, that the redaction requirements be explicitly acknowledged, may have had some impact - but I am skeptical. I don't think these matters have been resolved. And I think among attorneys who have limited in-house technology support, the fact that electronic redaction (that has not been "flattened") can be undone is beyond their knowledge and so the problem continues.

They have not.

Try to avoid collecting such info in first place.

Try to have more than one person read over a document to ensure the redaction was complete.

Typically the lawyer will file a substituted filing with redactions, and ask the court to strike/delete the offending pleading.

Unfortunately, they have become missed opportunities.

Usually a request is made to US Attorney. In the alternative a motion must be filed

Usually, left it in

We simply include the FEIN in the disbursement order. Socials are not used. The money goes to the law firms for subsequent client disbursement. As for the pro hac vice matter, I simply comply.

Where a debt on an account is sought to be discharged in bankruptcy, typing the entire number allows the creditor to identify that its particular account has been included when it accesses the Court-filed documents. We favor the inclusion of the full account number -- not bank account numbers, but such numbers as credit card accounts.

Without penalties being assessed by the courts, litigation has been the only way to resolve these matters. At least one organization has made a greater effort to fix the problem once informed of it.

Yes

yes

yes

yes

Yes b/c I never submit information with private information.

Yes, attorneys have become exceedingly adept at coming up with creative ways to overcome this. Most recently, the ex parte and selected parties options in ECF filing have also been useful.

Yes, simply by education

Yes, with the new rules, we have limited it to either the year of birth only or included the age (i.e., X years old) instead of using a date of birth.

Yes.

Appendix D

Question 8: Please describe the measures you've taken to ensure that personal identifier information is not raised unnecessarily.

We have received direction from our Defender raising these issues.

Adjust phrasing of questions, and agreement off record not to include that information

advise reporter

Advise witness not to reveal PII.

Again during jury selection making sure that personal identifiers are not put on the record

agree with attorney to provide information in paper form

Agree with counsel and court reporter before the deposition for redaction of inadvertently used ID.

Agree with counsel beforehand that we will not state such PII in our oral argument/questioning; agreed to leave it out of some pleadings.

Agree with opposing counsel that the witness may provide the information off the record and that the parties will not file it unless necessary and pursuant to applicable rule, agreement, or order.

agreed to protective order to limit disclosure

Agreed to provide certain information about witnesses (addresses) off the record rather than have counsel ask for information in deposition.

AGREED TO REDACTION OF DOCUMENTS, AND ATTORNEY EYES ONLY RESTRICTIONS ON DOCUMENTS

Agreement among the parties beforehand to redact those items.

Agreement of counsel that information will be provided in some other manner as needed

agreement to not disclose the information

Agreement with counsel opposite as game rules for depositions are discussed.

Agreement with counsel that personal identifiers will not be used in open court. I have almost never had a problem with this issue.

Agreement with counsel to provide personal identifying information off the record.

agreement with opposing counsel not to reference such information on record

agreement with opposing counsel to refer to social security number by last four digits only.

Agreements made during depositions to exclude identifying numbers.

Agreements with opposing counsel

Agreements with opposing counsel in advance.

always recite that this an account ending in 4 digits, never indentify the entire account, I don't ask about SSN unless there is a discrepancy

As before, we sometimes use age (i.e. X years old) instead of an exact DOB. For minors, we have also agreed to a generic system (like Minor A, Minor B) instead of using names.

As one example, I alerted a pro se plaintiff that the complaint he filed against the FDIC contained his Social Security Number. Because he was not registered to file ECF pleadings, I filed a motion on behalf of the parties to have his pleading removed from the ECF docket and replaced with one that redacted his SSN.

As previously stated, I first try to submit a summary of the amount owed without giving detail as to each employee, but sometimes, I have no choice.

Ask that if social security numbers are needed that only the last 4 digits be given as an answer.

Ask the plaintiff to provide this information pursuant to a protective order asked opposing counsel to accept sensitive information off the record and state agreement on the record.

at court direction referred to child by initials

At trial I do not read or have read any portion of a transcript that contains PII.

Attempt not to raise those issues in proceedings unless absolutely necessary

Attempt not to use documents in open court containing such information.

Avoid asking those questions.

avoid questions or references to personal identifier information unless absolutely relevant.

Avoid using proper names at hearings, effectively use "code" language for the sensitive information, tell the court in advance at sidebar or in chambers what will not be said in open court

Avoid using such information in briefs or motions. (I'm an appellate lawyer so don't have much experience in district court proceedings.)

Be aware in direct examinations not to ask those questions concerning personal identifiers.

Be selective in use of exhibits so as not to unnecessarily raise personal identifier information

Be selective in what is included in the appendix.

Because of my general awareness of the rulings, I try ensure that such information is raised only when absolutely necessary.

Besides redacting the exhibits, we try to insure there are no questions asked on that subject but some times it cannot be avoided such as when a debtor or defendant denies execution or that they are the proper party.

Blackened specific account numbers, also in bky court we file a separate sheet with the social security full number on it, and on the public pleadings only list last 4 digits. In family law we have "sealed" pleadings to keep personal information from being public information.

By reaching an agreement with my adversary before the proceeding that we will not use personal identifier information because it is not necessary.

By redacting information from exhibits

By stipulation with the government, the protected information is shielded and withheld from display to the jury.

by working with opposing counsel and the court in fashioning orders and providing only necessary information. While most litigants want full disclosure there is usually cooperation when it comes to privacy protection for the parties.

Caution all in the firm to be sensitive to this issue

Defendants produce the documentary information with the identifier information replaced by a letter (e.g. person "A") or some other similar method so that plaintiff's counsel can cross-reference different documents or information relating to one individual without disclosure of the identity of the individual.

Discussed it with adversary counsel informally. Entered into stipulations and confidentiality agreements.

Discussed the issue with opposing counsel and have explained to the Court the resulting agreement.

discussion with counsel/court before proceeding

Discussion with opposing counsel and off line exchange of whatever personal info is required but need or should not be in a transcript.

Do not ask personal identification questions in depositions or allow clients to answer those questions in a deposition.

Do not seek Social Security information by examinations on record.

Documents filed in paper format only and under seal.

Documents get redacted before production (with consent of opposing parties), therefore no problems with regard to subsequent use.

Don't ask a witness unnecessary personal identification questions at the start of a deposition.

Don't ask, don't tell.

Don't mention personal information. Don't make it part of the unsealed record.

Drawn the issue to the attention of the court when others seemingly file documents without following the rule.

During a child porn case, information about a previous child molestation case from the state system was discussed. I endeavored not to say the child's name during questioning of the witness so that redaction would not be an issue.

During depositions, I have asked that portions of the transcript be sealed. Unfortunately, that doesn't always happen. Also, even with the best of intentions (e.g., refer to minor as "RS") during the deposition lawyers and witnesses invariably forget and refer to Robert Stone. Although we should go through the transcript and search out those mis-steps, as a practical matter, the attorneys often overlook that and file pleadings with unredacted information.

During depositions, I have objected to client offering their full social security number on the record, as opposed to simply the last four digits.

During depositions, information such as social security numbers can be given off the record so that counsel can conduct an investigation of the witness without disclosing the social security number.

During the initial Rule 26 conference we typically address such issues and develop protocols for addressing the issues prior to the deposition phase of the lawsuit. We also employ protective orders to protect sensitive information.

Electronic filing sites remind of the need to redact, so I of course attempt to do so in pleadings, briefs.

Established internal office procedures requiring personnel filing documents to scan and redact personal information unless necessary to the issue in dispute.

Fashion witness questions to cause personal identifier information not to be stated in the answers

File under seal.

filed under seal

Filing pleadings under seal, holding conferences off the record.

filings under seal

For example, ask the witness to verify only the last four digits of a social security number, or only part of an account number.

For example, when asking a witness where they live specifying just the city and state and not their address. Objecting to questions that call for personal information and specifying that the witness should only have to provide for example, her city and state for her address.

for sentencing hearings, I have scanned medical/mental health records into pdf format and then put on a disc. I then file a motion requesting that these records be sealed and/or protected and state in the motion that I will be manually filing the records. I then mail copy with motion to U.S. Attorney and deliver the disc containing the scanned documents to the clerk's office pending the judge's ruling on my motion.

For transcripts, oftentimes there's no reason to have a witness state anything on the record that's subject to FRCP 5.2(a). If it is, then have the witness identify only the last four digits, year of birth only, etc.

Generally do not ask personal information questions unless necessary.

Generally, I avoid asking for personal identifier information. It is rarely relevant in the types of cases I try.

Go off record when private info asked

go off the record at depositions

go off the record in deposition when supplying social security numbers

gone off the record

Health issues, especially HIV, are always a problem. While it is important to inform the BOP, I limit any mention of these type of issues to keep them out of the record. As to personal identifiers, I never incorporate them in any filings.

I am careful to exclude personal identifier information in all public filings. I often use other non-personal identification techniques to ensure that the parties understand the information necessary for the litigation.

I am sensitive to privacy issues, so I automatically notice such things when reviewing documents.

I ask the questions off the record.

I avoid putting personal information on the record when examining a witness or offering an exhibit.

I avoid questions that would elicit such information unless absolutely essential

I do not ask for it and object when it is requested. Along with opposing counsel, we make sure that the redacted version of documents is all that is submitted into the record.

I do not ask of my witness or client any personal identifying information if it is not necessary.

I do not ask some of the questions that I would have asked prior to the change in the rules. Counsel periodically has agreed to a separate confidential transcript (portions)

i do not mention names of children in court or any of the prohibited info

I do not put personal identifier information in the pleadings and other documents I file, and have instructed my assistant, who handles our e-filing, to comply with redaction requirements of the court.

I do not refer to personal identification information on the record.

I do not use any personal identifier information in my pleadings.

I do not use the SSN in filings. When opposing counsel needs the information, I give it to his office on the telephone.

I don't ask (or permit witnesses to provide) personal identifier information "on the record."

I don't ask about social security numbers.

I don't ask for precise addresses.

I don't ask for such information on the record unless I believe it is directly relevant.

I don't ask for the witness' birthdate or social security number if I can avoid it reasonably, even though that information is sometimes very necessary.

I don't ask witnesses to give social security numbers, dates of birth, or addresses anymore unless the information is required for the case.

I don't mention the information unless it is absolutely necessary, which in my practice area is seldom.

I generally object to providing personal information, such as social security numbers, unnecessarily in a deposition or at trial.

I generally object to such inquires

I generally refrain, unless absolutely necessary to the case, to avoid such inquiries.

I get counsel's consent or a protective order.

I have asked the Government not to unnecessarily introduce such information at a sentencing or other hearing (i.e., if such information is contained in a document but that information is not relevant to the point being litigated, it should be redacted or omitted); I have indicated to the Court that I will avoid, and would like the Government to avoid, making reference to such information, so we don't use it casually.

I have discussed same with opposing counsel at depositions, often with a high degree of cooperation to omit the question

I have discussed the issue with opposing counsel prior to a hearing/trial and entered into stipulations and/or agreements not to reference such information.

I have objected in depositions to questions that call for such information on the ground that it is covered by the privacy rules and subject to redaction and that the information should not be sought in the first place, particularly where it appears unlikely to lead to admissible evidence. Depending on the intrusiveness of the questioning, if counsel has refused to withdraw questions seeking such information I have instructed a witness not to answer and stated that I will be seeking a protective order regarding those particular questions. I have also had witnesses in deposition refuse to answer questions because of the concern about personal identifier information (relating to identity theft as well as privacy concerns), without any instruction from me, placing upon the questioning attorney the need to move to compel answers to such questions. It would be helpful if there were rules that changed the burden in deposition and discovery and allowed a witness not to answer such questions without a demonstrated basis for it. Often the reason that the information is requested is to then have investigative background reports performed on witnesses which in turn implicate the Fair Credit Reporting Act and likely non-compliance with the notice provisions of that Act, further interfering with the privacy rights of individuals involved in litigation.

I have objected to the Government's filing of stipulations or other exhibits on the record without such redaction or have moved for their exhibits to be sealed. I have found U.S. Attorneys to be insensitive in this area with regard to criminal defendants.

I have occasionally referred to individuals by initials, or just referred to their titles, or descriptive information, to avoid using names.

I have raised the issue with opposing counsel and we have agreed to provide and to stipulate to the accuracy of such information outside of a deposition or in someplace other than a sworn pleading.

I have reached agreements with opposing counsel that personal identifier information will be redacted in the production process.

I have stipulated with opposing counsel that documents containing this information be produced in redacted form so no further precautions are necessary. I avoid issuing discovery that requires the production of such marginally relevant information, if possible.

I have used the initials of a juvenile and described the juvenile based on the juvenile's relationship to the witness or other known adult.

I instruct my clients not to provide personal identifying information on the record.

I instruct my deposition witnesses not to give SS#s and do not request it from others.

I just don't ask and object when the opposition does

I just try to make sure that it is not mentioned.

I never ask for Social Security numbers and allow the opposition to withhold or redact them. I don't disclose home addresses and telephone numbers except when local rules require or they are relevant to a claim or defense.

I no longer include identifier information in requests for records and subpoenas to third parties (Medical providers, etc.)

I object and instruct my client not to answer if the personal information is not relevant. If the information is relevant we have the record reflect all "X"s or simply go off the record completely before providing the information to counsel.

I object and instruct the attorney or witness not to answer or question. So far I have been able to catch it before the information was spoken.

I object in depositions to providing any such information on the record of the deposition and instruct witnesses not to answer the question. I do not ask for such information unless it is directly and materially relevant to the case (a very rare occurrence).

I personally review all exhibits and pleadings being filed in any case I'm involved in to ensure proper redaction, and I have done in-house training on the need for redaction.

I refrain from asking questions which would elicit personal identified information.

I require confidentiality agreements and protective orders regarding personal, private and medical information.

I seek protective orders from the court if I require sensitive personal information.

I specifically request the witness not to verbally state the specific personal identifier information.

I try not to put anything in a record that does not have to be there. Of course, in depositions, etc. I want all the protected information. Staff will be alerted again at the next staff meeting.

I try to avoid eliciting personal identifying information in transcripts whenever possible.

I try to structure questions so the private information is not included in the transcript

I used initials and partial addresses.

I usually have prior agreements with opposing counsel, whether through protective orders or otherwise, that would address the use of such confidential information.

I will not allow my client to say his social security number on the record.

I will not verbally state the information during a deposition, instead I will point to the information and ask the witness if it is correct. That way the SS#, etc. does not appear in the transcript.

Identification of children by initials; identification of bank account information and social security identification by last 4 digits only;

If it's not relevant to anything, don't bring it up. If it is, I usually have an agreed protective order entered.

If requested at deposition, we have provided the information off the record.

If the information is not pertinent to the issue at hand, and I have the information in another admissible form, there is no need to inquire about it, thereby obviating the need to redact it later.

I'm very careful not to include information that is unnecessary

In addition to using confidentiality agreements and protective orders, we have made an effort to redact personal identifier information from discovery, so that as documents are included in motion papers the information is not inadvertently made public.

In at least one case, the real names of witnesses were not used in the transcript.

In cases where I anticipate a concern, I seek a protective order. That said, there is still a lack of information about how documents are to be filed in PACER when they are under seal.

In defending depositions of federal employees, I typically make a statement regarding personal i.d. info and Privacy Act sensitive information at the outset, and state an objection when personal and protected information is sought.

In deposition testimony, I have not asked personal identifier information and have had it written down on a separate sheet of paper.

In deposition, instruct the witness not to answer

In depositions, pi information needed from the deponent is given off the record.

In depositions, we go off record when dealing with names of minor children. In depositions, I instruct my client not to answer when asked their SS#; For interrogatories, when opposing counsel asks for personal identifying information, we only list the last four digits of the social security number and the year a person was born.

In exhibits that contain confidential and personal identifier information, my office redacts the information prior to submitting the exhibit at trial.

In our practice regarding individuals with disabilities, we often refer to individuals by first name and last initial to preserve their privacy.

In suppression hearings, the address can be referred to by street without the precise address.

In the work that I do, rarely is personal identifier information needed. We take great measures not to include unnecessary information in our filings. Tax returns etc are usually filed under seal.

included info in a separate document

indicate in a deposition that that portion is deemed confidential --essentially a stipulation to a protective order regarding the confidential information

Instruct associates to avoid collecting such unless absolutely necessary.

Instruct witness in deposition not to give social security number.

Instructed associates and witnesses to avoid disclosure. Object to a question that may lead to disclosure

Instructed clients not to answer questions about social security numbers and offering to provide it to opposing counsel if it becomes relevant.

Instructed witnesses not to provide SSN's when requested.

It is just a matter of thinking ahead of time what information is actually needed and then tailoring questions accordingly.

It is my normal practice to discuss this issue with opposing counsel very soon in the litigation, and to come up with a procedure to deal with personal identifier information.

Just do't ask

Limit questions to name and address.

limiting information to what is essential to the litigation; objection to private information where appropriate; allowing the court to rule where the issue is contested.

Made an agreement with all parties that such information is not essential to the formal record. If that fails approach the court for an order.

Made an in firm presentation to attorneys and staff directing compliance with the rules and to use abbreviations whenever possible.

made staff aware of the need to redact

Mainly it is a matter of being aware of the problem.

Meet and confer with opposing counsel in the hope of obtaining an agreement regarding lodging documents under seal.

Motion in Limine. Refer to witness by number rather than name

Motions to preclude the introduction or discussion of certain medical records prior to the hearing.

Never ask for it; object to opposing counsel's questions

no experience on this issue

No such information is requested during discovery

Not ask questions that lead to such information but do not lead to relevant information

Not asking for witnesses' Social Security Number or date of birth in depositions.

Not asking unnecessary questions during deposition / trial.

Not mention personal identifiers unless absolutely necessary. To date, I have not consciously had to do this, since I have yet had personal identifiers be a contested issue.

Not reading into a transcript, blacking out ss numbers, etc

Not to use information unless necessary

Notifying the court at a side bar or prior to the hearing that I will delete address of witness or names of minor(s) in my examination.

Object and ask that the information, if given, be sealed or redacted in the transcript at that time.

object or strike references, go off the record

Object to question asking that information. This has prevent the information from being made part of the record.

Object to such info at deposition

Objected to questions in depositions and specifically referred to initials of minors, etc. in hearings.

Objected to the question where social security numbers or similar information was asked where it had no relationship whatsoever to the subject matter of the case and could not lead to discoverable information.

Objections raised

Off record discussions

Office policy - Staff understands they must review all documents prior to filing with the Court to look for such personal id. information.

Off-record discussion

omitted the personal identification information and replaced with other descriptive information to assure proper identification

Only ask for or allow last four digits of Social Security number to be identified in transcript.

Other than a name, which is normally part of an indictment, I never file anything with personal information, unless I first attempt to have it sealed.

paralegal review prior to filing

Paralegals review documents to be produced with an eye toward locating personal information that should be redacted.

Per protective orders, we designate the relevant portions of the transcript as "Confidential" or "Attorneys' Eyes Only".

Personal identifier information is rarely relevant or useful in my cases, so I don't ask for it unless it is needed.

Pre-hearing conference with opposing counsel, personal and staff review of documentation, review index to deposition transcript.

Prepare witnesses so that they do not include such information in answers unless expressly called for.

Prior agreement by parties to exclude certain unnecessary topics

produced redacted documents, so such information is not identified in the proceeding.

proffer documents for the court's examination instead of reading information on the record.

Proposed protective orders.

Protective orders or stipulations to seal portions of transcripts where personal identifier information must be disclosed. Avoid disclosure if not necessary, by agreement with adverse counsel and court.

Protective Orders requiring filing certain materials under seal

Protective orders.

Rarely an issue in my practice.

reach agreement with opposing counsel; object based on the rules and confidentiality

Reach an agreement with counsel to provide information off the record.

Redact before offered in evidence.

Redact documents containing such information before producing them in discovery or using them as a deposition exhibit.

Redact exhibits in advance. Redact identifiers by using x's in place of numbers. Redact identifiers using for example the last 4 digits of a social security number.

redact information from the document prior to introduction, by stipulation of parties.

Redact or black out confidential information on documents attached to pleadings. Making sure not to publish or reference confidential information.

redact personal identifying info from certain discovery items

Redact.

redacted when required

Redacting the information and filing directly with the court.

redacting the information before it is offered in exhibits

Redaction of such information from documents before production in discovery.

referring only to the last 4 digits of SSN and asking other counsel to do the same

referring to children as "Jane Doe" etc.; advising my clients to be sure to just give year of birth in response to that question rather than giving full DOB

Referring to minor by initials, making sure Social Security numbers and DOBs are removed from any documents

Refrain from asking personal questions at deposition, e.g. home addresses in a business case.

Refrain from asking questions that require that information unless it is necessary for the case

remove ss nos.

Request permission to file information under seal.

Request the court to redact personal identify information from documets submitted at sentencing.

Request to the Court

Requested sealed hearings and/or filed sealed motions.

resist providing that information at all

review all exhibits for personal information before filing. didn't do that until the new rules and requirements were publicized

review and redact evidence or other documents prior to filing or a court hearing

review attachments for any social security information and redacted

screening of information

search for and redat same before producing or filing docs

Selecting only relevant portions of a transcript

Self-censorship in pleadings and at hearings, using initials, pseudonyms, etc. At times, I have omitted giving illustrations and examples to avoid referring to redacted information or the contents of sealed documents.

Simply intra-office discussion with attys and staff

Simply notifying the court and counsel of a potential concern in advance and clarifying the issue early in any proceeding

simply refrain from mentioning that information

SS numbers are redacted. The only federal court proceedings in which I am involved are Chapter 7 Bankruptcies. Other than names and addresses, which are required in BR Pleadings, the only other "identifier" is SS numbers. I hope this is responsive.

stipulating or agreeing with counsel to make only general reference in the record to a private or secure document that contains the identifiers

Submitting declaration instead of providing document as exhibit. This is only practical in limited circumstances.

The avoidance of questions that solicit such information and instead the exchange of such information in written form.

these issues are not inquired about

Think about the questions that are asked. Don't ask questions that unnecessarily require personal information. Stipulate to the existence of facts to avoid putting that information on the record. Actually read over the evidence admissions BEFORE the trial for personal information unnecessary to the case. Redact a copy of all documents when received and securely store the unredacted document with destruction date as soon as possible.

To the extent personal identifier information is not relevant to the dispute I generally agree that it need not be provided on the record and attempt to get the same concession from the other side.

to the extent unnecessary, it is not included in court filings

Trained my staff and provided notice to the court reporter.

Tried to avoid those topics unless absolutely called for.

Try to avoid having to use documents containing the information.

try to only ask for last for digits of account numbers

Urged our attorneys not to use this information if it is not necessary.

use astericks instead if full id numbers

Use just the appropriate last 4 digits.

Use of white out prior to efilng or document production.

Use only last 4 digits of account numbers, social security numbers, etc. do not use names of children in papers filed

Use the last four digits of social security numbers only.

Used last four of social security number or initials of minor.

Used redactions on exhibits, placed portions of transcripts under seal.

We advise all employees not to orally convey or write such information on documents that would become subject to public record. Therefore, the need for redaction will be minimal on transcripts where such policy is adhered with.

We ask clients to not provide social security numbers during depositions. We redact all personal identifying information from medical records before offering them into evidence.

We don't ask questions that reveal residence address, for example, and we try to redact that information from documents prior to introduction.

We have had numerous hearings where bank account numbers, Social Security numbers, or minors were involved. Before trial, by motion or otherwise, we file with the court that we are going to use appropriate initials or digits necessary regarding the evidence.

We have taken steps to keep PII out of deposition transcripts. If we have the PII from another source we don't put it in the transcript.

We make sure our clients do not provide such information on the record. We will give it to opposing counsel but not on the record.

We redact documents during discovery, before they are produced.

We redact personal identifier information from all stored documents that are accessible by anyone either through online access to pleadings or on our bankruptcy information websites.

We routinely try to redact private personal information in exhibits filed with pleadings.

We try to avoid revealing social security number. One time we could not avoid it and the court sealed the records and we had to make a motion to obtain access.

When drafting a document, try to work around the need for such identification where possible.

When filing sentencing memoranda, I try to avoid the personal identifier info and relate to the court that I have omitted the personal identifier info at the hearing.

When I am in a procedure I will try to stipulate matters and include them in materials that the judge or jury may review without going into the specifics for the record.

When I anticipate that private information might be divulged by a witness, etc., I caution the witness to not divulge such information.

When using documents with personal identification information, I generally do not read into the record the personal identification information.

When, during deposition, an opposing party asks my client his or her social security number, I object and promise to provide it in a disclosure.

Whenever possible, I simply control the questions I ask a witness so that the answer does not involve a disclosure of such information. This is easier in a civil case than a criminal case.

White out personal identifier information from exhibits that are attached to pleadings filed with the court.

Within this office, we attempt to screen for such information, redacting it in advance.

You simply don't ask the offending question. If the information is material, get it out once and then refer to it by a shortened form from then on.

Appendix E

Question 10 (Other): What types of information currently in the files should be redacted
(Other: Text)

address, social security numbers, phone numbers and EINs
addresses

addresses, names and other information that is unnecessary to the case.

all information in asylum hearings

any other information provided at detention hearings

Any personal information of federal law enforcement officers.

any social security or military id numbers

any statement alluding to cooperation with the government in a criminal case.

Anything that could be reverse engineered to locate people or assets via a public internet search.

attorney cell phone number

auto insurance ##, tax preparer TIDNs, bank acct ##, birth dates,
citizenship and place of birth

Confidential business information, such as formulas, pricing, agreement terms etc.

content of confidential information conveyed to the court

cooperation of defendnt

credit and banking account record information

employment records

full birth dates, full account numbers for credit cards, etc.

home address

Home addresses

Home addresses except where necessary

in 1983 cases, home addresses and phone numbers of defendant police officers

juvenile offenses

Medical information

minors, peer review

Mother's Maiden Name

names of minors and SSN

Names or Minors

non-relevant personal information

Parents' names

personal telephone numbers

Phone numbers and addresses

Photographs (In situations where identity must be protected)

Photos associated with any of the above, cell phone numbers

PSR and BOP Reports

residential address

Sensitive personal health information (diagnoses and certain conditions)

Soc Sec #

Soc security no

Social Security number

Social Security Number

Social Security Number and bank account number

Social Security number, address, phone number

Social Security Numbers

Social Security Numbers

ss number

SSN

SSN

SSN and credit card numbers

telephone and email identification

Appendix F

Question 16: Please note which categories should be deleted from the current list of documents excluded from the public case file, and explain why you think the information should be included in the file.

Statements of reasons in the judgment of conviction. This is a matter that occurred in open court. The public ought to have it to review the exercise of the court's discretion in sentencing

Pretrial bail or presentence investigation reports Statements of reasons in the judgment of conviction

Statements of reasons in the judgment of conviction

Unexecuted summons or warrants of any kind Pretrial bail or presentence investigation reports Statements of reasons in the judgment of conviction Documents containing identifying information about jurors or potential jurors Financial affidavits filed in seeking representation pursuant to CJA

ALL

All of the categories should be public record, unless national security were to be at issue. The reason for my suggestion for a broad disclosure policy is that Democracy is at stake when the public is denied access to information.

All sentencing memorandums.

Any matter having to do with any kind of cooperation. These documents should not have to be sealed. They should be kept separately from general criminal case files. Period.

Because the district court is obligated to give reasons for its sentencing, it makes no sense to categorically exclude from the record the judge's statement of reasons, which is almost always pro forma any way. It should be no more subject to exclusion than the sentencing transcripts, and unless the the latter is sealed, the former should not be sealed.

Except in those cases where there is a motion to seal; the Statement of Reasons in the judgment of conviction should be made available to the public. Since the conviction itself is a public record, it does not make much sense to argue that the convicted individual has a privacy interest to protect. Of course a different argument can be made in the case where one cooperated with the government, but even in those instances there is little secret regarding anyone's status during the trial. Finally, it would do away with the requirement to file a motion to unseal the document when preparing the Joint Appendix for the Appellate Brief.

Exhibits attached to motions such as police reports, mental or medical report, or other information that is otherwise covered by privacy laws.

Financial affidavits filed in seeking representation pursuant to CJA Why conceal all the information contained in these affidavits? Some should be excluded from public review (the personal identifier information), but some of it shouldn't.

I think the presumption should be that none of these documents should be shielded. Transparency is very important to our societal goals.

Juror documents

My beef concerns sealed documents. At present a PACER docket does not list sealed documents. That is appropriate for the general public. However, I am appellate counsel in a case where about half of all documents were sealed. I am having an awful time getting just the docket listings for documents relating to my own client and for co-defendants. For example, although my client pled guilty and was sentenced, there were no docket entries for those events. I need those transcripts for an appeal. What else is there that I don't know about? After months of litigation the judge gave me the docket listing for my client, but he still won't give me docket listings for the co-defendants. What they are trying to hide is that certain co-defendants cooperated with the government - a fact my client already knows perfectly well because they testified against him in open court at his sentencing. Yet to protect against disclosure of this already-known fact they will not let me even see docket entries relating to co-defendants - without making any individualized item-by-item determination that they would have any harmful effect. This leaves me half-blind as an appellate attorney, but the judge seems not to care in the least, and seems actually to be amused by my situation.

Presentence investigation reports may be the most important document in a case file. Disclosure of the report would help explain how a judge arrived at a sentencing decision in a particular case.

Pretrial bail or presentence investigation reports
Statements of reasons in the judgment of conviction

Prior criminal records because they are not always correct and potential employers may access the incorrect or incomplete records.

Sealed documents-when the reason for the sealing is past.

Sentencing position pleadings and motions for downward departure

Statement of Reasons in the Judgment of Conviction

Statement of reasons for conviction

statement of reasons for judgment of conviction should be kept confidential only when it reveals a defendant's cooperation; much of the information in a pretrial bail or presentence investigation report is found in public records -- more selective exclusion would be more difficult to accomplish but would make more sense if your goal is to have as open a file as possible

Statement of reasons in judgement of convictions

Statement of reasons in judgment of conviction

Statement of reasons in the judgement. If it is a reason for a judgement it should be public.

statement of reasons in the judgment

Statement of reasons in the judgment of conviction contains information of benefit to the public

Statement of reasons in the judgment of conviction and, possibly, pretrial bail or presentence investigative reports (if it could be limited to the parties only)

Statements of reasons

Statements of reasons in J&C. I have never read a statement of reasons, in over 200 cases, containing protected information

Statements of reasons in judgments- The rationale for imposing a sentence should be accessible to the general public. Persons interested in the basis for a sentence should be able to glean into the court's reasoning. Sometimes the reasoning can serve to protect the general public and other times it may act as a deterrent.

Statements of reasons in the judgment of conviction

Statements of reasons in the judgment of conviction Documents containing identifying information about jurors or potential jurors

Statements or reasons in the judgement of conviction. Presentence investigation reports. To the extent we have a system in which similar people are treated similarly we need to know why judges impose the sentences they impose. For that we need to know what the presentence investigation shows and why the judge followed or departed from it.

The statement of reasons should include information concerning the court's rationale for the sentence imposed, especially in the wake of the Supreme Court's decision in *United States v. Booker*. Sealing a SOR where the defendant co-operated could be done on a case-by-case basis.

Unexecuted summons or arrest warrants should not be deleted in co-defendant cases.

Unexecuted summons or warrants of any kind Statements of reasons in the judgment of conviction Ex parte requests for authorization of investigative, expert or other services under the CJA

Unexecuted summons, juvenile records, records with identifying informatino about jurors, sealed documents: all for the reason that the potential harms significantly outweigh the potential rewards for maintenance of those documents in the public file.

unexecuted warrants - can be helpful in assisting potential clients with pending cases - to determine what charged with, etc.

Appendix G

Question 18: Please describe those categories of materials that should not be included in the public case file, and explain why they should not be included.

Pretrial bail or presentence investigation reports Statements of reasons in the judgment of conviction THESE ITEMS ARE HELPFUL TO THE DEFENDANT AND POST CONVICTION RELIEF COUNSEL IN PREPARING PCR AND HABEUS MATTERS

ALL

all defense sentencing documents

All sentencing memorandums.

any filings by CJA counsel for payment that would reflect pedigree information about the attorney

any information pertaining to or suggesting witness i.d. or addresses; personal info or addresses of arresting agents. Certain of the list should, however, be available to attorneys not yet of record, with defendant's waiver

Any informational letters re: the accused or witnesses.

Any statement by the Defendant or the Government that a Defendant has debriefed, or voluntarily interviewed with the Government. This type of information not only subjects the Defendant, but also his/her innocent family members to retribution from violent criminals. In addition to the danger to the Defendants and their families, there are law enforcement concerns as well. Ongoing investigations could easily be rendered ineffective if the target of any investigation is made aware that the investigation is proceeding and who those witnesses are. In my practice, if I did not feel secure that information concerning my client's de-briefings was to remain private I would strongly suggest that they no cooperate with the government. I feel like many other Defense attorneys would do the same. Law enforcement agencies would lose a tremendous source of information. This is especially true when dealing with cases involving violent Mexican Drug Cartels. Defendants are usually willing to meet with the government under the understanding that there meetings are confidential. Drug Cartel cases always carry with them a risk of death and violence directed at keeping Defendants form de-briefing with the Government.

Anything pertaining to a defendant's medical or mental health records or condition.

CJA Payment Vouchers

Cooperation plea agreements

Defendant's family personal information

Exhibit attached to motions or in support of motions that are either police reports or medical or mental health records, or other types of records normally covered by privacy laws.

exhibits that are not redacted or filed under seal

government's motion for downward departure are sealed but the name of the motion appears on the docket sheet in pacer

Motion to withdraw as counsel could contain privileged information

Motions for reductions in sentence due to substantial assistance. Avoid retaliation from busybodies who hate snitches

motions requesting review of detention orders or reduction of bail.

Names and addresses of co-signers on release bonds

Notes made by law enforcement officers should be made public to enable the people to know and assess the credibility of matters related by law enforcement. The notes made by court reporters should be filed and made available to the public for viewing to allow the public to assess the accuracy of transcripts. The transcripts of grand jury proceedings really need to be made public so people may learn who is alleging what and to enable the public to make an informed assessment of the integrity of the grand jury system, and to deter the abusive use of power.

Objections to the presentence investigation report. These reveal the contents of the report, which is sealed.

Plea agreements subject to 5K provisions.

plea agreements that contain language regarding cooperation of the defendant.

Plea agreements with cooperation language, or at least those parts of the agreement.

Pretrial Service Reports, Financial Affidavits, ex parte motions

sentencing memorandums which frequently give information about defendants and their respective families, including medical/mental health history

Sentencing pleadings

Something needs to be done with plea agreements that spend pages on the defendant's cooperation. Filing them under seal does not help, because it only alerts the outside that the defendant (probably) cooperated. The default would be to file all plea agreements under seal, but that defeats the goal of open files in court cases.

statements of reasons in the judgment of conviction

The Statement of Facts in a plea bargain case should be sealed.

transcripts will of hearings or trials will often have content that could put witnesses or the defendant at risk.

Appendix H

Question 20: What circumstances gave rise to such suspicion or knowledge? (Other, text)

All of the above, except "Don't Know". Also, defendants that are kept at outlying facilities and transported on non-court days are thought by co-defendants to be cooperating.

All of the above.

arrest/initial appearance of cooperating client at the same time as principal defendant

Because of behavior of a defendant post-arrest, confederates were suspicious of the actor's motives. In some cases the individual was completely blameless. Without access to the entire file, I was unable to declare that the suspicions were groundless.

client advised me of fact.

Client reports.

Clients make us aware of the dangers of them cooperating with the government. This danger extends to the defense attorneys also.

co-defendants and co-defense counsel; jail chat; when being transported by USM or local law enforcement officials; even jail employees

Discovery to defense counsel

Everyone knows who the cooperators are. It is a waste of time sealing plea agreements and files.

inmate filed reviewed by other inmates

Inmates are required by other inmates to present docket sheets to confirm that no departure motions or Rule 35 motions are listed.

Inmates demanding cellmates show them their pleadings

Inmates in narcotics cases serving less than guideline sentences while in federal custody are presumed to have cooperated by other inmates.

loose procedures on the part of law enforcement

News reports/testimony in state court proceedings

Once in prison they are required to show their paperwork to other inmates.

Prisoners learn very quickly what repeated trips to the courthouse mean, also some view PSI's or other similar documents

Through debriefing reports provided in discovery

Word of mouth

Appendix I

Question 22: You indicated that the court's policy regarding posting of plea and cooperation agreements has not been successful in protecting the privacy and security of individuals signing those agreements. Please explain.

5k1 motions appear to be posted

AN ATMOSPHERE OF FEAR IS CREATED WHEN ONE DEFENDANT KNOWS THAT A CO-DEFENDANT IS COOPERATING WITH AUTHORITIES. I HAVE HAD A CLIENT THREATENED BY A CO-DEF WHO MUST HAVE KNOWN THAT MY CLIENT WAS COOPERATING WITH THE GOVERNMENT.

Any competent attorney can determine who is likely cooperating without the need to review the agreements.

Anyone who knows how the system works can figure out, under the current system, whether someone is probably cooperating

Anyone with password access to the site can gain access to the plea agreement. While attorney's of Defendants who are targets of cooperation should have access to such documents in preparation of defense strategy, the general public should not. Access to plea agreements should be restricted to named parties.

As noted above, others still have ways of finding out who cooperated. I am just not sure what can be done, because there are individuals who do not have the interests of the cooperating defendant at heart when setting policies in this area, and some people in the criminal justice system simply do not see a problem here (exposure is simply the cost of cooperating).

At the Detention Center these documents are shared. I've heard of instances in which others demand that the defendant produce the document or where the defendant produces it to avoid any suggestion that s/he's cooperating.

Because the docket sheet will list the existence of a sealed filing, anyone with passing familiarity with the criminal justice system will be aware of the meaning of a sealed document.

Certain groups are sophisticated enough to have realized that when there is no entry at all (no "Plea agreement is Court Ex. 1" for example), that means the defendant is a cooperator.

Clients who arrive at a prison will often call and request a copy of the court's docket sheet, because they have been "asked" to do so by other inmates. I believe these inmates are being evaluated by other inmates to determine if they are cooperators or not. If they are, they may be at risk of harm.

Given the due process and confrontation clause requirements, to some extent this problem can never be obviated.

I don't know of any specific instances of harm, and don't know how one would avoid it, but if you know how to read a docket sheet you'll see suspicious gaps in document numbering, indicating the existence of sealed documents.

I don't think plea agreements should be private, and the contents are usually found out anyway.

If someone really wants to find out if a defendant is cooperating and understands the system, the fact that a plea is sealed in some cases and not others is an indication that the sealed plea agreement contains a cooperation clause.

In cases in which cooperation agreements have been sealed, the USA insists on placing in the unsealed agreements language pertaining to proffers made by the defendant, which it does not put in non-cooperation plea agreements.

In my District, the US Attorneys Office has been using boilerplate language in their plea agreements which when asked to be removed they often will not.

In my experience the Factual Basis was not sealed when a plea bargain was entered. These Factual Basis documents contain information that could easily show that a Defendant may be cooperating.

In my opinion, all plea agreements involving cooperation should be automatically sealed, rather than on a case-by-case basis.

In some cases where defendants are cooperating, posting the fact that an individual has been arrested is enough to put that person in jeopardy. It is certainly enough to put an end to the individual's ability to actively cooperate. In the EDVA this information is not placed under seal. Other districts place entire cases under seal during the period a defendant is cooperating.

In some cases, even when initially sealed, the information about pleas and cooperation later becomes public.

Individuals with a serious interest in intimidating cooperating witnesses are not deterred by the unavailability of plea and cooperation agreements on line.

Knowledgeable inmates and others know how to read docket sheets. They know what a notation that a document is sealed means. documents mea

Many times co-defendants or unindicted conspirators attribute behavior to a defendant, even when the person in question has done nothing wrong. Access to information now sealed would allay those suspicions in certain cases. In cases where the defendant actually was cooperating in some manner, he would be no worse off because of disclosure of his actions.

More and more I hear of people monitoring court pleadings in a case finding these documents

people find out without the use of public documents, they find out from other sources

Plea agreements are publicly filed in this district and can be accessed by any individual.

plea agreements containing cooperation clauses are not filed under seal and appear on pacer

Privacy, no; security, don't know, at least in my experience. The press tracks these things very closely. Stories are written that sensationalize a case beyond any rational basis for doing so.

some threats to defendants and witnesses come from law enforcement or the office of prosecutors

The Mexican cartels are very sensitive to defendants they think are cooperating. There are not enough separate facilities in which to ensure the safety of cooperators. The balance between safety and constitutionally guaranteed rights is sometimes hard to achieve, while trying to protect people. Here in the Northern District of Illinois, there is great cooperation and coordination among the U.S. Atty's Office, the Judiciary and the attorneys, especially the Federal Defender Staff and Panel Attorneys. Where the system sometimes breaks down is where the privately retained atty's are not paid by the defendants or their families, but by third parties whose interests may not coincide with those of the defendants.

The public notation that a "sealed" document is filed before sentencing indicates that the defendant is cooperating and the government has filed a sealed motion for sentence reduction.

There are instances where no plea agreement or cooperation agreement is signed, yet an individual cooperates anyway or attempts to cooperate anyway. Many times the government wants to meet with persons to see what they know before offering a deal. The individual cooperates and meets with the government, but ultimately is not offered a deal. At sentencing the Defendant's attorney wishes to apprise the Court of the Defendant's attempts to cooperate in an effort to show that he did everything he could to mitigate his sentence. Under the current Court Policy that defendant's notice to the Court of his attempt to cooperate are not protected because there is no cooperation agreement or plea agreement. The Court's policy should be amended to state that any mention of a defendant's cooperation or attempt to cooperate with the government should remain sealed. This is a grave concern for us lawyers who represent clients that have had dealings with the violent Mexican Drug Cartels.

There is now way for it to be. Once an individual cooperates, it is very difficult to keep that a secret. Just the way it is. But I think more can be done to protect those that do chose to talk.

They are available to the public.

TO my knowledge, there is no court policy. Rather, here in Central District of Calif., if parties want a plea agreement which contains a cooperation agreement sealed, they submit an in camera application to the court. However, PACER then lists the filing of an in camera for that defendant, and the filing of a plea agreement (or simply a document) under seal, it is relatively apparent that the deft is cooperating.

Too many people seem to have access to info
TOO PUBLICLY ACCESSIBLE

When cooperating individuals are incarcerated, they are forced by other prisoners to disclose copies of their presentence investigation. They are then identified as cooperators.

With the exception of the few cooperators who are not in jail everyone in jail knows who is cooperating both because they make frequent trips to "court", because they do not attend co-defendant meetings, and because the jails are incubators for information. There is virtually no system which keeps the identity of cooperators secret and I am not convinced that there should be.

Appendix J

Question 24: In which federal district do you primarily practice?

DistrictAbbre	Frequency	Percent
	44	7.1
5th Circuit	2	0.3
8th Circuit	2	0.3
9th Circuit	1	0.2
ALMD	4	0.6
ALND	8	1.3
ALSD	5	0.8
ARED	2	0.3
ARED, ARWD	1	0.2
AZD	7	1.1
CACD	26	4.2
CACD,CASD	1	0.2
CAD	1	0.2
CAED	6	1
CAND	12	1.9
CAND, CACD	1	0.2
CASD	4	0.6
COD	14	2.2
CTD	13	2.1
CTD, NYSD	1	0.2
DCD	19	3
DCD, ORD	1	0.2
DED	2	0.3
DED, PAED, NYSD, PAWD	1	0.2
FLMD	13	2.1
FLND	2	0.3
FLSD	15	2.4
GAMD	1	0.2
GAND	6	1
GAND, NYSD, TNMD, ALND	1	0.2
GASD	2	0.3
HID	4	0.6
IAND	2	0.3
IAND, IASD	1	0.2
IASD	2	0.3
IDD	1	0.2

IDD, WAED	1	0.2
ILCD	2	0.3
ILED	1	0.2
ILND	22	3.5
ILND, ILCD	1	0.2
ILND, ILED	1	0.2
INND	7	1.1
INSD	1	0.2
KSD	9	1.4
KSD, MOWD	1	0.2
KYED	3	0.5
KYWD	6	1
LAED	7	1.1
LAMD	1	0.2
LAWD	4	0.6
MAD	16	2.6
MAD, CTD, NYSD	1	0.2
MAD, RID	1	0.2
MDD	9	1.4
MED	2	0.3
MIED	4	0.6
MIWD	3	0.5
MND	9	1.4
MOED	6	1
MOWD	4	0.6
MOWD, KSD	1	0.2
MSND	1	0.2
MSND, MSSD	1	0.2
MSSD	4	0.6
MSSD, PAED	1	0.2
NCED	2	0.3
NCMD	1	0.2
NCWD	2	0.3
NDD	1	0.2
NED	1	0.2
NHD	1	0.2
NJD	13	2.1
NJD, NYSD	2	0.3
NMD	7	1.1
NMID	2	0.3
NVD	7	1.1

NYED	15	2.4
NYED, NYSD, NYND	1	0.2
NYND	2	0.3
NYSD	31	5
NYSD, NYED	5	0.8
NYSD, NYED, CTD	1	0.2
NYWD	3	0.5
OHND	7	1.1
OHND, OHSD	3	0.5
OHSD	14	2.2
OKED	1	0.2
OKND	2	0.3
OKWD	6	1
ORD	4	0.6
PAED	15	2.4
PAED, NYSD	1	0.2
PAMD	5	0.8
PAWD	9	1.4
PAWD, MDD, DCD	1	0.2
PRD	11	1.8
RID	2	0.3
SCD	4	0.6
SDD	1	0.2
TNED	2	0.3
TNMD	2	0.3
TNWD	1	0.2
TNWS	1	0.2
TXED	6	1
TXND	7	1.1
TXSD	15	2.4
TXWD	10	1.6
UTD	4	0.6
VAED	10	1.6
VAWD	2	0.3
VID	1	0.2
VTD	3	0.5
WAED	1	0.2
WAWD	8	1.3
WIED	4	0.6
WIED, WIWD	1	0.2
WIWD	3	0.5

WIWS	1	0.2
WVSD	1	0.2
Total	624	100

Appendix K

Question 26: Which types of clients do you primarily represent? (Other, text)

All Parties in Bankruptcy Matters

all three marked categories

Bankruptcy

Bankruptcy creditors

Bankruptcy

Bankruptcy

Bankruptcy

Bankruptcy

bankruptcy

Bankruptcy

Bankruptcy

Bankruptcy

bankruptcy

Bankruptcy

Bankruptcy

bankruptcy

Bankruptcy - Consumer Debtors

Bankruptcy (plaintiffs & defendants)

bankruptcy debtors

bankruptcy debtors

Bankruptcy Debtors

bankruptcy litigants

Bankruptcy Matters

Bankruptcy petitioners

Bankruptcy Trustee

Bankruptcy Trustee

Bankruptcy, both debtors & creditors

Bankruptcy, mainly debtors

Bankruptcy-Creditors and Debtors

bankrupts and creditors

Bankruptcy debtors

Business cases - No real Plaintiff/Defendant delineation

capital habeas and state habeas

Chapter 7 Bankruptcy

Corporate Debtors in Chapter 11 Bankruptcy

Creditor in a bankruptcy case

Creditor in Bankruptcy case

creditor in bankruptcy cases

creditor/bankruptcy
creditors in bankruptcies
creditors in bankruptcy
creditors in bankruptcy cases
Creditors in Bankruptcy cases
Creditors in bankruptcy proceedings
Criminal appellants (pro bono)
criminal restitution victims, both private and federal
Debtor in bankruptcy case
debtors
debtors and creditors in bankruptcy
Debtors and creditors in bankruptcy cases
Debtors in Bankruptcy
Debtors in Bankruptcy cases
Debtors in Bankruptcy Cases
Debtors in Bankruptcy Cases & Adversary Proceedings
Debtors in Bankruptcy Court
Debtor's in business Chapter 11
Debtors, Creditors and Trustees in Bankruptcy

Defendant (the State) in federal habeas off capital punishment cases:

Defendant on appeal
Defendant's appellate counsel
Government
Government agency and plaintiff class members
Government Attorney for EEOC
I don't hardly do any federal work at all

I represent various parties in bankruptcy cases, including appellate work in connection with same.

immigration - typically in circuit court

Internal Revenue Service as respondent in Tax Court or creditor in Bankruptcy Court

municipal corporation in civil cases
parties in bankruptcy cases
Plaintiffs and defendants
Plaintiff's class actions

Plaintiffs, Defendants and Trustees in bankruptcy adversary proceedings

rare court practice - in house atty
represented federal agency
representing Material Witnesses

respondents in federal habeas actions

retired

software and technology businesses in trade secret matters

State Government

State in Federal Habeas Cases

State of Connecticut as party to a bankruptcy case

Trustees, debtors, and creditors in bankruptcy cases

US Government

Appendix L

Question 27: Any other comments or suggestions about the privacy rules that have not been covered in the questionnaire.

A CLE program on privacy and redaction requirements could be offered by the court or state bar.

A frequent concern, somewhat beyond this survey, is the frequency with which corporate parties produce confidential information in reliance on and pursuant to a protective order only to have the protections removed after production.

As a defense attorney oft times I need DOB and SSN numbers to obtain medical records, credit records and insurance information. Without a social security number it is very difficult. There ought not be any blanket preclusion (privilege) for asking for such information in a deposition or written discovery. Plaintiff attorneys are increasing being difficult about giving this information up based on privacy reasons, yet they know it is needed for legitimate reasons. Privacy is becoming an excuse for being obstreperous.

As I commented above, this is a good topic for paralegals to take ownership of.

Flexibility in allowing attorneys to file documents under seal will balance any burden placed on an attorney under a privacy protection program. Because this exists, we should lean toward protecting privacy.

Have trial exhibits not put on docket so they do not have to be redacted after trial for purposes of appeal; huge waste of time and documents, as redacted, are not true copies of exhibits.

I am an appellate lawyer and typically deal with transcripts and docket entries as they were previously created in the district court. Although I have filed documents in district court, my experience with privacy practices in that court is limited.

I am engaged primarily in plaintiff class actions, many of which are on behalf of consumers. A judgment in a class action typically has a list of opt-outs who are excluded from the effect of the judgment, but I have attempted to submit these under seal when consumers are involved, even though I don't believe it is required. Especially when it potentially conveys health care information (eg they purchased a particular drug) I don't believe consumers names should be in the public record on a matter that they would like to exclude themselves from.

I am in-house, and have not practiced before fedl court for over a year

I am not a good candidate for this survey because my only experience in Federal Court is filing 7 or 8 unopposed chapter 7 bankruptcies

I am not clear about the procedure for reviewing transcripts of trials, hearings and who has the responsibility to do so, and attendant liability for doing this incorrectly.

I believe that there should be more protection for medical and health information in depo and trial transcripts and pleadings

I believe privacy rules for public records should be as least restrictive as possible.

I believe that all sentencing memorandum filed in criminal cases should be filed under seal of court and deleted from the public record.

I believe the systems works the best it can under the circumstances. The many drug cases for which I have been counsel are dangerous and the individuals we represent have many problems with the individuals they worked for. Some times it is a dangerous circumstance for all involved. When a plea is sealed, every one knows they are cooperating regardless of the case. Under the current system all plea agreements are sealed which helps therefore no one knows who is cooperating until trial. It is what it is!

I currently spend a significant amount of my time on cases involving current or former employees and/or competitor misappropriation of trade secrets and other intellectual property. The laxity in protecting information beyond identifiers that may not rise to the level of a trade secret but is still valuable confidential information of a company appears to allow the defendants in these sorts of actions to harness the litigation intended to provide some protection against such misappropriation to in fact make public the very confidential information that the plaintiff is trying to protect, and thereby retaliate against the plaintiff for bringing such actions, by filing confidential information not proprietary or trade secret information as exhibits to court filings with relative impunity.

I do not agree that documents/proceedings involving cooperators should be kept sealed, particularly plea agreements. I also disagree with the practice of requiring a "plea asupplement" in every change of plea to disguise the existence of a cooperation agreement. Cooperators have enough incentives to lie as it is.

I have none, thank you for conducting this survey.

I haven't had a problem.

I personally think the privacy rules are cumbersome and probably not worth the cost in time and effort. I would think that someone trying to get personal identifying information about people wrongfully can obtain it a lot more easily than by scouring federal filings. They would have to know how to get it, have a Pacer account, know what to look for and be willing to spend the time to get specific documents that might contain the information they want. Plus, the fact that they have to use Pacer means they could be caught.

I practice patent law. Except for litigation, my files are paper files. My secretary's computer, where such files are created is not connected to the internet for security purposes. I am one of a dying breed.

I tend to represent corporations whose confidential and proprietary information is subject to discovery as well. The rules and caselaw certainly provide for protection in this regard, but the protection afforded an individual as codified in Rule 5.2 seems to require a proactive approach by both parties. Whereas, it seems the confidential information of business entities is the subject of negotiation in discovery and sometimes gamesmanship. Is there a way to clear this up?

I think that privacy issues should be part of mandatory CLE

I think the further the court can go in requiring that documents be made available publicly without unnecessary deletions, etc., the more efficient and apparent our legal system will operate.

I think the privacy rules are motivated by good ideas but are impractical and undemocratic. Essentially the government gets to keep secrets and the defendants' and public's right to know what is going on in the COurt system are ignored.

I think the Rule needs inclusion of employment/personnel records especially those that include HIPAA references

I think there are some docs that seem to be protected in one district and not another (Wy vs Co.). The practice should be uniform and subject to some clear rules to expose the docs to other lawyers for cross examination purposes with cooperating co-defs or defs in other related cases.

I was not a good candidate for this survey because I litigate only rarely and am just becoming familiar with ECF.

If Social Security numbers and dates of birth are removed/redacted from transcripts that Social Security files with the courts, the chances of mistakes occurring when claims are proceeded will increase. Therefore, the best option for handling Social Security transcripts is to have them filed under seal and/or limit access to the parties in the case.

In bankruptcy cases, attachments and exhibits to proofs of claim filed with the court require close scrutiny as many include unnecessary personal identifier information that should be redacted.

In general, I believe our concern for privacy in judicial proceedings is overblown. Private information is easily accessible by multiple means.

In light of the use of electronic case filing, when a court requests or the rules provide for the filing of unredacted copies of documents that were filed with redactions or otherwise underseal, it would be very useful to establish email addresses to which the unredacted or unsealed copies are sent so the party is not filing both electronic redacted copies and paper unredacted copies of pleadings.

In my current area of practice, the issue of redaction does not arise, since litigation focuses on state cases already adjudicated. In the one federal capital trial in which I was involved, it appeared to me that the redaction policy adequately protected the cooperating witnesses.

In the case of electronic filing, a screen that reminds the filer of the privacy requirements of the rule might help ensure compliance. I believe that bankruptcy courts have something like this for social security numbers.

It is difficult and very expensive to review and redact personal identification information from large case filings and motions. To add "insult to injury," I have expended many \$\$ of my client's money to redact information, only to have the individual plaintiff file personal identifiable information about themselves without care or complaint. Thus, defendants are forced to carry the burden and expense, while a pro se plaintiff can try to obtain a settlement simply because the costs of litigation outweigh the merits of any claim.

It is most important that cooperating defendants be protected and not subject to threat. Their safety and the need to safeguard ongoing investigation must constantly be balanced with the concept of open access to courts.

It is sometimes difficult to know what constitutes a financial account. For example, does it include only bank or credit card account numbers, or could it be any account number, such as with a contractor, vendor or store? Also, I believe the Rules should allow for an objection when opposing counsel asks for protected information in open court so that it can stay out of the transcript altogether and not have to be redacted, which can cost extra time and money for the parties.

It may be a good idea to seal pretrial release orders when a cooperating criminal defendant is released on a low bond [or seal all release information]. This tells the public that the person is helping the government and puts the defendant at risk.

It might be helpful, if the District Court would put on seminars about these subjects-almost like ECF training or in conjunction with the State Bar Association.

It should be everyone's joint responsibility to ensure compliance. Initially it should be the offering party's but the other party and judge should be equally vigilant to catch anything that someone else misses. It should be a cooperative effort.

It should not be necessary for exhibits to be in the public record in most cases. Pleadings are easy to sanitize. The problems are exhibits or the spoken word. Ordinarily exhibits need not be shared on PACER.

It would be useful if the Judicial Conference would give some guidance on redaction software -- e.g. does Acrobat 8's redaction package generally work well enough.

Many of my clients have been law enforcement officers, some of them undercover, or public officials in sensitive or public safety positions. I have had difficulty in many cases in keeping their home address and other locating information confidential. Some judges are not willing to treat these individuals differently than other civil defendants or witnesses. However, there is a very real safety threat to these officers and their families if the information becomes public. Civil Rule 5.2 does not address this situation (or the situation where a witness/defendant has a restraining order against a stalker, etc.). Absent some direction from the rules, there are judges who will not (or cannot) accommodate individuals who are at risk. I would hope that could somehow be addressed.

Many privacy concerns should be handled by rules, implemented by the clerk, or by more automatic procedures with the assistance of technology available to court reporters. These people usually have electronic / searchable files that can be easily redacted. Requiring actual reading of paper transcripts is time wasting for everyone.

Most documents filed on the ECF system do not require redaction. Rather than require EVERY filer to check a box every time ANY document is filed certifying that personal data has been redacted, why not require a one time - or annual- certification. Filers are already subject to the obligation to redact, when necessary, under the FRCP. Personally, I don't think that checking a box adds to the privacy process.

My cases since the redaction requirements have been in effect have all fallen under the administrative record exception under FRCivP 5.2(b)(2), and in any event redactable information has not otherwise come up.

My general feeling is that the bar's sensitivity to personal identifier information is low.

Not sure your survey adequately covers questions pertaining to bankruptcy practice and procedure

Often examiner ask personal family including children's identities and personal history information regarding witness which is tied to the witnesses address and other identifiers. Making this information available on line allows the privacy of these individuals to be invaded for no public benefit.

Please don't let Judges create individual rules regarding this.

Privacy protections should be placed for restrictions on criminal records, marital history, employment history and health history if not relevant to disputed issues in proceedings.

Problem of sealing records from the public but MUST be still available to counsel in ongoing criminal case. Awkwardness of method of sealing entire case which then forbids filing of non-sealed documents via ECF.

Rules for transcript preparation, be they deposition or trial transcripts, which require a confidential transcript addendum containing personal identifiers, would do the most to ensure removal of personal identifiers from the public records.

Secret proceedings are unjust. If a man makes a deal, the terms of that deal should be public. Don't make deals you are ashamed of and you don't have to worry about privacy.

Several years ago, I was involved in a case filed in the United States District Court for the Eastern District of Kentucky and later removed to the Bankruptcy Court. The case was filed as a securities fraud case. It was filed by attorneys known for making outrageous allegations in complaints. The Complaint went on for page after page about the dishonesty of an individual who had done nothing wrong. Nearly all of the statements in the Complaint were untrue and slanderous. Ultimately, the case was settled for defense costs even though it demanded millions of dollars. For me, the case illustrated a defect with electronic filings and the PACER system. We have a system in which statements made in Court filings are privileged from claims of defamation. That worked well when court filings required an affirmative effort to access the Court filings. Now, however, most of what is stated in pleadings is readily available over the internet. I believe that lawyers are abusing the ability to make outrageous statements in pleadings filed in the federal court system in order to further illegitimate interests on the part of their clients. I would like to see the availability of a mechanism whereby certain cases, upon Motion and Order of the Court, could be removed from public access through PACER. This might only be available until the case is finally decided.

So Far, I am pleased with the rules relating to redaction of sensitive materials with respect to personal identifiers and cooperation agreements and criminal judgments.

The Court should have a PDF-handling module in order to perform redaction uniformly within that manual. In that way the underlying information may be saved for Court and authorized user access, meanwhile access to non-authorized individuals may be completely removed once the PDF document is rendered in a copy requested by an authorized individual. The module may ask the filer to define the areas or text that should be redacted, and then the module could strike the redacted data exclusively when a copy is requested by an unauthorized individual. Access to court information, essential for the proper conduct of democracy, is saved.

The Court's policy **MUST** be changed to protect all information regarding a defendant cooperation with the government.

The filing of redacted documents is often difficult, especially when it relates to sentencing.

The most common issue I run into is whether or not various account numbers are financial account numbers. For example, account numbers from medical providers or insurance companies.

The need to maintain the confidentiality of court records is itself a task filled with contradictions if we are to have faith in the open public trial the constitution requires. I am troubled greatly by the issue of client security, but the openness that the internet creates and all electronic media for that matter is difficult to combat successfully. I have at times tried to grapple with this problem in my own way with the assistance of judges and prosecutors and even clients for that matter, and have managed to conclude only two things: a one-size-fits-all solution will likely not be found; and maybe a case-by-case approach is all that we can expect in this area.

There are too many rules and regulations in federal court, especially at the appellate level. The 11th circuit is more interested in form and not substance.

There needs to be harmony among the circuits as to how mobile phone companies should respond to subpoenas seeking phone records. Last week NPR had a short piece about this problem which I've encountered.

These rules are generally not applicable to my practice, as it seldom, if ever, involves individuals.

Though I practice very regularly in federal court, I am not aware of any filing we have made that contained information covered by Rule 5.2. We have redacted information covered by protective orders due to trade secrets.

To enforce the privacy laws in existence, the laws need teeth so that violators have a financial incentive to comply. For example, HIPPA has no private right of action. To put teeth in the HIPPA law, there should be a statutory damage provisions along with fee shifting.

Under electronic filing, and the very real threat of identity theft, the rules should provide for special penalties/sanctions if opposing parties file publicly information excluded under 5.2, such as SSN, birthdate, etc. Alternatively, opposing counsel should have a set period of time to move for removal of such information following notice by counsel.

We only list the last four digits of clients' social security numbers. We only list the last four digits of bank account numbers to identify the asset. However, we do list the entire account number for credit cards and other collection agency account numbers to ensure that notice of the debt sought to be discharged can be readily identified.

While I have had occasional cases in Federal Court (most of which involve personal injury cases), the vast majority of my practice is in the state court. While I do occasionally practice criminal law, I have not had any cases which I can recall in the last many years that were in Federal Court. I do believe the protection of private information is important, and while strive to comply with the rules on same. I think the questionnaire needs to allow more than yes/no or don't know responses as to many of the questions. Often the answer I wished to give to a question did not neatly fit into these basic categories.

Without sanctions for violating these commonly known rules, compliance will always be lacking as the cost to comply will always outweigh the cost of noncompliance. Also, the rules should allow for filing a Motion to Strike with an Order that the party who violated the rules file a corrected version of the document. The current implementation places the burden on the person who did nothing wrong and whose privacy was violated.

You may wish to consider these answers are provided by an attorney who strictly does appellate work.

**TAB
11-E**

Attachment 5 to Privacy Subcommittee Report

**Fordham Law School Conference on Operation of the
Federal Privacy Rules**

**JUDICIAL CONFERENCE PRIVACY
SUBCOMMITTEE**

**CONFERENCE ON PRIVACY AND INTERNET
ACCESS TO COURT FILES***

**PANEL ONE: GENERAL DISCUSSION ON
PRIVACY AND PUBLIC ACCESS TO COURT FILES**

OPENING REMARKS

*Hon. Reena Raggi***

MODERATOR

*Daniel J. Capra****

PANELISTS

Joel Reidenberg¹

Ronald Hedges²

Peter Winn³

Lucy Dalglish⁴

Hon. Cecelia G. Morris⁵

Maeva Marcus⁶

* This Conference was held on April 13, 2010, at Fordham University School of Law. The text of the Conference transcripts has been lightly edited. The terms CACM (Committee on Court Administration and Court Management), and PACER (Public Access to Court Electronic Records), an electronic public access service for United States federal court documents, will be used throughout.

** United States Circuit Judge of the U.S. Court of Appeals for the Second Circuit; Chair, Judicial Conference Privacy Subcommittee.

*** Reed Professor of Law, Fordham University School of Law.

1. Professor of Law & Director, Center on Law & Information Policy, Fordham University School of Law.

2. Former Magistrate Judge for the District of New Jersey.

3. Department of Justice, University of Washington Law School. Mr. Winn is speaking in his personal capacity only and not on behalf of the U.S. Department of Justice.

4. Reporters Committee for Freedom of the Press.

5. United States Bankruptcy Court Judge, Southern District of New York.

6. Professor, George Washington University Law School.

JUDGE RAGGI: Good morning.

Everyone knows that we are here this morning for what is an important part of the work of the Privacy Subcommittee of the Judicial Conference Standing Committee on the Federal Rules.

Just to give you a little background on that work, the federal courts, obviously, are engaged in the public's business, and so the presumption is that our work, including our files, are open to the public. There are many reasons informing that presumption. Open files are important to the litigants who are involved in the cases before us. Open files are important to the public's oversight of the courts' work. Public access is also important to history. There is much that can be learned about a society from the work of its courts; from the concerns that prompt individuals to seek assistance in the courts.

All of these reasons have led the judiciary to presume that our files would be open. But increasingly, there have been concerns voiced about unnecessary disclosures of private information in court files. Some of these are not new. There has always been a concern about information disclosed in court files that could actually facilitate other criminal conduct. Identification information, such as Social Security numbers, that could be used as part of identity theft or information about individuals cooperating with government investigations, who, because they are helping to target individuals involved in crimes, could find themselves targeted by criminals.

There has also been a general concern about whether a high loss of privacy for litigants in the court will prompt people not to use the courts as a means of resolving their disputes. As history teaches us, a society where people do not think they can resolve their disputes in a court is a society where they find some other means to do so, not always positive. So we face these competing concerns of public access and protection of privacy.

The Federal Rules already provide for protection of privacy in many respects. And those are relatively recent rules. Nevertheless, the last decade's experience with greater public access on the Internet to court files has sharpened our understanding of privacy concerns. So in 2009 or thereabouts, the chairman of the Standing Committee on the Federal Rules, Lee Rosenthal, who I am so pleased is here with us today, started to receive inquiries from members of Congress that seemed to deal with both of the matters I have addressed: public access to the court. Congress is concerned about whether we are going online fast enough and whether our access is broad enough to serve the public. At the same time, Judge Rosenthal has received congressional inquiries about why we are not doing more to protect private material in these publicly available documents.

So in the best traditions of all bureaucracies, a subcommittee was formed to study this matter. This subcommittee is, of course, the one that is here today at Fordham.

We operate as a subcommittee of the Standing Committee on the Federal Rules, but I really have to say that our efforts represent a joint endeavor by both the Standing Committee and the Committee on Court Administration

and Court Management, CACM. They, of course, have responsibility for policy, and the Standing Committee has responsibility for implementation. I want to say thank you very much to all of my colleagues from CACM for helping us, and most particularly, to the former chairman of that committee, Judge Tunheim, who I am also pleased was able to join us today.

Most of you are here to serve on panels. I want to explain to you how we view your contribution in the overall work of the subcommittee. We broke our work down into two phases. The first I will call statistical. Through the work of the Administrative Office and the Judicial Center, we have been able to crunch lots and lots of numbers to get an idea of what is publicly available, what kind of private information is showing up in court files, and, just from a statistical perspective, how large a problem we have and in what areas.

With the benefit of that information, we are now moving to phase two, which is this conference. The subcommittee decided that it would be most helpful to have the viewpoints of as many different persons in the legal and related-to-law communities about public access and private information. So we have invited you today, civil and criminal lawyers, prosecutors and defense attorneys, academics, judges, and a variety of people who serve the court—who serve the court as clerks of court and in various other support functions—to come and talk to us about your experiences in these areas. I thank you so much, on behalf of the subcommittee, for giving us your time. And I want to remind you of what would be most helpful to us. You are here to educate the committee. Please be frank about what you have seen and where you identify concerns, and do not hesitate to disagree with your fellow panelists. I cannot emphasize enough our view that we need to hear diverse views on how to calibrate the balance between public access and protection of privacy.

All of this effort this morning is the work of one person, and that is the subcommittee reporter, Daniel Capra, Professor of Law here at Fordham. I thank Dan many, many times for his work for this committee. He also serves, in his spare time, as a reporter for the Evidence Committee and a variety of other tasks. As everyone says, he is a dynamo, and most particularly in the service to the judiciary. So thank you, Dan.

Of course, I also want to thank Fordham University for hosting this and for really giving a lot of thought to what the conference should involve. With that by way of welcome and introduction, let me turn it over to Dan Capra.

PROF. CAPRA: Thank you, Judge. Thank you very much for that excellent introduction, which sets forth basically what we are trying to do today.

I am moderating a panel which we have called the general panel. The subcommittee is considering at least possible changes to the privacy rules. The privacy rules are located in your materials, actually in a couple of places. There were some pamphlets that were given out by the Administrative Office, and behind Joe Cecil's report is the particular

privacy rules that were enacted in 2005, 5.2 of the Civil Rules, 49.1 of the Criminal Rules, and the like.

The subcommittee, as I say, is considering whether rule amendments are necessary and also is considering a discussion of policy changes, but all within the context of this broader idea that Judge Raggi was talking about: the balance between privacy on the one hand, and open access to court records on the other, in the light of ease of Internet access. So we thought it would be appropriate to kind of set the day with a general panel. By "general," it does not mean airy and platonic and talking about love and things like that. There will be practical discussions involved as well, but within the context of setting a broader framework.

I need to give my own thanks. First of all, I need to give my thanks to Joe Cecil for all his fine work in terms of the statistics that he has done and all the searches of the records that he has done over the past month. It has been truly amazing. He will talk about that later on today, but since I have the opportunity, I wanted to thank him for his excellent work in that respect. I want to thank Susan Del Monte, who gave me many great recommendations about who to call and who to bring here, especially for the Plea Agreements Panel. I think we have a Plea Agreements Panel that represents all the views that all the districts have been coming up with. I would like to thank Susan for giving me those suggestions.

Allyson Haynes, from the University of Charleston School of Law, I would like to thank because Charleston did a program that covered some of these issues, and she was very helpful in helping me to form ideas for this program.

With that, I am done. I would like to give you over to my colleague, who I am proud to have here on the panel, Professor Joel Reidenberg, Professor of Law at Fordham Law School and Director of the Center on Law and Information Privacy.

PROF. REIDENBERG: Thank you, Dan, thank you, judges. I think it is terrific that you are focusing so carefully on these issues.

My background is as a privacy scholar, not as a civil procedure expert. So my remarks will be focused on some of the broader privacy issues that open access raises.

To set the stage, I would like to focus on a few of the problems associated with too much transparency. We do not often think about publicly held information as giving us too much transparency in our society. But to follow up on some of the comments that Judge Raggi made just a few minutes ago, in the past, when we thought about the openness of public records and particularly about court records that were open to the public, we would find that those records still had an effective privacy protection through practical obscurity. Access to the information was not easy and physical or geographical limitations restricted how widely information in the public records could actually be disseminated or obtained. This made public record information practically obscure.

The Internet and network information flows eliminate that practical obscurity today. We now live in a context with an increasingly and

completely transparent citizen that has, I think, some very significant dimensions. I would like to focus on two points during this short presentation and make a suggestion for a way of approaching the tradeoff between openness and privacy.

The first point is that completely open access has important public safety implications. The Amy Boyer case illustrates this problem. Amy Boyer lived in New Hampshire and was murdered by an ex-boyfriend who, through access to information obtained from an information broker, found out where she lived and worked, stalked her, and shot her at her workplace.⁷ That same kind of data, locational data, can now easily be gleaned from publicly available court records, if they are online and searchable, and used just as Boyer's ex-boyfriend used the same data obtained from the information broker. That is one obvious problem.

The less obvious, but very difficult, problem is the de-contextual use of information that would be contained in court filings and court decisions. If information about individuals is extracted from court filings and exploited through data mining or combined with additional information acquired from data brokers, from other public databases or from other publicly available information, the original context is lost and the data mining leads to the development of behavior profiles of individuals, to stereotyping, and to decisions based on what I will call "secretive data processing" because the data mining and profiling is hidden from the individuals. In effect, by making all this information about the citizen so transparent, the public does not really know what happens to their personal information and, ironically, the accuracy of the information describing individuals can be compromised through out-of-context compilations and profiling.

Another obvious consequence of the transparency of personal information is identity theft. The richness of data that is in court filings would be very useful for identity thieves. A criminal can very easily masquerade as someone else if data can be taken from varied sources and combined together to provide enough personal information about the victim.

The second point is that the integrity of the judicial system is challenged. This goes back to the comments that were made earlier in today's session. Unprecedented wide access and dissemination of everyday court records and proceedings can have an impact on jurors' willingness to serve and on witness candor. If the personal cost for engaging with the legal system is a perceived loss of privacy because the data is now publicly accessible, freely searchable, and "Google-able" on the Web, the public hesitates or opposes participation in the judicial system. Similarly, parties may be intimidated by the Internet accessibility of personal information related to their participation in a court proceeding. There is a qualitative difference from the days when an observer had to go to a musty courthouse to find the data. People will be reluctant to come to court to vindicate their rights if they perceive that it makes their lives a completely open book.

7. *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001, 1005–06 (N.H. 2003).

Lastly, the transparency has an impact on perceptions of judicial integrity. The data mining that might go on with respect to litigants, witnesses, or statements made in a court filing can just as easily occur with respect to the judges themselves and the judges' personal lives. Many would be surprised at the associations about judges that might be made by data mining information in court cases just from the way judges manage their cases. So these issues suggest that public safety and the integrity of the judicial system are at risk from over-transparency.

As to my suggestion, I would like to focus on the approach to the trade-off between openness and privacy. I know that court systems have focused very carefully on redaction as one potential solution. The redaction model is also used outside the United States, in many foreign jurisdictions, as a way of balancing privacy interests with court oversight. But another model that I would like to recommend as a very worthwhile avenue for the courts to explore is limited-purposes disclosures. This approach makes personal information available publicly, but only for defined purposes. We see this approach in American legislation, specifically the Driver's Privacy Protection Act.⁸ Under the Act, driver's license information is a public record, but the data cannot be used for purposes other than those enumerated in the statute. The permissible purposes relate to the reasons why the data is public information such as driver authentication, car insurance, recalls, that sort of thing.

I think we need to explore this approach in the court context. The court system should be addressing key questions. Why is the information about these individuals publicly available? What is the reason for the information to be publicly available? What are we trying to accomplish? Can we construct limits on use in ways that are compatible with the public purpose for the information being out there?

I will close with that.

PROF. CAPRA: Thank you, Joel.

I turn now to Ron Hedges, former Magistrate Judge for the District of New Jersey. He worked very hard to get the Sedona Conference to come up with principles on privacy and public access to courts in a civil context. I will also put in a plug that he is an excellent Special Master in the matter of *In re REFCO*.⁹

MR. HEDGES: As are you.

PROF. CAPRA: I do not know about excellent, but I am as well. Over to Ron.

MR. HEDGES: Good morning. Thank you for allowing me to be here. I want to spend a few minutes talking with you about how The Sedona

8. 18 U.S.C. § 2721 (2006).

9. *In re REFCO* Sec. Litig., No. 07 MDL 1902(JSR), 2010 WL 304966 (S.D.N.Y. Jan. 21, 2010).

Conference¹⁰ [Sedona] came up with its Best Practices on Public Access and Confidentiality in Civil Litigation.

Sedona works through “Working Groups.” The Best Practices were a product of Working Group 2 [WG2], and I was a member of the editorial team. I think I can tell you, not surprisingly—I expect you are going to hear it today—this was a very contentious process. There were a number of interests involved.

There were a lot of people on WG2 who were very pro-access. There were others representing corporate interests that were concerned about protecting secrets, and the like, that took an opposite view. It took four years to get the Best Practices to the public version that is now available. As I said, the process was contentious throughout.

What we did was to come up with a draft, and we did a series of “town halls” around the country, five or six, inviting different constituencies to come in and comment. It is fair to say that we have a couple of themes that go through everything.

The first theme was a very basic distinction between discovery materials that generally do not see the light of day and that people can protect as much as they want under Rule 26(c)¹¹ or the like and materials that are filed in court. We were very much opposed to the concept of confidentiality orders that included an automatic sealing provision such that, if parties exchange discovery materials, they can simply—by filing an affidavit or whatever—seal materials filed with the court. That is a First Amendment violation.

I realize that there has always been a concern that we are driving people out of the system because of transparency issues. We can debate that all day, if we need to do that. But it is fair to say that Sedona came down very much on the idea of open judicial proceedings, including jury selection, openness in settlements, and openness in anything that may be filed with the court. So we have the basic distinction between what goes on between parties and what goes into courts.

We also came out very strongly on the concept of intervention. If there are sealing orders filed, the public or the public is representative, which is often the press, should have an opportunity to come in and challenge these before a judge.

I am happy to say that we have been percolating along for three years now. We are about to go online with another version of a database that accumulates case law that has developed in the last several years, of which there is an enormous amount. I see a trend of the future that we will see a lot more issues created by electronic filings. For example, inadvertently produced materials may be on the Internet that should not have been there and how those materials are brought back.

10. THE SEDONA CONFERENCE, <http://www.thosedonaconference.org/> (last visited Sept. 23, 2010).

11. FED. R. CIV. P. 26(c).

In a nutshell, that is how The Sedona Conference put together the Best Practices, what the Best Practices are intended to accomplish, and where the Best Practices and WG2 may be in the course of the next several years.

PROF. CAPRA: Thank you, Ron.

Peter Winn has been writing articles in this area for a number of years now. He provided comments on the initial redaction rules that came through. He has written an article dealing with some of the issues that the subcommittee is investigating today. Peter Winn is an attorney for the Department of Justice and Adjunct Professor of Law at the University of Washington Law School. Let me turn it over to Peter.

MR. WINN: Thank you very much.

I got into this business by accident several years ago when one of the local judges in Seattle asked me to write an article about the privacy implications of putting judicial records online.¹² Over the next few years, I became less and less happy with the analysis in that article and wrote another that came out last year in the *Federal Courts Law Review*.¹³ I am already starting to reconsider some of the arguments in that article.

I keep changing my mind because two things are going on here that are very difficult to reconcile: we want court records and proceedings to be open and transparent, but we also want to make sure that sensitive information in the hands of the courts is protected. Both goals are important. Transparency is necessary for the legitimacy of the system, necessary to maintain a healthy political feedback loop, and necessary for effective public oversight. However, at the same time, courts also have a fundamental responsibility to engage in a truth-finding process. To find the truth, courts need access to sensitive information from the participants in the process—not only the litigants, but jurors and witnesses as well—people who are critical for the fact-finding process to work. Traditionally, these judicial participants have been more or less comfortable disclosing their sensitive information with the understanding it would be used only for purposes of resolving the dispute in the context of the judicial process and would not come back to bite them. When participants start getting burned or hurt after disclosing their sensitive information to the court—when the information is used for other purposes than resolving the dispute—litigants, witnesses, and jurors are going to be less and less inclined to tell the truth in the first place. Thus, to make the system work we need both transparency and privacy.

In the good old days of the paper-based system, we could have our cake and eat it too. We could have both transparency and privacy because of the practical obscurity of paper. Paper records were public, or at least ninety-nine percent of them were public—the ones that were not filed under seal. But because paper records were difficult to access, very few people were

12. Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004).

13. Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135 (2009).

ever hurt when sensitive information was filed in the so-called “public” judicial system.

By contrast, electronic information is not practically obscure—its very essence is to be easy to access. In this new world of electronic information, we have become increasingly aware, sometimes shockingly aware, of just how complicated and difficult it is to have both a transparent system and a system that protects sensitive information. It was probably just as difficult when people started to use paper in the thirteenth century, but we had 800 years to get used to it.

So where are we in the federal system? I like to think of the federal system as a guinea pig, because it was out there first. That was probably because we did not know any better—the benefits seemed obvious, the costs hidden by the habits of centuries of using practically obscure paper. The state courts have been the next wave and are struggling with the same problems. I have learned much from watching the transition in the federal system, but, in many ways, the state courts have much greater challenges. Juvenile cases, divorce cases, probate cases, all present much more difficult problems than those typically faced in the federal system.

In the federal system, to some extent, we have only jumped halfway into the swimming pool. PACER is still not Google-searchable. It still has a lot of the attributes of practical obscurity, simply because of the difficulty of accessing the electronic information. I think it is almost certain that it is going to be Google-searchable in ten years or sooner. It may be Google-searchable much sooner than that. The law.gov movement, largely under the leadership of Carl Malamud, is already in the process of seeing to it that federal court records are online in a Google-searchable manner.¹⁴ It is just in the nature of electronic information that it will become much more accessible and will raise more and more difficult problems in the context of protecting sensitive information.

So how do we protect sensitive information in courts? There are three basic strategies.

One is not to put the information into the system in the first place. Categories like Social Security numbers, names of minor children, financial account numbers—a lot of times you simply do not need that information in a pleading to start with—

JUDGE MORRIS: Excuse me, let me just interrupt. The word is called bankruptcy.

MR. WINN: Right, bankruptcy.

JUDGE MORRIS: I will get there in a minute.

MR. WINN: I stand corrected. You do need to put quite a lot of sensitive information in a bankruptcy file as a matter of law. So that strategy does not work very well in bankruptcy. And more generally, that

14. LAW.GOV: A PROPOSED DISTRIBUTED REPOSITORY OF ALL PRIMARY LEGAL MATERIALS OF THE UNITED STATES, <http://public.resource.org/law.gov> (last visited Sept. 23, 2010).

strategy will not work when sensitive information needs to be filed with the court.

A second strategy is to try to put it in the judicial system either under seal, or offline. The 2007 privacy rules permit the use of protective orders to take documents or information offline—similar to how Social Security and immigration cases are routinely handled today. This strategy has not yet widely been adopted by lawyers. Instead, agreed sealing orders are still the norm. However, while reliable to protect sensitive information, agreed sealing orders often fail to meet the required common law and constitutional standard—a standard seldom enforced in the absence of a dispute. As electronic court records become increasingly subject to computerized audits, and as the improper use by attorneys of the agreed sealing order to protect sensitive information becomes subject to greater legal scrutiny, the agreed sealing order, itself, may become a thing of the past. If that happens, using protective orders to take sensitive information offline may become the only practical alternative.

The third idea to protect sensitive information was just raised by Professor Joel Reidenberg. That is, to prevent people from using sensitive information filed in court records for secondary uses unrelated to the administration of justice. A general rule permitting disclosure of certain information in the context of the public court proceeding but prohibiting disclosure of the same information outside the courthouse would probably be unconstitutional. In my article in the *Federal Courts Law Review*,¹⁵ however, I suggested that a more limited set of information management requirements, unrelated to any specific content, and imposed solely on bulk data aggregators might pass constitutional muster. Data aggregators might be required by contract to adhere to certain information management procedures in exchange for the grant of bulk access privileges. Thus, for instance, they might be required to “scrub” their data for inadvertently filed Social Security numbers (as many of them do now anyway). However, with the exception of limited computer “scrubbing” techniques, I have grave doubts that general rules to address the more difficult problem of secondary use of information from court files—for instance, “data mining” judicial information for commercial purposes—will ever be likely either to pass constitutional muster or be very effective as a practical matter at protecting sensitive information. In conclusion, I do not see any obvious, easy, one-size-fits-all solution.

I do have some hope that we will be able to muddle through and find solutions to these problems, but I do not think it will be easy, or that the solutions will be found quickly. We have three basic tools available: rules, training, and technology. I think the rules that the federal courts have developed are reasonably good. I am just not sure that there is much more you can do in the rulemaking process. You cannot have a general rule forbidding the filing of all sensitive information—much of that information must be part of the public court record, and what is sensitive in some

15. See Winn, *supra* note 13.

contexts is not sensitive in others. The courts have to rely on the parties and their attorneys to identify the sensitive information in their filings and take affirmative steps to protect it. That is pretty much all the rules do now, and pretty much what any rules in the future would ever be able to do.

The more significant area of deficiency—that is, the area where there is most room for improvement—is the need for better training of lawyers. Most of us have developed our intuitions in a paper-based world of practical obscurity. We have taken it for granted that documents filed with the clerk's office will stay in the court system and will not surprise us with unexpected secondary uses. Many older lawyers still have their secretaries file their pleadings on the PACER system, and lack any real personal knowledge of the system. The younger generation is much more technologically literate, but we can all do with better training. It may not be until our children's generation is practicing law that lawyers will become better attuned to the problems of handling judicial information properly, given the wider and more open set of possibilities for its secondary use. We, who have been trained in a particular way, will simply have to die and let somebody else take over.

The area with potentially the most promise is the improvement offered by better technology. We can do a much better job facilitating access. Court decisions, briefs ought to be Google-searchable. We can do a much better job than we are doing protecting sensitive information in the process, and technology is an important part of that solution. Professor Edward Felten has highlighted many of these potential solutions. These technological solutions are possible only if lawyers and judges begin to work proactively with computer programmers. We tend to assume that computer technology is a given when we engage in rulemaking or when we plan our CLE programs. It is not. The problems that we fashion rules to try to address, and that we train lawyers to better understand, are in part, creatures of a particular form of technology. The design of that technology can be changed to solve some of these problems. However, these technological changes often spawn new problems, making new rules and training necessary. It is an endless cycle, but that is no reason to give up.

As we struggle with these problems in the federal system, much can be learned from watching our sister courts in the state system navigate these electronic rapids. State courts have much larger dockets, and often manage much more sensitive information than do the federal courts—one need only think of the type of information handled by family courts and in juvenile criminal proceedings to see just how difficult these challenges are. One lesson that appears to have been learned by both the state and the federal courts is the importance of involving as diverse as possible group of interested parties in the development of both the rules and the technology which will be used as courts go online. At the Williamsburg conferences where state and federal court personnel meet to explore different ideas,¹⁶

16. See NATIONAL CENTER FOR STATE COURTS, http://www.ncsconline.org/images/NCSC_GeneralBrocWEB.pdf (last visited Sept. 23, 2010).

there appears to be a consensus that it is critical to get everybody to the table when you are making decisions. The process is similar to that involved in drafting an environmental-impact-statement. When all the affected players are at the table, the conversation can be contentious. However, it makes it more likely you will identify the problems at the front end, when it is still possible to hash out some solutions. Furthermore, it makes it more likely that the proposed solutions you reach will be more likely to work, with greater buy-in by participants in the end. It is nearly impossible to identify the problems of managing sensitive information when you try to think these things through in the abstract. You have to get everybody at the table and explore the problems before you can identify solutions.

Finally, a related point I would like to make is that sensitive information is largely a matter of context. Information is not sensitive simply because it jumps out at us that it needs protection. It all depends. Information can be sensitive in some contexts and not in others. For instance, information excluded by the application of the Rules of Evidence is not sensitive if disclosed to the public; but it is very sensitive if disclosed to the jury. Thus, a motion to suppress can be filed and disclosed to the public subject to the classic judicial oversight concepts. However, if a juror uses the PACER system to learn about the cocaine seized by an illegal government search or a defendant's prior criminal record—information which may be public and online—we may no longer be able to provide the defendant a fair trial, consistent with fundamental notions of due process.

In the eighteenth century, Jeremy Bentham argued against the exclusionary rules of evidence, arguing that jurors should be trusted to make decisions after hearing all the facts.¹⁷ As electronic information becomes more and more difficult to control, we may be forced to adopt Bentham's view of the exclusionary rules. However, I believe and hope that we all can focus on this problem and get a handle on it. I think we have to get a handle on it. But I really do not have any obvious, easy solutions about how to do it, other than to try to muddle through, and continue to work together.

Thank you.

PROF. CAPRA: Thanks, Peter.

Our next speaker is Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press.

MS. DALGLISH: Thank you. Good morning. It is nice to be here.

The Reporters Committee, for those of you who do not know, is a legal defense and advocacy organization based in Washington, D.C.¹⁸ We have been around for forty years. We help journalists defend themselves when they are in trouble and gain access to all sorts of state and federal records and proceedings. I have one entire program area, run by a super-fellow, an

17. See JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 15–16 (1827).

18. THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org> (last visited Sept. 23, 2010).

experienced litigator who has spent a year with us, and they are focused solely in the area of secret courts and prior restraints. This is of great interest to me. I am a former journalist and a former litigator. All of my lawyers are former reporters.

I need you to understand a little bit about the landscape that journalism is operating in right now. Whereas all of the rest of you are probably going, "Oh, my God, the Internet. Everything's available," reporters are going, "Oh, my God, the Internet. Everything's available. Suddenly I might actually be able to do my job effectively."

We are in a situation where there are a lot fewer journalists in mainstream news organizations. By having easy access to this information, they are able to do a better job of reporting the news to the public. There are some jurisdictions—probably not Manhattan, but certainly in places like Utah—where you have many local newspapers and really only one federal court that covers an enormous geographic area. Now they are able to accurately and completely report news stories as well. We view the PACER system as miraculous. It by and large works very, very well. I work on cases all across the country, and I love it, because I no longer have to rely on a local lawyer to go and dig out some information about a case I have heard about.

There are, as I said, fewer reporters. Many of them who were able to support a family on a journalism income in the past are no longer able to do that, so you have a lot more independent journalists. Money is an obstacle to PACER. A lot of them just cannot even afford to use it anymore.

I want to break my comments, very briefly, down into several categories. One, I would like to talk about the identifiers issue. I would like to talk briefly about plea agreements. I would like to talk very briefly about settlement agreements, the trend toward anonymous juries, and then the most important problem of all, which really was not even on the agenda, the issue of disappearing cases in the federal docket system.

First of all, identifier issues. I was one of the folks who testified back in 2002 or when you came up with the first rules. By and large, I think the redaction system that you have implemented that allows the last four digits of bank account numbers and Social Security numbers works fairly well. It does not cause a lot of phone calls from reporters. They are not all that concerned about it.

One thing that is a problem, however, is the birth date issue. Reporters' issues have to do almost exclusively with making sure they have the right person. I come from the land of Johnsons, Andersons, Sorensens, and Carlsons. And there are not just hundreds of them; there are thousands of them. You need to make sure that you have the right John Anderson. Reporters do not want to identify the wrong John Anderson as a criminal. They want to be accurate. Often the best way to ensure you have the right John Anderson is to know the birth date of the person who has been charged with a crime. Perhaps even worse than having personal identifying information released about someone actually involved in a court case is when information is released and everybody thinks it is about the wrong

guy. That is a real problem, and the more information you can provide, particularly a birth date, helps reporters identify the right person.

If you do not need all the rest of this stuff—I understand bankruptcy is an exception—if you do not need it, why are you collecting it? I think you really need to think very carefully about the identifying information that you do collect in the federal court files.

Plea agreements are something that reporters traditionally have relied upon—not every day, but sometimes there is very useful information that appears in those cases. It is helpful to flesh out a story, to identify trends. Lately, with the reporters who are calling me and asking me, “Why can’t I get this plea agreement information?” it has to do with business cases, where they are trying to figure out who in Enron or who in whatever other criminal economic case they have is talking to whom. That information is very useful.

One of the problems that I hear is from reporters who work for the national publications and national broadcast stations. You guys have rules that are different all over the country. I have one summer intern coming in this summer who is going to work on just keeping track of what the feds are doing with plea agreements, because we need to be able to tell reporters what they can get and what they cannot get in each district.

There is, in my mind, an appalling trend toward completely anonymous juries in the federal system and the state system as well. I understand that we are asking people to give up a lot when they become a juror. But you know what? That is something that, when you are an American citizen, you just sign up for. We have a responsibility to serve on juries. I think the notion that you cannot find out who jurors are in the federal system, unless you are really, really lucky or you file requests for it months and months after a case is resolved or you are lucky enough to sit through a trial, to find out who is sitting on that jury panel—I think it is appalling. I think a criminal defendant is entitled to a fair trial, and part of that is having the ability for the public to know whether or not the people who were empanelled on that jury should have been empanelled on that jury.

The best case I can think of about this—and it was not a federal case, but I think it illustrates my point—there was a murder case being tried in New Jersey. It resulted in a mistrial. *The Philadelphia Inquirer* did a story about what was going on in this entire case.¹⁹ They were the ones that figured out that the jury foreman did not even live in New Jersey. She was from Pennsylvania. She had apparently had a car licensed in New Jersey. She got elected to be the jury foreman in this murder trial. That is just appalling. And it was a reporter who figured that out.

When you came up with the electronic court access rules, this completely slipped right by us. It was not until probably six months afterwards that reporters were calling saying, “What is going on? All of a sudden we

19. Rita Giordano, *Post-Neulander Trial Contempt Case Near End*, PHILA. INQUIRER, May 24, 2002, at B3.

cannot find out who is sitting on a federal jury unless we are actually sitting there and we might overhear a name.”

It turned out that this was part of the electronic access rules that completely slipped by us. You would have heard from us if I had been paying better attention way back when.

Settlement agreements—I think Ron is going to talk more about all of this. There is some very important information that can be accessed. It is of great public benefit. Probably the best example—and perhaps Dave McCraw can talk about this a little bit more from The New York Times Company standpoint—*The Boston Globe*—again, I think these were mostly state court cases—found out a great deal of information from their Pulitzer Prize-winning stories on priest abuse in the Archdiocese of Boston.²⁰ Most of that information came after they were able to go back twenty, thirty, forty years and get a lot of those settlement agreements unsealed. I think when the safety of children is involved, there is no reason whatsoever why all of these things need to be sealed. It is a public safety issue.

Finally, the secret docket cases. I never in a million years would have thought this would be possible. We have a system of open courts in this country. I understand that in certain circumstances when you are conducting a criminal investigation and you have not completed all of the indictments in your case that you are trying to present and you are trying to get all your ducks in a row and get people charged in the right order, maybe it has to be temporarily sealed. But right now, as far as I can tell, there is not a single district in this country who has figured out how to reopen those completely secret cases once they have been closed.

What usually happens is a U.S. Attorney will come in and say, “We just caught this really bad guy,” and you will go in and try to find the case—this is not in every district, but in a fair number of them—and it does not exist. You go to the clerk of court and they say, “We cannot open it unless we have a court order.” You go to the judge and he says, “I cannot unseal it unless the U.S. Attorney tells me I can.” And you go to the U.S. Attorney and they say, “Well, that is a problem that the judge is supposed to come up with.”

Meanwhile, at one point several years ago, we found thousands of cases in the federal system where docket numbers were just missing. Now, I know the Judicial Conference has attempted to address this issue, but it has not been fixed yet.

My very last point is on the civil side. There was a case we got involved in about a year ago, involving a federal civil case that was conducted entirely in secret in Pennsylvania for seven years. It was a situation where a woman brought a claim under the federal anti-pregnancy discrimination law.²¹ She sued her former employer, who, she contended, fired her

20. *Predator Priests*, BOSTON GLOBE, <http://www.boston.com/globe/spotlight/abuse/predators/> (last visited Sept. 23, 2010).

21. *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 371 (3d Cir. 2008) (affirming the district court’s order to seal the case).

because she had an abortion. This thing was litigated for seven years. The only way we found out about it was when it was appealed to the Third Circuit and the Third Circuit decision was released and the local legal newspaper said, "What is this?" They went back to get the documents, and the entire case was sealed.

That is just plain not right.

PROF. CAPRA: Thanks, Lucy.

I will say there are people in this room who are on the case of some of the issues that Lucy was dealing with, particularly disappearing docket numbers, entirely sealed cases. That report, to my understanding, is forthcoming.

So there has been significant work done on that. The Privacy Subcommittee and the Sealing Subcommittee have been kind of working in tandem on these issues, because the issues do tend to overlap in some respects.

But thanks for bringing that up. That is an issue that the Judicial Conference is working on.

You have already heard the fact that some of these issues are much more difficult in bankruptcy than anywhere else. We will see when Joe Cecil presents his data that many of the unredacted Social Security numbers that have been found in the two-month search that Joe did were in bankruptcy proceedings. So we thought it appropriate in terms of setting the table for the rest of the day to bring in an expert on these matters. That is Judge Cecelia Morris, who is from the Southern District of New York Bankruptcy Court and also served as the clerk of that court for many years.

I turn the floor over to Judge Morris.

JUDGE MORRIS: Okay, everybody, get a pen and paper out right now and number from one to five. I am serious. Do it. I was given this idea by Karen Gross, the president of Southern Vermont College since 2006.

I want you to write down five entities that you owe money to. Do it. This is a serious test. Besides writing down who you owe money to, write down how much you owe them. And do not tell me you do not have any debt. If you have a phone in your pocket, you have debt, because they give it to you on credit. They give you electricity on credit. So you have debt.

While you are doing this, I want your full name, every name you have been known under, and your Social Security number. Your monthly mortgage payments, your cable bill, your insurance premiums. Keep writing. I see people not writing.

I want the ages of your minor children. Are you getting there?

Now, beginning right here, I want you to come up to this podium and read everything you have just written to this room.

That is how it feels to file bankruptcy.

Privacy is important. Last year the consumer cases skyrocketed, and 1.3 million entities filed bankruptcy, most of those filings were individuals that had to do exactly what you did. And, by the way, we are putting it on the Internet.

MS. DALGLISH: Full Social Security numbers are going on the Internet?

JUDGE MORRIS: No, full Social Security numbers are no longer going on the Internet. But that is what you are doing, and we are sending your full Social Security numbers to your creditors. They are not going on the Internet.

By the way, we are also putting this information on PACER at an incredibly low price. The idea that you cannot afford to go on PACER at how much a page? That is sort of beyond me.

There is a difference here also between the number of cases filed in federal district court of about 300,000 and the 1.3 million cases filed in bankruptcy courts. Bankruptcy, as we have already heard, more than any other area of law, has a pronounced dichotomy between the debtor's privacy rights and the rights of creditors and the public to this information.

Section 107 of the Bankruptcy Code states that information filed in the bankruptcy court is "public records and open to examination by an entity at reasonable times without charge."²² That is what it says.

The press may want the birth date. My financial world wants my Social Security number. In 1995, when CM/ECF²³ went live, I did not even know my Social Security number. Why did I not know it? I did not have to have it for every credit card, for every financial transaction. Today it is memorized. Why? Because it is part of every financial transaction.

So I am filing bankruptcy. What do I need? I need my name, address, birth date, familial situation. Am I married? How many kids do I have? What are their ages? Employer, current income, assets, including real property, jewelry, household goods, liabilities, current rent, mortgage payment, taxes, club fees, medical expenses, tuition payments, charitable donations, creditors, judgment, liens, leases, security deposits, IRAs, and all other retirement accounts. Each of those entities that I owe money to needs correct information in order to prosecute their claim. Your credit life is now tracked through your Social Security number.

The bankruptcy electronic filing system is vital to the practitioners, the creditors, the judges that participate in the bankruptcy system. It also greatly expands the number of individuals who can easily access the information. The debtor and the creditors and the public all benefit from the thorough disclosure of information. My name is Cecelia Morris. I do not want to be confused with the Cecelia Morris that filed bankruptcy in Brooklyn. It is similar in this way to the no-fly list that unless you have another identifier to distinguish Cecelia Morris in Poughkeepsie and Cecelia Morris in Brooklyn, it would mess up my credit report.

In response to privacy concerns, we have all heard about the December 2003 rules that allow only the disclosure of the last four digits of a Social Security number on the publicly available bankruptcy petition. You still

22. 11 U.S.C. § 107 (2006).

23. CM/ECF (Case Management/Electronic Case Files) is the case management and electronic case files system for most United States federal courts.

have to file the Social Security number, because your creditors are entitled to the full Social Security number. It is only the public information and the public docket that redacts everything except the last four digits. Again, you want to make sure the right parties and interests have the right notice, the proper notice, and are necessarily at the meeting of creditors.

When I described to you about coming up here and talking, that is the meeting of creditors. The meeting of creditors is run by a trustee. "Raise your right hand. Do you solemnly swear that everything you have told me on this petition is true and correct? Does anyone have a question?"

Under this new system, most of the account numbers are redacted, including bank accounts, credit cards, loans. When a case is filed pro se, the court makes every effort to protect private information since pro se debtors will often fail to redact confidential information. There is good quality control in the bankruptcy court clerk's office. There is really very good quality control on the petition filed by attorneys. The lawyers know how to do it. It gets done. The pro ses hand it in physically—remember, the electronic case filing system in the bankruptcy court is made for lawyers. It is not made for pro ses. Pro ses still have to come to the court.

The last thing that happened to me in the courtroom that was just blatant was when a lawyer had filed a petition with the wrong Social Security number and, in filing with the wrong Social Security number, she then filed a motion that said that was the wrong Social Security number and this is the correct one. The motion had the full Social Security number. Needless to say, she was chastised in court. She also fired a staffer. I am sure that was not the only thing the staffer had done, but that incident underscores the importance of maintaining a high level of discipline when it comes to redacting information.

Now let's talk about creditors.

Everybody is familiar with the Bernie Madoff case. Does anyone in the room not know about Bernie Madoff and the Ponzi scheme? Guess what happened? All of the proofs of claims have attachments. What did they do with the attachments, these creditors? They scanned those—Social Security numbers, home addresses, investment account numbers. Some of these people are worth a lot of money. With their Social Security numbers, you can go down to the bankruptcy court or sit at home on your computer, and you can find out a lot of information.

If I had to identify the greatest source of unredacted information, I would point to proofs of claims filed by pro se creditors. Not all creditors are large banks with legal counsel; many creditors are small businesses or individuals who will attempt to fill out a proof of claim themselves. As in the Madoff case, they will attach all sorts of identifying information about both the debtor and themselves. Compounding this problem is that these proofs of claim, unlike the bankruptcy petition itself, is not quality controlled by the bankruptcy clerk's office.

With respect to pro se debtors and pro se creditors, it is clear that they do not know why it is so important to redact identifying information. The court and the official forms may be able to do a better job at clarifying why

things need to be redacted, to prevent identity theft, and how to redact information, block it out. Clear, unequivocal instructions such as, "Do not give us your full Social Security Number in this proof of claim."

PROF. CAPRA: Thank you, Judge.

As Judge Raggi pointed out in her introduction, a historical kind of framework for this is going to be very valuable for the committee. We could not get anybody better on that particular task than Professor Maeva Marcus. I would like to turn it over to her. She is a Research Professor of Law and Director of the Institute for Constitutional History at George Washington University Law School.

PROF. MARCUS: Thank you.

After reading the summaries of what will be discussed today, and after hearing my fellow panelists, I realize that historians' concerns are somewhat different from the problems on the conference agenda. We take the long view: we want court papers to be saved exactly as they were filed and to be accessible in the future, because they are a fruitful source for all kinds of historical research. Since the beginning of the national government in 1789, the operations of the federal judiciary have played a significant role in the development of the nation, and no one today can anticipate what particular topic will be of interest to scholars in the coming decades. It is impossible to determine what will be relevant and important to the questions that will be studied fifty or a hundred years from now. Historians, therefore, do not want records to be changed in any way or destroyed.

They also do not want records to be sealed. I do not have firsthand experience with case papers that have been sealed. I do know, however, that papers are sealed too frequently, and litigation has ensued. If these papers are not eventually opened, who knows what will have been lost to history. Historians would urge the privacy subcommittee to devote the time and energy to finding technological solutions to practical problems like the redacting of information that would identify individuals or making voir dire transcripts public, so that scholars can have access to as many court papers as possible in the future. I understand that there are instances in which sealing the record, or part of it, is the only feasible solution at the moment. I would encourage the subcommittee to consider time limits for sealed papers.

Time limits have been used in a variety of situations where privacy is a concern. Judges who leave their papers to public repositories, for example, often provide in the deeds of gift that the collections cannot be used for a specified length of time. We assume, especially when the time limit is stated as "after all judges who served with the subject have left the bench," that the concern is to spare embarrassment for the judge's colleagues. But often a judge's papers contain items such as information about litigants that raise privacy concerns. Historians sometimes find copies of court filings in these collections, and these papers do not necessarily have the redactions that you find in the official copies of the documents. And this is a good thing for us. The very items of information that are redacted are often

useful to scholarly studies. While the judge and parties might not want this information disseminated at the time the case is being considered by the court, we would like it to be preserved. Historians believe that primary sources should be kept just as they originated. No changes should be made by another hand. If a time limit is imposed on sealed court records or redactions, I think that privacy concerns would dissipate.

As illustration of historians' need for unadulterated court papers, I can point to a number of very important books whose authors have used federal court records as their primary sources. Most of these concern courts in the eighteenth and nineteenth centuries. Mary K. Bonsteel Tachau produced the only monograph dealing with a federal district court in the 1790s, an in-depth study of the court in Kentucky that served by law as both district and circuit court.²⁴ My own work on *The Documentary History of the Supreme Court of the United States*²⁵ required many visits to regional archives to find the lower federal court records that would reveal how and why the case was brought to the Supreme Court.

For the nineteenth century, Christian Fritz's book, *Federal Justice in California: The Court of Ogden Hoffman, 1851-1891*, is a perfect example.²⁶ This monograph illustrates a new trend in judicial history. Formerly, and still today to a large extent, our conclusions about the role of courts and judges in our society were based on appellate opinions. But a thorough study of a particular district court provides a view of the operation of law that had not been available to us previously. We learn about all kinds of judicial business that did not eventuate in appellate court decisions. The great variety of litigation, the people involved in it—and the trial court involves the largest number of people in the federal system—all inform the legal, economic, and social history of the period being studied. For an accurate picture to be drawn, records cannot be tampered with. Nothing has been removed from the eighteenth and nineteenth century records used in these works. If information is removed from twenty-first century court records, historians will not be able to produce equally valid studies.

Some authors who have tackled twentieth century topics that required research in federal court records have found the court records useful but had to supply information that had been redacted from them. Often, this information was found in copies of these court documents in private collections. Examples include Allen Weinstein's book, *Perjury: The Hiss-Chambers Case*²⁷ and Stanley Kutler's work, *The American Inquisition: Justice and Injustice in the Cold War*.²⁸

24. MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816* (1978).

25. *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800* (Maeva Marcus et al. eds., 8 vols., 1985-2007).

26. CHRISTIAN G. FRITZ, *FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851-1891* (1991).

27. ALLEN WEINSTEIN, *PERJURY: THE HISS-CHAMBERS CASE* (1978).

28. STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* (1982).

Writing history has changed a little bit in the twenty-first century. For example, a book on *Bush v. Gore*²⁹ came out sooner than it would have in the twentieth century, because all the Florida court records were on the Internet, and the author was able to do research in those records quickly.

I have addressed myself to the privacy concerns with which this conference is concerned. Let me just say in conclusion that there is a larger question in the minds of historians, and that is the condition of the permanent records and where they will be found in the future. Everyone seems to be talking about instant access online. Will the courts continue to administer the electronic database or will electronic records be turned over to the National Archives, as the law requires?

The records of federal executive agencies—and lower federal courts are treated as agencies by the statute—are to be turned over to the National Archives, and it is the National Archives' responsibility to decide which records should be kept permanently. When space for paper records was an issue, there were fights over the destruction of records by the National Archives, and court records often were involved.

About thirty years ago, for example, the National Archives decided to keep all bankruptcy records from the nineteenth century but to destroy a large portion of the twentieth century records because there were too many of them. In the early 1980s, Chief Judge of the Northern District of California Robert Peckham and a group of historians began a campaign to encourage the National Archives to rescind its decision. They were partially successful. The Archives agreed with the historians on a sampling plan that would preserve a sufficient number of twentieth century bankruptcy records to enable economic, social, and historical analyses to proceed. But I gather that this sampling may not yet be in place.

A similar problem has befallen the records of other federal courts. The National Archives put on hold its most recent records schedule, because of opposition to the plan to destroy a large number of court records. The Archives agreed to do an assessment, but that has not been completed.

Historians face many obstacles to using court records in their research. Even before the advent of electronic records, courts were derelict in sending their papers to the Archives. We expect to find court records in regional archives, but often they just are not there. Working in the 1980s, David Frederick, who wrote a history of the Ninth Circuit from 1891 to 1941,³⁰ found no records in the Archives but, after searching the courthouse, found some relevant material in the clerk's office. When I was working on my *Steel Seizure* book³¹ in the 1970s, I, too, looked for records at the Archives but ended up finding them at the D.C. courthouse where the steel companies filed suit. When you are lucky enough to find that a court

29. CHARLES L. ZELDEN, *BUSH V. GORE: EXPOSING THE HIDDEN CRISIS IN AMERICAN DEMOCRACY* (2008).

30. DAVID C. FREDERICK, *RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891–1941* (1994).

31. MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977).

actually has sent its records to the regional archives, you are faced with a warehouse of records and no good way to search for exactly what you would like to see. Electronic records represent an advance, because they, at least, are searchable. Are they permanent, however? And historians have found that the National Archives' own database is difficult to use and behind the times, so sending records there may not be the best thing for historians, though the law has not changed.

PROF. CAPRA: Thank you.

First, I want to ask Ron Hedges about the sealing issues. Just being involved anecdotally in cases, I see that it is kind of automatic that lawyers file things under seal. Is there something that needs to be done about this?

MR. HEDGES: I do not think it is automatic that lawyers file things under seal. I think it is automatic that lawyers sign protective orders that have provisions in them that really govern discovery, and some place in that protective order there is a sealing provision.

PROF. CAPRA: But in *REFCO*,³² we had filings just filed under seal automatically, when they did not have any confidential information in them that we could see. Does that happen routinely, in people's experience?

MR. HEDGES: I think, depending on the nature of the litigation, yes. I supervised a lot of IP litigation, and it is common in patent litigation and the like to want to protect information because someone thinks there is a commercial secret somewhere that cannot see the light of day. The fact of the matter is, there are not many things in civil litigation that need to be filed under seal.

PROF. CAPRA: On the issue of anonymous juries, I do not know, Lucy, what the reference was to the electronic access stuff that you let go by, but there is nothing in the rules that I know about that deals with anonymous juries—in the privacy rules.

MS. DALGLISH: My understanding is, it says, while the case is pending, you cannot get it, and afterwards you can go back and make an application. Then, when the entire case is concluded somewhere down the line, you might be able to go back and do it.

PROF. CAPRA: That is not one of the Judicial Conference's rules, in my understanding. Is it?

MS. DALGLISH: I was told that it happened at the same time as the electronic court access rules.

PROF. CAPRA: I just think that it is a case-by-case approach. Am I wrong, Judge?

MS. DALGLISH: No, it is not case-by-case.

PROF. CAPRA: In terms of what CACM has on this, is there anything on anonymous juries?

MS. DALGLISH: In other words, if I am a reporter, I can go to any federal court in the country while the jury is being selected and they have

32. *In re REFCO Sec. Litig.*, No. 07 MDL 1902(JSR), 2010 WL 304966 (S.D.N.Y. Jan. 21, 2010).

just been empanelled, and I can go to the clerk of court's office and say, "Can you tell me the names of the individuals on this jury?" I am not aware of a single U.S. district court in this country that would let you have it while the case is going on.

PROF. CAPRA: I am just inquiring as to where this doctrine comes from. Judge Huff wants to speak.

JUDGE HUFF: Isn't there a ninety-day hold on filing transcripts to permit the redaction process to occur?

JUDGE TUNHEIM: There is, and transcripts of juror voir dire are generally set aside separately.

PROF. CAPRA: This is not an anonymous jury rule per se. We are talking, really, about the transcripts, which leads us to the panel.

MS. DALGLISH: If you go and listen in court and attempt to catch their name, you can hear their name. If you have missed jury selection and you want to go in to the clerk's office and say, "Can I have a list of the folks who were empanelled?" they will tell you no. I am telling you, this is going on all over the country. I get about three phone calls a month.

JUDGE TUNHEIM: I am not aware of any rule or policy that affects that. You are probably right. In most instances, it depends on what the clerk's office will turn over to you. I think technically that should be available. But it is not the subject of any rule or policy that I am aware of.

PROF. CAPRA: Mr. Hedges?

MR. HEDGES: The big debate going on these days now is in large trials, where there are extensive juror voir dire being done and there are pre-questionnaires being sent out. A question that courts are facing is whether or not those questionnaires are things that should be available, especially now that a number are being offered electronically.

The anonymous juries that I have seen are really ad hoc events because of concerns, generally, about organized crime. The last time the Second Circuit really had a fight about that was the Martha Stewart trial four or five years ago.

PROF. CAPRA: In which the Second Circuit said that the judge had acted too broadly.

MR. HEDGES: That is right.

JUDGE RAGGI: I am sure we are going to discuss this more. I think what you are talking about is what judges would not consider to be an anonymous jury.

MS. DALGLISH: You are right. I misspoke.

JUDGE RAGGI: Just so we are all talking about the same thing. Because, as you yourself pointed out, the profession of journalism has changed so much. A person who comes to the clerk's office and says, "Could I have the names and addresses of the jury?" could be looking to do investigative reporting or could be up to mischief. No clerk is probably just going to turn it over without making sure the judge wants it. So in the end, that query is going to probably go to a judge, and then you are going to talk

to a judge about why you want it and whether he is going to give it to you or not.

PROF. CAPRA: Thank you.

I want to give Professor Reidenberg a chance to kind of sum up on this issue of limited usage. Then we will close and get to the next panel.

PROF. REIDENBERG: Thanks, Dan.

I think it is really a question of thinking about the disclosure and the uses that we associate with public access to the courts as really being part of our political checks and balances. What are some of the uses? Oversight of court fairness, oversight of court administration, uses connected with the litigation—that is the bankruptcy case.

But now, when we talk about secrecy of the identity of jurors during a trial and the points you just raised, we get into other areas where we must be far more careful. Is it okay, for example, that someone wants the names and addresses of jurors who are sitting on the jury because they want to sell them a particular cell phone service? Suppose the cell company's marketers discover that jurors, while they are sitting on juries, tend to be more susceptible to advertisements for text plans. Is that the kind of world that we want to see? I am very unsympathetic toward those types of releases.

What about someone who wants to gain access to information from probate records to create lists for a dating service of widows and widowers who happen to be wealthy?

If we start seeing too much secondary use or out of context use, if we start putting voir dire questionnaires in real time, online, in ways that are searchable from Bing, what will be the effect on the willingness of our citizens to participate in our legal system?

PROF. CAPRA: Is the technology available to limit that kind of motivational use?

PROF. REIDENBERG: Yes. We can build the architectures. But, we also need to build a legal structure that has some kind of sanction for the non-permissible uses.

**CONFERENCE ON PRIVACY AND INTERNET
ACCESS TO COURT FILES**

**PANEL TWO: SHOULD THERE BE REMOTE
PUBLIC ACCESS TO COURT FILINGS IN
IMMIGRATION CASES?**

MODERATOR

*Judge Robert Hinkle**

PANELISTS

*David McCraw*³³

*Daniel Kanstroom*³⁴

*Eleanor Acer*³⁵

*Elizabeth Cronin*³⁶

*Mark Walters*³⁷

JUDGE HINKLE: This next panel is a more specific application of some of the general principles that were addressed in the panel that we just finished. When CACM was first developing the privacy policies that led later to the adoption of the rules that we are operating under, Social Security cases were cut out for different treatment than all other kinds of cases, so that the Social Security files were available at the courthouse, but were not available electronically over the PACER system. Then, as it went on through, immigration cases got added to that, so that immigration cases now are handled like Social Security cases.

One of the questions is whether that should be done that way, and what adjustments, if any, should be made to the way they are handled. We have a panel of some people with a great deal of expertise in the immigration area to address it.

The first speaker we have is David McCraw. He is the Vice President and Assistant General Counsel for *The New York Times*, a job that I think probably 90% or maybe 100% of people at some point in their careers have aspired to. What a great thing to do.

MR. MCCRAW: I guess I am happy they do not reveal what I get paid. That would cut that number down. That is why privacy is so important.

* United States District Court Judge, Northern District of Florida.

33. Vice President & Assistant General Counsel, The New York Times Co.

34. Director, International Human Rights Program, Boston College Law School.

35. Director, Refugee Protection Program, Human Rights First.

36. Director, Office of Legal Affairs, United States Court of Appeals for the Second Circuit.

37. Office of Immigration Litigation, Department of Justice.

Professor Dan Capra very wisely invited Nina Bernstein to be here today, . . . who is a *New York Times* reporter who covers immigration, on the theory that you probably will hear from a lot of lawyers today, and should hear from some real people. Nina, to her great fortune, is being honored this morning in Washington, at the American Society of Newspaper Editors, for her coverage of immigration. So to completely reverse the tables on Dan, she sent a lawyer in her place.

She did prepare remarks about Rule 5.2 for me that begin, highlighted in yellow: "Terrible mistake." That phrase comes up in the first paragraph of her remarks and her statement concludes with how many times government officials tell her privacy is important—right after someone has died in detention.

I will try to give a lawyerly gloss to those remarks.

As most of you know, and as I came to learn as I prepared for this, Rule 5.2 does have a carve-out, as Judge Hinkle suggests, for immigration cases, where you have electronic access at the courthouse for the whole docket; outside of the courthouse, you are limited to the docket itself, orders, and other dispositions. It is our view that this attempt at privacy, in effect, serves neither of the public policy goals that are implicit in that. It neither protects privacy very well nor does it bring the kind of transparency the court system should have. It is, in effect, a version of what you heard in the last panel, practical obscurity.

In my mind, "practical obscurity" is actually a code word for "elite access." It is a method by which we decide that certain people in this democracy should have greater access to information than others. We do that by making sure that people who cannot hire private investigators, who do not have lawyers to go down to the courthouse, who live far away, who are disabled, who do not know how the system works, do not have access. To me, that is fundamentally a very, very bad approach to transparency.

I think it is also a bad approach to privacy, if you look at how it actually plays out. I looked at about three months of Southern District filings in immigration cases, just using PACER. What you can see when you go onto the system are the orders and the decisions. You can see certain orders on scheduling and so forth. You know who the litigant is. You know who is seeking asylum. You know who is objecting to a deportation. If you look at the online decisions, you can find out a great deal about the cases.

What you do not find and what you cannot get is the habeas petition, and what you cannot get are complaints, usually in the nature of mandamus. Those are very, very important for people like Nina, who are trying to find out what is going on in a system that, on the administrative side, is shrouded in secrecy. It is when they pop up in court that there is a chance to understand what the complaints are about, what mistreatment is being alleged. It is very important for her and for others like her and for researchers to see that, and to see not only individual cases, but to see patterns.

Nina came to poignantly realize how the system worked when she wrote a story about a woman, whose name is Xiu Ping Jiang, a Chinese woman

who came to the United States.³⁸ In China, she, of course, did what is unthinkable: she had a second child. Therefore, she was being subjected to mandatory sterilization. She fled to this country, and later she was detained and in the process of being deported for violation of the immigration law. During her hearing, the judge asked her name and she responded twice, giving her name, not waiting for the Mandarin translator. The judge, an administrative judge, thought this was some example of bad faith that she was responding in English rather than waiting for the translator, and said, "I am going to treat you as if you did not appear."

Fortunately, she had relatives here, who were able to find a lawyer in New York who took her case.

Her habeas petition would never have been known and would never have been reported on except for the fact that it was misfiled. Even then it would not have been found, except that Xiu Ping happens to have the same name as the former wife of the gun man who shot up the Binghamton immigration center last year.³⁹ So while *Times* reporters were doing stories on him, they came across her filing. It had been misfiled. It had been filed publicly and was available remotely.

My point here is rather obvious, which is that it should not take a mistake for people to know about that and to write about that case and cases like it.

JUDGE HINKLE: Next we have Professor Daniel Kanstroom, of Boston College. He is the Director of the Immigration and Asylum Clinic and the Director of the International Human Rights Program at Boston College.

PROF. KANSTROOM: Thank you very much. It is an honor and a pleasure to be here.

I am going to speak from the perspective of both the theory and practice of immigration law, an area that has sometimes been referred to as standing in the same relationship to civil litigation as mud wrestling does to the Bolshoi Ballet. I was asked to speak specifically about the current bars on remote access to immigration cases.⁴⁰

My understanding is that the bars were motivated by two background principles: one, a concern about sensitive information, and the second, a concern about volume. I think these are surely significant concerns and, in some cases, compelling ones. But my ultimate conclusion, which I will get to in a minute, is guided by a couple of fundamental principles that I will disclose as a suggested way of thinking about this.

The main principle, as others have noted, is a general background norm of openness, which I think is mandated by the First Amendment, in addition to due process and some deep common law traditional principles. The most basic idea is that federal court case files are generally presumed to be

38. Nina Bernstein, *For a Mentally Ill Immigrant, a Path Clears Out of the Dark Maze of Detention*, N.Y. TIMES, Sept. 11, 2009, at A20.

39. See Robert D. McFadden, *Upstate Gunman Kills 13 at Citizenship Class*, N.Y. TIMES, Apr. 4, 2009, at A1.

40. Rule 5.2(c) of the Federal Rules of Civil Procedure and Rule 25 of the Federal Rules of Appellate Procedure bar electronic remote access by the public to filings in Social Security appeals and certain types of immigration cases. FED. R. CIV. P. 5.2(c); FED. R. APP. P. 25.

available for public inspection and copying.⁴¹ Now, of course, these principles are not absolute. Still, I would suggest that we start with them and hold them, at least, as a kind of tiebreaker. I often tell my students in Administrative Law that when you have these kinds of “tectonic” conflicts, what you may really need is some sort of tiebreaker principle. I think the principle here ought to be a strong presumption of open access.

Those who have concerns about problems caused by openness, in my view, bear burdens of both production and persuasion. And I think those are heavy burdens. In immigration cases, especially in deportation cases, they are particularly heavy, due to a couple of other principles that derive from the nature of the cases.

First of all, as the Supreme Court has long recognized—and just recently reiterated in the *Padilla v. Kentucky*⁴² case—deportation, while not technically a criminal punishment, is a severe penalty. The stakes are very, very high—sometimes, literally life and death. Although removal proceedings are technically civil, deportation “is nevertheless intimately related to the criminal process.”⁴³ Also, as the Court has recently noted, “The ‘drastic measure’ of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.”⁴⁴ So I think we ought to look to the norms of criminal cases for some sort of analogous guidance. These are, for the most part, norms of open access. They are certainly not categorical bars.

Another guiding principle is the legendary, sometimes humorous, sometimes teeth-gnashing complexity of immigration law. One court has referred to immigration as an area of law that would “cross the eyes of a Talmudic scholar”;⁴⁵ another, an area of law where “morsels of comprehension must be pried from mollusks of jargon.”⁴⁶

Complexity in this context, I think, matters, particularly because the exact boundaries of these rules are, to my eyes, rather unclear. I could not tell, upon reading the text of these rules, whether they would cover a case like, for example, *Hoffman Plastics*,⁴⁷ which was a Supreme Court case that dealt with the intersection between the National Labor Relations Act and immigration law. It is also far from clear whether these rules cover all habeas corpus challenges, particularly if they are just focusing on the conditions of detention, naturalization appeals, etc.

41. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–78 (1980); see also *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (recognizing common law right “to inspect and copy public records and documents, including judicial records and documents”).

42. 130 S. Ct. 1473 (2010).

43. *Id.* at 1481. See generally Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law”*, 29 N.C. J. INT’L L. & COM. REG. 639 (2004); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890 (2000).

44. *Padilla*, 130 S. Ct. at 1478 (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

45. *Cervantes v. Perryman*, 954 F. Supp. 1257, 1260 (N.D. Ill. 1997).

46. *Kwon v. INS*, 646 F.2d 909, 919 (5th Cir. 1981).

47. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

The point here is that immigration cases arise in a wide variety of contexts, and I fear the rules, as drafted, may be overbroad in ways that call their validity into question. In fact, I am fairly certain that they are.

Finally, though, as our President likes to say, “Let me be clear.” In *certain* types of immigration-related cases, privacy concerns are quite compelling. For example, asylum cases, Convention against Torture⁴⁸ cases, S visa cases,⁴⁹ T visa (trafficking-victim) cases,⁵⁰ U visa cases,⁵¹ mean that many of these cases require substantially *more* protection than the rules give. So the rules are overbroad in light of the background constitutional and immigration law norms, but they may be under-protective in others.

The over-breadth problem, I think, also relates to—as David was saying and as I will validate—the tremendous value that is brought by close public scrutiny to these cases. It has really made a huge difference, for a variety of reasons, which, if we have time for questions, I would be happy to talk with you more about.

A second feature of the system that I think should be highlighted in this vein is the prevalence of transfer and detention decisions. This is a powerful concern. Many thousands of people each year are arrested, placed in removal/deportation proceedings, and then summarily detained and transferred from, say, Massachusetts, where I have experienced it quite a bit, or New York to remote parts of Texas or Louisiana, where their cases proceed and where judicial review, if there is any, follows in that district, in that circuit. So, remote access to these cases is incredibly important, and incredibly difficult if you have to actually go to the courthouse to get it. I apologize to anybody who lives in either Texas or Louisiana, but for those of us practicing in Massachusetts or New York, I think it is a compelling problem.

So the rules, as I said, are both overbroad and they also seem under-protective in some cases. This under-protective aspect can inspire a false and, I think, dangerous sense of security. I would not want people to think that these rules are sufficiently protective in the cases in which more

48. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (as codified in 8 C.F.R. § 208.18 (2010)) [hereinafter *Convention Against Torture*].

49. S visas may be given to noncitizens who assist U.S. law enforcement to investigate and prosecute certain crimes and terrorist activities. *See* 8 U.S.C. § 1101 (a)(15)(S) (2006). They are strictly numerically limited.

50. T visas may be given to noncitizens who are victims of “a severe form of trafficking in persons,” as defined in section 103 of the Trafficking Victims Protection Act of 2000. 8 U.S.C. § 1101 (a)(15)(T)(i).

51. U visas may be granted to noncitizens who have suffered substantial physical or mental abuse as a result of having been a victim of certain types of criminal activity; who possess information concerning such criminal activity; and have been helpful, are being helpful, or are likely to be helpful to a federal, state, or local law enforcement official, to a federal, state, or local prosecutor, to a federal or state judge, to the Service, or to other federal, state, or local authorities investigating or prosecuting criminal activity. *See* 8 U.S.C. § 1101(a)(15)(U).

protection is warranted. I think all of this amounts to a call for greater nuance and texture in the rules as they are drafted.

One last issue, which comes up a lot in current discussions about immigration law, is the question of volume. I do think that volume is a major problem, both for the administrative agencies and for the courts. I am not quite sure precisely how it compares to Social Security or other areas of law. I do think, though, that volume has disparate impact in certain circuits compared with others—more in the Second and Ninth, probably, and the Fifth and the Eleventh; maybe a little less so in the Seventh and the First. Anyway, it is certainly a concern. But I think it is a concern that should be more technically and more historically understood. The volume of appeals into the judicial system rose dramatically in the early 2000s for quite specific reasons. Though I do not have time to go into details, there was a confluence of three factors. One was vastly increased, post-9/11, workplace- and security-related immigration enforcement. A second was vastly increased and, in my view—and, it now seems, in the view of the Supreme Court⁵²—rather overenthusiastic and legally incorrect criminal/immigration enforcement. This concerns a certain type of deportation case, where the person, often a person with legal status, is being deported because of criminal conduct. I have referred to this as “post-entry social control deportation” as opposed to “extended border control” deportation, which deals primarily with undocumented people.⁵³ The Court on that score, by the way, has ruled in a series of cases, nine-to-nothing, eight-to-one,⁵⁴ that the government theories in those cases were wrong. So there are a vast number of cases that are not going to be prosecuted as aggravated felonies anymore.

A third factor is the reduction in the size of the Board of Immigration Appeals that was championed by John Ashcroft.

None of these factors are now true. The Obama Administration has stopped the workplace raids. As I said, the Supreme Court has definitively rejected the Department of Justice’s legal theories in major crime-related cases. Increased resources are now, properly in my view, being directed to the Board of Immigration Appeals and to the immigration judges, where the quality of administrative adjudication should improve. You can go to the website of the Executive Office for Immigration Review to see some statistics on this.⁵⁵ I should also disclose that I am on the Immigration Commission of the American Bar Association. We have just released a

52. See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

53. See generally DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) (analyzing these types of controls).

54. *Lopez v. Gonzales*, 549 U.S. 47 (2006) (holding that an “aggravated felony” includes only conduct punishable as a felony under the Federal Controlled Substances Act, regardless of whether state law classifies such conduct as a felony or a misdemeanor); *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that state drunk driving offenses, which do not have a mens rea component or require only a showing of negligence in the operation of a vehicle, do not qualify as an aggravated felony “crime of violence”).

55. See *Statistical Year Book*, DEP’T OF JUSTICE, <http://www.justice.gov/eoir/statspub/syb2000main.htm> (last visited Sept. 23, 2010).

major report, written primarily by Arnold & Porter, about this last set of issues, and calling for certain further reforms, but highlighting the reforms that are already taking place.⁵⁶

So I do think—though perhaps I am too optimistic about this—the volume concern is actually going to diminish, and I would bet that it already has diminished, as the quality of administrative adjudication has risen. Also, as I am sure you know, appellate court jurisdiction over deportation cases has been substantially limited in recent years, particularly in cases involving challenges to the denial of discretionary relief from deportation.⁵⁷

In any case, the volume concern cuts two ways. High volume, while a concern for federal courts, also indicates to me that deportation can be a sort of enforcement tsunami that bears close watching, especially by lawyers, advocates, policy groups, and the press. Remote access to immigration cases has been crucially important to determine whether there have been patterns of racial disparities in enforcement, patterns of wrongful deportations of U.S. citizens, deportation of low-level offenders in categories that superficially appear to involve major crimes (e.g., “aggravated felonies”), and much more. Much of my own scholarly work has been in this vein.

So in sum, the general exemption of immigration, and especially deportation, cases from remote access seems to me to require much more substantial justification than I have yet heard. Certain types of cases clearly do require protection. But for those cases, sealing and redaction are much more appropriate.

But, in general, given the harshness of deportation, its convergence with the criminal justice system, the complexity of the law, the lack of counsel for most deportees, and the prevalence of detention and transfer policies, it seems to me that the costs of general exemption are much greater than the potential benefits.

Thank you.

JUDGE HINKLE: Next we have Eleanor Acer. She is the Director of the Refugee Protection Program at Human Rights First.

MS. ACER: Thank you very much. It is a pleasure to be here.

Human Rights First works in partnership with lawyers at law firms in New York, Washington, and other places around the country to help provide legal representation to asylum seekers who are indigent as they navigate their way through the asylum system. And we provide this representation at the Asylum Office level, before the immigration courts, and before the federal courts as well. We also advocate with the U.S. government to urge that U.S. asylum standards are in accordance with our

56. ARNOLD & PORTER LLP FOR THE ABA COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010), available at http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

57. See Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006/07).

obligations under the 1968 Protocol Relating to the Status of Refugees (Refugee Protocol)⁵⁸ and other international human rights standards.

Asylum has a long history in this country. The pilgrims came here seeking some protection from persecution. In the wake of World War II, the United States led the international community in setting up a regime to ensure the protection of those who fled from persecution. In 1980, the United States enacted a law that actually created the status of asylum.⁵⁹ That law just celebrated its thirtieth anniversary last month.⁶⁰

I am giving you a little bit of background just to set the stage for the importance of maintaining confidentiality and some protections for confidentiality in asylum cases and in similar cases involving withholding of removal due to refugee status⁶¹ and withholding of removal under the Convention Against Torture.⁶² I actually agree with many of the points raised by my fellow panelists. I agree that this is not an easy issue to navigate, but I think it needs some closer examination.

There are a number of reasons, which I will touch on, for maintaining confidentiality in cases involving asylum and similar forms of immigration relief. One is, of course, the potential for some kind of retaliation against an individual if he is returned home. Another reason is the potential for some kind of harm to family members or other colleagues who may actually still be in the country of persecution. In addition, asylum applications often involve very confidential types of information. Finally, another reason is that the very nature of an asylum application requires that applicants be honest about very intimate details of their lives, as well as about information that could affect the lives of other individuals, and so the assurance of confidentiality is actually incredibly important to the people in the process and also important to the strength of the asylum system, so that applicants and witnesses really do provide accurate information and are not scared to provide information that is important to the process out of a fear that it may later be publicly disclosed.

U.S. regulations, as some of you may know, actually contain specific protections for confidentiality in asylum cases. These regulations appear in two different places. They appear at 8 C.F.R. Section 208.⁶³ as well as 8 C.F.R. Section 1208.6.⁶⁴ The reason they appear in two different places is that since the Department of Homeland Security took over the

58. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force 1968).

59. Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (codified as amended at 8 U.S.C. § 1522 (2006)).

60. HUMAN RIGHTS FIRST, RENEWING U.S. COMMITMENT TO REFUGEE PROTECTION: RECOMMENDATIONS FOR REFORM ON THE 30TH ANNIVERSARY OF THE REFUGEE ACT 1 (2010), available at <http://humanrightsfirst.org/asylum/refugee-act-symposium/30th-AnnRep-3-12-10.pdf>.

61. See Withholding of Removal Under Section 241(b)(3)(B) of the Act and Withholding of Removal Under the Convention Against Torture, 8 C.F.R. § 208.16 (2010).

62. See *Convention Against Torture*, *supra* note 48.

63. 8 C.F.R. § 208.6.

64. *Id.* § 1208.6.

responsibilities of the former INS, the U.S. Immigration and Naturalization Service, in 2003, responsibility for immigration and asylum matters now rests with the Department of Homeland Security, though the Department of Justice continues to play a role as well. As a result, these regulations are essentially mirror regulations appearing in two different places.

Under 8 C.F.R. Section 208.6(a), “Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination . . . pertaining to any reasonable fear determination . . . shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General.”⁶⁵ Now, under the Homeland Security Act, that discretion actually rests with the Secretary of Homeland Security.⁶⁶

The regulations include an exception for “[a]ny Federal, State, or local court in the United States considering any legal action,” including that “[a]rising from the proceedings of which the asylum application, credible fear determination, or reasonable fear determination is a part.”⁶⁷

In addition to these regulations calling for confidentiality in asylum proceedings, the instructions on the asylum application form actually inform the individual applicant at the time he or she actually fills out the initial asylum application.⁶⁸ The asylum application form’s instructions state,

The information collected will be used to make a determination It may also be provided to other government agencies . . . for purposes of investigation However, no information indicating that you have applied for asylum will be provided to any government or country from which you claim a fear of persecution.⁶⁹

Then the instructions cite to the regulations, i.e., to 8 C.F.R. Section 208.6 and 8 C.F.R. Section 1208.6.⁷⁰

Why does this matter? I can tell you why I think it matters, and I will in a little bit. But I am going to cite the Department of Homeland Security’s explanation of why confidentiality matters first.

There is a fact sheet that was prepared by the U.S. Citizenship and Immigration Services (USCIS) Asylum Division and that fact sheet is posted on the USCIS website.⁷¹ This fact sheet was prepared for those in the USCIS Asylum Division who actually adjudicate asylum cases.⁷² In

65. *Id.* § 208.6(a).

66. Homeland Security Act of 2002, 6 U.S.C. § 271 (2006).

67. 8 C.F.R. 208.6(c)(2).

68. U.S. Citizenship and Immigration Services, I-589, Application for Asylum and Withholding of Removal, *available at* <http://www.uscis.gov/files/form/i-589.pdf>.

69. *See* U.S. Citizenship and Immigration Services, Instructions, I-589, Application for Asylum and Withholding of Removal, *available at* <http://www.uscis.gov/files/form/i-589instr.pdf>.

70. *See id.*

71. *See* U.S. Citizenship and Immigration Services, *Fact Sheet: Federal Regulations Protecting the Confidentiality of Asylum Applicants* (June 3, 2005), *available at* <http://www.uscis.gov/files/pressrelease/FctSheetConf061505.pdf>.

72. *Id.*

both the first paragraph and in the response to the first of the frequently asked questions, USCIS explains some of the reasons why the regulations protect asylum-related information.⁷³ The fact sheet explains that “[p]ublic disclosure of asylum-related information may subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant’s family members who may still be residing in the country of origin.”⁷⁴ Public disclosure also can, in rare circumstances, and only if the individual can meet the standards, give rise to a potential asylum claim in and of itself, based on potential for persecution based on the release of that information.⁷⁵

The U.S. Court of Appeals for the Fourth Circuit, in its decision in *Anim v. Mukasey*,⁷⁶ has actually cited to this particular USCIS memorandum and its explanation of why maintaining the confidentiality of asylum seekers is important.⁷⁷ So, too, has the Court of Appeals for the Second Circuit in its decision in *Lin v. U.S. Department of Justice*.⁷⁸

I am also going to read briefly from the policy of the UN Refugee Agency. The United Nations High Commissioner for Refugees (UNHCR) was actually created before the 1951 Refugee Convention.⁷⁹ The United States is a member of the Executive Committee of UNHCR and is also one of UNHCR’s leading donors. UNHCR has explained, in a policy letter, that “the nature of asylum proceedings call[s] for strict observance of the duty of confidentiality.”⁸⁰ The UNHCR itself has a confidentiality policy for all the refugee status adjudications it conducts itself across the world. As a general rule, UNHCR will not share any information with the country of origin (i.e., the country of feared persecution). The policy letter also stresses that information relating to the applications needs to be kept strictly confidential. The letter includes several additional paragraphs describing the importance of maintaining confidentiality in asylum cases.

For people who have actually applied for asylum, many kinds of information are included in their asylum applications. This information can be very personal and sensitive information: the details of an individual’s rape or torture; the rape or torture of the applicant’s family members or colleagues; details about an individual’s sexual or gender identity, or the sexual or gender identity of another.

Sometimes asylum applications and testimony can include names of individuals who helped an asylum seeker escape from his or her

73. *Id.* at 2, 3.

74. *Id.* at 3.

75. *Id.*; see also United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

76. 535 F.3d 243 (4th Cir. 2008).

77. *Id.* at 253–55.

78. 459 F.3d 255, 263–64 (2d Cir. 2006).

79. See *About Us*, UNCHR: THE UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c2.html> (last visited Sept. 23, 2010).

80. Letter from Joanne Kelsey, Protection Officer, UNHCR, to Sandra Saltrese, Miller & Associates (July 12, 2007) (on file with Human Rights First).

persecutors; names of other individuals who participated in prohibited political activity with the asylum seeker; or the names of individuals who are members of an underground church. Often during the asylum process, the applicant will need to describe how other individuals who are similarly situated are treated, and U.S. asylum adjudicators will want names, specifics, dates, and other detailed information to assess credibility and eligibility for asylum.

Oftentimes, the very fact that a person has applied for asylum can be viewed by a persecuting government as an act of treason, or at least as a blatant criticism of the government and its human rights policies.⁸¹ This danger was publicized more at the height of the Cold War, but this danger is still very much present, whether we are talking about China or Iran or many countries where state and non-state persecutors may target individuals for a wide range of reasons.

In closing, I would like to thank the Judicial Conference Privacy Subcommittee and Fordham University School of Law for inviting me to participate in this panel. I actually did not realize that the confidentiality of asylum claims was a subject of discussion by the Judicial Conference's Privacy Subcommittee. In looking at this issue in preparation for our discussion today, I realized that there needs to be a lot more attention devoted to these issues.⁸²

JUDGE HINKLE: Thank you.

Next is Elizabeth Cronin. She is the Director of Legal Affairs and Senior Staff Counsel at the Second Circuit.

MS. CRONIN: Thank you, Judge. Good morning. Thank you so much for inviting me.

From the viewpoint of the federal courts, there are two issues that I think are relevant to the discussion here today. One is the public availability of the A-number, or the alien registration number, and then whether the federal rule 5.2(c)⁸³ should be reexamined or what the implications of that rule are. I am going to address the A-number issue very briefly. I think I am going to let Mark Walters talk about that in more depth. I would like to focus on the public access portion of the federal rule.

To set the stage, I would like to explain that, for the most part, up until about 2002, the federal circuit courts dealt with immigration cases, particularly asylum cases, on a relatively small scale. Prior to around 2002, immigration cases accounted for less than four percent of our circuit's caseload. Within just a couple of years, the filing of immigration cases exploded, and by 2004 to 2005, they accounted for over forty percent of the

81. See Virgil Wiebe et al., *Asking for a Note From Your Torturer: Corroboration and Authentication Requirements, in Asylum, Withholding and Torture Convention Claims*, IMMIGR. BRIEFINGS, Oct. 2001, at 6 n.24 (on file with Human Rights First).

82. See Memorandum from Bo Cooper, INS General Counsel, to Jeffrey Weiss, INS Director of Int'l Affairs, in *Hearing Before the Subcomm. on Immigration, Border Sec., & Claims of the H. Committee on the Judiciary*, 107th Cong. 41 (2002), available at <http://judiciary.house.gov/legacy/82238.pdf>.

83. FED. R. CIV. P. 5.2(c).

court's caseload.⁸⁴ So you can see that it increased exponentially over a really short period of time. As a result, many people in the court ended up becoming experts in a lot of different areas of immigration law, as a necessity.

As many of you are probably aware who are involved in this field, our court tried many different methods of handling the influx of cases, both to address a rising caseload and out of a desire to provide a timely forum for the litigants. Ultimately, the court developed a non-argument calendar, which we call the NAC,⁸⁵ successfully eliminating the backlog. But the cases continued to come, predominantly to the Second and the Ninth Circuits.

Prior to this time, I do not think a lot of thought was given to A-numbers or the implications of having A-numbers available. However, once the deluge of immigration cases came, it quickly became clear that the only reliable method for keeping track of the thousands of immigration cases that we were dealing with was to have the A-number utilized to identify who the cases belonged to. There is a letter from Molly Dwyer, who is the Clerk of Court in the Ninth Circuit, addressing this issue in the materials that were given out this morning.⁸⁶

There have been some suggestions that the A-numbers should be redacted as a way of protecting the confidentiality of the litigants. But, as Molly says in her letter—and our clerk of court agrees—absent a suitable replacement system, this could really wreak havoc on the courts and the ability of the courts to maintain order of the thousands of cases that get filed.⁸⁷

Some of the issues that are relevant with respect to the availability of the A-numbers:

First, the names in many of these cases are incredibly similar. In our circuit, a large majority of the cases are Chinese immigrants filing asylum.⁸⁸ There has been a lot of confusion in how the names are reported when they get to us, whether their first names are substituted for their last names. Many of the last names are similar. Without having some other identifier, like an A-number, it would be impossible for the clerk's offices to keep track of who the cases belong to.

Second, immigration cases, as you know, can go on for many, many years. They go from the agency up to the circuit. They go back to the

84. MICHAEL A. SCAPERLANDA, IMMIGRATION LAW: A PRIMER 7 (Federal Judicial Center, 2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/immlaw09.pdf/\\$file/immlaw09.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/immlaw09.pdf/$file/immlaw09.pdf).

85. See generally 2D CIR. R. 34.2.

86. Letter from Molly C. Dwyer, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit, to Professor Daniel Capra, Fordham Law School (Nov. 2, 2009) (on file with Fordham Law Review).

87. *Id.*

88. See John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 71–72 (2005).

agency, sometimes many times. It is an effective way of making sure that the case is tracked properly.

Third, clerks are always concerned that somebody may get deported by mistake because they were misidentified. The A-number is a way of preventing that from happening.

Fourth, the Board of Immigration Appeals (BIA) issues presidential decisions with A-numbers, except in asylum cases. But many cases begin as asylum cases and then turn into something else when they get to the circuit court.

Fifth, courts do not want to be in the business of doing redaction, for obvious reasons. They do not want to be taking documents that come to them and altering them in some way. Also they do not want to be charged with the awesome responsibility of perhaps taking something out that should not be taken out.

Lastly, there is a question of what harm could come to petitioners as a result of the A-numbers being made available, and even some Immigration Judges have asked courts to put the A-number on their decisions so that they can track the case that they had when it was at the agency level.

I will let Mark deal with that more. But those are some of the issues that are relevant to the A-number.

With respect to Federal Rule 5.2, as I understand it, initially the Social Security cases were the ones that were given protection from unlimited public access, because they are inherently different from regular civil cases. They are a continuation of an administrative proceeding, the files of which, at that level, are confidential. Moreover, according to the report of the committee when they were discussing this rule, the cases in the Social Security context are of limited or no legitimate value or use to anyone who is not a party in those cases.⁸⁹ As you know, with Social Security cases, they are replete with medical records, because the person has to put that information in, in order to qualify for the benefits.

Immigration cases were included in the new version of the rule because they presented similar privacy issues as those in the Social Security cases. As discussed, this federal rule limits access to actual documents at the courthouse and does not permit electronic access, other than to the docket sheets and the court's decision. I think, as both Mr. McCraw and Professor Reidenberg said, it ends up being practical privacy or practical security, because fewer people have physical access to those records.

It is not surprising to me that the media and research academics would want greater or easier access to court documents. I think in the written materials, Mr. McCraw mentioned judicial transparency. This is obviously a very important concept to the federal courts as well. Under this particular rule, the judiciary is trying its best to balance the court's own support of open access to records with the privacy of litigants. As everyone has discussed from this morning's panel to this panel, it is a very difficult and

89. FED. R. CIV. P. 5.2 advisory committee's note.

complicated issue. The rule is not perfect, but it is an effort to balance those two competing interests.

In this day and age of electronic availability of just about everything, I guess the question is, is this rule an anachronism, or is it a euphemism for “elite access”? Or is it trying to address a legitimate concern that unfettered electronic access to immigration records through the courts can lead to what, I think, one professor this morning said could be data mining that would create dangerous situations for petitioners because Internet access may allow for private or personal information to go viral?

Professor Kanstroom talked also about whether immigration cases are more akin to criminal cases, and mentioned that it would be helpful to look at the criminal privacy rules. But criminal cases, as we know, are available, for the most part, electronically. In my view, having read a lot of immigration cases and looked through a lot of immigration records, there are some differences between immigration and criminal cases that would make immigration cases more akin to Social Security-type cases that would warrant, perhaps, a stronger look at those privacy issues.

As I said earlier, Social Security cases originate in the administrative agency and then they come right to the Federal Circuit courts. The administrative records, as Ms. Acer so ably described, are replete with personal information. There is a letter from the government to a judge involved in the beginning process of developing these rules about what kinds of records are available.⁹⁰ If you have the ability to look through an administrative record in an immigration case, you can see that it is not in discrete areas, that this personal information is woven throughout the entire record, in the same way as the Social Security case. There are copies of passports, which include photographs. There are photographs of the individuals and their family members. They have history of their origin, their dates of birth, the addresses where they lived in the country from which they are coming to the United States. There is information about their children. There are often very detailed medical records. There are a lot of different statements, because these petitioners are giving statements, often from the time that they arrive in the United States, regarding torture, domestic violence, gender identification, political dissent, sexual assault, among many other issues.

As you know, in asylum cases, often what the immigration judge is looking at are credibility determinations. A lot of times, the decision as to whether or not to find the petitioner credible rests upon the information that that person is providing. If they are providing very little detail, then it is more likely that the immigration judge may rule against them. It is important for them to provide as much personal detail as possible.

One of the problems that our court has experienced is the lack of the quality of representation of asylum petitioners. About eighty percent of

90. Letter from Peter D. Keisler, U.S. Department of Justice, Civil Division, to Hon. Sidney A. Fitzwater, U.S. District Court for the Northern District of Texas (Oct. 15, 2004) (on file with Fordham Law Review).

petitioners in our court are represented by counsel, which would sound like a good thing. But many times they may often be better off representing themselves than having counsel. These are retained counsel. They are not appointed for them. So there is some concern that even if redaction rules are put into effect, these attorneys are not going to be providing the kind of redaction that would protect the people whom they are filing on behalf of.

Thank you.

JUDGE HINKLE: Thank you.

Mark Walters is the Senior Litigation Counsel at the Office of Immigration Litigation, the Department of Justice.

MR. WALTERS: Thank you, Judge Hinkle.

I have been doing appellate and trial litigation in the area of immigration law for twenty-five years at the Department of Justice, twenty of them as both a litigator and supervisor. For reasons I can no longer remember, I became the principal point of contact for the Ninth Circuit when there were issues related to mediation, or when general administrative matters needed to be addressed. One of the recurring topics of discussion with the Ninth Circuit was the process of getting administrative records to the court from the BIA. As we moved toward electronic filing, almost every aspect of that process needed to be looked at again: How are we going to transmit records? Will they be paper records or electronic? Are the records going to go online? If so, what portion of each record is going to be kept from the general public and what will be available to the public online?

The practice right now, as you all know, is that the public has limited access on PACER, but unlimited access at the courthouse for those who are willing to go there and ask for the file.

The current practice is working on a number of practical levels. That does not mean that public access cannot or should not be improved in the future. My concern is that we are not where we need to be technologically to improve access today.

Let me deal with the alien registration number, or A-number, issue first. I do not know if the Privacy Subcommittee has received any letters on this issue, but I know the clerks of the various circuits have gotten letters from time to time urging that the A-numbers be redacted from their orders. I think Elizabeth has given you a number of reasons why they should be left on court orders—common names, among other things. But also, more than in any other area of law, people in immigration proceedings are repeat litigants. Many immigration cases come to the Court of Appeals twice, and go through the agency two, three, or four times. You want to make sure you know, when you are dealing with somebody, whether there are already removal orders for this person, or whether they have already been granted immigration benefits. When aliens have interacted with the benefit side of the Department of Homeland Security, the U.S. Citizenship and Immigration Services, USCIS, or even with the now-defunct Immigration and Naturalization Service, they would have done so under an assigned A-number. But their names might change over time. There are lots of legitimate reasons for a subsequent name change. Marriage is an example.

In addition, after aliens have been here for a while, they may choose to anglicize the order of their names, or even change the spelling to make it more readable or pronounceable in English. There are also many illegitimate reasons for subsequent name changes, like the adoption of aliases for criminal activity or to avoid immigration enforcement. The A-number sticks to the individual despite these changes almost as well as the fingerprint. And it really helps avoid clerical error. In the end, it helps prevent mistaken removals, and promote accurate enforcement of court orders.

The Ninth Circuit has had hundreds of cases in the last several years where the surname is Singh; the Second Circuit, hundreds of Lin cases. One of my attorneys accused me of giving her only Lin cases after I assigned her three in a row. It was just a coincidence, but I think you get the point. The situation we have long had in the United States with an abundance of people named Smith and Jones presents itself even more frequently in some cultures, because of repetition or similarity of names.

Turning to the question of what should be available on PACER, the points made by Eleanor Acer on asylum are good points. The need for confidentiality in the asylum context is one of the primary reasons not to give public access to immigration records on PACER. The suggestion has been made to redact immigration records and then give the public full access online. This ignores the sheer volume of cases that would need careful redaction. In the last six years, the number of cases that have gone from the BIA to the courts of appeals have ranged from a low of about 7,500 to a high of about 12,300. To illustrate what redaction of these records would mean in practical terms, consider the experience of the Freedom of Information Act (FOIA) unit at the Board of Immigration Appeals. It takes a member of that unit about two hours to go through an inch of paper and redact it using FOIA standards. The average asylum record is four inches thick. This means one FOIA officer would have to work a full day to get just one average asylum record ready for transmission to the court of appeals in redacted form.

So why not ask the petitioners' attorneys to do it? For cases completed in immigration court in fiscal year 2009, only thirty-nine percent were represented, while sixty-one percent were unrepresented. For obvious reasons, it would be unwise to ask unrepresented aliens to apply the standards that trained FOIA officers apply if you expect to get a meaningful redaction. Such pro se redactions would be inconsistent in the extreme, sometimes to the public's detriment and sometimes to the alien's.

The Ninth Circuit has a pro bono program and makes a large effort to get quality law firms on the west coast to give their junior associates experience in the Court of Appeals by providing immigration training and asking them to take cases. If you are going to ask these firms and their lawyers to do redaction when they agree to take these cases, what impact will that have on the number of firms and lawyers willing to participate in the pro bono program? I am not sure you would get quite as many volunteers if the commitment up front is to spend a day or so doing redaction.

I want to sum up by saying that I think the ultimate goal, to reveal as much as possible online, is a worthy one. But practical realities mean we must wait for the technology that will make this reasonably possible. Right now, if redaction has to be done manually, given the amount of time and money that it would take to deal with up to 12,000 records a year, we are not there yet.

JUDGE HINKLE: We are at the point of taking questions.

PETER WINN: I just have a question for Elizabeth Cronin, in terms of the technology of the access to a Social Security or an immigration file. I did some experiments in Seattle on this. My understanding is that an outsider can actually enter a notice of appearance in a case as an interested party or something and actually have online access to it. It is just not anonymous access. So the parties to the case would know who was watching and looking at the pleadings. They would have remote access.

MS. CRONIN: I do not know. According to our Clerk of Court, PACER access is available to pretty much anyone who files, but I do not know about that specific issue.

MR. WINN: With respect to an offline case, which is what Social Security and immigration cases are, even though there is no access through PACER, the parties have online access.

MS. CRONIN: Correct.

MR. WINN: So a third party who is not a party has, technologically, the ability to identify themselves as somebody who wants that access and can file using the same technology as the parties do. It is just that the parties would be able to see that and see that transparently and be in a position to protect themselves if they wanted to.

I just was not sure if you were sort of zeroed in on the technological capacity to deal with some of the concerns of the press about online access to these offline records. But the availability of this intermediate system would also allow, to some extent, online access on an individualized basis.

PROF. KANSTROOM: May I speak to that? In anticipation of this, I did a little bit of unscientific empirical research, and I started calling around to some lawyers who litigate nationally in these kinds of cases. A couple of people did mention that. That made me think that a lot of the problem here is a question of coding, whether we could code asylum cases to protect them at a sort of anterior point in the system or not, and the idea that if we cannot, we still have this other problem. A couple of lawyers, for example, said to me that they were now thinking that all they had to do to maintain access to their cases was not code them as immigration cases, but get them coded as habeas or something else.

So I think this is a big question. Maybe there are the kernels of a solution in that understanding.

JUDGE TALLMAN: I am from the Ninth Circuit in Seattle.

I want to underscore a couple of points that Mark Walters and Elizabeth made. The letter that Molly Dwyer wrote was written at the direction of the fifty judges on our court, who process 8,000 immigration cases a year. I

think about the privacy problems in immigration, the sensitive information in Social Security appeals, the sensitive information in criminal cases. We are working on a national security case right now, with top-secret information. If we have to redact or somehow deal with these problems in each of these cases, it will bring the Ninth Circuit to its knees.

And I do not think the Ninth Circuit is alone. I cannot underscore the practical problems that we have in just getting access to information that has already been partially sealed or redacted before the administrative agency or the court below, in trying to get a comprehensive appellate record so that the decision maker is presented with the information that he or she needs in order to make the decision.

You can talk about all of these interim steps to try to protect some of the sensitive information. But how do you describe in the opinion, when you are writing the decision, the reasons why you decided the case, without disclosing that which you are seeking to protect?

I also want to underscore the point with regard to the identifiers. We just have too many litigants by the same name. We are going to have to give them some kind of a number that is going to be unique, whether it is an A-number or a Social Security number or a new litigation number. I just do not know any other way to do it. Otherwise, we cannot have any confidence when we put that person eventually on the plane, if they are going to be deported, that we have the right Singh who is going back to the Punjab.

JUDGE HINKLE: What do you do now? You issue the opinion where you describe the information in, say, an asylum appeal. That opinion goes out, and it has the name and it has the information in it, right?

JUDGE TALLMAN: That is exactly right. And you run into the problem that Mr. McCraw was talking about, where in the wrong case, that information can have very harmful consequences back in the country that you are going to repatriate the alien to.

MR. MCCRAW: I certainly have a great deal of sympathy for the practical problems of the courts dealing with paper. But I hope those of you who are attorneys for civil litigants will share with me sort of the irony, having been in front of judges, where, when we explain how hard electronic discovery is, how many documents we have to go through, and having judges tell us, "Figure it out. The law requires you to disclose those documents."

The fact is, we understand that. These practical problems should be taken seriously, but they should not overcome constitutional rights and the greater common law values of transparency in the court system.

JUDGE RAGGI: I have a question that asks this panel to think beyond its particular task and may actually tread a little bit on CACM's responsibilities. When we talk about redacting immigration cases, we are basically talking about creating an exception from the presumption in favor of open court files. We will hear in the course of today from any of a number of groups who will say, "Make an exception for me, too."

I am not sure I quite understand how the privacy concerns that you have articulated and that I recognize with respect to immigration warrant a different treatment from the privacy concerns of other litigants in a variety of cases, of jurors—we have just heard it said that for jurors it is tough. This is part of their civic duty. Why is not that also the answer with respect to any party that comes knocking at the court door? I am not suggesting that we may not recognize exceptions. But, why immigration and not other areas?

MR. WALTERS: I think one answer to that is the volume. The Ninth Circuit, in the last six years, has ranged from thirty-one to forty-one percent of their docket being immigration cases.

JUDGE RAGGI: You think that is an argument for sealing or redaction?

MR. WALTERS: That is an argument for why they should not have to be redacted, but, rather, limited access on PACER should continue, with only attorneys of record having access.

JUDGE RAGGI: Why limited access, though, for this type of case and not others presenting comparable privacy concerns or for jurors who have provided a host of private information to us?

MR. WALTERS: I think it is the practical problem with applying redaction rules to that volume of records, coupled with the fact that this would not be light redaction. As some of my co-panelists have indicated, in addition to the sensitive information in asylum cases, which are a large percentage of the immigration docket, you have quite a bit of personal information in every immigration case, having to do with Social Security, Selective Service, medical history, hardship claims with medical records, and marriage information, sometimes including very personal details. Is this a legitimate marriage or is it not? The list of sensitive and personal information frequently found in immigration records goes on and on. One of the letters in the materials gives a more comprehensive list.⁹¹

So I think it is volume combined with a need for thorough redaction that distinguishes immigration cases. It is not a light redaction, like you might see in some other cases, where there are only a few places in the record where you have to deal with sensitive or personal information. And it is not a manageable volume. These two factors call for an exception.

JUDGE RAGGI: If I can just press my concern, because the committee will undoubtedly discuss this at some length. This is not an area of simply a private dispute—contracts or anything else. This is an area of enormous public debate, reaching well beyond the judiciary. To not give broad access to what we are doing in this area raises some of the concerns that Mr. McCraw highlighted. I think we are a little hesitant about limiting access. Who would we limit access to? You have suggested just the litigants. How could we justify that in an area of serious public policy debate?

JUDGE HINKLE: We are at the end of the panel, basically. I would say this to everybody. One of the reasons we have panels like this is to hear stories like David McCraw told us about accidentally coming on to a case

91. *Id.*

that really needed to be reported. Yet the puzzle for everybody is to figure out a way to protect the private information. If that is an asylum case, it is probably chock-full of this really private information. Figure out a way to protect the private information while also allowing public access to the fact that there is an immigration judge who is being very arrogant and treating a person shabbily, which needs to be disclosed publicly. It is a very difficult problem.

MS. ACER: In many of these cases, at least in the asylum context, you are talking about returning people to places where individuals—either that individual or others—are at risk of persecution, torture, and serious harm, in states that either are not protecting individuals or are actively persecuting those people. We in the U.S. have no control over that.

I think that is one way in which these cases may be different. I am not at all commenting on the protections that other individuals should potentially enjoy or not.

**CONFERENCE ON PRIVACY AND INTERNET
ACCESS TO COURT FILES**

**PANEL THREE: IMPLEMENTATION—WHAT
METHODS, IF ANY, CAN BE EMPLOYED TO
PROMOTE THE EXISTING RULES' ATTEMPTS
TO PROTECT PRIVATE IDENTIFIER
INFORMATION FROM INTERNET ACCESS?**

MODERATOR

*Hon. Ronald Leighton**

SPEAKER

*Joe Cecil***

PANELISTS

Michel Ishakian⁹²

Edward Felten⁹³

Joseph Goldstein⁹⁴

Hon. Elizabeth Stong⁹⁵

Jay Safer⁹⁶

Robert Heinemann⁹⁷

JUDGE LEIGHTON: My name is Ron Leighton. I am a United States District Judge from the Western District of Washington, a member of the Court Administration and Case Management Committee.

The panel we have here is the panel on implementation. We are here to discuss the means and methods by which the judiciary seeks to disseminate information and, at the same time, protect privacy.

When I was given responsibility by Judge Raggi for the implementation side of the aisle, I said this is a committee in need of a job description. When the other committees identified a policy, we would go to work in developing an appropriate method for achieving that objective—easy. As I

* United States District Court Judge, Western District of Washington.

** Project Director, Division of Research, Federal Judicial Center.

92. Chief, Public Access & Records Management Division, Administrative Office of the United States Courts.

93. Professor, Princeton University.

94. Freelance Reporter.

95. United States Bankruptcy Court Judge, Eastern District of New York.

96. Partner, Locke Lord Bissell & Liddell LLP.

97. Clerk of Court, Eastern District of New York.

have drilled a little deeper, I have come to the conclusion that, just as the competing legitimate interests of the courts and its constituencies make policy making difficult, so too these important and oftentimes mutually exclusive interests make it difficult to select an appropriate method to best achieve what would otherwise be deemed a laudable goal.

To help us navigate through these choppy waters, we have assembled an interesting and informed panel of speakers.

To begin, we are going to ask Joe Cecil, who is a senior researcher for the Federal Judicial Center (FJC), to talk about a study that was just conducted by the FJC on unredacted Social Security numbers within the federal judiciary over a two-month period. Joe?

DR. CECIL: Thank you, Judge Leighton.

This is the implementation panel, and one of the things that we were asked to do was to determine the extent to which the protections in the rules to guard against improper disclosure of Social Security numbers have, in fact, been properly implemented. You will recall that the attorneys are instructed to redact the Social Security numbers upon filing.

Our study is essentially the study that you heard described by Peter Winn earlier. It was a Google search of all the documents filed in federal court, district court, and bankruptcy court in November and December of this year. We were looking for something that was very specific. We were looking for a pattern of numbers that followed the pattern that Social Security numbers have, the three digits, hyphen, two digits, hyphen, four digits.

The result of that search revealed about 2900 Social Security numbers in all the documents filed, the 10 million documents filed, during those two months.

The rules themselves have some exceptions for filing of Social Security numbers, and it looks to us like probably about five million of those Social Security numbers fall under some of the exceptions. There were numbers that were from the previous day's court proceedings that were not restricted. Some of the documents were, in fact, filed earlier than December of 2007. But in the end, we got down to 2400 Social Security numbers that look like they are still knocking around in the system, numbers that should have been redacted.

Two final points.

First, we are talking about 2400 documents. Some of these documents have more than one Social Security number. In a large commercial bankruptcy, we would find documents that listed Social Security numbers for all of the employees that worked at the business that went bankrupt. We would find documents and financial account numbers for investors in a failed enterprise. So some of these documents are really rich in Social Security numbers. We estimate that about twenty percent of them have more than one.

The last thing is that when we think about the 2400 Social Security numbers that still exist in the records, you have to keep in mind that we are talking about ten million records that are filed in court. So, really, only one

out of every 3400 documents that we examined had a Social Security number.

Thank you.

JUDGE LEIGHTON: Joe, thank you.

The first member of the panel to speak is Michel Ishakian. She is the Chief of the Public Access and Records Management Division at the Administrative Office of the United States Court. Prior to joining the Administrative Office, she worked as a management consultant for the EDS [Electronic Data Systems] Corporation and as a Foreign Service officer. Michel?

MS. ISHAKIAN: Thank you, Judge Leighton. Good morning.

I would like to begin by giving you a very brief overview of the judiciary's electronic public access program, the mission of which is to facilitate and improve public access to court records and court information. Although I am here today to discuss access to court records through PACER, I would be remiss not to mention that the program is broader and encompasses the judiciary's public websites, courtroom technology, and noticing.

PACER was established in 1988 as a dial-up service. In the last decade, through the implementation of CM/ECF—that would be the electronic case filing system—PACER has evolved into an Internet-based service. In other words, PACER is a portal to CM/ECF, which is integral to public access. PACER provides access to various reports, court dockets for more than 30 million cases, and over 500 million—that is 500 million—documents filed with the courts.⁹⁸ This is by any standard a massive collection.

During 2009, the program reached a new milestone, with over one million registered PACER accounts. In any given year, approximately one-third of those accounts are active, and many accounts do, in fact, have multiple users. PACER has several categories of users. They are fairly discrete. Fully 75% are from the legal sector or are litigants, 10% are commercial users, approximately 5% are background investigators, which we have sorted out from commercial institutions, 2% belong to the media, and 2% represent academia.

As I mentioned, PACER users are registered. All PACER access requires user authentication through the use of a log-in and password. Usage information is collected and stored, as set forth in the PACER privacy and security notice on our website, as well as the PACER log-in banner. This provides a deterrent to those who would use PACER to obtain information for nefarious purposes. I can tell you that the Administrative Office does respond promptly to subpoenas for information on PACER usage. Information that we have provided has been used quite effectively in the courts.

98. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 12 (2009), available at http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/Viewer.aspx?doc=/uscourts/FederalCourts/AnnualReport/2009/includes/annualReport2009_screenResolution.pdf.

The judiciary proactively works to strike a reasonable, reasoned balance between providing public access to court files and protecting sensitive information, as evidenced by the evolution of national policies, federal rules, and procedures over the years. We have not done so in a vacuum. We seek expert advice and input from all the various interested parties—especially all of you here today—which, as we have already heard today, are often seeking different, sometimes mutually exclusive outcomes. On a personal note, I will let you know that this is just the type of territory—fraught, ongoing, seemingly intractable issue—that a former diplomat really relishes.

Our efforts to inform the public of our policies, rules, and procedures extend to the Internet. We have published extensively at the following website: www.privacy.uscourts.gov.

In the interest of time, I would like to summarize just a few of the more recent steps that have been taken to protect sensitive information, while preserving a high level of public access to which we are committed.

In 2003, CM/ECF was modified so that only the last four digits of the Social Security number can be seen on the docket report in PACER. In May 2007, the Forms Working Group, comprising judges and clerks of court, reviewed over 500 national forms to ensure that they did not require personal-identifier information.⁹⁹ Although, as Judge Morris pointed out earlier, there is still work to be done, we only found six forms which required that information, and those forms were revised or modified to delete those fields.

Last August, the courts were asked to implement a new release of CM/ECF that was specifically designed to heighten the awareness of the filer's requirement to redact. The CM/ECF log-in screen now contains a notice of redaction responsibility and provides links to the federal rules on privacy. CM/ECF users must check a box acknowledging the requirement to comply with the rules in order to complete the log-in process. CM/ECF also displays another reminder to redact each and every time a document is filed.¹⁰⁰ Judging from the complaints we have received, these changes have certainly served to heighten awareness.

The judiciary continually seeks to expand public access. An important initiative to do so was approved by the Judicial Conference last month. Namely, the Digital Audio Pilot, which provides access to audio files of court hearings through PACER, was approved for national implementation.¹⁰¹ During the pilot phase of this initiative, a major concern was assuring that personal information not be made available to the

99. *Good Form! Working Group Restyles, Improves Federal Court Forms*, THE THIRD BRANCH (Admin. Office of the U.S. Courts), May 2009, at 1, 7, available at <http://www.uscourts.gov/uscourts/News/TTB/archive/200905%20May.pdf?page=1#page=1>.

100. *News Item: Notice Enhanced for Redaction Responsibilities*, U.S. COURTS (July 27, 2009), http://www.uscourts.gov/News/NewsView/09-07-27/Notice_Enhanced_for_Redaction_Responsibilities.aspx.

101. *News Item: Judiciary Approves PACER Innovations To Enhance Public Access*, U.S. COURTS (Mar. 16, 2010), http://www.uscourts.gov/News/NewsView/10-03-16/Judiciary_Approves_PACER_Innovations_To_Enhance_Public_Access.aspx.

public through the audio files. Eight courts participated in the pilot, including the Nebraska and Pennsylvania Eastern District Courts, as well as the North Carolina Eastern, Maine, Alabama Northern, Rhode Island, and New York Eastern and New York Southern Bankruptcy Courts. Each of the pilot courts warned lawyers and litigants, in a variety of ways, not to introduce personal identifiers nor to ask questions which would elicit personal identifiers unless absolutely necessary. Lawyers and litigants were also warned that they could and should request that recorded proceedings that include information covered by the privacy rules or other sensitive matters not be posted. Of course, the presiding judge ultimately determines which audio files should be posted.

A word on the use of software to redact. Algorithms can and have been developed to identify Social Security numbers, and they are effective in most, but certainly not all, cases. Unfortunately, it is far more difficult, and in some instances not presently possible, to develop algorithms to identify other types of sensitive information, such as the name of a minor, which, I would argue, is far more sensitive in nature than a Social Security number. Be that as it may, technology is a wonderful tool. I know—we use it liberally. But it is not a fail-safe, and it is certainly not an adequate substitute for filer vigilance with respect to protecting sensitive information from disclosure.

I think it is fair to say that the judiciary's national and court-based efforts, which you will be hearing more about shortly, appear to be having the desired effect, as illustrated by the Federal Judicial Center's excellent study. We really took heart that, of the ten million recently filed documents that the researchers reviewed, less than .03% were found to contain Social Security numbers. Of those, 17% had a readily apparent basis for a waiver. Upon further scrutiny, we believe that we will find more documents that qualify for the waiver for pro se litigants. All in all, this is very valuable information, and we will use the results of the study to zero in on lapses and address them.

Thank you.

JUDGE LEIGHTON: Thank you, Michel.

Our next presenter is Professor Edward Felten. He is the Director of the Center for Information Technology Policy and Professor of Computer Science and Public Affairs at Princeton University. His research on topics such as web security, copyright and copy protection, and electronic voting has been covered extensively in the popular press. In 2004, *Scientific American* magazine named him to its list of fifty worldwide science and technology leaders. Professor Felten.

PROF. FELTEN: Thanks.

I would like to respectfully challenge the standard narrative about this issue. The standard narrative is that there is a longstanding tension between transparency and privacy, and that technology makes this worse. I would like to argue that technology can be our friend on these issues, in two ways. First, advanced technology can help us to address the privacy challenges we face. Second, advanced technology increases the benefits of openness.

First, we can use advanced technology to help address the privacy challenges. We have already seen an example of this earlier in the session, with the study of how many Social Security numbers are present in documents. That is a valuable step. Of course, Social Security numbers, as Michel said, are probably the easiest case, because there is a very fixed pattern that is easy to scan for technically. It is possible to find and automatically redact Social Security numbers in a lot of cases.

But I believe that technology can be pushed a lot farther to help identify failures to redact, not as a replacement for human attention, but to augment it. There are some simple things we can do, and some more technologically advanced things. As an example of a simple practice, if a particular name or piece of information is redacted in one case document, but not in another, a system could flag that fact at the time of filing and alert counsel or the court employee who is filing that document to take another look.

As an example of a more advanced use of technology in these fields, I am convinced that advanced machine learning methods can be very valuable in helping to find failures to redact, even for difficult types of information, such as names of minor children. This is a topic on which we have ongoing research at Princeton, and we are hoping to be in a position to talk about positive results soon.

So I believe that we can do a lot to help find redactions that are done wrong, and I think there is a lot that can be done in terms of how the system is structured and how users interact with it in order to make it more evident when certain kinds of sensitive information is available.

I would also like to talk about some of the benefits of transparency, of putting documents out there for people to use. The kind of research that I was talking about into machine learning, the kind of research into different interfaces, as well as research about the extent of privacy problems in the documents of the sort that we have been doing, is only possible because we do have access to a large number of documents. We have assembled a corpus of about two million documents by a variety of lawful means that has served to enable our research. But many people who are itching to do constructive research along these lines have been held back by lack of access to documents. It is simply not feasible to buy two million documents from PACER. That would cost too much money, as well as not really being feasible even to download them all. So access to documents has a lot of value.

Indeed, there are many new types of constructive and valuable research which will become possible when documents are available to researchers in bulk. This includes research on issues of direct interest to the judiciary, such as questions of judicial workload and case management, historical and journalistic research to look at global pictures and trends across the entire judicial system, as well as development of new tools for improved legal research. I am convinced that if and when a large quantity of court documents becomes available to the great minds of Silicon Valley, we will see great new ideas, improved ways of doing legal research that really put the sort of technology that has enabled companies like Google to succeed to

work on the specific problems of lawyers and legal researchers. I think there is a lot that can be done in that area, but it is not quite possible today because information and documents are not as available as they could be.

If the judiciary is going to move ahead toward a system that is more open and makes more documents available, the next logical question is how best to enable positive uses of those documents of the sorts that I described. From the viewpoint of researchers looking to use these documents, there are really two things that we would like to see.

First, we would like to see bulk access to the raw documents. There is no substitute for actually having the data on which your study is going to operate.

Second, I would argue for authentication of the documents by using a technology such as digital signatures, which is a kind of electronic seal of authenticity put on a document. The advantage of doing that is that it makes it self-evident that the document is authentic, regardless of from whom you received it. That makes it possible for, say, a commercial service to provide a document to a working lawyer. The lawyer can be sure that the document is authentic because it bears the digital signature of the Administrative Office of the courts or some other authoritative body.

I think there is a lot to learn, actually, from other branches of government which do face, not the same, but similar kinds of issues in balancing transparency against cases where information should legitimately be withheld. The executive branch and the legislative branch have been working through these issues, on a larger scale in some respects than the judiciary has. I think there is a significant amount to be learned there.

Finally, on this question of how best to enable access for positive use, let me just put in a brief plug for our paper on this topic, called *Government Data and the Invisible Hand*, which appeared in the *Yale Journal of Law & Technology*, Volume 11, last year.¹⁰²

Thank you.

JUDGE LEIGHTON: Thank you, Professor.

Our next speaker is Judge Elizabeth Stong. Judge Stong has served as a United States Bankruptcy Judge for the Eastern District of New York, one of the pilot-project districts, since 2003. Before taking the bench, she was a litigation partner and associate at Willkie Farr & Gallagher in New York and associate at Cravath, Swaine & Moore and law clerk to the Honorable David Mazzone, U.S. District Judge in the District of Massachusetts.

Judge Stong.

JUDGE STONG: Thank you so much. Thank you especially to Professor Capra and Judge Raggi and Judge Rosenthal for convening this and for inviting me to participate.

It has been quite an interesting experience to step back and look at these issues systematically and from the special window that we have on personal information in the bankruptcy process. What we look at in the bankruptcy

102. David Robinson, Harlan Yu, William P. Zeller & Edward W. Felten, *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160 (2009).

arena is the most personal detailed information about an individual's situation that you can imagine. We do it at a point where they have come to the bankruptcy process for a fresh start, probably because something bad has happened—for whatever reason, not at a high point, but at a comparative low point in their lives.

So the question we are looking at is not like the question of the prior panel—whether to redact, what the tradeoffs are—because that decision was made back in 2003 when the bankruptcy process adapted to the need, the requirement, to get Social Security number information out of our public documents, at about the same time that we were going, universally throughout the system, in the bankruptcy courts in the United States, to electronic filing, electronic access to information.

So think about where this puts us. Disclosure drives our process. The kind of disclosure you see in a bankruptcy case is unlike anything I saw in my prior life as a big-case litigator. You can file a class action against the biggest company in America. You do not have to tell much of anybody much of anything about who you are. If you file an individual bankruptcy case, as 1.4 million consumers did last year, and you need to disclose your name, your address, your dependents by age, though not by name, where you work, where you used to work, how much you make, who you owe money to, what you own. I have seen debtors take this so literally as to itemize the things in their closets. It is a pretty intrusive process.

Access to this information is critical—access for courts, access for creditors, access for the trustees assigned in the case, access of the Office of the United States Trustee, part of the Department of Justice charged with the very important job of seeing if there is abuse of the bankruptcy system taking place. So you have broad disclosure by individuals. You have broad access to that information. And we put it all on the Internet. We have put it on the Internet because, as of 2003, in every single bankruptcy court, every single document, whether filed by a lawyer or filed pro se, winds up electronically accessible. This is, for many practitioners in the field, a volume practice.

I think and I assume—and I am generally gratified in this thought and assumption—that every lawyer who files a document with a federal court does it with the care and attention it requires and deserves. But it also happens from time to time that somebody has one too many cases to get filed that day, maybe in a bit of a hurry—it is a volume practice sometimes. Of those 1.4 million consumer cases that were filed last year, a certain number of them, filed by counsel, may nevertheless not have received precisely the attention we would like to see, and, yes, occasionally a mistake does happen.

I have to tell you, I was extremely interested in seeing the numbers uncovered by the study—ten million documents. This is taking me back to my days as a litigator, when we did document review in big cases, antitrust clearance, things like that. I was both heartened and concerned to see the number of documents in which Social Security numbers still appear. I was not surprised to see that we in the bankruptcy world have a certain number

of those on our watch—2244 of the 2899. I was struck to see that filing pro se is an exemption. When I see a pro se, I sometimes see someone who has already been victimized in one way and may well be victimized by not having a lawyer in a very complicated process, if the court process does not attend to the needs of that case.

So you take these competing factors that affect nearly every bankruptcy case—the need for disclosure, the need for access, the fact of electronic filing—and you get a bit of a perfect storm against which to apply a criterion that I think we universally understand should be as close to perfect compliance as we can get. Remember what comes along with an inadvertently included Social Security number: a name, a home address, a mailing address if it is different, employment, a record of every debt that person owes. This is a portfolio of information designed to facilitate identity theft. So you attach that also to a Social Security number, and you have your next perfect storm. Imagine the risks. Imagine the problems.

Now, you are going to say, is identity theft really such a problem for people who file bankruptcy? Is that the kind of identity people want to steal in the credit world? I am here to tell you, it happens. It happens. And it is a problem. Then you have again victimized somebody who has come to the court process for relief, relief for the honest but unfortunate debtor.

So what do we do in our court? First of all, I think we are grateful every time we see a properly redacted document. And they usually do come in that way. The statistics are consistent with our experience. I embrace this notion, mentioned in the prior panel, of informal, anecdotal, empirical research. I think that must be a professor's way to say, asking around, which is what I did. It sounds a lot better.

I will tell you that in our court we do not see a widespread problem. But it does not need to be a widespread problem in order to be a problem. When attorneys miss this, they create a potential issue; if it is not caught, it will live on that docket indefinitely. What we see anecdotally, as we follow up on these situations—when they are identified, for example, through the quality-control process that our wonderful Clerk's Office staff undertakes with every document filed electronically—it seems that most of the time this is a situation of staff in an attorney's office filing a document, with attorney supervision, but not at the level and with the guidance that we would like to see. And so a mistake happens.

How do we follow up with this? We have electronic filing training. We make it available to attorneys, but we invite staff to participate as well. We have a wide-open door to this training, and the more it is used, the better, from our perspective. Retraining is available too. These are complicated procedures, and if you do not use them every day, you should come back. We welcome that. We encourage it. We promote it, and not in a punitive way.

When we see it as a problem, it sometimes traces to staff. We immediately contact, through the Clerk's Office, the filing office and get a redacted document on the docket, and the unredacted document is taken down.

When you go into CM/ECF to file a document, as you have heard, you have to specifically check and click through a screen that acknowledges that you know you need to redact this information. Do we all check something and click through every time? I was recently away and clicked through to use a hotel's Internet access. Did I scroll down to the bottom and say, yes, I had seen the policy?

But I think it still serves a useful purpose. Every time filers log into CM/ECF, they are required to acknowledge that they are aware of this policy or they cannot go further in logging in and filing their documents.

We also try to remind people in other ways. We have an ECF newsletter. It is surprisingly interesting reading. I mean that. It is written in a short narrative way, kind of fun—how many documents have been filed? And we put reminders, again in a prose way—not just a policy, not just as a teaching thing, but reminders and information about the importance of complying with the requirement to redact Social Security numbers—not our court's policy, but a fundamental policy of the Judicial Conference.

Sometimes if we see a problem come up more than once with an attorney's office, the staff will really reach out to that office and try to get to the right staff people and invite them to come in. If they are having a problem or they have a question about our procedures, we want to hear from them, to make our procedures better.

Finally, it happens—and it is rare, I will say once or twice every two or three months—that we see a document in chambers or in court containing unredacted personal identifier information, often by a pro se, sometimes in the supporting documents filed with a proof of claim, which is what a creditor files, together with original documents that have been scanned, describing why they should get a payment in a bankruptcy case. If we see it in chambers, we are promptly responsive, either through our courtroom deputy in my own chambers, down to the Clerk's Office, to be sure that the problem is fixed. That is an informal procedure. It is a question that comes up rarely enough that that kind of direct intervention seems to be a practical solution, and a solution that gets the attorney's attention. Nothing like a call from the Clerk's Office or from the courtroom deputy to say, "We see something we are concerned about. Can you please fix this, and fix it promptly? Thank you so much."

It has worked. We have not yet established a system to impose a consequence or a penalty. I do not believe it has ever been the case that we have been required to take away someone's filing privileges, for example, and I expect it will not come to that. It would take an extraordinary amount of noncompliance, I think, for us to go to that level.

I will end with this. This reminds me a little bit of something I learned growing up in the San Francisco Bay Area, where we were never done painting the Golden Gate Bridge. You sanded it and painted it in one direction; and then you turned around and you started in the other direction. Once the decision is made, in whatever court, that information of this nature needs to be redacted from documents, but needs otherwise to be available to some participants in the process, just like the Golden Gate Bridge, you are

never done reinforcing the need to comply. As a court, we should never consider ourselves done with the enterprise of making compliance as easy as possible, as plain as possible from a procedural standpoint, and as comprehensive as possible, because even one mistake, given the potential consequences, is a mistake we should not tolerate.

Thanks very much.

JUDGE LEIGHTON: Judge Stong, thank you very much.

Our next presenter is Jay Safer. Jay is a partner at Locke Lord Bissell & Liddell's New York office. He counsels clients on commercial matters, including protection and preventive measures, the creation of risk litigation plans, e-signature, e-discovery, e-readiness, and pre-litigation analysis.

Jay?

MR. SAFER: Thank you, Judge. I recently had the opportunity to participate on a committee, which helped draft a proposed rule for the state courts on how to deal with private, sensitive information about individuals. It has to be remembered what we all recognize—that never have so many documents been so available to the general public that are filed with courts electronically. The FTC identity theft page¹⁰³ estimates that nine million Americans have their identity stolen each year.¹⁰⁴ In the federal courts, you have Rule 5.2,¹⁰⁵ which has been discussed in part. I will get to that in a second.

But think about how you would write a rule and what you would put in it. What information would you deem to be appropriate to tell an attorney not to put in papers? How would you tell that attorney so that it was effective, in having the attorney understand and follow the rule? What should be the enforcement of that rule? Who should be checking the documents? Should it be a clerk of the court? Should it be the judge? What information should be precluded, and should the rule be mandatory?

The federal court Rule 5.2, as I said, has selected information. It has Social Security numbers, as you know. It has taxpayer-identification numbers, birth date, the name of an individual known to be a minor, and financial-account numbers.¹⁰⁶ I want you to try to remember that.

Briefly in my time, I want you to compare what is now happening in the state courts with the federal rule. Keep in mind that in the state courts the general public has access now to almost all documents. First of all, while e-filing is not required in state courts specifically, once you get into the New York State Commercial Division, e-filing becomes, in effect, a presumption. A new proposed rule under legislation in New York State¹⁰⁷ will require e-filing in certain counties. Thus, any case involving commercial matters in New York County, Nassau County tort cases, and one other county and type of case to be selected, will be e-filed.

103. *About Identity Theft*, FED. TRADE COMMISSION, <http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html> (last visited Sept. 23, 2010).

104. *Id.*

105. FED. R. CIV. P. 5.2.

106. *Id.*

107. Act of Aug. 31, 2009, ch. 416, 2009 N.Y. Sess. Laws 1140–42 (McKinney).

But even putting aside e-filing, what they are doing in the state courts is scanning all documents that are filed. You can imagine, with all the documents being filed, how much is going to be available to the general public. All you have to do as a member of the general public is go to various links to the court website; www.nycourts.gov is the main website. There is specifically a link that is the Supreme Court Records On-line Library.¹⁰⁸ It is called SCROLL.

What it does is make available to the general public all these documents. However, the state of New York, unlike the federal courts, has no statewide unifying court rule on how to deal with sensitive information. It has a scattering here, a scattering there. A statewide rule was proposed in 2006. It did not go forward.

So in sitting around looking at this, the first question was, how do you deal with what information? At the New York City Bar Association, I am Chair of the Council on Judicial Administration, and we had a subcommittee dealing with this, consisting of a wide range of people: Steve Kayman, who was a lawyer; Judge Silbermann, a former administrative judge; Karen Milton, who is the Circuit Executive of the Second Circuit, and others. We prepared a report proposing nine types of information that would require exclusion in their entirety: Social Security numbers, taxpayer ID numbers, bank and other financial-account numbers, passport numbers, driver's license numbers, government-issued ID numbers, other identification numbers which uniquely identify an individual, names of minor children, and dates of birth. The rule would be mandatory.

This report is named the *Report Recommending a New York State Court Rule Requiring that Sensitive Personal Information Be Omitted or Redacted from Documents Filed with Civil Courts*.¹⁰⁹ The report is available at www.nycbar.org, Reports of the Council on Judicial Administration.

In doing the report, we looked at other states. Fifteen other states have rules on access, based on what you file. But they are all different. Looking at these nine types of information, one issue we looked at was whether if, for good cause, you needed to use such information, certain portions of the numbers, such as the four last digits of Social Security, could be included. But in looking at this and trying to decide whether a clerk should have the responsibility to look at this issue, we said the clerks have so much to do that it should not be their responsibility. It should be the responsibility of the attorney.

Then the question came up, should this be an ethical violation? The feeling was that it was just too hard to have it as an ethical violation, and it should be set forth as a court rule.

108. See *Supreme Court Records On-Line Library*, THE COUNTY CLERK AND SUP. CT. OF N.Y. COUNTY, <http://iapps.courts.state.ny.us/iscroll/index.jsp> (last visited Sept. 23, 2010).

109. SUBCOMM. ON ELEC. COURT RECORDS, COUNCIL ON JUDICIAL ADMIN., REPORT RECOMMENDING A NEW YORK STATE COURT RULE REQUIRING THAT SENSITIVE PERSONAL INFORMATION BE OMITTED OR REDACTED FROM DOCUMENTS FILED WITH CIVIL COURT (2010), available at <http://www.nycbar.org/pdf/report/uploads/20071821-ReportRequiringNeedtoProtectSensitiveInformationFromIdentityTheft.pdf>.

Then the question was, do you have other types of information, like email addresses, which you should include in the rule? But it was felt that the nine types of information contained the most sensitive information.

I sent the report with a letter to Chief Judge Jonathan Lippman of the New York State Court of Appeals and Chief Administrative Judge Anne Pfau. It was then sent to the Civil Practice Law and Rules Advisory Committee, on which I am fortunate also to be a member.

The CPLR Advisory Committee has now sent to the Administrative Board of the State of New York a modified version of what we proposed at the City Bar. Interestingly, the Advisory Committee took a much stronger view. They said it is not enough information. There should be more information excluded.

They have recommended the following exclusions: Social Security numbers, telephone numbers, date of birth, driver's license numbers, non-driver photo identification card numbers, employee identification numbers, mothers' maiden names, insurance and financial account numbers, demand deposit account numbers, savings account numbers, credit card numbers, computer password information, electronic signature data or unique biometric data, such as a fingerprint, voiceprint, retinol image, iris image, medical procedure, diagnosis, or billing codes.

That is a lot. But the CPLR Advisory Committee said, "We want to protect sensitive information. And we want to make it mandatory." It said the courts should have the ultimate responsibility to determine whether something should be removed, and they have the ability to do that upon motion if this issue is contested. Matrimonial litigations were excluded.

One area that may need a modification is consumer debt cases. On a number of occasions, with sewer service, people buy debt, and they sue people. Those defendants, if you require certain information be excluded, will not have the ability to know whether they are really being sued for something they did. It has been requested in those cases that, for example, the last four digits of Social Security numbers be allowed.

Another point is that, when you are looking at this and you are realizing all the issues that come up, there are also certain people—fairly—who say, "Wait a minute. We have a First Amendment right to have access to information. We want to have access and that there be as little restriction as possible."

So what is going to happen now, I think, we will know in the next few months, hopefully. Will the Administrative Board approve this? If they do, it will be the first time in New York State that there will be a statewide rule for which attorneys will be responsible for excluding certain sensitive information when filing their papers with the court.

Thank you.

JUDGE LEIGHTON: Jay, thank you.

Our next speaker comes from the U.S. District Court for the Eastern District of New York. Robert Heinemann is the Clerk of that court. He has held that position since 1983. Before that, he was a Chief Deputy Clerk and pro se staff attorney. He received his J.D. from Brooklyn Law School and

his A.B. from Fordham University. He has received the Director's Award for Outstanding Leadership from the Administrative Office of United States Courts.

Mr. Heinemann.

MR. HEINEMANN: Thank you, and I want to thank Judge Raggi for inviting me to this discussion.

As a Clerk of Court, I have a more general perspective about this. First, I am very aware that I am a public information officer between the court and the public. At the same time, I am also aware that I have to be a gatekeeper, a temporary gatekeeper. I want to underline the word "temporary," in deference to the press, because I also am a public information officer who responds to press inquiries.

I think the Internet is really our helper here, although it has been a hard way to get there at times. I agree with what was said earlier in another panel—I think it was by Judge Morris—that scanned documents are problematic. I would much rather always have an electronic document. I think electronic documents are easier to seal temporarily or completely, if it is done appropriately, and limited to certain views by parties and by the court. It is also easy to unseal an electronic document.

The flip side of all of this—and I think courts do a very, very good job in the criminal area and sometimes a less good job in the civil area—is in unsealing documents. When people are indicted before they have been arrested or there is a safety or security issue, for a very brief period of time, that information or indictment is sealed. As soon as that person is arrested or the reason for sealing it is gone, almost immediately the court directs the clerk to unseal.

I think that happens less often in civil litigation, where there is more of a desire on the part of one or more of the parties to seal a settlement agreement or to seal some corporate information. I am not talking about patents or other matters that often may need to be sealed and stay sealed. I think courts can do better in terms of unsealing civil cases.

But there are a lot of practical issues. I will not go over what was put in my statement, except briefly.

We have to comply with the federal rules. In each district, it is important to have local rules of policy. The Eastern District of New York has them.

It should be transparent why a document is being sealed, and there should be an order of approval to seal it by the court. I think the form we have developed in Eastern New York is useful for that purpose.

It also is very important—and here is where the problem comes in—to always use that form or to always make it clear why a document needs to be sealed, however briefly, or if it is the rare case that may have to have a longer-term seal. That is where human error comes in. We have to do our best, as public servants and as members of other agencies of the government, to limit that human error, and as members of the bar.

A core question for this committee may be: who ultimately is responsible to be a backstop to seal or unseal, or for redaction? I certainly

do not think it should be the Clerk's Office in the first instance, but maybe it should be the Clerk's Office in the last instance. Attorneys do get busy; attorneys will make errors. The U.S. Attorney's Office will make errors. The Clerk's Office will make errors. But at some point, since this area is so important in terms of privacy and, in criminal cases, protection and safety, someone has to be accountable as a backstop. That will not make human errors zero, but it will certainly make errors less likely because there is another pair of eyes looking at it.

That brings me to another point that I touched upon in the statement. I think we need more help with the software in terms of flagging potential areas where something should have been sealed that may have been missed. We do have quality-control deputies. That is a very important role now. The Clerk's Office has changed tremendously over the last ten years, going from a very paper-intensive office—we will always have paper, but where every item was paper—to now, where everything is potentially on the Internet that is filed by an attorney, very quickly. That is the beauty and I think it is a help, but it is also something that needs very careful control and monitoring.

To the extent that the Administrative Office can provide us with additional software tools—the Office does a great job right now, but if we can have some additional search that might be done to limit or to flag certain categories of docketing that we would look at more closely, since we have so many thousands of docket entries to look at in every situation—that would be very helpful.

Another obvious point is that courts can have local rules on a variety of matters, and they do—courts need to have them—and they can have local policy, but even with changed federal rules of procedure, I think it takes a good two to three years before the practicing bar really, in general, gets very familiar with those federal rules of procedure and starts to use them daily and uniformly and are aware of them. This means that Clerk's Offices have to do much more to be proactive, to put more on our website, to flag things in ways that make it available and right under the nose of counsel. If it takes two to three years for counsel, with all due respect, to get really familiar with the federal rule, imagine how much longer it takes counsel and the Clerk's Office and other government agencies to get familiar with local rules of policy, or administrative orders, which often are the most effective and efficient way to do something quickly, but also may be the least well known or well understood. So we have to use our public websites to call attention to policy changes in a very proactive way, in a way that you see it immediately as to what is new on your website, as soon as that administrative order goes out there, or policy or procedure or form.

So those are some of the things that I think Clerk's Offices can do to help the court police these matters, which are only really policed in the short term and only in maybe one or two percent of filed matters, before they are once again, in most instances, open to the public.

Thank you.

JUDGE LEIGHTON: Thank you, Mr. Heinemann.

Our final speaker is Joe Goldstein. He is a freelance reporter and former courts reporter for *The New York Sun*. He is currently working on a project for ProPublica, a nonprofit investigative newsroom.

Mr. Goldstein.

MR. GOLDSTEIN: Hi. About the only thing I am qualified to talk about here is how reporters actually use electronically filed documents.

I used to have a desk in the U.S. courthouse in Brooklyn, when I was writing for *The New York Sun*. I figured that most of my stories would be based on courtroom events that I had actually witnessed—trials, arraignments, and sentencings. On occasion, the courthouse will have a good trial, and that will keep the reporters nourished for a couple of weeks. But I was struck that there is a lot less courtroom action than we might actually expect. Criminal prosecutions, even the good ones, generally end in plea deals, and none of the evidence that the prosecutors have amassed ever comes out in open court.

The point here is that a robust right of public access to the courts needs to encompass more than just the right to sit in on court when there is a judge on the bench. Reporters rely very heavily on PACER to figure out what is actually going on. A huge share of what we write about comes from documents filed electronically, attachments to those documents, and the like.

I am trying to think of an example to illustrate this. You may remember the name of Russell Defreitas, who was indicted on charges of trying to blow up part of JFK Airport.¹¹⁰ The case broke in June 2007, and he has been in court a handful of times since then. Certainly the case is still going on, and very little has actually emerged in open court. But if you log on to PACER and run a docket search, you will see that, as of last night, there were 192 motions and letters that have been filed. You can bet that most of the reporters in the Eastern District have read every single word of that. It is really from that that they are able to follow one of the more important cases that is currently winding through that courthouse.

I am unclear on what proposals, if any, are on the table to further redact court records, to seal additional court records. But I would like to say I am probably against it.

From this spectator's point of view, one of the main functions of courts is to pry sensitive, personal information from people. This is not an incidental function; this is what courts do. Much of what emerges in proceedings or in attachments filed on PACER does contain sensitive information, terribly private information, people's darkest secrets. The public has a right to know, and this information ought to very much be in the public domain.

At the sentencing of a murderer, for instance, a widow might talk about how this has traumatized her children. Just because the names of minors are disclosed, that does not mean that the transcript ought to be reflexively redacted or sealed. A defendant who does not want to go to prison for the

110. Cara Buckley & William K. Rashbaum, *4 Men Accused of Plot to Blow Up Kennedy Airport Terminals and Fuel Lines*, N.Y. TIMES, June 3, 2007, at 37.

rest of his life may tell the court a tale of woe about his ill health. He may provide medical records. He may provide psychological records. He may talk about abuse that he suffered as a child. Just because that is sensitive medical information does not mean that it should be reflexively sealed or kept private. It will factor into the sentence that the court makes, and the public ought to have a right to inspect the factual bases of that sentence.

There seems to be a concern that information filed electronically will be used for nefarious purposes. I believe that we have heard that there are instances of identity theft from bankruptcy proceedings. I am not very familiar with that, but I would like to know about instances in which we know that information filed on PACER or filed electronically has been used to do wrong. I want more than just sort of an undifferentiated fear.

I have read in the past about concerns that criminals will use electronic access to courts to access information about potential cooperators and coconspirators and use it for purposes of witness intimidation. I am not aware of any such cases. Maybe they do exist. But I think the courts should have a couple in hand before they act on that fear.

I do not want to be too provocative, but I will say that last year in Brooklyn an attorney was sentenced for trying to facilitate hits on a couple of witnesses. A defense attorney in New Jersey was indicted on a similar sort of thing just last year. My hunch—and I do not know for sure—is that defendants who want to use information that comes out in court to kill off those who might testify against them are generally getting their sources of information from discovery or from confidential information that never gets filed publicly. So I would caution against just being worried that the public has access to motions and the like that are filed electronically, and that that would suggest that some of this information might be used to intimidate witnesses and the like.

I would just like to close by saying that, especially in the civil context, a lot of documents are already filed under seal. Documents that could simply be redacted are instead just filed under seal. There has been talk about needing a backstop to make sure that Social Security numbers and other identifying information is not filed on PACER. The backstop that I am interested in seeing is a backstop of judges and court officials who make sure that attorneys engaged in civil litigation are not just filing documents under seal because it is more convenient and they would rather litigate privately than let the public have access. My hunch is that a good portion of the documents that are filed under seal need not be.

I will close with that.

JUDGE LEIGHTON: Joe, thank you. Does anybody have a question?

Judge Stong talked about the need to search for perfection here because the stakes are so high for some folks, particularly in bankruptcy. Yet we have an exemption for pro se filers. I have been told that 40% of the cases in the Ninth Circuit have a pro se participant, twenty-five percent in the Western District of Washington, where I am from.

Should we be doing something for those folks? And if so, what?

JUDGE STONG: As a practitioner, I can assure you that none of my clients was ever pro se. But moving to my role and my perspective in a bankruptcy court, where both debtors and creditors and other parties of interest may file pro se, I do not see a reduced risk of harm to people who do not have a lawyer in their Social Security number being electronically accessible in the docket. However you give effect to that concern, I do not see a principled basis to make a distinction in the kind of harm you are trying to avoid.

It is a lot easier to have a framework to instruct lawyers and require lawyers, for example, who file electronically—unlike pro se litigants, who bring paper to the counter, which is scanned—to base your requirements on that system. I would not want to create administrative traps for uninformed people trying to navigate a sufficiently complex process already by somehow creating impediments to the ability to file a case.

But I think your concern is spot-on. There is no difference whatsoever—in fact, maybe even more harm could be done to self-represented people through the inadvertent inclusion of Social Security numbers on the documents they file in the case. I certainly make no distinction if I see a Social Security number in the docket, based on whether the debtor has an attorney. If I see it in something that is handed up in court, if I see it on a proof of claim, we attend to it the same way.

I have taken the spirit, if not the letter, of the Judicial Conference policy and the requirements that we implement through CM/ECF to be that this information should not be publicly available. How we do it is through the requirements we impose on lawyers, through CM/ECF and otherwise. Why we do it, I think, would make no difference whatsoever whether there is a lawyer or not.

So I think I am agreeing with you.

JUDGE LEIGHTON: Professor, last word.

PROF. FELTEN: I think there are some things that can be done technologically to help pro se filers avoid mistakes of this sort, to scan their filings and be a little more aggressive about pointing out possible problems. As well, if you can ask them to fill out up front a fairly simple form—that might depend on the type of case they have—in which they explicitly list information—for example, in a bankruptcy case, information about their Social Security number and bank accounts—that could help to target a technological scan for information that ought to be redacted, which can then either be done for them or can be suggested.

JUDGE STONG: I will just note that the number is nine, nine Social Security numbers that were found in those documents that were reviewed in pro se papers. My speculation is that every single paper that comes in—and I do mean paper—at the Clerk's Office is reviewed for this purpose. That is the only way I can imagine that we are getting to a number like nine in the many pro se papers that are filed.

JUDGE LEIGHTON: My thanks to the panel.

**CONFERENCE ON PRIVACY AND INTERNET
ACCESS TO COURT FILES**

**PANEL FOUR: COOPERATION AND PLEA
AGREEMENTS—PROFESSORS &
PRACTITIONERS**

MODERATOR

*Hon. Steven Merryday**

PANELISTS

Caren Myers Morrison¹¹¹

Gerald Shargel¹¹²

Barbara Sale¹¹³

Christopher Brown¹¹⁴

Alan Vinegrad¹¹⁵

Jan Rostal¹¹⁶

Cris Arguedas¹¹⁷

JUDGE MERRYDAY: We will consider this afternoon the issue of plea agreements and cooperation agreements. It is a difficult subject. It is one that has, I think, the central attention of the subcommittee that is considering privacy issues, particularly in the area of criminal practice. From the vantage of our research, it is clear that many mechanisms are in place around the United States, based on similar but different operational principles. There is a variation in degree of satisfaction and confidence in those mechanisms, so we wanted to investigate an array of them.

We will do so in two panels, the first panel consisting of practitioners and academics, and the second panel of judges.

We will begin with a presentation from Professor Caren Morrison, of Georgia State University.

PROF. MORRISON: Thank you very much.

Internet access to criminal case records in general, and to plea agreements and cooperation agreements in particular, poses several

* United States District Court Judge, Middle District of Florida.

111. Professor, Georgia State University College of Law.

112. Professor, Brooklyn Law School.

113. United States Attorney's Office, District of Maryland.

114. Correctional Programs Division, Bureau of Prisons.

115. Partner, Covington & Burling LLP.

116. Federal Defenders of New York.

117. Partner, Arguedas, Cassman & Headley, LLP.

difficulties. The first and most obvious is that it raises the fear of retaliation against cooperators. The second is that it may deter some individuals from cooperating in the first place. Third, and probably most importantly, these two concerns may encourage prosecutors, who are apprehensive of their cooperators getting hurt or of losing important sources of evidence, to take steps to limit the damage before their fears are realized, even if their concerns are overblown.

So concerns triggered by Internet access may drive prosecutors to hide what they are doing, either by over-relying on sealing, masking the kinds of deals that they make with cooperators, either by using charge bargaining or hiding sentencing facts from probation departments and courts, or avoiding filing plea agreements in the first place.

An important backdrop to the whole issue is that use of cooperating defendants is far from transparent. It is a law enforcement mechanism that is difficult to regulate, susceptible to arbitrary application, and seems to result in wide disparities in the treatment of defendants. So increasing meaningful information about how the government chooses and rewards cooperators is an important goal.

For these reasons, I suggest that the Committee consider limiting Internet access to criminal court records on PACER to the parties and to the court, and not having these files be accessible to the general public except in paper form at the courthouse. But in addition, I propose that the Committee require the government to provide detailed data on plea and cooperation bargains and sentencing in the aggregate.

Before I get into specifics, I want to make clear several underlying premises on which I am basing my proposal.

The first is that the fundamental role of public access to court records is to enable the informed discussion of public affairs and, in particular, to allow the public to understand what the government is doing. These are the purposes that Judge Raggi spoke about in her remarks this morning. These, in turn, will enhance public confidence in the system and allow increased public oversight.

The second is that any solution ultimately reached must not result in a net loss of information to the public or in the alteration of the character of that information. At a minimum, my proposal assumes that the public will continue to have access to court records at the courthouse to the same extent that the public did in the past.

Further, any solution that treats cooperator files differently from non-cooperator files will raise a red flag, and in so doing, is going to identify the cooperators. So any solution that seals only cooperation agreements and not plea agreements, for example, will do little to protect cooperator security.

In addition, identification of cooperators is not limited to plea documents. Sentencing memoranda—in particular, substantial assistance motions filed by the government—are just as revealing. So are motions to adjourn sentencing until all related defendants' cases have been resolved. Even the docket sheet itself frequently reveals cooperation. If, for example, there are

a lot of sealed entries or an unnaturally long delay between plea and sentencing, anybody who is familiar with the system will recognize that that is typically the file of the cooperator.

Prosecutors are well aware of these facts, and they will do whatever they feel is necessary to protect the safety of their cooperators. This can lead them to alter the way they conduct their business. So the practice of signing up and rewarding cooperators, which is already fairly opaque, can become even more so as prosecutors become concerned that their cooperators are in danger.

Finally, I think sealing documents is a poor solution, for a couple of reasons. First of all, sealing is not supposed to be a permanent or blanket solution. Sealing is supposed to be used in exigent circumstances and for limited periods of time only.¹¹⁸ It is not meant to be used automatically in every case in which someone cooperates. Second, in an online context, there is a strong disincentive to unseal anything. Once something is unsealed, it immediately becomes available to an enormously wide public, and so prosecutors and defense lawyers representing cooperators will not be in any hurry to do so. Once again, this is contrary to the legal purposes of sealing, which is supposed to be a short term solution, ending once the exigency has passed.

As I said, the first part of what I am suggesting is to try to curb unwarranted exposure of cooperators by limiting access to the docket sheets and the case documents on PACER to the parties and to the court. This would leave all non-sealed documents still available at the courthouse.

Obviously, this kind of restriction on online access would need exceptions, particularly in high-profile cases or cases of heightened public interest, such as public corruption cases. That would help to answer the issues raised by the Salvatore Gravano or Bernie Madoff-type cases, where obviously there is going to be high newsworthiness content. In those cases it would make more sense, given the amount of publicity they generate, that the records be available online. In such cases, I think the district courts should have the flexibility, with input from the parties, to allow the public to access these cases on PACER, on a case-by-case basis.

But for the vast majority of run-of-the-mill cases which involve cooperators, such as narcotics cases, where the potential risks to the cooperators are high and the news value is low, I am not certain that there is that much public benefit from having those cases posted online.

This proposal might seem restrictive, but it actually would not result in a net loss of information to the public—at least not any more of a loss than there is already in a paper world. My concern with the solutions devised by the districts of North Dakota and New Hampshire, which have the virtue of treating cooperators and non-cooperators alike, is that they completely obscure the information about whether defendants are cooperating or not.

118. *See, e.g.,* United States v. Cojab, 996 F.2d 1404, 1405 (2d Cir. 1993) (noting that the power to seal documents “is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons”).

In addition, they give the public no information whatsoever about what the terms of the cooperation agreements may be.

A system in which every plea agreement looks alike and everything is accompanied by a sealed plea supplement is misleading and fails to inform the public of what its government is doing. Worse, the public will be denied that information at the courthouse as well, as there is no access to sealed records. I think that solutions that provide protection to defendants by obscuring government action do run contrary to the purposes of public access.

So the second part of my proposal is that there really has to be a way of delivering information to the public so that it can understand how many defendants the government is cooperating with and the magnitude of the benefit given to those defendants compared to non-cooperating defendants. In my view, it is more important for the public to know exactly what kind of trades the government is making with individual cooperators than it is for them to know that the cooperator's name is, for example, "John Smith."

A way to increase public oversight without triggering fears of retaliation would be to organize the information differently, outside of the confines of a criminal case file with a specific defendant's name on it. Rather than sealing, redacting, or otherwise obscuring the terms of the cooperation bargain, it would be more helpful to disclose all cooperation agreements with the explicit terms of the bargain intact but the personal identifying information redacted. What I have in mind is a system of anonymous defendant profiles, which could be organized by the type of crime charged and then could include a statement of initial charges, all subsequent and superseding charges, plea documents, an indication of whether the defendant cooperated, and if so, the substance of his cooperation, and sentencing information. If the defendant did cooperate, the cooperation could be sorted into one of four general categories: providing background information, agreeing to testify, providing testimony, or taking an active part in the investigation.¹¹⁹

In this way, the computerization of the federal courts could give the government an opportunity to shed light on its practices without a massive loss of individual privacy.

JUDGE MERRYDAY: Thank you very much.

Criminal defense attorney and Professor at Brooklyn Law School, Gerald Shargel.

PROF. SHARGEL: Thank you. Good afternoon.

In a system that celebrates transparency, I do not think that sealing is appropriate in the case of cooperators. Not only is it not appropriate, I do not think it accomplishes anything. The idea that people learn that a particular person is a cooperator online, whether it is on ECF or PACER or Whosarat.com, is nonsense. People learn that someone is a cooperator

119. This proposal is described in greater detail in Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 974-76 (2009).

because they know about the case and they know generally what has happened to the defendant. A sealed proceeding is an advertisement that the person is cooperating. So is a delay. It is usually obvious within hours or days that someone is cooperating. As I have said, it is like Thanksgiving dinner. When one of the relatives is absent, you know something is wrong. The same is true in a multi-defendant criminal case: when one of the defendants is absent or someone that is part of the gang is not charged or sentence is delayed for two, three, four years or more, you know something is terribly wrong.

There is one other thing that flies in the face of sealing the information pertaining to a cooperator—and let me make this clear. If someone makes a deal with the government and goes in, sometimes under cover of night, and pleads guilty, I am not suggesting that the plea minutes not be sealed. I am not suggesting that any information pertaining to the cooperator not be sealed. But I am suggesting that it would be unconstitutional for the sentencing proceeding itself to be sealed. The Supreme Court has said recently, back in January of this year, in *Presley v. Georgia*,¹²⁰ that the public has a qualified First Amendment right to know exactly what occurs in a case.¹²¹

I use the example of Sammy Gravano, who received a sentence in the Eastern District of New York of five years, having admitted to nineteen murders and other related criminal activity.¹²² The public has an absolute right to know why that happened. The source material for why that happened would be the sentencing minutes and the comments of the judge in imposing the sentence. If a lawyer stands before a sentencing judge and makes an argument that that client was an important, effective, and essential cooperator in rooting out a serious criminal organization, the public has the right to see that—my point being that it is constitutionally wrong to think about sealing these records.

There was a case in the Southern District of New York that went to the Second Circuit where a district court judge decided, only for her own convenience, to hold all sentencing proceedings and some guilty pleas in the robing room, simply, as I said, for convenience. No reason was put on the record. The Second Circuit reversed convictions in two companion cases that were reviewed by it.¹²³ Once again, the court found that it was unconstitutional.

I cannot imagine that there can be a blanket rule where courts were permitted to make generalized findings that all records are sealed in the cases of cooperating witnesses. It would never pass constitutional muster.

The danger of cooperation is not caused by posting the sentencing proceeding online. The danger of cooperation is not posed by having the

120. 130 S. Ct. 721 (2010).

121. *See id.* at 723–25.

122. Joseph P. Fried, *Ex-Mob Underboss Given Lenient Term For Help as Witness*, N.Y. TIMES, Sept. 27, 1994, at A1; *see* United States v. Gotti, 171 F.R.D. 19, 21–22 (E.D.N.Y. 1997).

123. *See* United States v. Alcantara, 396 F.3d 189, 201–03 (2d Cir. 2005).

sentencing proceeding as a public proceeding, which it is. Can we extend the closed filing online and say that the sentencing proceeding is closed, that the door should be closed and no one should be admitted, seal the courtroom? I do not think there is anyone in the room who would suggest that that is constitutional. I do not think there is anyone in the room that would suggest that is appropriate in any way.

My point, very simply, is this: if sentencing is an open proceeding, it should be available to the public, both in terms of entering the courtroom and seeing what occurred on PACER or ECF or any website that wants to pick it up. I think that cases like the Gravano case make absolutely clear that when something completely out of the ordinary happens, the public has a right to know why.

Moreover, I feel strongly that it is not the obligation of the judiciary, of the court system, to protect witnesses or protect cooperators. I think it is the obligation of the executive branch. I think it is the obligation of the Bureau of Prisons or the Marshals Service, with its Witness Protection Program, to engage in protecting its witnesses. There are mechanisms in place. There are separation orders. This is a vast country, with a vast network of prisons. Prisoners are routinely housed in places where a danger does not present itself. There are special prisons that accommodate cooperators. There are ways that the safety of a cooperator while in prison—and, of course, out of prison as well, in the Witness Protection Program—can and is effectively secured. The Marshals Service boasted of the fact, and I think continues to boast of the fact, that anyone who stayed in the program and followed its rules has never faced harm. There has never been a murder or an assault of any kind. I know that was true up until recent years, as long as that person stayed in the program.

This is the obligation of the executive branch. We have open court proceedings in this country, and it cannot be a policy to take a particular class of defendants and say, in those cases, we are going to seal.

Thank you.

JUDGE MERRYDAY: Thank you, Mr. Shargel.

Another vantage, no doubt, from the Criminal Chief, the United States Attorney's Office in the District of Maryland, Barbara Sale.

MS. SALE: Perhaps surprisingly, I agree with my colleague that sentencing proceedings should not be sealed. That is perhaps the extent of my agreement with him, however. And I thank the people who put this program together for allowing a diversity of views.

I come from the District of Maryland, where the primary office is in Baltimore, which has one of the highest homicide rates in the country, I am not proud to say. It is the home of the infamous *Stop Snitching* videos, which were actually marketed DVDs, which exhorted people not to snitch on other people and threatened harm to those who cooperated with law enforcement. *Stop Snitching II* featured a little boy of about ten wielding a gun. Baltimore is also a place where we have had a constant stream of notorious, high-profile witness retaliation cases.

We had a hideous arson case some years back in which a family of seven was burnt to death in their home because the mother was suspected—suspected, merely—of having passed information to the police about neighborhood narcotics transactions. We had another firebombing where an older lady was burned out of her home for the same reason. These are just citizens trying to clean up their neighborhoods and make them safer for ordinary law-abiding people to live in.

We have more recently had cases involving deliberate first-degree murders of people who were believed to be cooperating in criminal cases. We had a case last year in which a person who was awaiting trial on a homicide learned from a witness list that a particular person, whose name was not theretofore known to him, was expected to be a witness. This happened to be a key witness, but he was a bystander, just somebody who just happened to be there and see something and report it to the police. The witness's mother urged him not to get involved because she had heard about the dangers faced by witnesses to inner-city crime. From his prison cell, using a smuggled cell phone, the defendant put together a network of gang members, who together gunned this man down in his front yard in front of his four-year-old child.

In this climate, we have to take every precaution we can to protect those who want to come forward and cooperate with the prosecution. It is not easy.

My colleague here says that the Marshals Service has a record of protecting people one hundred percent, but that speaks only to the formal WitSec program, in which witnesses are given new identities and relocated. In the real world, very few are admitted to that program, and even those who are often choose to go back to the neighborhoods that they come from. We had a case a year ago where a protected witness went home on Thanksgiving Day. He was supposed to be in witness protection, but he went home to see his mom for Thanksgiving, and was gunned down a block from her house because he was believed to be cooperating.

I do not need to tell horror stories for the rest of the afternoon, but they are real, and they happen, day in and day out.

There are two consequences to this in our federal court system. Maryland was among the last to go to electronic case filing in criminal cases because our Chief Judge and some of the key players were very wary about what would happen. We finally bit the bullet and, in August 2008, went to electronic case filing in criminal cases, but only after the public defender and I, and one of the judges, and a representative of the private criminal defense bar sat down for months to try to figure out how best to protect cooperating witnesses. We adopted what has come to be known as the North Dakota plan. This means that whenever somebody pleads guilty, there are two documents that are filed on PACER. One of them is simply a plea agreement. It lays out all the things that you need for a plea agreement—the elements of the offense and the maximum penalty and the rights that the defendant is giving up and that sort of thing. Then there is filed in every case a “sealed supplement.” If the person is not cooperating,

the sealed supplement simply says, “This is not a cooperation agreement.” If the person *is* cooperating, it lays out in three or four pages the whole litany of expectations and obligations that go with the cooperation agreement. So anybody looking at the docket from outside on PACER would see that all plea agreements look exactly the same, and only by gaining access to the sealed supplement—and people do move to unseal from time to time—could somebody determine that Person A was cooperating, whereas Person B was not.

This seems to have been effective. The defense bar is very happy with it because they feel that it protects their clients. But that seems to have resolved itself. As we stand now, we are confident that we are doing what we can to protect cooperating defendants from exposure as they move through the system.

There are several points throughout the system where this becomes important. Early on in the case you may need to protect the identity of the cooperators to protect an ongoing investigation. You might think that after they have testified at trial, it is all out in the open and there is no longer any need to protect them. But it turns out that there is a continuing need to avoid identifying cooperating witnesses on paper. Judges that I work with and people in my office have gotten letters from cooperators in prison begging them to send some kind of phony court document so that they can show it to their new colleagues in prison to prove that they are not snitches, that they are not cooperators. It is not simply that a person is endangered by cooperating in a particular case. It turns out that being a “snitch” is a status that sticks to people throughout their incarcerations, and—who knows?—maybe beyond, which puts them at risk. So we have had people ask to have phony judgment and commitment orders, or phony plea agreements that show that they are not cooperating.

Of course, the court cannot do that and we cannot do that. The public defender in our district has generated letters to former clients saying, “It is too bad you elected not to cooperate. I could have gotten you a better deal”—wink, wink. Presumably, they can show this around, and it may protect them.

It turns out that *paper*, something that is actually in black and white, is important to people in prisons and in the criminal community on the street who are trying to determine who is and who is not a cooperator. We are investigating a case right now where an FBI 302 report of investigation was circulated as proof that the victim was cooperating. That 302 report had been turned over in discovery, and copies were located in four penal institutions in three states. The witness was, again, gunned down in his home neighborhood.

For now, I am not suggesting any global policy solution. Our solution of having a sealed supplement in every case seems to be working. Others have suggested the Southern District of New York solution of having the plea agreement remain in the prosecutor’s file and never made a part of the court record. I think each district is going to have to work its way through these issues separately. I take Judge Raggi’s point that everybody is

looking for a carve-out here. We certainly are. We would like to have cooperators not exposed on the public record in perpetuity and endangered by having their status as witnesses on PACER.

Thank you.

JUDGE MERRYDAY: Thank you, Barbara.

From the Intelligence Operations Office of the Bureau of Prisons, Christopher Brown.

MR. BROWN: Good afternoon.

I just want to take a couple of minutes to talk about what happens to inmates once they are received inside a federal prison with the tag as a “snitch” or a “rat.” I can tell you from experience that one of the things that happens right away is that other inmates seek to find out why they are there. What I mean by that is, once an inmate is received at a federal prison—I basically call them the welcoming committee. These are the inmates who attempt to be your friends, just to find out why you are there, what your case is all about. What they are actually trying to find out is if this person can be trusted or not. The way they do that is, they want to see your presentence investigative report or your statement of reason—just something to say you did not cooperate with the government and you did not take a plea to basically rat out others.

The Bureau of Prisons does do a good job—as well as the Marshals—in keeping these individuals safe. However, one of the problems that we are faced with is, once an inmate has been outed as being a rat or a snitch, what to do with him. Once we find out that the inmate has been compromised—and I am not talking about inmates that are in the Witness Protection Program. I am just talking about the average inmate who, for whatever his reasons were, decided to take a plea and he named his codefendants and he received a reduced sentence.

The Bureau of Prisons tries to keep these inmates within 500 miles of their home. However, that is not always possible. First and foremost is the inmate’s safety. Once this inmate steps foot inside the institution, if this inmate cannot produce some sort of documentation that says that he did not cooperate or take a plea, then he is basically ostracized for whatever time that he has to do. No other inmates want to befriend him. The only other inmates that receive this type of treatment are child molesters. We read about it, we talk about it, we see it on television, but it is real. These inmates basically do their time in isolation.

Let’s talk a couple of minutes about assaults. They are assaulted. They are harassed pretty much on a daily basis. Basically, what can be done? We can move them from prison to prison, but some of the intelligence of that inmate is passed on from institution to institution. Just like this inmate is transferred to another institution, so are others. It is almost like they have their own underground network.

The Bureau of Prisons does not allow these documents inside the prison, but the inmates are allowed to review them. However, they are not allowed to keep them in their possession. When I listen to the stories about the inmates asking for fake documentation, I have firsthand experience where

inmates have basically asked me the same question: “How do I go about getting fake documentation? I am receiving pressure on the yard to produce some type of documentation that says that I am not a cooperater.”

What happens from that point on is, we have to assess whether or not we can keep that inmate in the same institution or whether we are going to break our own rule of 500 miles, which is really an unwritten rule, and send that inmate somewhere where he will be safe.

Not only is the inmate in danger, sometimes his family members are in danger. I have had inmates tell me that individuals in their community want to see their pre-sentence investigation report. Somebody in their family will show it to someone in the community, who will verify the information and then get the word back into the prison that this person is okay or this person cannot be trusted.

The Bureau of Prisons recognizes that this is a problem. In 2002, what the Bureau of Prisons did was to basically let all inmates know that they can no longer have access to these materials. Simply telling an inmate, “You cannot have these materials, but do not talk about your case”—there are 1800 other inmates there. You have to talk to someone. You cannot spend ten, twelve years in a federal prison and not try to fit in with someone.

There also was the issue of moving them to other prisons where they will be less susceptible to harm. That is something that we try to do. We still try to keep them close enough so they can maintain family ties. However, that is not always possible. A lot of things depend on whether or not that inmate will stay close to home—basically, the security level of that inmate. We may not have a facility close by.

Sometimes the inmate will feel, “What did I get for cooperating? I get harassed daily. I have been assaulted. And to add insult to injury, I am being moved away from my family, where they can only come and visit me once a year.”

We are addressing issues with inmates. However, one of the biggest problems that we face inside the prison is getting the inmates to actually come forward. More often than not, the inmate who has been assaulted will not tell you he has been assaulted. It is usually a situation where they say they were injured doing a sports activity. If there were no witnesses to what the event was, there is no way we can go forward and investigate, when an inmate swears under oath that he was not assaulted.

My last point, and one of the issues that we are also addressing, is that the inmates know that once they are assaulted and they admit to being assaulted, they are going to be moved. They want to know how much time they are going to spend in the special housing unit under twenty-three-hour lockdown. They cooperated. They were assaulted, harassed. Now they are locked down for twenty-three hours a day, and they are going to be moved somewhere away from home.

Those issues are currently being addressed. We are doing the best we can. My personal opinion is that access to records—it is an issue where inmates know, once they step inside the prison, that they have done something wrong and their safety is basically going to be up to them. We

do provide the best security we can for them. However, we cannot be everywhere at once. We do ask them to cooperate with us. Sometimes they do, sometimes they do not. But I do not think limiting access to records will really help us at all, the issue being that the information that the other inmates receive is information that can be found just about anywhere.

Thank you.

JUDGE MERRYDAY: Thank you, Christopher.

A former United States Attorney and now an attorney with Covington & Burling, Alan Vinegrad.

MR. VINEGRAD: Thank you.

I start from the presumption, which is a safe one, because I think it has been endorsed by the Supreme Court of the United States,¹²⁴ that there should presumptively be a qualified First Amendment right of access—to be specific, to criminal proceedings, including plea agreements.¹²⁵ My general view on this issue is that the Federal Rules of Criminal Procedure and the case law that has developed surrounding the issue of sealing criminal proceedings or documents relating to them provide sufficient legal authority for case-by-case fact-specific determinations of when that presumptive right of access should be overridden.

The safety of witnesses is obviously an important consideration. Not having ongoing government investigations compromised is obviously a valid interest and consideration. In fact, it may be such that in a particular case it justifies denying public access to cooperation agreements, not just electronically, but even in hard copy from a courthouse.

But I caution against a categorical approach because even with cooperators—I am putting aside people who simply plead guilty (I think there is less of a concern about confidentiality for them)—I think a hard and fast rule that shields their agreements or sentencing proceedings from public view is hard to justify, the prime example being cases in which the cooperation of those defendants becomes publicly known, either at the time of their plea or the time that they testify in open court at a trial, or even earlier. To pick one recent notorious case, the longtime chief financial officer who worked for Bernard Madoff pled guilty several months ago, pursuant to a cooperation agreement.¹²⁶ I think the fact that he was cooperating became publicly and widely known even before he entered his plea.

So I am hard-pressed to envision a rule that would deny the public access, electronically or otherwise, to the terms and conditions of his cooperation agreement. It is hard to see what higher value, from the law-enforcement perspective, is being served there. And so I do question this

124. See *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984).

125. See *id.* at 510-12.

126. See Transcript of Plea at 8, 40-41, *United States v. DiPascali*, No. 09 CR 764 (RJS) (S.D.N.Y. Aug. 11, 2009); Jack Healy & Diana B. Henriques, *A Madoff Aide, Guilty, Reveals Scheme Details*, N.Y. TIMES, Aug. 12, 2009, at A1.

all-or-nothing approach, where either we grant access electronically or otherwise categorically to plea and cooperation agreements or we do not.

Obviously, there are competing considerations here. That is why we are all sitting in this room right now talking about it. But having said that, I would make just a couple of brief points.

One is, I do question the efficacy of what will be achieved ultimately by having varying levels of access to these types of agreements, either going to the courthouse to get them in hard-copy form or electronically, again as a categorical matter that says you can get it one way, but not the other. I think it is a challenge to see the meaningful, principled, constitutional difference that would support different rules for one versus the other. It seems to me that, in this day and age, with lots of enterprising people and organizations out there who amass data and information and documents, especially in our electronic age, equal access basically just avoids the necessity of having a so-called cottage industry of those who would gather this information anyway and make it public or sell it to persons and make it electronically available.

I could take a more cynical approach and say that basically, while I completely understand and agree with many of the concerns that Barbara Sale articulated earlier from the law enforcement perspective, it seems to me that in a great majority of cases, those who are bound and determined to make mischief with a cooperating defendant are going to be able to do that, whether the cooperation agreement is electronically available on PACER or not, whether they take the time to go to the courthouse and get it or get somebody to go get it. Or, I think as is more typically the case, as Gerry Shargel mentioned before, the people who have the greatest interest in finding out who the cooperators are and who may want to make mischief are going to figure it out anyway, through the normal course of events in a criminal case.

So, while I think the concerns are valid, I do not know what is really accomplished by denying electronic access. I would say the same about Mr. Brown's comments with regard to what happens in the Bureau of Prisons. I will not repeat it, but he basically said it at the end of his remarks. I do not know what sealing or denying electronic access accomplishes or does to solve the many problems that confront cooperators in prison. In fact, if I can plagiarize my former colleague Caren Myers Morrison's article, which is excellent on this topic, I think I question the severity of the risk, not posed by cooperation generally, but by electronic access to the sorts of documents we are talking about here, where there are organizations that have had a field day making these documents available, and virtually no documented instances of retaliation have resulted.¹²⁷

There are districts that have come up with creative solutions, I think, to these problems. I think the creativity comes with concerns of its own. I will just mention two, and then I will be done.

127. See Morrison, *supra* note 119, at 956–58 (discussing www.whosarat.com).

One is the notion of filing generic plea agreements that all contain these generic cooperation provisions even for non-cooperators, which seems to me troubling from a public “right to know” perspective because what the public is getting is misleading information. So, too, I think one has to look hard at a practice well known to me—I hope the Chief Judge from my old district does not take my head off for saying this—of having plea or cooperation agreements not actually filed with the court, and therefore avoiding, frankly, the types of requirements that are embedded within our Rules of Criminal Procedure and our case law. I think there is a tension between that practice, on the one hand, and the notion that criminal matters and dispositions should be subject to public scrutiny.

Thank you.

JUDGE MERRYDAY: Thank you, Alan. From the Federal Defenders of New York, Jan Rostal.

MS. ROSTAL: Thank you, and thanks to the subcommittee for bringing out all these views.

I speak on behalf of the constituency my office represents, which is the indigent defendants in the Southern and Eastern District court system (we represent some 2500 indigent defendants a year). No one pays a lot of attention to my clients, including the press, which does not have a lot of interest in them. They are not the Bernie Madoffs, they are not the cases that the press really cares about or deems newsworthy.

I have to say, thinking about their cases, and thinking about the advice I have to give a client when he or she is deciding whether to cooperate, one of the questions I get is obviously how much time they are going to get. But the other is: what is it going to mean? Who is going to hear the details of my case and my life? What is it going to mean in the Bureau of Prisons? What is it going to mean when I get deported, as many of my clients will, to the Dominican Republic, Colombia, or Mexico? What is electronically available in other countries? What is my family going to be able to see? What are the enemies of my family going to be able to see?

Those are obvious and fair questions. Clients are being asked to cooperate by law enforcement, by U.S. Attorney’s Offices, and being told that everything is being done to try to protect them. They are told maybe they will not have to testify, maybe their cooperation will never be made known to the public. Yet, under the current system of free electronic access, somebody out there Googling can get it, regardless of whether there is any true public interest in disclosure of the information.

This seems backwards to me. On behalf of my clients, I have to say, I fall with what I hope is going to be dubbed the “Professor Morrison rule,” which is that the problem is not so much in the sealing or unsealing, it is in the unfettered electronic access. It seems to me that if there is going to be a presumption, why wouldn’t the presumption be in favor of limiting the electronic access to parties and to the court, probation officers, pretrial officers, other people with an institutional need to know? If there is a case of public interest, a Bernie Madoff kind of situation for example, or any other case of a newsworthy level, let the press or parties come in and ask for

the access and then weigh all these competing interests. Why mess with it from the get-go and put my (no offense to them) less newsworthy when there is no one interested in their proverbial tree falling in the woods?

There should be a concern for the folks whom I represent, who, for the most part, have given up their freedom. Part of the bargain was not necessarily giving up their privacy, and not just whether they cooperated, but in sentencing submissions, what diseases they have, what learning disabilities their children have, what medications they are on, whether they did or did not give post-arrest statements when they were arrested. Maybe that does not rise to the level of cooperation, but who knows how that is going to play back home?

There are already too many personal details of clients' lives getting revealed in electronic systems, details that are not newsworthy, and that nobody really seems to care about, except for more sinister reasons. If there is an interest in those details, that interest it seems to me, can be protected by making the press or those who have the interest take the steps to get access to the information and show why they care, even if that is just going to check out the courthouse file the old-fashioned way. I object to the Facebook-ization of ECF and PACER.

Thank you.

JUDGE MERRYDAY: Thank you, Jan. Our final but not least panelist is Cris Arguedas, a criminal defense attorney. Cris?

MS. ARGUEDAS: Thank you. I am a criminal defense attorney. I started as a federal public defender, and I still do a lot of indigent work. I think this is a pretty complicated subject, actually.

My position is that the First Amendment requires that shutting out the public should be viewed as a drastic step, and it should be taken in as narrow a way as possible. I think that is probably kind of unassailable. The question is, how do you do that?

I think one needs to look at where the danger is from. It is, I think we all agree, from the people in the system. It is from your codefendants, your potential codefendants, or your prison mates. It is not from the public, basically. We now have a situation where all of these various versions of sealing very effectively do shut the public out of knowing what is going on, and they do not at all effectively stop your codefendants, potential codefendants, and housemates in the prison from knowing what is going on. So we have done a very dramatic thing that is aimed at the wrong section and that implicates the First Amendment.

I also think that there are some real dangers over the fact that we have such radically different procedures going on in each district of our federal courts. I want to just identify how different they are. One could argue that these are examples from a menu, so everyone could choose which one sounds good to them. And it does show flexibility in the federal system—always a good thing, I think. But the other thing is, it is quite chaotic, and it gives a lot of mixed messages that could be exactly misinterpreted by the people whom we are supposed to be protecting these cooperators from.

For example, in many districts, it is the way it always was. Plea agreements are filed and they are put on PACER, and that is where they are, unless I, when I am representing the cooperator, move to seal them. If I move to seal them, it is always granted and it is sealed. Then everyone in the system knows: sealed means cooperation. Right? So the public gets to know kind of nothing, but the flag is up for all the people who are dangerous to my client.

We have the Northern District of California, San Francisco. They have no plea agreements available on PACER at all. PACER shows a plea was entered. But if you go to the courthouse, you can see it all on paper, unless it is sealed, in which case, again, the public does not get to know what happened, but the people who are dangerous do.

You have the District of New Hampshire, in which every plea agreement has boilerplate language in it that says if the defendant gives valuable assistance and cooperates, the government will make a 5K1 motion.¹²⁸ You put that in every plea agreement, whether you are cooperating or not. This is supposed to be protecting someone from danger? I would not want to be the person at Lompoc [Federal Correctional Complex], who is saying, "Oh, no. They put it in everybody's. It is a way of camouflage." Does this make sense to anybody?

The District of North Dakota: they file a basic plea agreement. It never says you are cooperating. Then every case files something separate, which is under seal and says "Plea Agreement Supplement." My plea agreement supplement, which is under seal, might say I am cooperating. The other one says, not in these words, "This is just a camouflage document. I am not cooperating at all, and we do not even need this thing here, except it is here so that it hides the guys that are cooperating."

Again, I think that is pretty much a big deception. It should not be what our courts are doing. But also, if you are a San Francisco hoodlum and you see a sealed document from North Dakota, that means snitch in San Francisco and in a lot of places. So I do not even think it is very good camouflage.

The Eastern District of Pennsylvania: they are like the Northern District [of California], but they refuse to put on paper everything that has to do with a criminal case. Nothing from the criminal case is there—not the plea, not the motions, not the sentencing documents, not anything.

Then we have the Northern District of Illinois, which I think has been described, which says that the criminal case, all of it, is accessible to the lawyers, basically, to the people involved in the case. So the public is entirely shut out of that. In my opinion, most of the time, in most of the cases, the people who are dangerous know who is snitching and who is not. So what has happened in the Northern District of Illinois is that nobody in

128. A 5K1 motion is a "motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009). When the government makes a 5K1 motion, the court may depart from the sentencing guidelines. See *id.*

Chicago gets to know what is happening in their federal criminal cases. That seems to me to be a serious abrogation of the First Amendment.

But my main message here is that we should be aware that there may be ninety different ways of doing this. It is because the various courts have decided this is the best way to protect their people. I appreciate, from Maryland, what your point is. But we cannot be so parochial, I do not think. What you may think is protection, I might think is a red flag based on the way my district does it. So it seems to me that at least there should be some guidelines and then exceptions, as always.

JUDGE MERRYDAY: Thank you, Cris.

Christopher, you were talking about the incidents in the Bureau of Prisons. Does the Bureau of Prisons compile data to determine the number of those and make any effort to categorize them by severity and cause?

MR. BROWN: We do collect data. But basically right now the only thing that we do is treat it as an assault. We do not categorize and say, this was an assault based on cooperation. That was one of the things that was brought up during the telephone conference. I did bring that up to my superiors. It would make it easier for us to track if we did have a system, not just saying it was a simple assault or a serious assault, if we broke it down to say it was because of cooperation.

JUDGE MERRYDAY: And you might have a problem with the credibility of your source for that information, as far as making a judgment about what it actually was. Some people would tell you that, I suppose, to divert your attention away from the real cause.

MR. BROWN: Yes, they do.

JUDGE MERRYDAY: Does the Department of Justice do that, Barbara? Do you know?

MS. SALE: Compile information about the reason for the assault? No.

JUDGE MERRYDAY: If a threat is made on a judge, the United States Marshals do a threat analysis, and they give it a rating and decide whether you will receive protection. I was wondering if the Department of Justice does that with respect to its witnesses or cooperators.

MS. SALE: It may be done with respect to witnesses who have been admitted to the Witness Protection Program because that is such a high level of protection. As Gerry mentioned, there are, I believe, four prisons where everybody in the prison is a cooperator. Presumably the risk level is a little bit lower there. But for the vast number of people—and I think probably thirty percent of our cases in the District of Maryland involve making 5K1 recommendations,¹²⁹ and that is a lot of defendants—there is no threat assessment that follows them.

We do, as you mentioned earlier, separation memoranda to the Bureau of Prisons and say that Gerry should not be with Cris, and so forth. There is only so much they can do. When you have a case that has thirty-seven individual cases—and some of these gang cases are just, as you all know,

129. *See id.*

unwieldy and huge—there is only so much you can do to keep people separated. I think some people just live on buses, getting moved around to BOP [Bureau of Prisons] facilities.

MR. BROWN: One of the things I want to clarify is, when you talk about threat assessments, we do complete threat assessments on inmates who have been threatened. Generally, we have thirty days to complete a threat assessment. At the end, we have to verify it or un-verify it. That stays as a part of that inmate's permanent record, no matter where they go, that a threat assessment was completed on that inmate.

JUDGE MERRYDAY: It seems that, at least in one sense, what we are doing here is deciding what risk to encounter and on whose behalf. Evaluating that is made particularly difficult if you do not have reliable data on how frequently this happens, how severe it is, what the source was, and whether there is, actually, anything you can do about it one way or the other.

JUDGE RAGGI: I have two questions, one for those of you who have supported removing criminal cases from the electronic filing and then one for those of you who think that is problematic.

To the former, as a rules committee, we can only implement congressional legislation. I am not sure that your proposal can be reconciled with the E-Government Act.¹³⁰ Is that right? Is this an argument for Congress rather than for a judiciary committee? Or are you urging something by the judiciary itself?

PROF. MORRISON: I am urging action by the judiciary itself, through its supervisory power over its own records. It is true that some of the tactics used in certain districts, such as the Eastern District of Pennsylvania, which provides no Internet access to criminal court records at all, seem as if they might fall afoul of the E-Government Act. But to my knowledge, no court has yet interpreted the E-Government Act as limiting the discretion of the judiciary to manage its own records. Congress has directed each federal court to maintain a website containing public information on its files, including docket sheets, but it could be argued that it gave substantial deference to the courts as to what information to provide. It is possible that a system that took docket sheets and court records offline but then provided detailed information in the aggregate would satisfy the requirements of the Act.

JUDGE RAGGI: For those of you who are more inclined to see this done ad hoc as individual cases may need attention, we are about to hear from a panel of judges who use some of the diverse means that you have talked about. There has been some question about whether the Privacy Committee should take a stand on any of these particular practices or view it as beneficial for individual districts to work out what suits their particular culture best. Does anyone want to speak to the issue of whether we ought to recognize certain best practices or encourage diversification?

130. 44 U.S.C. § 101 (2006).

PROF. SHARGEL: I think it is problematic if you have an ad hoc approach. I think that is just too difficult. I think there has to be some symmetry. It is either going to be one way or another.

Another problem that you face is that all these plans have been implemented, and yet seemingly there has not been any challenge to the plans. Several panel members have been talking about the constitutional requirements of the First Amendment, yet none of these plans or programs have faced a First Amendment challenge. It would be interesting to see what happens if they do.

It would seem to me that it should be symmetrical. I think it should be uniform. I do not think it should be a catch-as-catch-can approach, with local rules in each district. But I think that the serious issue will be determined when someone, sooner or later—probably an institutional litigant like Federal Defenders—brings a First Amendment challenge.

MS. ARGUEDAS: To me, the salient point is that the most dangerous population, in terms of who is going to do the beating-up and killing of people, is in the federal prisons. They come from all the different districts, and so they are misinterpreting, or perhaps correctly interpreting, these different signals from the different places. So I think it has to be pretty uniform—not without some flexibility on a case-by-case basis. But I think we have to act like a federal system, since we are sending them to federal prisons.

MR. VINEGRAD: I think the rules currently provide both a general rule of application that people can follow and also an ability of courts, based on, not so much custom and practices, but particular problems in a particular district or case, to make a case-by-case determination of what falls within that standard. Rule 49.1¹³¹ has a good-cause standard now for limiting electronic remote access to documents, and good cause may vary between New York and North Dakota as to what meets that standard. It is not all that different than what courts do all the time, which is apply a standard to the particular facts of a case and come up with their body of law for what is going to fly in terms of a request for confidentiality and what is not.

PROF. SHARGEL: Also, if I may, I do not think we should walk away from this meeting with the notion that there is an inexorable path from electronic filing to trouble in prison or trouble on the street. Trouble in prison happens in all sorts of ways. I have heard several times of people working in the prison offices actually selling information contained in private probation reports that are in the offices and alerting other prisoners that an inmate is cooperating. Stopping electronic filing is not going to solve that problem. On the street there are similar ways that lead to trouble and danger to cooperators or potential cooperators.

Keep in mind, the troublemakers, the killers, the vicious people do not have a proof-beyond-a-reasonable-doubt standard. They do not even need probable cause. Mere suspicion has resulted in the deaths of many cooperators and people who actually were not cooperating.

131. FED. R. CRIM. P. 49.1.

We are here talking about a small segment of a potential problem, a problem with constitutional implications. That is why, once again, I look back to the executive branch to resolve this.

JUDGE MERRYDAY: On behalf of Judge Raggi and the Standing Committee, thank you all for participating in this panel.

CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL FIVE: COOPERATION & PLEA AGREEMENTS—JUDGES' ROUNDTABLE

MODERATOR

*Hon. Steven Merryday**

PANELISTS

Hon. Loretta Preska¹³²

Hon. K. Michael Moore¹³³

Hon. Henry T. Wingate¹³⁴

Hon. Michael Baylson¹³⁵

Hon. Stefan Underhill¹³⁶

Hon. Raymond Dearie¹³⁷

JUDGE MERRYDAY: Thank you very much. We are now beginning the second phase of the afternoon panel on plea agreements and cooperation agreements.

Our first speaker, from the Eastern District of New York, Chief Judge Raymond Dearie.

JUDGE DEARIE: Thank you very much. I am delighted to be with you.

I have just a couple of points, listening to the previous panel. I think one of the very positive things about this conference is that it calls to our collective attention, in particular some of us judges, the fact that there has developed over the years a sort of knee-jerk endorsement or acceptance of applications to seal documents. Of course, I come from one of those districts where plea agreements are not made part of the record. But it goes beyond just plea agreements—sentencing letters, 5K1 letters¹³⁸ in particular. There has developed a practice, I think, in part because of some of the types of cases that have been ongoing here in New York City—gang cases, organized crime cases for example—the courts have been very receptive to applications by the executive. Gerry [Shargel] is quite right: it is the executive's responsibility to protect their witnesses and the integrity

* United States District Court Judge, Middle District of Florida.

132. United States District Court Chief Judge, Southern District of New York.

133. United States District Court Judge, Southern District of Florida.

134. United States District Court Chief Judge, Southern District of Mississippi.

135. United States District Court Judge, Eastern District of Pennsylvania.

136. United States District Court Judge, District of Connecticut.

137. United States District Court Chief Judge, Eastern District of New York.

138. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).

of their investigations, but to do that, in part, they come to us and make applications. We have been enormously tolerant, I think—sometimes, arguably, absurdly so. You have, for example, the sentencing letter of someone who has testified in five or six or seven cases. It made the front page of the [*New York*] *Daily News* and the *New York Post* and even *The New York Times*, day after day after day, and the application by the government to seal the 5K1 letter, which does nothing more than chronicle, in lawyer's terms, the same sort of stories that we read in our morning papers.

We have gotten, it seems to me, perhaps a little bit too receptive, too tolerant, about these applications. I think we have to begin again to be far more selective in the kind of relief we grant and in the cases in which we grant that relief.

The idea of uniformity throughout the United States is not a notion that I personally have endorsed with great enthusiasm. After all, jurisprudence is not developed uniformly, except by cases that we get from the Supreme Court. We develop our law within our circuits. Circuits differ. Indeed, there are characteristics peculiar to certain circuits and districts that invite different approaches. Off the top of my head, I can think of the way some districts approach gun cases, for example. Marijuana cases in some parts of the United States are treated very severely. In the way we have applied the guidelines, there are regional differences. I think there needs to be a recognition that within a given district, perhaps within a given circuit, there are characteristics that are peculiar that will inform a judge when he or she is called upon to decide whether or not sealing or some form of that relief is appropriate. So, although I think the theme ought to be generally uniformity, there are circumstances peculiar to a given case that warrant variances from an established procedure.

Not only do we have to consider whether or not we ought to seal something or remove it from the public record or redact it, I think one of the problems is a tendency to seal on a particular day, and a document remains sealed indefinitely. It stays that way long after the reasons that might justify sealing, or some similar relief, have passed. The reason for that is more often institutional inertia and general indifference. Nobody is interested. The general public is not interested. The situation only changes when, for example, the news media is suddenly interested in a case and we get an issue before us and an application.

I think we have to take seriously the idea of cataloguing these cases when we take documents out of the public record for good reason, which we must articulate, subject to review and evolving jurisprudence within our circuits and beyond. We have an obligation, it seems to me—and this is totally in concert with our First Amendment sensitivities—we must continue to ask the question of whether or not a document may not be filed in the public record. I think we do not do that.

A recent study by the Administrative Office [of the United States Courts] makes clear that a lot of documents are sealed on day one, for good reason, but on day 401, those reasons no longer apply. If we are serious about our

First Amendment responsibilities, I think we need to be sensitive to that and guard against dispatching documents to the status of forever “private” without compelling justification.

As far as the public versus the Internet, I am a bit of a Luddite when it comes to things electronic, involving cyberspace. But I tend to think that is probably not the significant issue. If someone is intent on doing harm, the information will become available, either through the Internet or in public.

Just to sum up my little part, being sensitive to First Amendment concerns does not just mean making a given ruling in a given case at a given moment. We need to continue to ask the question of whether or not the relief secured at one time is necessary to keep in place.

JUDGE MERRYDAY: Thank you very much.

From the Southern District of New York, Judge Loretta Preska.

JUDGE PRESKA: Thank you.

Ladies and gentlemen, as we have all recognized, of course, there is a qualified First Amendment right of access to the public and the press in criminal proceedings, articulated in cases like *United States v. Alcantara*¹³⁹ here in the Second Circuit. These cases, of course, require that restrictions on public access to criminal proceedings and the docketing in those proceedings be accompanied by appropriate and contemporaneous findings of fact.¹⁴⁰

Here in the Southern District, upon a defendant’s pleading guilty to an indictment or superseding information with a cooperation agreement—and, indeed, really with any plea—several relevant documents are produced. The first is a minute entry. That is a memo from the judge’s deputy clerk to the docket clerk setting out the fact that a particular defendant pleaded guilty on such-and-such a day, sentencing scheduled for another day, report on bail status, and the like. The docket clerk then converts that minute entry into a docket entry.

Although that docket entry might make no specific reference to a cooperation agreement, as we have all recognized, the experienced observer can often figure out when a cooperation agreement is in place. For example, if the transcript of the proceedings is sealed, the observer will assume cooperation. If a sentence date is not scheduled, but only a status letter, the observer will assume cooperation.

Although I agree with Chief Judge Dearie and others that the Internet is neither the be-all nor the end-all, concern for safety of cooperators was heightened by the electronic accessibility of the docketing materials. Of course, we have all read about the wonderfully named website, Whosarat.com,¹⁴¹ which makes it its business to peruse the dockets and to inform anyone who is reading who is a cooperator, who is working undercover, often providing mug shots of those individuals.

139. 396 F.3d 189 (2d Cir. 2005).

140. *See id.* at 199–200.

141. WHO’S A RAT—LARGEST ONLINE DATABASE OF INFORMANTS AND AGENTS, <http://www.whosarat.com> (last visited Sept. 23, 2010).

Adam Liptak in *The New York Times* quoted a Justice Department official saying, “We are witnessing the rise of a new cottage industry engaged in republishing court filings about cooperators . . . for the clear purpose of witness intimidation, retaliation and harassment The posting of sensitive witness information creates a grave risk of harm to cooperating witnesses and defendants.”¹⁴²

Obviously, that mission is made easier by the electronic accessibility, rather than schlepping down to the courthouse and going through paper records.

I note parenthetically that electronic availability of this information is not the only way information about cooperators gets out. I have recently been informed that the United States Attorney’s Office in the Southern District of New York noticed lawyers perusing the lawyer sign-in sheet at the U.S. Attorney’s Office to see who had gone in ahead of him or her. Needless to say, the multi-line sign-in sheets have been discontinued.

In the Southern District, decisions about accessibility of cooperation agreements are made on a case-by-case basis. In the most ordinary case, where, the Executive Branch has concern for a cooperator’s safety, the assistant will ask that the minute entry and the transcript of the plea proceedings be sealed, usually until the cooperator testifies or is sentenced. The docket entry will not indicate the identity of the defendant. The docket merely reads, “Sealed document placed in vault.” When the Executive Branch voices more concern over the safety of a cooperator, a judge might determine that the delay of any docket entry is necessary. In those instances, the United States Attorney’s Office generally makes a written application setting out the reasons for the necessity of delaying docketing, and, if that application is granted, with, of course, the requisite findings of fact, all of the documents associated with that plea are put together in a sealing envelope and that sealed envelope is retained in chambers. No docket entry at all is made.

The Court of Appeals has specifically endorsed the delaying of docketing in the *Alcantara* case provided that the interval of delay ends on a specified date or the occurrence within a reasonable time of a specified event.¹⁴³ I think this goes to Chief Judge Dearie’s point that there is often not an end to it. We have been urged in our court, on the basis of *Alcantara*, to set either a date or an event certain for the unsealing of the document and the docket entries. Again, generally, the court will provide for unsealing either at sentencing or when the cooperator testifies.

Thus, in almost all instances, the public will know why, for example, Sammy the Bull¹⁴⁴ got five years after admitting to nineteen murders. The public just might not know it on the day the individual pleads.

142. Adam Liptak, *Web Sites Expose Informants, and Justice Dept. Raises Flag*, N.Y. TIMES, May 22, 2007, at A1.

143. See *Alcantara*, 396 F.3d at 200 n.8 (citing *In re The Herald Co.*, 734 F.2d 93, 102–03 n.7 (2d Cir. 1984)).

144. *United States v. Gotti*, 171 F.R.D. 19 (E.D.N.Y. 1997).

Finally, there are also some circumstances in our district where a case is commenced as *United States v. John Doe*. For example, if the government is building a case against an organization—let us say a Mexican drug cartel, or even a corporation—and if the government signs up a cooperator as the first step in the investigation, disclosure of that individual's name might well undermine the investigation or put the individual at risk. In these instances, again on application of the Executive Branch, the court will permit, upon findings, the proceeding under the *United States v. Doe* name and then will seal the proceedings. Sometimes they are sealed cases, again upon adequate findings.

It is also the general practice in the Southern District of New York not to docket any plea agreement, whether a cooperation agreement or otherwise. Most judges do not mark the plea agreements as exhibits to the plea proceedings. Generally, the court will review the agreement, allocute the defendant, and then return it to the United States Attorney's Office. This return is consistent with Local Rule 39.1,¹⁴⁵ which provides that lawyers retain the originals of any exhibits they proffer. This is a general rule; it does not just apply to plea situations.

It is also the policy of the United States Attorney's Office in the Southern District that, unless sealed, plea agreements, including cooperation agreements, are public. They are not generally on the docket, but if requested, they will be provided.

Eventually, as you can hear, most of these cooperation agreements are unsealed and the related docket entries made, indicating when the docket entry was made and when the original event reflected in the docket entry took place. That way, the public can see what the government is doing.

Thus, we in the Southern District feel that this approach is a good balance between the safety of the cooperators and their families, on one hand, and the need for transparency in our work, on the other. I suggest to the [Judicial Conference] Privacy [Sub]committee that such an approach allows judges to do what judges do—that is, to consider the competing interests and then to fashion a fact-specific remedy on a case-by-case basis. Thus, I commend that approach to the committee.

Thank you.

JUDGE MERRYDAY: Thank you.

From the district just to the south of the Middle District of Florida, my friend Mike Moore.

JUDGE MOORE: Thank you.

From the remarks that I have heard, there does seem to be some coalescing of practice around the various districts. This comes following the sort of district-by-district experimentation, with the advent of electronic access.

But just from a judicial perspective, and to give some context to our district practices before we get into how we got to where we are, I see one

145. S.D.N.Y. R. 39.1.

of the roles of a judicial officer as to promote public confidence in the judiciary as an institution. One of the ways in which we do that is to increase public access to our public records and public access generally to what we do. So, in one sense, I think it would be ironic if electronic access, which enhances public accessibility and ease of accessibility to public records, would be turned on its head and used as a way to limit access by the public to the work that we do.

I think that is just a frame of reference of where our court came from as we began dealing with the issue that arose out of the Whosarat website.¹⁴⁶

When we were confronted with it, we did pilot it, so to speak, with this dual docket of a paper docket and an electronic docket, where we were withholding the plea and cooperation agreements from electronic filing. We did that for about a year and revisited the issue. I think there was some sentiment that it was somewhat unseemly to maintain a dual docket, a paper docket and an electronic docket, and that our electronic docket should mirror to the maximum extent, if not fully, what was being filed in our paper docket, with the idea that at some point in the future our electronic docket is our sole docket. That is where the future is taking us. To that extent, we should have an electronic docket that is at least as publicly accessible, in terms of all the documents that heretofore had been filed in the paper docket.

Having said that, we recognize the concern of the litigants. Certainly the U.S. Attorney's Office had a continuing concern in all of its cases. But if you are a defense attorney, you may have a concern at one point not to have cooperation agreements or plea agreements filed in the record, and at other times you may want to have somebody else's documents made publicly available.

But we looked at it, without trying to get into the fray and pick winners and losers on this for the parties, and found that there was an alternative. The alternative, I think, has been touched on. It has been adopted in other districts around the country. That was, at least in our minds, that there is no rule, substantive or procedural, in the federal criminal context that requires the filing of a plea agreement, much less a cooperation agreement. It has been a practice in many districts around the country, but it is just that. It has been a practice. There is no compelling reason why a lawyer has to file a plea agreement or a cooperation agreement.

Now, to the extent that a party seeks to do that and the concern is the cooperation aspect of an agreement, that can be parsed or made a separate agreement. If the lawyers want to file a plea agreement, they are welcome to do so. It becomes their choice, their decision. If they do not want to file the cooperation agreement because of concerns for the safety of witnesses, there is no obligation for them to do it, so they can elect not to do so.

But where does that leave us? When we go to a plea colloquy, it is incumbent upon the judge to ask the standard question: Are there any inducements for the entry of the plea of guilty? That is where it is made a

146. See *supra* note 4.

matter of public record that the individual has entered into a cooperation agreement with the government. The judge is free to look at the agreement. As Judge Preska has mentioned, it can become an exhibit. It can be returned to the parties. But the fact of cooperation is now in the public domain, through the transcript, and unless somebody finds it necessary to go to the public record and request a transcript of that proceeding, it is really of no interest to anyone else at that point and is not made a part of any electronic record.

I think it is a viable solution or a practical solution that does not undermine the court's otherwise obligation to promote transparency and public accessibility to our records.

That is the way we have handled it.

JUDGE MERRYDAY: Thank you, Mike.

The Chief Judge of the Southern District of Mississippi, Henry Wingate.

JUDGE WINGATE: Thank you. Thank you so much for inviting me here to share my few comments with you on this matter.

The people in my district have addressed this matter almost *ad nauseam* in trying to come up with what we thought to be the best approach. Mississippi has two districts, the Northern District and the Southern District. When I came on the bench many, many years ago, we were separate in almost everything. The Northern District had its rules and the Southern District had its rules. When I was a practicing attorney, I actually carried around rulebooks for the Northern District and for the Southern District. I had so much stuff in my trunk on the different rules that I had no place for my clothes or my tire.

But after I came on the bench, we all got together and decided that perhaps we ought to have one set of rules for the entire state. So now we have uniform rules for the Northern District and for the Southern District combined.¹⁴⁷

When this thorny issue arose, the first thing that I did was to talk to my opposite number up in the Northern District to determine how we might address this issue. We conferred with the U.S. attorneys, the public defenders, the U.S. probation officers. They all were on the same page that we ought to do something. Then we referred it to our local Criminal Rules Advisory Committee, attorneys appointed by chief judges from both the Northern and the Southern Districts, and had them study the issue. They canvassed the country on possible solutions, and they came up with what they thought would be the best approach, which I will discuss with you in just a moment. They then published their suggested approach for comments in the local newspapers, to allow attorneys and other interested people to make a response. Then, after having received no negatives, the judges of the Northern District and the judges of the Southern District all voted to approve this local rule concerning this particular matter.

147. N.D. Miss. & S.D. Miss. L.U. Civ. R., *available at* <http://www.msnd.uscourts.gov/FINAL%20CIVIL%20RULES%20w%20amendment%20.pdf>.

We then sent it to the Fifth Circuit Court of Appeals to get the Fifth Circuit Court of Appeals' view on the matter, and the Fifth Circuit Court of Appeals approved it.

We have in effect a local rule dealing with plea agreements, which is different from our rule involving the sealing of documents. We also have a rule regarding motions for sentence reductions, based on cooperation with the government. I will start with the one on plea agreements.

Basically, it mirrors the North Dakota approach.¹⁴⁸ All plea agreements shall be submitted, with original signatures, in paper format to the court, and then shall be sanitized by the drafter of any references to cooperation. After a plea has been accepted in open court, plea agreements shall be scanned and electronically filed as public, unsealed documents. All plea agreements shall be accompanied by a sealed document entitled "Plea Supplement." The plea supplement will also contain the government's sentencing recommendation. The plea supplement will be electronically filed under seal. All cases will be docketed identically, with reference to the sealed plea supplement, regardless of whether a cooperation agreement exists. The district judge may order the entire plea agreement to be sealed for a specified period of time if the court finds an exception.

So we have two documents submitted. One is the plea agreement; the other is the plea supplement. They are both accepted by the court. One is to be sealed; the other is for public review.

The document-style plea agreement is read into the record. Nothing is read into the record concerning the [contents of the] plea agreement, other than the fact that there is one and that the parties have signed it and that it will be filed under seal.

The matter concerning reductions based on cooperation: Government motions filed pursuant to Federal Rule of Criminal Procedure 35¹⁴⁹ or Section 5K1.1 of the United States Sentencing Guidelines¹⁵⁰ or 18 U.S.C. Section 3553(e)¹⁵¹ shall be filed under seal without prior leave of court. The government must provide notice to counsel for the defendant that such motion has been filed and provide defense counsel with a copy of the motion. Defense counsel may not copy or distribute the motion, nor may they reveal the contents of the motion to anyone other than their client, without prior leave of court. Said motions will remain under seal indefinitely, unless and until a court enters an order directing that they be unsealed.

In taking this approach, we took into consideration the public's right to know. We are concerned about it. We took into account the safety of prisoners. We are concerned about that, too. Then we took into account what we considered to be an abuse of our PACER system. We found that prisoners were accessing PACER. We found that some penitentiaries allow

148. D. N.D., *Plea Agreements & Plea Agreement Supplements* (2007), available at http://www.ndd.uscourts.gov/pdf/Plea_Agreements.pdf.

149. FED. R. CRIM. P. 35.

150. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).

151. 18 U.S.C. § 3553(e) (2006).

access to PACER on the computers in the penitentiaries. Therefore, they were pulling this information right out of PACER. So we tried to craft an approach that we thought would at least address the problem.

We also recognized that prisoners identified as snitches face problems in a penitentiary, not only because they have snitched in the past, but because prisoners are afraid they will snitch in the future. A lot of abuses occur in the penitentiary setting. There is the selling of drugs. There is other criminal activity afoot. There are assaults committed by anonymous persons. Prisoners feel that someone who has snitched in the past will snitch in the future, and thus, they pay special attention to snitches. So it is not just because of what they have done or the snitching they have done in the past that concerns the prisoners. It is also their fear of what they [past snitches] might say about what is going on in the penitentiary.

We have heard so many anecdotal stories about what has transpired in various prisons, both in our domain and elsewhere, that we felt we had some obligation there. We felt we had some obligation to protect our PACER from being a part of this wrongdoing. So we crafted the rules that I just described. These are rules that both the Northern District and the Southern District of Mississippi have embraced.

With regard to this matter of whether those of criminal intent or hostility will discover the information, no matter what we do, we do not take that view. We reject that view, just as we reject the view that one should not put locks on houses because a professional crook is going to break in anyway. We tried to make it a little more difficult for that individual to come forward and to hurt us. We tried to put some obstacles there to make them work just a little bit harder.

That is the view that we have taken in the Northern and the Southern Districts of Mississippi. That is the entire state of Mississippi. So we weighed in on this matter mightily. I might add again that our rule was approved by the United States Court of Appeals for the Fifth Circuit.

Thank you.

JUDGE MERRYDAY: Thank you.

From the Eastern District of Pennsylvania, Judge Michael Baylson.

JUDGE BAYLSON: Thank you very much.

The protocol that we adopted about three years ago is in your booklet, along with a short memo that I did with Professor Capra. It describes the formulation of this and how it has been working.

Basically, both the government and defense counsel, when they want to file a plea agreement, file it under the heading, "Plea Document." That is all the docket shows, the electronic docket or the physical docket. The same with a sentencing memorandum. It just shows the term "Sentencing Document." It is not accessible electronically, regardless of whether it is cooperation or not. However, the document is accessible to someone who comes into the Clerk's Office.

People can say that that is an artificial distinction, that it is an illegal distinction. I do not agree with either of those. It works for us. Our

Clerk's Office told us that it was exceptionally rare for anyone to come in and ask to see a document filed of record in a criminal case. It just really never happened. But based on Whosarat.com and some other stories, we felt that there was a risk of this happening remotely, electronically. That is why we designed the policy the way we did.

I respectfully take issue with those who think there is a guaranteed right of public access to plea agreements. I am not aware of any ruling of the Supreme Court or any circuit court that has ever held that. In the Third Circuit we have a fairly well-developed body of law that allows for sealing of lots of documents involved in the criminal process—the results of discovery, wiretap evidence, things like that. If a trial starts involving one of those things, there are many instances where representatives of the press have tried to gain access to them. If they petition the trial court to do that, the Third Circuit requires that we allow the press to intervene, to be heard. We have to rule promptly, with facts, defending the preclusion of the material from the public record or allowing access to it. Then there is an expedited appeal if the press wants to appeal. Usually the whole process is done and accomplished in three or four days. In past history, there are lots of instances of that.

So at least in the Third Circuit, I think we are well within our rights in protecting plea agreements from uniform public access.

We have many documented examples in the Philadelphia area of a culture of intimidation and retaliation. We feel as a court that we have some responsibility to take some action that protects our records, our court records, from being available for those purposes. Is there any guarantee? Is it failsafe? Of course not. But we thought it was reasonable, within the public interest, and did not deter people from looking at those court records if they really wanted to, by coming to the court and going to the Clerk's Office and asking to see them. We felt that that served the objectives of public access.

I should also say that I think it would make a lot of sense if the Department of Justice would take a position on these issues that we are exploring here today. I think there are a lot of reasons why courts may have their own local preferences for how they do things. I think some courts feel guided by circuit law in unique ways and that other districts in different circuits may not feel so compelled. But I think nationally and nationwide it would be advantageous for the Department of Justice to develop some guidelines or rules for various U.S. Attorney's Offices to follow in this instance. I would respectfully recommend that the Privacy Subcommittee make such a recommendation to the Attorney General.

I want to add just a couple of other things, and then I will stop.

The 5K1.1 motion¹⁵²—and in the sentencing guidelines the word “motion” is used—was, under the pre-*Booker*¹⁵³ regime, a necessary motion for a judge to depart downward from the guidelines. Post-*Booker*, I

152. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).

153. *United States v. Booker*, 543 U.S. 220 (2005).

do not think 5K1.1 has the same significance, and I do not think a motion ought to be required. I think some thought should be given by the Sentencing Commission to eliminating the concept of a motion in order for a judge to apply 5K1.1. We all know that we have to make a Guidelines calculation before we apply the statutory factors and impose a sentence. But 5K1.1 no longer has that gateway significance that it had before.

Also I think there is a lot to be said for the practice in the Southern District of New York, and the Eastern and Northern Districts, for not filing these documents at all. We considered that in our court, but it did not carry the votes. But I think it has a lot of merit to it.

My own view also is that we should have some more development of substantive law in this area. I am sure these issues will come up, and we will get some more circuit law. Maybe the Supreme Court will take a case that involves some of them. I think the amendment of the Rules should await further substantive legal holdings.

Thanks.

JUDGE MERRYDAY: Thank you.

Let me clarify, if I may. You said that you do not agree that a qualified right of access attaches. Is that a statement that is applicable to a plea agreement in the public docket?

JUDGE BAYLSON: If the plea agreement is filed publicly—that is, if it is available in public—then obviously there is a right of public access to it.

JUDGE MERRYDAY: Your view is that that problem is made by the filing of it.

JUDGE BAYLSON: Yes, it is made by the filing of it. Furthermore, even though we have this protocol in our district, the government still files a lot of plea agreements under seal when there is a cooperation provision and they think the case is very sensitive. They recognize that that is, to some, a signal that the defendant may be cooperating, but nonetheless they go ahead and do it anyway, because they feel the protection of the terms of the agreement is more important than somebody making an inference out of the fact that it was filed under seal.

JUDGE MERRYDAY: Do you think that the event of sentencing affects whether the qualified right of access has attached? In other words, if it is not filed but a sentencing occurs in which a concession is made based upon a term in that plea agreement—

JUDGE BAYLSON: The uniform practice in our district is that where there is a sentencing of a defendant who has cooperated, colloquy on that takes place in sidebar, and the sidebar conference is sealed. If and when the sentencing transcript is uploaded—we have digital audio—the sidebar is not available publicly. If the transcript is to be prepared by a stenographer, then the sidebar is not available to the public.

JUDGE MERRYDAY: Satisfying the qualified right of access?

JUDGE BAYLSON: That is our feeling, yes.

JUDGE MERRYDAY: Thank you.

From the District of Connecticut, where my mother was born, Judge Stefan Underhill.

JUDGE UNDERHILL: Thank you.

Let me just give a little bit of background about how Connecticut came to undertake a very comprehensive revision of its local rules on these issues two or three years ago.

In 2005, two things happened that kind of shook up the District of Connecticut. The first was a very highly publicized criticism of the state court system in Connecticut for so-called secret files. It became known and widely reported in the press that the state court system basically would not acknowledge the existence of some several hundred files, principally the divorce files of politically connected folks in Connecticut. This was front-page news. The concern in the district was, are we doing the same thing? Are we hiding files in some way? Are we not letting the public know that we have cases pending?

The second thing that happened in 2005 was that the Second Circuit decided the case of *United States v. Alcantara*,¹⁵⁴ which made clear that plea proceedings, which, in our view, included cooperation colloquy, had to be conducted in open court unless the stiff requirements for court closure could be satisfied.¹⁵⁵

So with those two concerns in mind, we undertook a comprehensive review of what we were doing. Frankly, there was quite a tension between the desire, both by the U.S. Attorney's Office and the court, frankly, to protect cooperators as much as possible against what we saw as very strict and clear guidelines from the Second Circuit Court of Appeals. I will say that with Judge Raggi sitting here. We always follow what the Second Circuit says to the "T."

I will disagree, at least in the Second Circuit, with the concept that a plea agreement or cooperation agreement is not a judicial document. As we read the Second Circuit cases, every document used by parties moving for or opposing adjudication by the court, other than a hearing or trial transcript, is a judicial document that is subject to the qualified First Amendment right of access. Now, the trick, I think, is that the right of access is a qualified right of access, and it can be overcome in circumstances that are sufficiently extraordinary.

If you look at a case like *United States v. Doe*,¹⁵⁶ in which the Second Circuit set forth four steps for closing a court,¹⁵⁷ that is essentially what our rule requires with respect to cooperation colloquies. The process in our district, in essence, is that the U.S. Attorney's Office or the defense counsel makes clear to chambers that there is a cooperator involved, that the plea agreement includes a separate document. In the District of Connecticut there are two letters. One is the plea letter; one is the cooperation letter.

154. 396 F.3d 189 (2d Cir. 2005).

155. *Id.*

156. 63 F.3d 121 (2d Cir. 1995).

157. *See id.* at 128.

When we are informed that there is a cooperation agreement involved, we begin the proceeding *in camera*. We give the U.S. Attorney's Office a chance to make a request that the proceeding be closed. We usually get an affidavit setting forth facts that we can rely upon to make the particularized findings of fact that are required for court closure. We then make a determination, based upon what we have been told by affidavit, whether to close that proceeding or not. Typically in a cooperation scenario, a closure motion is granted. The transcript of that proceeding—and that is usually undertaken prior to going into court for the plea colloquy—the transcript of that proceeding is sealed. If the correct findings are made, the docketing of that cooperation colloquy is also not shown on the docket sheet, until some later date, typically sometime after sentencing.

At that point, we go into court. We do the plea colloquy. The plea agreement makes no mention of cooperation. We do not mention cooperation. We do not include it as something that is inquired of on the record. Rather, it is a fairly discreet inquiry: Does the written plea agreement contain your entire agreement with the government? Has anybody made any other promises to you that are not put down in writing in your agreement with the government?

The agreement with the government, of course, includes both the plea and the cooperation agreement, which incorporate each other by reference. So the defendant can truthfully say, "No. My entire agreement is put down in writing," with no mention on the record of any cooperation agreement.

We think this works pretty well. I asked our U.S. Attorney just a moment ago whether she was aware of any complaints about it. The only complaint she has, which I would share a little bit, is that our judges have not been uniform in the way that they have followed the rule. Some of them who have been here longer than the rule are not going to be told how to do things, and they are going to do them their own way. So there is not uniformity.

But the rule, I think, is quite comprehensive. In my view, it tracks quite well a number of Second Circuit decisions that we wanted to make sure counsel were aware of and followed. We thought that that kind of enforcement would be increased if we put it expressly into the rule. Frankly, it also helps the judge do the right thing.

We did consider, after this rule came into effect, what I know as the South Dakota rule. Maybe North Dakota has the same rule—but the Dakota rule. We declined to adopt it, principally because of the concern that folks who had not cooperated would be deemed to have been cooperators and would be potentially subject to retaliation.

In sum, we like to think that our rule, although relatively strict—because the Second Circuit rules are relatively strict—strikes a pretty good balance between recognizing the substantial, although qualified, right of First Amendment access and balancing that right against the right of the individuals who are cooperating and the right not to be put at risk as a result of that cooperation.

JUDGE MERRYDAY: Thank you, Judge Underhill.

We do have a couple minutes for some questions.

JUDGE DAVID COAR (U.S. District Court for the Northern District of Illinois): If there is an 11(c) agreement,¹⁵⁸ an agreed-upon sentence, is that not covered in the plea colloquy?

JUDGE UNDERHILL: That would be in the plea agreement letter.

JUDGE COAR: But it would not be discussed in the colloquy?

JUDGE UNDERHILL: It would be. But I do not think there is a concern—at least in our district, those are relatively rare. Nora Dannehy can correct me if I am wrong, but my sense is that they are not really used as a substitute for a 5K1.1 motion. If I get an 11(c)(1)(C) agreement, it is going to be the concern that I am going to go too low or whatever. So they are going to try to say, “Here we go, so do not go below this.” It is not really used with cooperators, to any great extent, as far as I am aware.

JUDGE COAR: In our district, we get fairly complicated 11(c)(1)(C) agreements, where there are variations—if this, then that. We may go through three or four levels.

JUDGE UNDERHILL: We have not seen that.

JUDGE RAGGI: I do have one question for the panel as a whole. As each of you have spoken about the reasons you have adopted your particular practices, I do not hear anyone saying that you really need any help from the Rules Committee. Am I right in that? No one is floundering or needs our help.

JUDGE PRESKA: Indeed, we must be cognizant of what Judge Underhill said about the rules having been made after people got here. Sometimes they are less likely to listen.

JUDGE MERRYDAY: Again, on behalf of Judge Raggi and the Privacy Subcommittee, thank you all for participating.

158. FED. R. CRIM. P. 11(c).

**CONFERENCE ON PRIVACY AND INTERNET
ACCESS TO COURT FILES**

**PANEL SIX: TRANSCRIPTS (INCLUDING VOIR
DIRE TRANSCRIPTS)**

MODERATOR

*Hon. John Koeltl**

PANELISTS

Hon. Gary Lancaster¹⁵⁹

Hon. Randolph Treece¹⁶⁰

Victor Kovner¹⁶¹

Nora Dannehy¹⁶²

Ben Campbell¹⁶³

Lori McCarthy¹⁶⁴

JUDGE KOELTL: Hi. My name is John Koeltl. I am on the Southern District of New York. I guess we are the host district.

I want to add my thanks to Fordham Law School for hosting this event and to Professor Capra for the great job and the great hospitality that they have shown us. They have done a spectacular job.

This is a panel on transcripts and Electronic Case Filing. The Judicial Conference requires the filing of transcripts on ECF.¹⁶⁵ It did that after an extensive study by the Court Administration and Case Management Committee concerning the proper way to do this. It arises from the general proposition that what is public in the Clerk's Office should be available remotely online, and there is basically no reason to treat transcripts differently, except for the fact that there may be matters in the transcripts which are said in open court that you would not file in a document. So there is a careful procedure for a ninety-day period from the time that the transcript is filed to the time that it is available electronically.

There are several questions that have arisen over this:

- How are the courts dealing with the rule?

* United States District Court Judge, Southern District of New York.

159. United States District Court Chief Judge, Western District of Pennsylvania.

160. United States District Court Judge, Northern District of New York.

161. Partner, Davis, Wright & Tremaine, LLP.

162. United States Attorney for the District of Connecticut.

163. United States Attorney for the Eastern District of New York.

164. Jury Clerk, Eastern District of New York.

165. See PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, <http://www.pacer.gov> (last visited Sept. 23, 2010).

- How well does it work?
- Should we be doing anything better?
- How does it work in criminal cases, with some of the issues that you have heard from some of the filings in criminal cases?
- How does it affect jurors?
- How does it affect the voir dire process for jurors?

We have a great panel to help to answer some of these questions and give their perspective.

Our first speaker is Chief Judge Gary Lancaster, from the Western District of Pennsylvania.

JUDGE LANCASTER: Thank you.

I was asked to talk about the process starting when someone requests a transcript of the proceedings until the point when it is actually released, and what is done in the process to protect any confidential personal information that might be in the transcript. Others are going to talk about what is done prior to recording the transcript to protect information. But once the court reporter has a request for a transcript of the proceedings, he will then go ahead and transcribe his notes and then will file a notice of filing of the official transcript. All the deadlines generate from that date, from when he actually files a notice of filing of the official transcript.

In that notice, he tells the parties that they have seven days in which to file their notice of intent to request redactions—that is, within seven days, that we intend on filing redactions. They do not have the redactions in seven days. They have to file a notice that they are going to ask for redactions. Within twenty-one days from the date that the first notice of intent to request redactions comes out, they have to file the proposed redactions.

The court reporter can redact personal identifiers without a court order. There are five specifically listed, including names of minor children, home address, Social Security number, and the like.¹⁶⁶ Those can be redacted without any court order. Where the rubber hits the road, particularly in civil cases, is when a party wants to redact some additional information above and beyond personal identifiers. Usually, again, this comes up in civil cases, where they may want to redact proprietary information that came out during the course of the trial—a business model, price structuring, things of that nature. If they are defending a patent case and they want to demonstrate how their product differs from the patented product on infringement, they do not necessarily want everybody to know how their product works.

This is where the problems come with the court reporters, particularly in those instances where a party submits some items that they want redacted from the transcript, on the basis that this item, this document, was subject to a confidentiality agreement during discovery. There are parties who believe that, simply because evidence is subject to a confidentiality agreement

166. W.D. PA. LCvR 5.2(D) (also listing dates of birth and financial account numbers).

during discovery, it automatically gets redacted from the transcript. But that is not the case. When the court reporters get these redaction requests, they have a dilemma. They can either tell the judge, "They are asking me to redact these things that are beyond the personal identifiers," or they can call the attorneys and say, "I cannot do this, because this is above and beyond the identifiers and you have not given me a court order," or they can simply ignore the request.

Right now—and this may be something that the committee needs to look at, and we are certainly going to start to look at this on a local level, for a local rule—there is no rule that tells the court reporter what to do. As a result, there are differing practices. Some of them will simply do nothing and ignore it. Some of them, if they know the lawyer, will call him up and say, "I cannot do this. You need a court order."

But there needs to be some official direction, either on the national level or on the local level, that tells the court reporter what to do when he gets a request for a redaction that is above and beyond the five personal identifiers and is not subject to a court order.

So that is something that I think we are going to have to look at, and particularly when things are asked to be redacted because they assert that they are subject to a confidentiality agreement. You cannot ask a court reporter to make a determination as to whether or not this piece of paper comes under the umbrella of the confidentiality agreement. That is not within their purview. That is not what they do, so we need that local rule.

If we get past that, the court reporter has thirty-one days to actually post the redacted version of the transcript. Then, after ninety days, it is subject to release under PACER.

There are a couple of things you have to keep in mind. There is a difference between redaction and under seal. That is an important distinction. A redaction comes about, as I said, through this process—such as eliminating the identifiers. For something that is under seal, that requires a court order. They are different. The only way you could see something that has been placed under seal is if another court order unseals the document. You have to go back to the court to do that—with the exception of the Court of Appeals. I can put anything I want under seal and the Court of Appeals will say, "So?" They see it. But for the public, you have to get that unsealed, and parties who get a transcript under PACER cannot get the parts that are under seal.

Just one other point I want to make, on the difference between criminal cases and civil cases when we are talking about jury protection. There is no rule of law that requires the voir dire of a civil jury panel be recorded. The parties and the court can agree that it will not be recorded. Thus, the problem of worrying about personal information coming out from jurors is kind of eliminated there. But in the criminal cases, by statute, Congress has determined that all parts of a criminal case, including the voir dire of jurors, have to be recorded. However—and, again, others are going to talk about what we can do to protect people—assuming that certain information comes out in the voir dire in a criminal case that is of a personal nature that should

not be disclosed and would discourage anyone from ever wanting to serve on a jury, the court also has the discretion to place that under seal, whether anybody asks for it or not. If something comes out and it is the transcript of the voir dire and someone orders the transcript, I can still place that portion under seal, if I feel that justice warrants it.

Thank you.

JUDGE KOELTL: Thank you, Judge.

Our next speaker will be Judge Randolph Treece, from the Northern District of New York.

JUDGE TREECE: Thank you.

I am going to be discussing disclosure of jurors' personal information on transcripts. In the Northern District of New York, we have a local rule and two general orders with regard to the nondisclosure of jurors' private information. They derive from a confluence of different sources. It comes from statute. We have the Federal Rules of Criminal Procedure 49.1.¹⁶⁷ We have 28 U.S.C. Section 1867,¹⁶⁸ which discusses certain nondisclosures. We relied significantly upon the guide of judicial policies and procedure,¹⁶⁹ through the CACM Committee. Essentially, we have taken the language almost verbatim from those various rules and statutes.

With those references, we have devised the following local rules and general orders with regard to the jurors' personal information. Under our Local Rule 47.2(e),¹⁷⁰ we go a little further than the Federal Rules of Criminal Procedure 49.1,¹⁷¹ and we direct that during voir dire, all jurors will be referred to by number and not by their name. If someone wants their names, then there must be a written motion or a written request to the presiding judge.

With regard to other sensitive information, our General Order 22 basically states that sensitive information regarding jurors will not be disclosed.¹⁷² Then, in our General Order 24, section 12,¹⁷³ which is actually our jury plan, there are five principles we follow:

- The names of jurors will not be disclosed on a public document;
- The names can be released by court order;
- The contents of records that have been presented to the clerk of the court will not be disclosed;
- The transcripts will be redacted with regard to the personal identifiers that are listed in 49.1; and

167. FED. R. CRIM. P. 49.1.

168. 28 U.S.C. § 1867(f) (2006).

169. GUIDE TO JUDICIARY POLICIES AND PROCEDURES, Vol. 10, Ch. 3, §§ 310.10, 333.20, available at http://jnet.ao.dcn/Guide_New/Vol_10_Public_Access_and_Records/Ch_3_Privacy_pdf.html. This document is only accessible by federal judiciary employees or through a Freedom of Information Act request.

170. N.D.N.Y. L.R. 47.2(e).

171. FED. R. CIV. P. 49.1.

172. N.D.N.Y. GEN. ORDER 22, § 11.2 (2010).

173. N.D.N.Y. GEN. ORDER 24, § XII (2009).

- There can be a request for an unredacted transcript, but that must be in writing.

Essentially, I can tell you that assigning jurors individual numbers is not strictly enforced. Only in high-profile cases does that occur. Clearly, in civil cases, just like in Judge Lancaster's court, assignment of individual numbers is not an issue, and it is not raised. But again, in high-profile cases it is.

However, what we do strictly enforce is that jurors' personal identifying information is redacted. It is done automatically by the stenographers. If there is anything else that needs to be brought to the court's attention for redaction, the court will give it due consideration as to whether there will be further redaction. If not raised, then those redactions will not occur.

If there is a request for further redaction, the court will perform a balancing of the public's qualified right of public access to the information against any other paramount right or higher value as to whether it should be disclosed or not. We do not seal jurors' transcripts. If it happens, it is very rare. I know of none. Also, jurors' transcripts are filed separately from other transcripts.

I now want shift to another topic—and it is not a digression, but it is an issue that probably has not been discussed much, and that is the disclosure of jurors' questionnaires. Under 28 U.S.C. Section 1867, it states that it is a crime for the clerk of the court to provide to the public those records that have jurors' personal information until such time as the entire master wheel has been exhausted and voir dire has been completed.¹⁷⁴

In the case of *United States v. Bruno*,¹⁷⁵ Judge Gary Sharpe conducted a dual-stage prescreening of jurors. First, there was the normal screening—the seven questions—that goes to the clerk.¹⁷⁶ Because of the complexity of the case, the court, along with the attorneys, fashioned another jury questionnaire that was approximately forty pages long and had maybe sixty-one questions. After reviewing those questionnaires, the panel of 600 was reduced to 300, which was the panel subjected to voir dire. Out of that, the actual jury was selected.¹⁷⁷

At the conclusion of the case, the press asked for the 600 jury questionnaires. So Judge Sharpe conducted a very extensive analysis on this request. One, with regard to jurors' names, during the voir dire, their names were publicly listed. They were not assigned numbers. So when the transcript was provided to the public, the names were disclosed. What he did not disclose were the actual questionnaires. He did make that ruling on two, maybe three grounds.

First, he took a position, which was the first time I have ever heard it, that the jury questionnaires, both the first prescreening and the second prescreening, were the court's private record.¹⁷⁸ They were not judicial

174. 28 U.S.C. § 1867(f) (2006).

175. 700 F. Supp. 2d 175 (N.D.N.Y. 2010).

176. *See id.* at 178.

177. *See id.* at 178–79.

178. *Id.* at 184.

documents nor were they public records. He relied upon 28 U.S.C. Section 1867, and he further relied upon the guide of judicial policy and procedure.¹⁷⁹ He also referred to our local rules and general orders.¹⁸⁰

Next, he discussed the general content of those questionnaires. He found that the answers to the questionnaires had extraordinarily sensitive information.¹⁸¹ For that reason, he concluded that there was a higher value or a paramount right to confidentiality that exceeded the public's qualified right to public access [to those questionnaires].¹⁸² He also found that there were present countervailing factors regarding the public's common law access to the questionnaires.¹⁸³

Lastly, he wrote by performing this analysis, he had narrowly tailored a resolution: You are going to get the transcripts of the voir dire, but you will not get the questionnaires.¹⁸⁴

Thank you.

JUDGE KOELTL: Thank you, Judge.

Our next speaker will be Victor Kovner, who is with Davis Wright Tremaine and who generally represents the press.

MR. KOVNER: Thank you, Judge Koeltl. Thank you, Professor Capra and Judge Raggi, for convening this excellent conference.

I am here as the press person. I just want to remind everyone at the outset, the press appreciates confidentiality in judicial matters as well. Their position is not always that everything ought to be public, that it is newsworthy and the public has a right to know. The press has come and will come before many of you asserting a qualified journalist's privilege in which they want to retain the confidentiality of their sources. Maybe there will be a federal shield law soon. There are shield laws in most states. It is a qualified privilege. Sometimes some confidential information comes out and may be available for attorneys' eyes only, it may have to come to trial. There are a variety of techniques where a case can be tried and yet some sensitive information may not be seen by everybody.

Keep that in mind when you hear that everything must be open.

I thought I would share the perfect storm of early 2004 with you very briefly. That is a trilogy of cases that arose in the New York metropolitan area where the press made successful requests for juror information during high-profile criminal trials. You are familiar with them, I am sure. But it is just worth noting, looking overall, in context.

We started with the Martha Stewart case in January of 2004—enormous press coverage.¹⁸⁵ Following the distribution of questionnaires in the impaneling process, a paraphrased portion of the questionnaire appeared on Gawker.com. There was no evidence that the media played any role in that

179. *See id.* at 180.

180. *See id.* at 180, 183.

181. *Id.* at 185.

182. *Id.*

183. *Id.*

184. *Id.* at 184.

185. *United States v. Stewart*, 317 F. Supp. 2d 426 (S.D.N.Y. 2004).

disclosure, but the district court chose thereafter to bar the media from attending voir dire while providing subsequent release of voir dire transcripts.¹⁸⁶ Unfortunately, the district court did not provide notice to the media or an opportunity to be heard. The press immediately moved to vacate the order, and the district court denied the motion.

The Second Circuit reversed, in an opinion by Judge [Robert] Katzmann, even though the juror selection was already complete by that time.¹⁸⁷ It cited the cases that would hold that documentary access is not a substitute for concurrent access,¹⁸⁸ and where Sixth Amendment rights of defendants were involved in *Stewart*, only the government had moved to close. The district court had not made, the Second Circuit said, the requisite finding that there was a substantial probability that the right to an impartial jury would be prejudiced.¹⁸⁹ Even though the defendant was high-profile, there was no evidence that the presence of the press would have any different effect on jurors than it would in any criminal case. It distinguished those cases where the voir dire, of its nature, touched on sensitive issues, such as whether jurors harbored racist views, as a kind of circumstance where at least some *in camera* voir dire would be appropriate.¹⁹⁰

Only two months later, in the state Supreme Court, we had *People v. Kozlowski*,¹⁹¹ the Tyco case, the prosecution of the chief executive of Tyco. There had been a six-month trial, and very late in that trial, the press noticed that one juror appeared to be making sympathetic signals toward the defendants. Much press attention followed, including, unfortunately, the identification of that juror while the case was continuing by one newspaper.

I make that point because the record is that the press never identifies jurors while a case is pending. Of course, after the case is over, then many of the jurors will speak to the press, and reporters will try to locate them. This was so exceptional. And, I have to say, the entire press was very troubled by it.

Thereafter, the juror received a questionable letter and a call. Other members of the jury had sent notes to the court regarding that juror. The court decided to hold an *in camera* inquiry into the circumstances, including of that juror, and eventually declared a mistrial. This was after six months. It caused quite a storm.

Thereafter, the press moved for access to the transcript of that *in camera* proceeding. The state resisted, on the basis that they had an ongoing investigation into juror tampering. The court thereafter unsealed the transcript of that *in camera* proceeding.

Now, a week after *Kozlowski*, the Southern District had *United States v. Quattrone*¹⁹²—Frank Quattrone, a senior executive at Credit Suisse. After

186. *United States v. Stewart*, No. 03 Cr. 717, 2004 WL 65159 (S.D.N.Y. Jan. 15, 2004).

187. *ABC, Inc. v. Stewart*, 360 F.3d 90 (2d Cir. 2004).

188. *Id.* at 99–100.

189. *Id.* at 100–01.

190. *Id.* at 99.

191. 898 N.E.2d 891 (N.Y. 2008).

192. 277 F. Supp. 2d 278 (S.D.N.Y. 2003).

denying a motion to impanel an anonymous jury—there was no possible danger to any of the jurors in this kind of white-collar case—the district court, noting what had happened in *Kozlowski*, issued an order barring the press from publishing the names of jurors.¹⁹³ Unfortunately, the district court did so after many of the names of jurors had already been read in open court. Also unfortunately, he had not given the press an opportunity to be heard. The order was subsequently, found by the Second Circuit—by Justice Sotomayor, it might be noted—to have been an unconstitutional prior restraint.¹⁹⁴ That opinion asked the court to consider other methods to mitigate unrestricted publicity.¹⁹⁵

Those three cases, I hope, have clarified the law, and some of the rules that have been discussed here have been adopted in the wake of those cases.

The most recent very high-profile case, *The People v. Anthony Marshall*, the son of Brooke Astor—received six months of intense coverage; every dot and title of what went on in the courtroom and outside was covered by the press during deliberations. These issues arise in the deliberation context as well. One juror sends a note that she had been threatened by another juror. Unlike *Kozlowski*, the judge in *Marshall* did not conduct an *in camera* inquiry and permitted the deliberations to continue, and a guilty verdict resulted. Not surprisingly, there was a motion to vacate the judgment of conviction, under these circumstances.¹⁹⁶ Now there are conflicting submissions regarding what went on in that jury. That motion is pending.

JUDGE KOELTL: Thank you, Victor.

Our next speaker is Nora Dannehy, the United States Attorney for the District of Connecticut.

MS. DANNEHY: Thank you. Thank you, Judge Raggi, Professor Capra.

I am going to give the perspective of the AUSA and the down-and-dirty mechanics of redaction: When that notice comes out, what does it mean for an AUSA as to redactions? What are the steps that he or she has to take? Then I will raise some of the steps that, at least in the District of Connecticut, we have started to do on the front end to avoid having to redact transcripts. Finally, I will just raise some general issues or concerns with the fact that transcripts will be remotely accessible electronically. What that really means is that they are widely accessible and much less expensive.

On the notice front: for an AUSA, the notice comes out that the transcript will be available in ninety days and redaction needs to take place. If the government has been the sponsoring entity for the witness, it is our

193. See *United States v. Quattrone*, 402 F.3d 304, 307 (2d Cir. 2005) (mentioning district court's order).

194. *Id.* at 312.

195. *Id.* at 311.

196. Indictment No. 6044/07 (N.Y. Sup. Ct. July 29, 2010), available at <http://www.nylj.com/nylawyer/adgifs/decisions/073010bartley.pdf> (denying motion to vacate).

responsibility to determine whether any redaction needs to take place. How that occurs is, really, in one of two ways. Depending on the relationship with the court reporter, the court reporter may give the AUSA a copy of the transcript so that he or she can just do the redaction in the office, with the understanding that if the AUSA really intends to use this transcript, he or she is going to order it from the court reporter, with whom we have a working relationship. Other times, the AUSA has to go over to the courthouse at the public terminal and do the redaction. There is a form that the District of Connecticut has issued with the five personal identifiers and the line number, page number, et cetera that must be used, to get it done.

When the requirement of transcript redaction first came out, the reaction was, "The sky is falling." That has not really proven to be true. I did a survey, very unscientific. I walked around the office last week and just said, "How's it going with that redaction?" Not surprisingly, everyone said, "Great."

I do not know if, in fact, it really is going well and folks are diligent in doing what they are supposed to do or if they just did not want to tell me. Maybe the next survey that is done is that the District of Connecticut is not complying. We will find out. But there was not, "This is awful. This is so burdensome," as I initially expected.

In terms of how different districts may be handling this, in Connecticut there is a policy on the district court website that specifically provides that attorneys, if they want to redact any information beyond the five personal identifiers, must file a motion with the court.

Steps on the front end to avoid having to go over to the courthouse and physically go through the transcript: most AUSAs are not putting personal identifiers on the record in court. That seems to be working very well. Exhibits, et cetera, that are filed are being redacted.

In addition, with child exploitation cases and human trafficking cases, we have reached agreements oftentimes with defense attorneys not to put the victim's name on the record. Both sides agree to refer to the victim by initials. It works well in sentencing or more controlled hearings. It is more difficult during a trial, where, not for any bad intent, but just in the moment, the attorneys tend to use the witness's name. We have had mixed results with the agreements at trial, but we are attempting to do that.

I think most of the judges in the District of Connecticut now, at voir dire, are no longer using potential jurors' names. They are referring to them by number. So there are no names in the transcript.

In terms of just general issues, we have heard today a lot about cooperators and the chilling effect or the increased potential for retribution if the information is electronically available. Obviously, with a transcript of a cooperator's testimony in detail, that concern is there.

In addition, having a transcript of the sentencing or even plea proceedings electronically available at a fairly inexpensive rate can also raise issues. Judge Underhill went through the steps in Connecticut that are taken to seal the cooperation agreement as well as to delay docketing of the cooperation agreement. When the transcript of the sentencing or the

transcript of the plea is ordered and potentially then becomes electronically available, it is going to reflect a sealed portion. So query whether that is sort of undermining the steps that are being taken with the documents themselves. If somebody orders that transcript and they see, up front, a sealed portion, they are going to know that there is likely cooperation in that case.

The other issue that the fact of an electronically available transcript raises is with victim witnesses and also standard fact witnesses. With victim witnesses—again, the human trafficking, child exploitation cases a prosecutor is asking this person to take the stand and, in open court where anybody can be sitting because it is a public forum—relay a very painful experience in their life. If a witness asks, the prosecutor has to say, “And the transcript will be electronically available and likely on the Internet forever.” That fact has a real chilling effect for a victim. Again, I raise the question, is the benefit of remote access to the public at large versus making the transcript available to the parties and to the court worth this potential chilling effect on a witness?

One other type of case that we have not really talked that much about, a witness in a white-collar case or public corruption case. Those witnesses oftentimes are going to testify about people in their community, people they have worked with, and high-profile people in their community. One of the things that sometimes gets them through is when a prosecutor says, “You can go up there, tell the truth, tell your story, and it is behind you.” Now it may not be behind them, in the sense that the transcript will be remotely available to the public, likely, in one form or another, on the Internet, and it is there forever. It is like when you are trying to tell your kids about posting a picture on Facebook: it will be there forever. So that when they are going to go for a job or anything else, they can be Googled, and that information is on the Internet. Again, it is something that I just think needs to be considered in weighing the benefits of remote access.

Finally—I do not think it has been out there long enough—I just raise the possibility of an increase in post-trial motions, most of which are likely to be frivolous. When the transcripts of witnesses’ testimony are more easily available, and people can read them on the Internet, as opposed to going down to the courthouse, I question whether judges are going to start to get an increase in motions challenging the truth of what was testified to, and how those are going to be dealt with.

Thank you.

JUDGE KOELTL: Thank you, Nora.

Our next speaker is Ben Campbell, the U.S. Attorney for the Eastern District of New York.

MR. CAMPBELL: First off, let me say I am very happy to be here. Thank you, Professor Capra, and thank you, Judge Raggi, whom I had my first trial in front of—and taught me everything I know.

I thought what I would do is spend a little time focusing on the real practical, real-world aspects of the redaction process and how it works, and a couple of issues that have arisen.

As many of you know, the Department [of Justice] as a whole is revising its discovery policies. Each district had to come up with its discovery policy. We have had a discovery policy in our district for a very long time. What we did was, we used this as an opportunity, basically, to bring everything together and synthesize and write a comprehensive document that we can give to our newest people and we can give to our senior people.

One of the things that we also did in that is to look at some of the aspects of Rule 49.1¹⁹⁷ on the criminal side and 5.2¹⁹⁸ on the civil side. As you know, we also represent the United States government when it gets sued, and the government does get sued a lot.

As an aside, I had one meeting with our Civil Division folks, and they told me about a case that literally involved a seventy-year-old lady pushing a cartful of Bibles across the street who got hit by a postal truck. My advice was, "Settle."

But it was an opportunity, I think, for us to tune our practices a little bit in this regard.

We sent out a guidance memo, basically, which we did about a month before I knew I was going to be on this panel—so it is just synergy—which basically talks about Rule 49.1 and some of the steps that we can take up front to mitigate and remove the need to go through and redact later on. Our folks had the same reaction that Nora was describing—"Oh, my gosh, the sky is falling." The reality is that that really has not quite happened, largely because a lot of our people think ahead, and we do not solicit a lot of identifying information in the direct examinations or in proceedings before the court. Frankly, it is not really that necessary.

More sensitive issues, I think, are raised by cooperator testimony and some other things, which I will get to in a few minutes.

So we do a lot of the same kinds of things that Nora was describing in terms of frontloading and trying to avoid the need to go back and redact later on.

I will say, the rule has served very nicely for us to signpost some of the issues for our folks up front that we can use then to not elicit identifying information at trial. There are some exemptions in the rule, many of which I think tailor very nicely to some of the issues that we have to deal with. If we are in a suppression hearing and we are talking about a particular location or we are talking about an asset-forfeiture proceeding, the exemptions tailor very nicely to the kind of discussion that we are going to have to have on the record.

What else have we done? One of the areas where I think we have some concern, or at least some thought on where we are right now, is the question of voir dire. I conducted an in-house e-mail survey. I got a wide variety of responses. I got everything from, "We never order the voir dire unless there is a *Batson*¹⁹⁹ challenge or some appeals issue that we need," to, "We order

197. FED. R. CRIM. P. 49.1.

198. FED. R. CIV. P. 5.2.

199. See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

the voir dire in every case,” to, “Well, it depends on what the court reporter gives you.”

It gave us an opportunity to sort of think a little bit about conveying to our folks that, as a practical matter, unless you really need the voir dire, it is probably not a good idea to order the transcript. If you do not order the transcript, then many of the issues that are implicated by the redaction process and some of the sensitivities about what jurors disclose at the voir dire are not implicated.

It also got us thinking a lot about whether or not, just as a practice pointer, it is a good idea, when you are standing there at the sidebar and the juror is telling you the reason why he cannot be fair or he is conveying something very sensitive, like he was a victim of a crime or he has somebody in his family who is HIV-positive, or whatever the reasons may be—and they are diverse, to say the least—it is a good practice pointer for us, as a reminder, to make a potential application at that moment, when all the parties are right there, as to whether that should be sealed or not. In many cases, a lot of times many of our judges will beat us to the punch in that regard, because they understand the issue of making sure that the jurors feel that they can be completely candid.

So, in general, the voir dire aspect of this issue, while there is some degree of sensitivity, has not really manifested itself yet in a systemic, problematic way.

My issue that I am grappling with is whether or not that is because we can tinker with our process more effectively to head it off, whether or not it is not being done because the court reporters and the court and the Clerk’s Office—everything is running sort of episodically. Sometimes we comply with the tenor of the rule; sometimes we do not. That is an issue, I think, that we are still burrowing into. I think we have a little bit more work to do in that regard, candidly.

Let me just close and talk about a couple of the issues that Nora raised and echo some of the concerns that we have.

One of them—several of the commentators in previous panels illustrated this point—is that it is not necessarily the public access to this information, but the ease of that access and the nature in which that access can become widely copied and widely available. That does raise some concerns that we do think about.

Now, look, to be perfectly candid, when you have a trial in which a cooperating witness is testifying—many of our trials get a lot of attention and a lot of press coverage—that means that there are folks sitting in the audience every day reporting on exactly what happens. But those cases are probably not the everyday case.

There are a lot more cases, as Jan was talking about, that involve a lot of folks that are just there doing the best they can under the system. We have a very sophisticated group of folks who pay a lot of attention to what we do and, more importantly, who testifies. That manifests itself in a lot of ways, and it does manifest itself by cooperator testimony getting posted on the Internet. That is a fact of life. We have had people threatened. We have

had people threatened in the institutions. We have had people killed as a result. Everything that Barbara said earlier does apply to us as well. We have spent a lot of time in our district paying a lot of attention to that. There are very significant organized crime cases or gang cases which we do a lot of. That is an issue that does cause us a little bit of concern.

Similarly, we do have some of the concerns for victims. We have had some very graphic testimony from victims, particularly in child abuse cases that have become increasingly common.

So those are some of the issues.

Thanks for the time.

JUDGE KOELTL: Our last speaker will be someone with firsthand knowledge of dealing with the jurors. Lori McCarthy, who is the Jury Clerk from the Eastern District of New York.

MS. MCCARTHY: Thank you very much. Good afternoon.

I am going to discuss voir dire transcripts and juror privacy concerns. I have not personally received any requests regarding voir dire transcripts, but recently there was a case where the press made a request to the court. About a week after the verdict was rendered, the press requested the release of the voir dire transcript, as well as the names, addresses, and telephone numbers of the jurors. The judge issued an order granting the release of the voir dire transcript, on the condition that prior to public release of the transcript, the court reporter redact any information that could reveal the identity of any prospective juror who participated in a sidebar discussion. On occasion, during orientation or before jurors are sent upstairs for jury selection, they have said that there may be some things that they do not wish to discuss in open court, and we always tell them that they have the opportunity to speak with the judge in sidebar if they are not comfortable about something.

I definitely think that before releasing voir dire transcripts, redacting any information from sidebar discussion that could potentially reveal the identity of a juror is a good idea. If voir dire transcripts do become available online and jurors know that their comments, especially sidebar discussion, will be accessible to the public online, they may not be as forthcoming with their opinions and experiences.

As far as the juror privacy concerns, I have found that when jurors fill out questionnaires, particularly anonymous questionnaires, many of them are more detailed and expressive in their comments, revealing more than they probably would in open court, and perhaps even sidebar. They know that the juror information sheet, which states their name, questionnaire number, and contact information, will only be seen by the Jury Department.

That is pretty much it.

JUDGE KOELTL: Thank you, Lori. First of all, questions from you all?

JUDGE HARRIS HARTZ (U.S. Court of Appeals for the Tenth Circuit): I am not asking this on behalf of myself. I am asking it on behalf of Professor Capra, in another capacity of his. This is for Judge Treece. Why

is it that with respect to your rules governing transcripts, you have one local rule and two general orders? Why isn't it all in a local rule?

JUDGE TREECE: I can tell you that, as of June of this year, the local rules will subsume the general orders. So there will not be any general orders after this year.

PROF. CAPRA: We have a whole report on that that you can access.²⁰⁰

PROF. CAPRA: I have a question about the juror number system that I guess is true in Connecticut and the Northern District. I have heard from a number of judges that that might depersonalize the whole voir dire process. I want to know if you have had that experience or you know of that experience in your districts. In other words, if you are referring to somebody as "Juror Number 2," it is different than referring to them by their real name.

I am asking that on Judge Leighton's behalf.

JUDGE LANCASTER: I had a case—I like to personally refer to the jurors by name and make them feel comfortable—where I had sentenced a guy to thirty years, a career criminal, and about seven months later, his sister, who works for a bail bondsman, ordered the transcript of voir dire—nothing else, just the transcript of voir dire. I ordered the court reporter to convert the names to initials and send the transcript out. I may have committed a reversible error. I do not know. I seldom know.

JUDGE TREECE: I can say, in terms of the assignment of numbers, it is more a practice in the breach. Judges and the attorneys often refer to the jurors by their names. It was just that in two very high-profile cases—both of them were terrorist cases—where the court directed that jurors will be identified by their numbers. Those are the only two instances that I can think of. Nonetheless, the local rule basically says that we are supposed to assign numbers on a regular basis. Just goes to show you that judges do not even follow their own rules.

MR. KOVNER: In Connecticut, it is more of a common practice?

MS. DANNEHY: In Connecticut, it is more of a common practice. It is fairly recent. The judges themselves, from what I understand, have not objected. It was actually at their own suggestion that the practice started. I also understand that jurors, when it is explained to them why they are being referred to by numbers as opposed to names, appreciate it.

It is explained that they have been given numbers and, for purposes of this proceeding, they are going to be referred to by number, just for ease.

JUDGE KOELTL: Are the jurors told, "Look, we are not referring to you by name because the transcript of this proceeding may be available online. It may be available on the Internet. To protect your privacy, we are not going to refer to you by name"?

200. JUDICIAL CONFERENCE OF THE U.S., COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT AND RECOMMENDED GUIDELINES ON STANDING ORDERS IN DISTRICT AND BANKRUPTCY COURTS (2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Standing_Orders_Dec_2009.pdf.

MS. DANNEHY: The answer is, I do not know. I do not want to answer that. I would think that would be a reasonable explanation, so I do not see why it could not be done. But I just do not want to speak, because I have not actually been there.

JUDGE ROSENTHAL: I just wanted to say that that is the practice in my district, telling jurors who are—and jurors are pretty smart. They get the fact that they are Juror Number One instead of Mr. or Ms. So-and-So, for the purpose of keeping their names optional or forbidden.

The real reason I raised my hand to speak to Panel Number Six is to thank everyone on behalf of the Standing Committee for participating in this extraordinarily helpful and informative day and to thank, in particular, Judge Raggi and Professor Capra and the Fordham Law School for the immense amount of work that has gone into this. And I thank all of you for the immense amount of insight that it has provided.

Attachment 6 to Privacy Subcommittee Report

**Memorandum by Hon. Elizabeth Stong on Operation of the
Federal Privacy Rules in Bankruptcy Proceedings**

JCUS Subcommittee on Internet Access to Private Identifier Information

Outline by Hon. Elizabeth Stong on Operation of Privacy Rules in Bankruptcy Proceedings

April 2010

Synopsis:

- I. Disclosure is essential to the purposes of the Bankruptcy Code. But with disclosure comes the potential for inadvertent disclosure of confidential information.
 - a. The Rules require that a debtor provide the court with her full Social Security number. The caption of a petition must include the last four digits of a debtor's Social Security number. And a debtor's full Social Security number is available to a debtor's creditors.
 - b. A debtor must also provide information and documents, including tax returns, that may contain her Social Security number. The Rules require the redaction of such documents.
- II. Purpose of disclosure.
 - a. The disclosure of a debtor's Social Security number allows the court and the debtor's creditors to verify the identify of the debtor, and to determine if the debtor has filed previous cases.
- III. Rules have been enacted to protect disclosure of confidential information. For example:
 - a. Rule 1005, as amended in 2003, no longer requires a debtor to include her full Social Security number on the petition.
 - b. Rule 9037, enacted in 2007, requires redaction of sensitive information, such as a debtor's full Social Security number.
- IV. Efforts to ensure compliance with redaction requirements.
 - a. In the Eastern District, attorneys for debtors and creditors who file on the CM/ECF system must receive training prior to receiving a password to access the system. Attorneys using the CM/ECF system must check a box indicating that they have read a notice regarding the redaction requirement. The Eastern District also publishes information about this requirement on its website.
 - b. The Eastern District's Clerk's Office and the Eastern District's Pro Se Law Clerk's Office remind non-ECF filers to redact Social Security numbers. The

Clerk's Office also reviews paper submissions prior to uploading to CM/ECF to ensure compliance.

V. Reported problems.

- a. Although the Eastern District is mindful of the problems that have been reported and the potential for problems, the Eastern District's Clerk's Office does not regularly receive complaints about or discover unredacted Social Security numbers in case filings.
 - i. But the Clerk's Office does see a problem occurring somewhat more frequently with attorneys who mistakenly file a debtor's Statement of Social Security number, rather than maintaining that document in her files.
 - ii. Another problem that occurs with somewhat more frequency is when creditors file proofs of claims that attach documents that contain Social Security numbers but do not redact them.

VI. Possible solutions.

- a. Increase training. The filing of unredacted information sometimes occurs when an attorney allows members of her staff to file documents using her CM/ECF password. One solution would be to require staff members to receive the CM/ECF training provided by the Eastern District.
- b. Impose penalties. There may be reason to impose penalties or consequences when an attorney checks the redaction responsibility box on the CM/ECF screen, but still uploads a document without the required redaction.

The Duty to Disclose Information in Bankruptcy Cases

- One of the fundamental objectives of the Bankruptcy Code is complete and accurate disclosure of all relevant information and meaningful notice to all parties in interest. As a result, the Bankruptcy Code and Rules, and the Local Rules for the Eastern District, require a debtor to disclose a great deal of information. By its nature, that is, bankruptcy is an intrusive process. Courts have made clear that “[a] debtor’s complete disclosure is essential to the proper administration of the bankruptcy estate.”
 - “The ‘fresh start’ policy of the consumer bankruptcy system is premised on the notion that a debtor comply fully and honestly with the requirements of the Bankruptcy Code. One essential obligation is the full disclosure that extends far beyond what debtors ordinarily would have to reveal in either a credit application or an ordinary lawsuit. For debtors to be eligible for bankruptcy relief, they must share details on assets, income, liabilities, expenses, previous bankruptcies, lawsuits, business attempts, and co-debtors. Debtors sign bankruptcy petitions under penalty of perjury, an admonition printed on the schedule above the signature line. ¶ Intentional failure to comply with the disclosure requirements carries large penalties. The court may deny or revoke the debtor’s discharge. False statements on bankruptcy schedules might lead to the imposition of sanctions on the debtor and/or the debtor’s attorney. Fraudulent concealment of assets may also be grounds for criminal conviction.” G-44 COLLIER ON BANKRUPTCY § 1.1.2 (2010).

Rules Requiring Disclosure of a Debtor’s Social Security Number

- A Debtor is required to provide the court with her full Social Security number.
 - Under Rule 1007(f), an individual debtor is required to “submit” to the clerk, rather than “file,” a verified statement that sets out the debtor’s Social Security number or that the debtor does not have a Social Security number. (A filer is also required to correct the information provided if it is incorrect. *See* Rule 1009(c)). This is known as the Official Bankruptcy Form 21 - Statement of Social Security Number.
 - When filing is made through the CM/ECF system, the filer must input the debtor’s Social Security number into the CM/ECF system, but that information is not available to the public. The attorney retains the Form 21, but does not file it on the docket.
 - When a pro se debtor submits a petition to the Clerk’s Office’s intake counter, the intake clerk retains the Form 21, but does not file it on the docket.
 - A clerk’s access to the debtor’s full Social Security number serves several purposes. For example, it enables a clerk to include the full Social Security number on the notice of the Section 341 meeting of creditors.
 - As the Advisory Committee Note makes clear, the purpose of this procedure is to prevent the Social Security number from becoming a part of the “filed” papers that are in the case file available to the general public.

- Rule 1005 requires that the caption of a petition commencing a case under the Bankruptcy Code shall include, among other identifying information, the last four digits of the Social Security number or individual debtor’s taxpayer-identification number. (This requirement is also found in Local Rule 9004-2(a), relating to the amendment of case captions.)
 - Prior to 2003, Rule 1005 required a debtor to provide a full Social Security number on the petition. As set forth in the Advisory Committee Notes, “this Rule was amended in 2003 to implement the Judicial Conference policy to limit the disclosure of a party’s social security number and similar identifiers. Under the rule, as amended, only the last four digits of the debtor’s social security number need be disclosed. Publication of the employer identification number does not present the same identity theft or privacy protection issues. Therefore, the caption must include the full employer identification number.”
- Creditors are privy to a debtor’s full Social Security number. For example, the debtor’s Social Security number is included in the notice of the Section 341 or 1104(b) meeting of creditors sent to creditors pursuant to Rule 2002(a)(1).¹ And the full Social Security number is also sent to creditors on the notice amending Social Security number. But, as noted, a full Social Security number is not filed with the court, and is therefore not available to the general public by searching the docket.
- In addition to these specific requirements, a debtor’s, or even a non-debtor’s, Social Security number may be contained in documents that are required to be filed with the court. As discussed below, it is the filer’s burden to redact such information, leaving only the last four digits of a Social Security number.
 - For example, the tax returns or transcripts filed with the court pursuant to Section 521, may contain a debtor’s or a non-debtor’s Social Security number.

Purpose of Disclosing

- The requirement that a debtor file a statement of Social Security number serves several purposes.
 - It allows the court to determine if the debtor has filed previous petitions under the same Social Security number, but under a different name.
 - It assists the process of notifying a debtor’s creditors that the debtor has filed a petition for relief.
 - And it helps ensure that a party who does not intend to file for bankruptcy is not mistakenly identified as such, with resulting impairment to that person’s credit and confusion on the part of creditors.

¹ Rule 2001(a) provides that:

[T]he clerk, or some other person and indenture trustees at least 21 days’ notice by mail of:

(1) the meeting of creditors under § 341 or § 1104(b) of the Code, which notice, unless the court orders otherwise, shall include the debtor’s employer identification number, social security number, and any other federal taxpayer identification number[.]

Privacy Considerations

- Over a decade ago, the Judicial Conference began consideration of and then formulated a privacy policy for electronic case files.
- The efforts of the Conference resulted in the passage of Rule 9037, in 2007, effective December 2007. (Likewise Fed. R. App. P. 25(a), Fed. R. Civ. P. 5.2, and Fed. R. Crim. P. 49.1 were enacted).
 - Rule 9037 provides that a party or nonparty making an electronic or paper filing may include only (1) the last four digits of a Social Security number and taxpayer-identification number; (2) the year of an individual's birth; (3) a minor's initials; and (4) the last four digits of the financial-account number.² This rule applies to all filings, except for certain exempted filings. *See* Rule 9037(b).³
 - The redaction of personal identifiers lies with the filing party.
 - The Advisory Committee Notes provide that “[t]he clerk is not required to review documents filed with the court for compliance with this rule. As subdivision (a) recognizes, the responsibility to redact filings rests with counsel, parties, and others who make filings with the court.”
 - The Advisory Committee Notes indicate that the rule is adopted in compliance with Section 205(c)(3) of the E-Government Act of 2002, Pub. L. No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules “to protect

² Rule 9037(a) provides that:

Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

³ Rule 9027(b) provides that:

The redaction requirement does not apply to the following:

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding unless filed with a proof of claim;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by subdivision (c) of this rule [sealed cases]; and
- (6) a filing that is subject to § 110 of the Code.

privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.”

- The Rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain “personal data identifiers” are not included in the public file.
- Any personal information not otherwise protected by sealing or redaction will be made available over the Internet. Counsel should therefore notify clients of this fact so that an informed decision may be made about what information is to be included in a document filed with the court.
- Subdivision (d) of Rule 9037 recognizes the court’s inherent authority to issue a protective order to prevent remote access to private or sensitive information and to require redaction of material in addition to that which would be redacted under subdivision (a) of the rule. These orders may be issued whenever necessary either by the court on its own motion, or on motion of a party in interest.
- Subdivision (g) of Rule 9037 allows an entity to waive the protections of the rule as to that entity’s own information by filing it in unredacted form. An entity may elect to waive the protection if, for example, it is determined that the costs of redaction outweigh the benefits to privacy.
- Moreover, Rule 9037 does not affect the protection available under other rules, such as Rules 16 and 26(c) of the Federal Rules of Civil Procedure, or under other sources of protective authority.
- Under Rule 1007(b)(1)(E), a debtor must provide “copies of all payment advices or other evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition.” But this Rule also provides that such production should be done “with redaction of all but the last four digits of the debtor’s social-security number or individual taxpayer-identification number[.]”

Privacy Considerations Related to Disclosures to the Trustee

- A debtor in a Chapter 7 or 13 case must provide ample disclosure to the trustee under Section 521(e)⁴ prior to the meeting of creditors under Bankruptcy Code Section 341.

⁴ Section 521(e)(2)(A) provides that:

The debtor shall provide--

- (i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and

- Under Rule 4002, every individual debtor shall bring to the meeting of creditors under § 341 information including evidence of social-security number(s), or a written statement that such documentation does not exist, and financial information including: evidence of current income such as the most recent payment advice; unless the trustee or the United States trustee instructs otherwise, statements for each of the debtor’s depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition; and a tax return for the most recent tax year.
- The Advisory Committee Notes to Rule 4002 indicate that it is the debtor’s duty to redact sensitive information. “Some of the documents may contain otherwise private information that should not be disseminated. For example, pay stubs and financial account statements might include the social-security numbers of the debtor and the debtor’s spouse and dependents, as well as the names of the debtor’s children. The debtor should redact all but the last four digits of all social-security numbers and the names of any minors when they appear in these documents. This type of information would not usually be needed by creditors and others who may be attending the meeting. If a creditor perceives a need to review specific documents or other evidence, the creditor may proceed under Rule 2004.”
- The Advisory Committee Notes also indicate that “[b]ecause the amendment implements the debtor’s duty to cooperate with the trustee, the materials provided to the trustee would not be made available to any other party in interest at the § 341 meeting of creditors other than the Attorney General.”
- Local Rule 4002-1 also makes clear that it is the debtor’s duty to redact personal identifiers and personal information. “An individual debtor providing information to the trustee or a creditor pursuant to Bankruptcy Code § 521(e) shall redact personal identifiers as follows: (i) if an individual’s Social Security number, alien registration number, or tax identification number is included, only the last four digits of that number shall appear[.]”⁵

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

Under Section 521(2)(B), “[i]f the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.”

⁵ Rule 4002-1(a) provides that:

An individual debtor providing information to the trustee or a creditor pursuant to Bankruptcy Code § 521(e) shall redact personal identifiers as follows:

- (i) if an individual’s social security number, alien registration number, or tax identification number is included, only the last four digits of that number shall appear;
- (ii) if minor children are identified by name, only the children’s initials

Procedures Enacted to Strengthen These Rules in the Eastern District

- The Administrative Office proposed changes to the CM/ECF filing system to include a notice reminding filers of their obligation to redact personal identifier information. It also encourages courts to stress the rules to filers who file in court, and has asked individual courts to share information on actions they have taken to ensure compliance with the privacy rules, including promulgation of local rules, standing orders, and outreach programs to the public and bar.

Non-ECF Filers

- When documents are submitted for filing in hard copy, which is done most often by pro se debtors, the intake clerk reviews the filing to make sure that unredacted Social Security numbers are not submitted prior to filing. And the Eastern District Bankruptcy Court has a Pro Se Law Clerk's Office to assist pro se filers.
 - Among its other duties, the Pro Se Law Clerk's Office provides advice to filers who have forgotten to redact sensitive information on documents such as pay stubs, and it is the practice of the Office to remind the filer to redact her Social Security number prior to filing.

ECF Filers - Both Debtors' Attorneys and Creditors' Attorneys

- Training. In order to file documents in a bankruptcy case in the Eastern District, attorneys must complete the court's free training course or certify that they have received training at another court, after which attorneys are provided with a login and password that will allow access to the system. The requirement that attorneys redact Social Security numbers and other sensitive information is stressed at this training. Members of an attorney's support staff are also encouraged to attend. In addition, information about the redaction requirement is provided in the Court's ECF Newsletter posted on the Court's website.
- ECF Notice. One step taken by the Administrative Office, and currently in use by the Eastern District, is a modification to the CM/ECF system that requires an electronic filer to review a notice and check off that she has read the notice, and that if she files, that she must be in compliance with the redaction rules. Importantly, the filer cannot complete the log on process without checking the box. The notice reads:

IMPORTANT NOTICE OF REDACTION RESPONSIBILITY: All filers must redact: Social Security or taxpayer-identification numbers; dates of birth; names of minor children; and financial account numbers, in compliance with Fed. R. Bankr. P. 9037. This requirement applies to all documents, including

shall appear;

(iii) if an individual's date of birth is included, only the year shall appear;
and

(iv) if financial account numbers are provided, only the last four digits of these numbers shall appear.

attachments.

____ *I understand that, if I file, I must comply with the redaction rules. I have read this notice.*

- In addition, another modification to the CM/ECF system is a reminder message added to the screen where the attorney finalizes the submission of filed documents. That message reads, "Have you redacted?" No affirming keystroke is required for that message.

Problems

- The Eastern District's Clerk's Office does not regularly receive complaints about or discover unredacted Social Security numbers in case filings. But when a problem arises, the attorney or other filer is notified, and asked to submit the document again with the proper redactions and the improperly filed document is removed from the docket.
 - The biggest problem the Clerk's Office runs into concerns attorneys who mistakenly file the Form 21 statement of Social Security number, rather than maintaining that document in her files. When this occurs, the Clerk's Office will notify the attorney of the error, and the filing will be removed from the docket. As noted, the attorney is required to input the debtor's Social Security number into CM/ECF for the Court's use, although this information is not publicly available, so the filing of Form 21 is not necessary for the Court to have the required information.
 - Another problem occurs when creditors file proofs of claim that attach documents that contain Social Security numbers but do not redact them. As with other filers, the Clerk's Office notifies the filer of the error, and removes the document. The creditor will then provide a properly redacted document.
 - Problems appear to arise most often when attorneys allow their staff to file on their behalf, but do not convey the proper procedures for redaction to their staff.
 - For this reason, attorneys are asked to have their support staff attend the Court's ECF training class where the procedures for redacting Social Security numbers are emphasized.
- The Pro Se Law Clerk's Office does not recall complaints from pro se debtors or non-debtors about their Social Security numbers having been made public.
- The Pro Se Law Clerk's Office does receive complaints concerning stolen Social Security numbers. This could arise in situations where an individual discovers that she was falsely or mistakenly placed into bankruptcy. Or by debtors who claim that creditors have invalid claims against them because of identity theft that occurred prior to her bankruptcy filing.
 - In such cases, the Pro Se Law Clerk's Office may make a referral to the United States Trustee for investigation, or to the FTC for help, and can provide credit freeze information.
- Some debtors attempt to file a petition using a fake Social Security number. While the

Eastern District Bankruptcy Court does not require debtors to present identification when filing, other courts do. But debtors who do file with a fake Social Security number are subject to dismissal without discharge, and possible prosecution for a bankruptcy crime.

Possible Improvements

- Require the staff of attorneys to receive CM/ECF training if the staff will be doing the filings.
- Impose penalties or consequences when an attorney checks the redaction responsibility box on the CM/ECF screen but still uploads a document that has not been redacted.

Enforcement: Case Law

Failure to Redact

- Courts have held that Rule 9037 does not provide a private right of action. Rather, the remedy appears to be either removal of the document from the docket, or a protective order under Rule 9037(b), in the form of either redacting the debtor's personal information or limiting electronic access to the document at issue.

Proofs of Claim

- There are a number of cases involving creditors who have filed proofs of claim without redacting sensitive information. Courts have held that Rule 9037 does not provide a private right of action for the relief sought by the plaintiff to cancel the debt owed to the defendant and/or assess sanctions against the defendant for attaching documentation to the proof of claim containing the plaintiff's full Social Security number and birth date. *In re French*, 401 B.R. 295 (Bankr. E.D. Tenn. 2009).
 - Case law has consistently held that a proof of claim may only be disallowed upon the nine statutory reasons enumerated in 11 U.S.C. § 502 of the Bankruptcy Code. *In re Lentz*, 405 B.R. 893 (Bankr. N.D. Ohio 2009) (ruling that a violation of Rule 9037 by a creditor filing a proof of claim that included the debtor's full Social Security number and other private information was not grounds for the disallowance of the proof of claim).
 - The remedy for violating Rule 9037 is set forth in the Rule itself, namely, to redact the information or limit electronic access to the document. *In re Carter*, 411 B.R. 730 (Bankr. M.D. Fla. 2009).

Providing a False Social Security Number

- The failure to provide a correct Social Security number, whether intentionally or unintentionally, may be grounds for dismissal without a discharge.
 - *See In re Riccardo*, 248 B.R. 717, 724 (Bankr. S.D.N.Y. 2000) ("This decision and its companion decisions are being published to give notice to the practicing bar that a discharge in bankruptcy will not be granted to those who use false social security numbers whether intentionally or mistakenly. Whether a debtor's use of a false social security number, and the subsequent failure to correct that error, was intentional or not is of little of concern to present or future creditors, whose rights

and interests may be prejudiced by the error regardless of the debtor's intent to defraud or lack of it. In either case the false information undermines the fundamental objectives of the Bankruptcy Code, which include complete and accurate disclosure of all relevant information and meaningful notice to all parties in interest. It is at least as important to represent accurately the debtor's social security number as any other information required to be set forth in the petition. At a minimum, a debtor who files a petition with a false social security number violates his or her oath made in signing the petition and is not entitled to a discharge under 11 U.S.C. § 727(a)(4)(A). Use of a false social security number in this Court will result in the automatic dismissal and closure of a debtor's case or, if discovered after issuance of a discharge, reopening of the case, revocation of a debtor's discharge and dismissal, with notification to all creditors, the U.S. Trustee's office and the three credit reporting agencies.”).

- In some circumstances it may be appropriate to bar a debtor who has intentionally used a false Social Security number from refiling for a certain period of time under Section 105(a).
 - *See In re Riccardo*, 248 B.R. 717, 724 (Bankr. S.D.N.Y. 2000) (“Such a remedy is most often invoked in the case of a serial refiler where the abuse of the bankruptcy process typically results in damage primarily to the interests of a single secured creditor . . . The potential damage to both existing and future creditors caused by the perpetration of identity fraud is far more pervasive and corrosive to the integrity of the bankruptcy process than the serial Chapter 13 filer seeking to stave off foreclosure by a single creditor. But such a determination should be made on a case-by-case basis, because it is not clear that the interests of the creditors and the objectives of the Bankruptcy Code would always be served by barring debtors from refiling.”).
- And, the filing of a false Social Security number may also be chargeable as a bankruptcy crime under 18 U.S.C. § 152, which makes punishable by a fine or up to five years imprisonment or both an act by “[a] person who- . . . (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under [the Bankruptcy Code]; (3) knowingly and fraudulently makes a false declaration, certificate, verification or statement under penalty of perjury . . . in or in relation to any case under [the Bankruptcy Code]”

Failure of an Attorney to Provide Client Social Security Numbers

- In one extreme example, an attorney filed at least 27 bankruptcy petitions for clients in the Northern District of California within a 90 day period. Most of those filings were made without the minimum documents required to commence a good faith case. The cases all lacked a list of creditors. Several lacked a Statement of Social Security number and even a filing fee. As part of its decision, the court ordered that the attorney was permanently enjoined from filing any bankruptcy petition in any court not accompanied by a proper matrix listing all creditors, a properly signed petition, a Statement of Social Security number, and a proper filing fee. *In re Pimentel*, 2010 WL 843771 (Bankr.

N.D.Cal. Mar. 8, 2010).

Attachment 7 to Privacy Subcommittee Report

Chart Prepared by Administrative Office on Local Rules and Practices

Governing Posting of Plea and Cooperation Agreements

TREATMENT OF PLEA AGREEMENTS

- *Six courts have policies that restrict public access to plea agreements through PACER, but make them available to the public at the Clerk's office.*
- *Nine courts indicate that they seal plea agreements when necessary, determined on a case-by-case basis.*
- *Fourteen courts have policies in which plea agreements are available to the public, but the cooperation information has moved out of the plea agreement to a non-public document (one that is either sealed or is kept outside of the public case file).*

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
Courts with policies that restrict public access to plea agreements through PACER, but make them available to the public at the Clerk's office:			
PA-E	3	The court established a protocol in which all documents on the CM/ECF system related to pleas and sentencings will be denoted as "Plea Documents," "Sentencing Documents," and "Judicial Documents." If the documents are not under seal, they will be available for public review at the clerk's office (but not available on PACER). Passwords to electronically access the documents will be given to judges, law clerks, the government, specific defense attorneys involved in the filing, probation, and (where necessary), personnel at the court of appeals. Effective September 1, 2007.	<u>July 9, 2007 notice on court's website</u>
NC-E	4	The court entered a standing order in August 2009, directing the clerk to enter all plea agreements filed in criminal cases "in such a manner that there is no remote electronic public access to plea agreements." The public, including members of the news media, may have access to filed plea agreements at the public terminal in the clerk's office. All motions based on the substantial assistance of the defendant are automatically sealed by the clerk (no need for attorneys to file motion to seal). The filings are sealed for two years unless extended longer by the presiding judge. Attorneys who have filed a notice of appearance in another criminal case in the court may file a signed certification that there is a case-related need to receive and review a copy of any sealed document to receive it from the clerk without a court order.	<u>09-SO-2 on court's website</u>

<i>COURT</i>	<i>CIR.</i>	<i>SUMMARY OF POLICY</i>	<i>SOURCE OF INFORMATION</i>
NC-W	4	The court decided to close the electronic window to all Plea Agreements and have implemented a more restricted access policy to all plea agreements. Plea agreements filed with this court will no longer be available to the general public via the Internet or Pacer. Only court users and case participants will be able to see the electronic version of a plea agreement. The general public and press can still see a plea agreement at the public terminal in the clerk's office or by requesting to see the file, both requiring the requesting party to come to the courthouse.	Frank Johns, Clerk of Court, 10/30/08
OH-N	6	<p>The Court's policy is that no newly filed plea agreements, motions filed pursuant to U.S.S.G. § 5K1.1 and/or 18 U.S.C. §3553(e) or Fed. R. Cr. P. 35(b), or statements of facts related thereto shall be available electronically through the PACER system.</p> <p>CM/ECF was modified in our Court to limit electronic access to these documents pursuant to a General Order, including identifying and restricting access to previously filed plea agreements. The new remote electronic access limitations are not a replacement for sealing documents. Documents that are intended to be completely unavailable to co-defendants and the public <u>must</u> be filed under seal as they have been in the past.</p> <p>Judges, Chambers and Court Staff have electronic access to the documents. Parties in the case will continue to have electronic access, unless the documents are sealed. The Public will not have internet access to the documents, but will be able to view the documents on the public access terminals at the court houses, unless the documents are under seal.</p> <p>Docket entries for plea agreements will contain generic language and the documents themselves will not be available through PACER over the Internet.</p>	<u>Order No. 2007-14</u>
TX-E	5	Each unsealed plea agreement must be presented to the court in paper, not electronic, format. The clerk's office thereupon will scan the paper plea agreement and electronically file it as a "private entry document," which limits electronic access to the document to the attorneys in the case, the presiding judge and the court staff. However, the clerk of court shall provide public access to all unsealed plea agreements at the clerk's offices upon request.	<u>L. Rule CR-49</u>
TX-W	5	Our business practice is . . . that these documents are not available on PACER.	11/19/09 Clerk's Privacy Survey, Appendix M

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
Courts that seal the plea agreement on a case-by-case basis.			
CT	2	If necessary, the court orders plea agreement to be filed under seal. If sealed, the judge who will sentence the defendant maintains the executed cooperation agreement and transcript of the canvass of the defendant regarding the cooperation agreement. In extraordinary situations, the docketing of a minute entry of the cooperation colloquy may be delayed.	<u>Revised Local Criminal Rule 57(b)(7)(A) adopted December 15, 2007</u>
VA-E	4	The EDVA judges studied this issue thoroughly and decided not to alter its practice in any way. Everything is unsealed unless counsel makes a motion otherwise, which is then decided on a case by case basis.	Fernando Galindo, Clerk of Court, 10/30/08
WW-S	4	Plea agreements are open to the public, unless the court orders it sealed in a particular case, based on the U.S. Attorney's office's motion or <i>sua sponte</i> .	Terry Depner, Clerk of Court, 11/03/08
TN-E	6	Our court looked at this last fall and considered following the North Dakota procedure. But after we conferred with the U.S. Attorney's office, they didn't think it was necessary. We left our procedure as is. If the U.S. Attorney's office wants a plea agreement sealed, they are to make a motion to seal. If the judges thought it was necessary, they could do so <i>sua sponte</i> .	Pat McNutt, Clerk of Court 11/02/08
IA-S	8	The court considered changing its practices, but, in the end, the judges kept the process as it is now – judges consider motions to seal on a case-by-case basis.	Marge Krahn, Clerk of Court (10/31/08)
CA-N	9	We do not have an explicit policy in this area. We rely for appropriate security on our local rule provisions for sealing documents. In other words, if a party feels the plea agreement should be walled off from observation by others, they may apply to have it sealed.	Rich Wieking, Clerk of Court, 10/30/08

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
WA-E	9	Documents listed in the Judiciary's Privacy Policy as not being included in the public case file are not reflected on the public docket in the EDWA. We have created restricted events for sealed documents such as motions for downward departure for substantial assistance and plea agreements indicating cooperation. There is no public docket entry and the court record number is skipped. We have several instances of skipped numbers in our dockets because we use restricted events for such things as presentence investigation reports, bail reports, assigning a law clerk, etc. Our judges did not want "Sealed Document" to show up on the court record around the time of sentencing, so we settled on using restricted entries based on the conference privacy policy.	Leslie Downey, Chief Deputy Clerk of Court, 11/14/08
CO	10	We left our procedure as is. If the U.S. Attorney's office wants a plea agreement sealed, they are to make a motion to seal. If the judges thought it was necessary, they could do so <i>sua sponte</i> .	Greg Lanham, Clerk of Court (11/03/08)
FL-S	11	After hearing oral arguments from representatives of both the U.S. Attorney's Office and the defense bar at an <i>en banc</i> hearing, the court voted to provide complete remote electronic access to plea agreements, rescinding its interim policy of providing no electronic public access. Each judge may, in accordance with the law, order specific plea agreements sealed.	<u>Administrative Order 2009-2</u>
Courts that have adopted policies in which plea agreements are available to the public, but the cooperation information has moved out of the plea agreement to a non-public document (one that is either sealed or is kept outside of the public case file):			
ME	1	Plea agreements are public and do not identify whether or not a defendant has cooperated with law enforcement. A second document entitled "Mandatory Plea Agreement Supplement" is filed under seal in conjunction with every plea agreement. If the defendant has agreed to cooperate, the supplement will contain the cooperation agreement. If there is no cooperation agreement, the supplement will so indicate. The mandatory plea agreement supplement will remain sealed until sentencing and for an additional 120 days thereafter, unless otherwise ordered by the court. A docket entry noting the filing of the sealed mandatory plea agreement supplement shall be publicly available through PACER, but the document will only be available to the court.	<u>Local Rule 111</u>
PR	1	The parties are to ensure that plea agreements are sanitized as to any reference as to whether a criminal defendant has agreed to cooperate with the United States. A document entitled "Plea Agreement Supplement" shall be filed under seal in conjunction with every plea agreement. If a criminal defendant has agreed to cooperate, the Plea Agreement Supplement shall contain the cooperation agreements. If the criminal defendant and the United States have not entered into a cooperation agreement, the Plea Agreement Supplement shall indicate that there is no cooperation agreement.	<u>Local Rule 111(b)</u>

<i>COURT</i>	<i>CIR.</i>	<i>SUMMARY OF POLICY</i>	<i>SOURCE OF INFORMATION</i>
NY-N	2	<p>At Guilty Plea Hearing: the Government would file a standard Plea Agreement and during the course of the plea, hand up a document containing the cooperation information and have it marked as a Court Exhibit - after the Judge discussed the contents of the Court Exhibit with the defendant and his counsel in general terms, the exhibit is returned to the Government pending their 5k motion at the time of Sentencing.</p> <p>Sentencing Hearing:</p> <ul style="list-style-type: none"> • The U.S. Attorney will electronically file in CM/ECF (within two weeks of sentencing) a Sentencing Memo that addresses all sentencing issues other than cooperation and their downward departure motion. They will not seek to file these sentencing memos under seal, as this can be an indication of cooperation. • The U.S. Attorney will submit (again, within two weeks of sentencing) a letter directly to the Court (Hand delivered or faxed to chambers), clearly marked NOT FOR FILING on the top of the first page, that 1) States the government's intention to move for downward departure at the time of sentencing, 2) Includes the government's anticipated recommended departure, and 3) States the supporting reasons (i.e. the nature and quality of cooperation). The defense attorney and Probation Officer should be copied on the letter, which will be treated like a victim letter or letters from defendant, or in support of defendant. • At the time of sentencing, the U.S. Attorney will formally make a motion for downward departure and state their recommendation. They may reference the prior letter to the court for the supporting reasons for their downward departure 	Larry Baerman, Clerk of Court (10/30/08)
MD	4	The main plea agreement document is public unless otherwise ordered. The statement of facts is an attachment to plea agreement, which is an automatically sealed event that must be docketed in every case.	Felicia Cannon, Clerk of Court, 11/03/08
TX-S	5	Plea agreements are public, but motions for downward departure including motions under Fed. R. Crim. P. 35(b) (reducing sentence for substantial assistance) must be filed under seal (Admin Procedures for EF, Section 6(1)c.).	Mike Milby, Clerk of Court, 10/30/08

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
MS-N and MS-S	5	Joint local rule effective December 1, 2009 states that all plea agreements shall be "sanitized by the drafter of any references to cooperation. After a plea agreement has been accepted in open court, plea agreements shall be scanned and electronically filed as public, unsealed documents." All plea agreements are accompanied by a sealed document titled "Plea Supplement", which will also contain the government's sentencing recommendation. The Plea Supplement will be electronically filed under seal. All cases will be docketed identically with reference to a sealed Plea Supplement, regardless of whether or not a cooperation agreement exists. The District Judge may order the entire plea agreement to be sealed for a specified period of time if the Court finds that exceptional circumstances exist warranting the sealing of the agreement. (See Note about MS-N's former practice, below.)	<u>Local Criminal Rule 49.1</u>
KY-E	6	General Order 08-09 restructures the Court's practice with regard to plea agreements to establish a procedure where all plea agreements will be accompanied by a sealed document entitled "plea supplement." The sealed plea supplement will contain either a cooperation agreement or a statement that no such agreement exists. This practice makes each case appear identical in PACER.	<u>Gen. Order 08-09</u>
ND	8	The plea agreement does not contain any information about cooperation. A "plea agreement supplement" is filed under seal in every case with a plea, whether the defendant is cooperating or not. If there is cooperation, it will be detailed in the supplement.	Policy on plea agreements, on Local Court Information page of site. URL: http://www.ndd.uscourts.gov/pdf/Plea_Agreements.pdf
SD	8	(Nearly identical to ND's policy): The plea agreement does not contain any information about cooperation. A "plea agreement supplement" is filed under seal in every case with a plea, whether the defendant is cooperating or not. If there is cooperation, it will be detailed in the supplement.	Standing Order of March 4, 2008, available on the court's home page, URL: https://www.sdd.uscourts.gov/docs/standingorder030408.pdf

COURT	CIR.	SUMMARY OF POLICY	SOURCE OF INFORMATION
MN	8	One judge reports receiving cooperation information as a letter to the Judge, and keeping it in his chambers file, if requested. Ultimately, the letter will be docketed, although he hasn't done that yet.	The judge
MO-W	8	<p>The plea agreement that is filed that does not contain any language concerning the cooperation of the defendant. The cooperation information will be contained in a letter that will reside with the USA and the Probation Office, and will be attached to the PSR or sentencing recommendation. The letter will be signed by the defendant, defense counsel, and the AUSA. It will not be part of the court file. The U.S. Attorney's Office is requiring that the sentencing judge sign the letter in a space marked "reviewed by ____."</p> <p>AUSAs are instructed that in cases where there is a cooperation agreement, but no reason to believe there is any chance for threats, etc. (e.g. – the typical white collar case) it will be up to the AUSA to decide when to make disclosure of the agreement. They may decide to do it on the record at the time of the guilty plea and immediately provide a copy to counsel for the co-defendants. However, if there is any possibility of reprisal then the confidentiality of the cooperation should be kept quiet until it becomes necessary to disclose the cooperation pursuant to the court's discovery order.</p>	Bill Terry, Operations Manager (11/08)
AK	9	In each case with a plea agreement, the plea agreement "must not include any reference, direct or indirect, to either the existence or nonexistence of a cooperation agreement, if any, between the defendant and the government." LCR 11.2(d) Instead, a "plea agreement supplement" is filed under seal in conjunction with every plea agreement. The plea agreement supplement will either contain the terms of any cooperation agreement, or indicate that no cooperation agreement exists.	<u>Local Criminal Rule 11.2(d) & (e)</u>
AZ	9	The terms of cooperation are not in the body of the plea agreement, but instead are in Exhibit 1 to the agreement. At the change of plea hearing, "Exhibit 1" is provided to the judge, admitted as an exhibit, and returned to the prosecutor at the conclusion of the proceeding. The prosecutor would be responsible for retaining the exhibit. (Of course, defense counsel also would have a copy.) Adopted April 25, 2008.	Source: 4/28/08 email from Judge Pyle

Notes:

- Tab 2C of the binder for the June 2009 meeting of the Privacy Subcommittee contains a 2005 Standing Order from the Northern District of Mississippi that effectively sealed all plea agreements. It appears that the order has been superceded by the joint Local Rule with Mississippi Southern, which is discussed on page 6.
- The 2008 version of this chart had an entry for the District of Rhode Island, which was deleted in this version. The entry had stated that in October 2008, the court was *considering* adopting a policy that would make plea agreements available to the public only at the courthouse (not through PACER). A December 2009 search of the court's website (e.g., its local rules, general orders, and CM/ECF web page) does not, however, indicate that the court ever adopted such a policy.

Attachment 8 to Privacy Subcommittee Report

**Article by Professor Caryn Myers Morrison on
Posting of Plea and Cooperation Agreements**

PRIVACY, ACCOUNTABILITY, AND THE COOPERATING DEFENDANT:
TOWARDS A NEW ROLE FOR INTERNET ACCESS TO COURT RECORDS

*Caren Myers Morrison**

INTRODUCTION

In Martin Scorsese's film *The Departed*,¹ crime boss Frank Costello, played by Jack Nicholson, learns that there is a rat in his crew—someone who is gathering evidence against him for the police. In order to uncover the rat's identity, Costello gathers his men in a bar, orders them to write down their full names and social security numbers, then hand delivers the information to his own mole in the police force for him to look up their records.

He needn't have gone to so much trouble. The federal courts' electronic public access program, known as PACER, now permits anyone to access case documents and docket information instantly over the Internet.² It is not even necessary to know the case file number, as a convenient indexing system allows one to search through criminal cases in every district court in the nation by defendant name.³ In *The Departed*, the rat is actually an undercover cop named Billy Costigan. But if Costigan had been a cooperating defendant instead—an individual who pleads guilty and agrees to assist in the investigation or prosecution of former criminal accomplices in exchange for sentencing consideration—the crime boss could have done his own checking from his laptop.⁴

* Acting Assistant Professor, NYU School of Law; Columbia Law School J.D. 1997; Assistant U.S. Attorney for the Eastern District of New York, 2001-2006. The author gratefully thanks Jim Jacobs, Daniel Richman, Rachel Barkow, Robert Ferguson, and Miriam Baer for comments on earlier drafts of this article, as well as the NYU Goldstock Criminal Law Lunch Group and the NYU Lawyering Scholarship Colloquium.

¹ THE DEPARTED (Warner Bros. 2006).

² The Public Access to Court Electronic Records system is "an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts" over the Internet. PACER Frequently Asked Questions [hereinafter PACER FAQ], <http://pacer.psc.uscourts.gov/faq.html>.

³ The U.S. Party/Case Index covers every district court. See U.S. Party Case Index: Non-Participating Courts, <http://pacer.psc.uscourts.gov/psco/cgi-bin/miss-court.pl>.

⁴ This article focuses solely on cooperating defendants, not confidential informants or undercover officers. Confidential informants are typically recruited by investigative agencies and paid in cash rather than leniency. See ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 1 (2002); Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 28 (1992). Undercover officers are not defendants at all but instead are police officers or

PRIVACY, ACCOUNTABILITY, AND THE COOPERATING DEFENDANT 2

This innovation has transformed the traditional model of court access. Federal court records have always been open to public inspection,⁵ but in practice the records were only available to those with the time and resources to travel to the clerk's office of the district court to consult individual case files.⁶ Committed to paper, locked in filing cabinets, court records were maintained in a state of "practical obscurity."⁷

The public's newfound ability to summon up any criminal case, even a closed one, with the click of a mouse would appear to be an unmitigated victory for the right of popular access to government information. We value openness in our public institutions—our right as citizens "to be informed about 'what [our] government is up to,'"⁸ — because it helps us understand how these institutions work, appreciate what they do, and maintain a sense of control over them. In judicial proceedings, openness has long been recognized as helping to check the abuse of governmental power, promote the informed discussion of public affairs, and enhance public confidence in the system.⁹

But this unfettered flow of information is in fundamental tension with a number of goals of the criminal justice system, including the integrity of criminal investigations, the accountability of prosecutors, and the security of witnesses. In order to function effectively, the system needs zones of shadow where the participants can deal candidly with each other. If those participants perceive instead that their actions, as memorialized in court documents such as plea agreements or sentencing motions, are on display, the process can become distorted. In response to unwanted scrutiny, prosecutors, sometimes aided by the courts, will attempt to conceal or disguise the information they regard as sensitive or confidential.¹⁰ The result is that, as information becomes more easily accessible, it can also become less meaningful.

federal agents posing as criminals in order to obtain evidence. See GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* 4-6 (1989).

⁵ The article limits its discussion to electronic access in the federal courts because, as a self-contained system about which we have more information than those of the various states, it is the most amenable to study. Cf. Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 852 n.4 (1995) (describing the federal system as "simply more accessible for analysis").

⁶ See *infra* Part IB.

⁷ *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

⁸ *Id.* at 773 (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

⁹ See *infra* Part II A.

¹⁰ See *infra* Part IC.

In concrete terms, the ease with which court information can now be retrieved means that individuals' criminal case records are available to anyone surfing the Internet. This, in turn, raises what might be loosely termed the Billy Costigan problem¹¹—the concern that the identities of cooperating defendants will be prematurely discovered, jeopardizing their lives and safety as well as the success of law enforcement investigations.¹²

While the first concern is that violence towards cooperators will increase,¹³ the issues raised by electronic access are not limited to retaliation. Exposure of cooperators' identities, or the fear of it, entails several interrelated harms. Whether or not retaliation and intimidation of witnesses and cooperators is exacerbated by Internet access to court files, the risk alone might discourage defendants who would otherwise consider cooperating with the government, potentially hampering law enforcement efforts.¹⁴

The prospect of possible chilling effects and retaliation has already caused a shift in behavior among prosecutors and courts. Whereas a cooperation agreement might previously have detailed the terms of the bargain between the government and the defendant, some districts are now experimenting with ways to conceal the nature of these bargains, either through sealing portions of every plea agreement or using conditional boilerplate that sheds very little light on the rights and duties of the parties.¹⁵ These practices result in a third kind of harm: a degrading of the information to which there is now increased access.

This is particularly problematic in the context of cooperator practice. The federal use of cooperators—and to some extent the plea-

¹¹ This is a slight misnomer, of course, because Costigan was an undercover officer rather than a cooperator. However, the scenario remains emblematic of the problem and arguably influences the behavior of prosecutors and agents. *See infra* Part IC.

¹² While the issue of the online dissemination of sensitive private information, such as home addresses and social security numbers, has been the subject of detailed debate, *see, e.g.*, Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet*, 79 WASH. L. REV. 175, 206-10 (2004) (considering Internet access to civil and criminal cases), problems specific to cooperation in criminal cases have not yet been fully examined.

¹³ Violence against cooperating defendants has been an intractable problem and shows no signs of abating. *See discussion infra* note 213 and accompanying text.

¹⁴ “Law enforcement agencies may be less likely to cooperate with U.S. Attorneys if they know that *everything* they say will be spread on the public record For that matter, witnesses and defendants may be less willing to cooperate, for more disclosure increases the risk of retaliation by their former confederates in crime.” *United States v. Zingsheim*, 384 F.3d 867, 872 (7th Cir. 2004) (emphasis in original).

¹⁵ *See infra* notes 97-101 and accompanying text.

bargaining system in general—suffers from a lack of transparency, even a lack of basic information, that has persistently hobbled efforts toward effective public oversight.¹⁶ While purchasing information and testimony from defendants in return for leniency has always been an integral part of federal investigations and prosecutions,¹⁷ it is also a practice that is susceptible to capricious application, resulting in wide, unjustifiable disparities in the treatment of cooperators across the country.¹⁸ The paradox of electronic access is that as ease of accessibility increases, so do the incentives to compensate for that access by further obfuscation. The forces that push the practice into the shadows can only be exacerbated by the fears raised by electronic access to court files.

In addition, the cost to privacy cannot be overlooked. Unlike the more forgiving world of paper records and fallible human memory, in cyberspace, nothing is ever forgotten.¹⁹ Information remains eternally fresh, springing to the screen as quickly years later as it did on the day it was first generated. If all federal defendants run the risk of becoming a permanently stigmatized underclass, cut off from legitimate opportunities of mainstream society,²⁰ cooperating defendants are further burdened with potential rejection by their former communities.²¹

¹⁶ See Hughes, *supra* note 4, at 21; Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 FED. SENT'G REP. 75, 76 (1998) [hereinafter Richman, *Challenges*]; Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1047 (1997).

¹⁷ Unlike in certain state systems, where many codes of criminal procedure forbid a jury relying on the uncorroborated word of an accomplice, *see* 7 WIGMORE § 2056, federal prosecutors can bring cases relying solely on cooperating witnesses. *See, e.g.*, United States v. DeLarosa, 450 F.2d 1057, 1060 (3d Cir. 1971) (“uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction”) (citing Caminetti v. United States, 242 U.S. 470, 495 (1917)).

¹⁸ As Albert Alschuler has observed, “[t]he word ‘disparity’ can mean either inequality or difference. . . . Inequality is another word for ‘unwarranted’ disparity.” Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 87 n.3 (2005).

¹⁹ *See infra* notes 238-40.

²⁰ *See* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L. REV. 387, 387-91 (2006).

²¹ *See* Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 4 (2003) [hereinafter Simons, *Retribution for Rats*] (noting that “the ‘common disdain’ in which cooperators are held often means that the cooperator is ostracized not only from his accomplices, but also from other communities that may be important to him.”).

This Article argues that simply enabling the public and the press access to criminal court files over the Internet will not ultimately shed light on the workings of government and is likely to prove counterproductive. Electronic access and the fears it raises might increase the disparate ways in which cooperation is administered, with little hope of remedy. Instead, the twin interests of public access and the just administration of cooperation bargains would be better served, not by electronic access to individual criminal court files, but by systematic disclosure of plea bargains in all cases, with identifying information redacted. Greater information could be a step towards rationalizing and improving what has been an area particularly resistant to study, and thus to reform.

These suggestions are particularly timely in light of the recent public debate triggered by the use of PACER information on a website called Whosarat.Com, which maintains thousands of profiles of cooperators and informants.²² The site's profiles are legitimized by their use of court records; otherwise empty allegations that someone is a "rat low-life informant"²³ are given substance when linked to court documents such as plea agreements that detail the quid pro quo struck between that person and the government.²⁴

Concerned that the website would encourage violence against cooperators, the Department of Justice asked the Judicial Conference to remove all plea agreements from the PACER system.²⁵ This proposal was met with fierce resistance from the public, the press, and the defense bar.²⁶ The debate, which the Judicial Conference has for the moment

²² See Who's A Rat, <http://www.whosarat.com>.

²³ Who's A Rat Informant Profile 495,

http://www.whosarat.com/search_profiles.php?keyword=&profile=2&x=43&y=4&start=450www.whosarat.com (last visited July 2, 2008).

²⁴ As the site itself notes, "[a]ll posts made by users should be taken with a grain of salt unless backed by official documents." Who's A Rat About Us, (last visited Aug. 4, 2008).

²⁵ Letter from Michael A. Battle, Dir., Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to James C. Duff, Sec'y, U.S. Judicial Conference, at 2 (Dec. 6, 2006) [hereinafter Battle Letter] (on file with author). The Judicial Conference is "the principal policy making body concerned with the administration of the United States Courts." U.S. Courts Frequently Asked Questions, <http://www.uscourts.gov/faq.html>.

²⁶ In response to the Judicial Conference's Fall 2007 Request for Comment on Privacy and Security Implications of Public Access to Certain Electronic Criminal Case File Documents, <http://www.privacy.uscourts.gov/requestcomment.htm>, open access proponents argued that Internet access provides accountability, transparency, and convenience. See, e.g., Sandra Baron, *Public Comments of the Media Law Resource Center, Inc., Concerning the Proposal to Restrict Public Internet Access to Plea Agreements in Criminal Cases 4-5* (Oct. 25, 2007) [hereinafter MLRC Comment],

declined to resolve,²⁷ received scant scholarly attention. But the question—whether records revealing the identity of cooperating defendants should be accessible over the Internet—deserves scrutiny. The issue of what information should be available electronically is a pressing one, which has attracted the attention of key actors in the system. Yet current approaches, which range from untrammelled access to severe clampdowns on information, are unsatisfying. Since federal court records remain accessible at the courthouse,²⁸ unlimited electronic access is not strictly necessary, either under the Constitution or the common-law. This Article is an attempt to engage with the conflicting values of open access and the needs of a fair and effective criminal justice system and to forge a solution that can accommodate both.

The Article starts from the idea that the primary purpose of electronic access should be to enable the public to understand what their government is doing. There is no overwhelming public need to know that a defendant named Billy Costigan is cooperating, so long as the public understands what the government has traded in order to secure his

available at www.privacy.uscourts.gov/2007text.htm [hereinafter Privacy Comments], Comment 63; Rene P. Milam & Guylyn R. Cummins, *Comments of the Newspaper Association of America et al. on Public Internet Access to Plea Agreements Filed as Court Records* 4-6 (Oct. 25, 2007) [hereinafter NAA Comment], available at Privacy Comments, Comment 64; Nat'l Assoc. of Criminal Defense Lawyers, *NACDL Comments on Privacy and Security Implications of Public Access to Certain Electronic Criminal Case File Documents* 1-3 (Oct. 26, 2007) [hereinafter NACDL Comment], available at Privacy Comments, Comment 67.

²⁷ See Judiciary Privacy Policy, available at <http://privacy.uscourts.gov>. As of August 2008, the Judicial Conference simply issued the following statement: "After considering the issue, including the comments received, the Court Administration and Case Management Committee decided to not recommend that the Conference change the national policy at this time. Instead, it informed the district courts of the need to consider adopting local policies while emphasizing that such policies should be the least restrictive to promote legitimate public access. The Committee may revisit the issue of a national policy at a later date." *Id.*

²⁸ For the moment, courts continue to maintain paper files. See JUD. CONF. COMM. ON COURT ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (amended Dec. 2006), available at www.privacy.uscourts.gov/Policy.htm (recommending that public access to case files in the courthouse not be affected by new policies). Even if paper records are phased out, each clerk's office can maintain a closed network of court documents accessible only through terminals at the courthouse, which would mimic the consultation of a paper file in a more convenient format. See William A. Fenwick & Robert D. Brownstone, *Electronic Filing: What Is It? What Are Its Implications?*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 181, 204 n.84 (2002) (noting that "plans for a kiosk or terminal in the courthouse that can be used to file pleadings and/or access the electronic files" accompany most e-filing projects).

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cooperation. The recent controversy presents an opportunity to answer the call of scholars and practitioners to remedy the lack of insight into the cooperation process. As the Judicial Conference has declined to issue a nationwide standard addressing Internet access to plea documents, the time is ripe for a constructive compromise that could limit access, but enhance the content of public information across the country. The goal is not to leave the public in the dark, but to promote fairness and transparency in the administration of one of the federal criminal system's most frequently used, yet least understood tools.

The Article proceeds in three parts. Part I will explore the tension between electronic access and the operation of an effective criminal justice system. This section will discuss how federal cooperation works in practice, and will critique the lack of standards to guide courts and prosecutors in rewarding cooperation. The resulting disparities will only increase with rising prosecutorial concerns about the risks of exposure to cooperating defendants in an online world. By curtailing prosecutors' ability to shield certain transactions from view, electronic access ultimately risks causing the public to lose meaningful information about how sentencing bargains are made. Part II examines the theoretical foundations of the right of access to court proceedings and documents, which spring primarily from a political theory of the First Amendment. This Part also evaluates the Court's privacy jurisprudence, which provides support for a possible limitation on access. If the values of informed self-government are not advanced by the dissemination of information about private citizens that sheds no light on what the government is doing, perhaps the costs of such dissemination outweigh its benefits. Part III offers suggestions to reconcile the values of access with those of a fair and effective administration of justice. It considers the recent debate over the accessibility of plea agreements over the Internet and evaluates the different solutions that have been proposed by courts, practitioners, and the Justice Department. The Part concludes that electronic information should be treated differently than paper records, because unfettered electronic access causes the participants in the system to change their behavior in ways that can obstruct, rather than enhance, public oversight. The Article instead proposes an approach that would pair limitations on online access to criminal court files with systematic disclosure of detailed plea and cooperation agreements in their factual context, but divorced from identifying data. A solution of this type would best protect privacy and security, while enabling the public and press to engage in genuine government oversight.

I. THE COLLISION OF ELECTRONIC ACCESS AND
CRIMINAL JUSTICE

While availability of court records on the Internet has seemingly fulfilled the promise of public access, it has only exacerbated the conflict between open access values and the operational needs of the criminal justice system. These problems are crystallized in the case of cooperating defendants,²⁹ where the government's desire for secrecy is at its height and the consequent distortions most pronounced.

A. *The Specific Problem of Federal Cooperation*

For a practice so deeply ingrained in our legal culture,³⁰ cooperation engenders an enormous amount of hostility. The overarching critique is that there is something fundamentally distasteful

²⁹ I will only be looking at cooperating defendants in ordinary criminal cases, such as violent crime, narcotics, and organized crime, not national security or terrorism, where the government has resorted to a much higher level of secrecy. See, e.g., Bill Mears, *Court Declines Appeal on 9/11 Secrecy*, CNN, Feb. 23, 2004, <http://www.cnn.com/2004/LAW/02/23/scotus.terror.secrecy/index.html> (former terror suspect Mohamed Bellahouel and news agencies both denied access to Bellahouel's sealed court proceedings).

³⁰ "In the words of Judge Learned Hand, 'Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly.'" *Hoffa v. United States*, 385 U.S. 293, 311 (1966) (quoting *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1959)). The earliest precursor of cooperation appears to have been the English medieval practice of "approvement," whereby a person indicted for a capital crime could elect to become an "approver," confessing his guilt and attempting to incriminate others in order to obtain a pardon. See Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1091 (1951). The court had discretion to admit or reject the defendant as an approver. See *Rex v. Rudd*, 98 Eng. Rep. 1114, 1116 (1775). If the approver was admitted as such and the targets were convicted, the approver was pardoned, but if they were acquitted, the approver was hanged. See Donnelly, 60 YALE L.J. at 1091 (citing 2 POLLOCK & MATTLAND, *HISTORY OF ENGLISH LAW* 631 (1899)). The draconian consequences of failing to convict one's accomplices were so conducive to perjury that the practice was abandoned. See 2 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 226 (Sollom Emlyn ed. 1736). Accomplice testimony was thereafter procured by giving a defendant who turned "king's evidence" or "state's evidence" an equitable right to request a pardon. See Simons, *Retribution for Rats*, *supra* note 21, at 6 & n.11. Eventually, the power to decide which witnesses could cooperate and testify for the state shifted away from the court to the prosecutor, where it remains today. See *id.* at 6 & n.12, 13.

about rewarding wrongdoers for informing on their associates.³¹ Because a cooperator's actions cannot easily be reconciled with our ideals of loyalty,³² he is viewed, at best, with ambivalence, if not outright "aversion and nauseous disdain."³³ Nor does the practice reflect well on the government, which sends a troubling moral message that the consequences of criminality can be avoided by betraying more valuable targets.³⁴ As one commentator has observed, "[t]he spectacle of government secretly mated with the underworld and using underworld characters to gain its ends is not an ennobling one."³⁵

³¹ This view has been dominant since the 19th century. See 2 SIR ERSKINE MAY, *CONSTITUTIONAL HISTORY OF ENGLAND* 277 (1863) ("So odious is the character of a spy, that his ignominy is shared by his employers, against whom public feeling has never failed to pronounce itself, in proportion to the infamy of the agent and the complicity of those whom he served."). A minority view holds that cooperation gives some defendants a chance to reject their criminal past and start a new life. See Simons, *Retribution for Rats*, *supra* note 21, at 4-5 ("While it is no doubt true that most defendants who cooperate do so (at least initially) for selfish reasons, there is an occasional defendant for whom the decision to cooperate is motivated by a genuine desire to make amends for wrongdoing."); John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 453 (1997) (noting prosecutors' belief that "cooperation with the government reveals something positive about a defendant's moral worthiness, contrition and prospects for rehabilitation.").

³² George Fletcher posits that loyalty is central to our conception of justice. GEORGE P. FLETCHER, *LOYALTY* 20-21 (1993). We may feel aversion to the act of informing, "even when the bad act deserves exposure, because we appreciate the value of loyalty itself, apart from the worthiness of its object. . . . The argument that the relationship that pursues illegal ends deserves no loyalty fails to separate out the illegality from the relationship." Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 623 (1999). Still, some cooperators may inform on their associates because they value other relationships more highly, such as those with their children or aging parents.

³³ Donnelly, *supra* note 30, at 1093.

³⁴ See Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292, 292-93 & n.14 (1996) [hereinafter Richman, *Costs and Benefits*] (noting that cooperation has negative effect on deterrence); Donnelly, *supra* note 30, at 1094 ("Even confirmed law-breakers have their standards of 'squareness.' To them the stool pigeon situation is the outstanding proof that law enforcement is not square. Contempt for law is thus encouraged.").

³⁵ Donnelly, *supra* note 30, at 1094.

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Still, we live with the practice because of its usefulness.³⁶ Cooperators enable the government to investigate and prosecute criminal organizations that it would otherwise be unable to infiltrate; without them, we would be limited to prosecuting only the most visible, low-level crimes.³⁷ Cooperators can give investigators and prosecutors an inside view into a criminal conspiracy³⁸ and, if a case does go to trial, they can help tell a coherent story to the jury.³⁹

1. How Cooperators Are Recruited and Rewarded. While local practice varies by district, many cases follow a similar pattern. A defendant who is considering cooperation will first attend a proffer session, a meeting between the defendant and his lawyer, the prosecutor, and one or more investigating agents.⁴⁰ During that and any subsequent proffers, the defendant will typically be debriefed, not only as to his knowledge of the scheme for which he was arrested, but also as to his knowledge and involvement in all other crimes.⁴¹ Because his ultimate object is to receive a motion from the government to the sentencing court stating that he has provided “substantial assistance” in the investigation or prosecution of another,⁴² the defendant will attempt to convince the government that he is trustworthy and that he has information of value.

³⁶ As Graham Hughes observed, “most cooperation agreements would be difficult to fit into any concept of repentance or rehabilitation. These are agreements to sell a commodity—knowledge.” Hughes, *supra* note 4, at 13. Nonetheless, Hughes concludes that the “utilitarian approach is surely the correct one.” *Id.* at 15.

³⁷ See Frank O. Bowman III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 44 (1999) (“[W]ithout accomplice testimony secured through substantial assistance agreements, several important categories of serious federal crime would be far more difficult to prosecute, and many individual cases within those categories would not be prosecuted at all.”).

³⁸ See Stephen S. Trott, *A Word of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1391 (1996) (“It is a simple fact that frequently the only persons who qualify as witnesses to serious crime are the criminals themselves.”).

³⁹ See Weinstein, *supra* note 32, at 595 (cooperator testimony can provide “the only complete narrative of a conspiracy whose details would otherwise only be presented to a jury in incomplete snatches obtained through wiretaps, undercover testimony and other investigative tools that cannot match an insider’s view.”).

⁴⁰ For a detailed description of the proffer process, see Gleeson, *supra* note 31, at 447-50.

⁴¹ See, e.g., Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1075 (2006) (practice in D.C.).

⁴² In the federal system, cooperation is generally not rewarded based on the success of the government’s prosecution. See Hughes, *supra* note 4, at 37 n.140.

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If the government perceives that his benefit as a witness and source of information outweigh the disadvantages of a deal, it will offer the defendant a cooperation agreement, which typically requires the defendant to plead guilty, to testify truthfully if asked, to agree to delay his own sentencing, and to refrain from any other criminal conduct.⁴³ In return, the government will agree to make a motion for “substantial assistance,” which enables the court, in its discretion, to impose a sentence lower than either the advisory sentencing guidelines or below any statutory mandatory minimum, or both.⁴⁴ The motion will set forth the nature and extent of the defendant’s cooperation, which may consist of simply providing information, agreeing to testify, giving testimony, or taking an active part in an investigation.⁴⁵ Typically, the cooperator’s sentence will be delayed until all the other targets of the investigation have been sentenced.⁴⁶ Committing additional crimes, or being found out in a lie, will usually be considered a breach of the cooperation agreement and will forfeit the cooperator’s right to a government motion.⁴⁷

⁴³ Ordinarily, the cooperator is required to plead to the most serious charge to which he has admitted, or at least a charge commensurate with the defendants against whom he may testify. See U.S. Attorney’s Manual 9-27.430 comment B(1), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrmm.htm#9-27.420.

⁴⁴ The government may make the motion pursuant to Section 5K1.1 of the U.S. Sentencing Guidelines or Section 3553(e) of Title 18 of the United States Code, or both. Section 3553(e) grants the district court authority, upon motion of the government, to impose a sentence below a statutory maximum “so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” 18 U.S.C. § 3553(e) (2006). Section 5K1.1 gives the court similar authority to depart from the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2007). The court may then consider, among other things, “(1) . . . the significance and usefulness of the defendant’s assistance, [. . .] (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant’s assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant’s assistance.” *Id.* § 5K1.1(a).

⁴⁵ See Stanley Marcus, *Substantial Assistance Motions: What Is Really Happening?*, 6 FED. SENT’G REP. 6, 7 (1993) (describing categories of cooperation).

⁴⁶ See Hughes, *supra* note 4, at 3. Like every other aspect of federal cooperator practice, this aspect varies by region. In the “rocket docket” of the Eastern District of Virginia, cooperators are routinely rewarded by a Rule 35(b) motion for resentencing, since sentences are not delayed. See Richman, *Challenges*, *supra* note 16, at 77.

⁴⁷ See, e.g., *United States v. Schwartz*, 511 F.3d 403, 406 (3d Cir. 2008) (government properly withdrew substantial assistance motion where cooperator continued drug trafficking activities); *United States v. Butler*, 272 F.3d 683, 687 (4th Cir. 2001) (government properly refused to file substantial assistance motion where cooperator

The government's dependence on the cooperation process and the contingent nature of the bargain provoke their own critiques. Because only "successful" cooperation is rewarded, there is concern that this creates incentives for the cooperator to try to please the prosecutor, with attendant risks of perjury and false leads.⁴⁸ Some point to cooperation's deleterious effect on the adversary system, contending that lazy or overburdened prosecutors use cooperation as a case management tool,⁴⁹ and that defense lawyers are reduced to insignificant roles on the sidelines.⁵⁰ Additionally, because a sentencing court can only depart from the advisory Guidelines, and more critically, ignore any applicable mandatory minimum sentence, on motion by the government, critics contend that the practice shifts too much sentencing power from the courts to the government.⁵¹ Finally, some argue that the system rewards

threatened life of co-defendant in jail); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) (no substantial assistance motion where cooperator was arrested with cocaine base five days after testifying against his supplier). *See also* Weinstein, *supra* note 32, at 585-87 (noting that unsuccessful efforts to cooperate can result not only in the denial of a substantial assistance motion, but also a potential sentence enhancement for obstruction of justice, or additional criminal liability).

⁴⁸ *See* R. Michael Cassidy, *Soft Words of Hope: Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1147 (2004) ("a cooperating witness cannot help but perceive that leniency from the government will depend upon a successful prosecution."); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 952 (1999) (interviews with former prosecutors and defense lawyers in the S.D.N.Y. indicating that "cooperators are eager to please prosecutors" and therefore have incentive to lie). *But see* Bowman, *supra* note 37, at 44 ("no one, on either side of the debate, has any idea how frequently cooperating government witnesses lie, or what is more to the point, whether they lie more than any other type of witness.").

⁴⁹ *See* Bowman, *supra* note 37, at 59 ("When cooperation departures are dispensed in nearly half of all cases, the substantial assistance motion has ceased to be a closely guarded method of obtaining needed evidence, and has degenerated into a convenient caseload reduction tool").

⁵⁰ *See* Weinstein, *supra* note 32, at 617 (arguing that cooperation "strips away what little remains of the adversary system" in cases resolved by guilty plea and "marginalizes and often eliminates the defense lawyer."). Daniel Richman, on the contrary, sees a critical role for the defense lawyer in helping the would-be cooperator assess his options and evaluate the trustworthiness of the attorney for the government. *See* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 73-74, 89-111 (1995) [hereinafter Richman, *Cooperating Clients*].

⁵¹ *See, e.g.*, Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 177-79 (1994) (arguing that the government motion requirement should be eliminated). Since judges have complete discretion as to whether to grant a departure at all, and can control its magnitude, underlying this critique is the assumption that prosecutors may fail to make substantial assistance motions even when the defendant has cooperated. Whether this

defendants without regard to moral culpability, since better informed defendants, who have more knowledge to sell, are frequently more deeply immersed in the criminal conduct, another problem exacerbated in the context of crimes carrying mandatory minimum sentences, such as narcotics offenses.⁵²

2. *Disparities in Administration.* The limits of these criticisms are that no-one really knows how valid they are. Most of those who write about cooperation, including this author, are influenced by their former experiences as participants in the system. Because there is so little empirical information and available data, the literature is frequently grounded on the impressionistic and anecdotal.⁵³ But although no study has yet been able to reveal how cooperation actually works across the 94 federal districts, every indicator is that it is administered in widely disparate ways across the country.⁵⁴

One of the main culprits is a lack of national standards, even within the Justice Department.⁵⁵ It is undisputed that the government

happens often is open to debate; many note that it would ill serve prosecutors to fail to make these motions without good cause. *See, e.g.,* Gleeson, *supra* note 31, at 454-55 (noting powerful institutional incentives for government to foster cooperation). Indeed, some argue that the problem is not that prosecutors unreasonably withhold the motion, but are too liberal in handing them out. *See* Bowman, *supra* note 37, at 58 (“the persistent temptation for prosecutors is not to withhold § 5K1.1 motions from the deserving, but to distribute them liberally in order to facilitate easy guilty pleas”).

⁵² *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 213 (1993) (observing how under a mandatory minimum regime, “[t]he big fish get the big breaks, while the minnows are left to face severe and sometimes draconian penalties”). There is some skepticism, however, about how frequently this type of inversion occurs. *See* Bowman, *supra* note 37, at 48. Since judges have discretion to grant or deny a substantial assistance motion, and control the magnitude of any such departure, Bowman argues, it would be only “a remarkably inept jurist” who could not “maintain rough proportionality within a single case if he or she considers it important to do so.” *Id.* at 53.

⁵³ *See* Richman, *Costs and Benefits*, *supra* note 34, at 294 (“Because the exchange of cooperation for sentencing leniency is under-regulated and never the subject of systematic empirical investigation, the views of every actor or former actor in the system on this issue will be based on personal experience or anecdote.”).

⁵⁴ *See* Richman, *Challenges*, *supra* note 16, at 75.

⁵⁵ The Sentencing Guidelines Manual recognizes the fact-specific nature of the inquiry: “The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis.” U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 cmt. background (2007). While each U.S. Attorney’s Office can establish its own internal policies regarding substantial assistance, one study found that at least a third of U.S. Attorney’s Offices did not adhere to their own policies. *See* Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An*

alone holds the power to make a motion on the basis of substantial assistance, and that its decision, in most cases, cannot be reviewed.⁵⁶ But how much assistance is substantial? The answer seems to depend on the district in which the defendant is prosecuted. In some districts, a cooperator must testify in the grand jury or in a court proceeding in order to qualify for a sentence reduction.⁵⁷ In others, the prosecutor may give a defendant the benefit of a substantial assistance departure simply for providing truthful information and being willing to testify,⁵⁸ or even for not providing any assistance at all.⁵⁹ In the most demanding districts, even truthful in-court testimony will not suffice; the cooperator must participate in undercover operations, engaging in such risky tasks as wearing a wire, conducting undercover meetings with targets, or making recorded telephone calls.⁶⁰

Even after the government has decided to file a motion for substantial assistance, there is no guidance on the degree of departure

Empirical Yardstick Gauging Equity in Current Federal Policy and Practice 7-8 (1998), available at <http://www.ussc.gov/publicat/5kreport.pdf>.

⁵⁶ The only limit on the government's power is that it may not decline to file a motion for unconstitutional reasons, such as race, gender, or religious affiliation. *See Wade v. United States*, 501 U.S. 181, 185 (1992) ("in both § 3553(e) and § 5K1.1 the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted.").

⁵⁷ *See Federal Court Practices: Sentence Reductions Based on Defendants' Substantial Assistance to the Government*, 11 FED. SENT'G REP. 18, 23-24(1998) [hereinafter *Sentence Reductions*] (majority of judges interviewed for study reported that "providing testimony leading to the arrest/conviction of others was the primary behavior to warrant a departure").

⁵⁸ *See, e.g.,* Brown & Bunnell, *supra* note 41, at 1072 (cooperators must at a minimum "provide a full and complete debriefing about [their] own criminal conduct in the instant case, as well as information about the criminal conduct of others"); *Sentence Reductions*, *supra* note 57, at 20 (describing similar practice in "Site A").

⁵⁹ In one of the few empirical studies made of cooperation practice, prosecutors admitted to occasionally rewarding defendants for arbitrary reasons, such as finding them "sympathetic." *See* Ilene Nagel & Stephen Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 522-23, 531-32, 550 (1992) (interviewing prosecutors, defense lawyers, judges and probation officers in three different districts and finding that in an appreciable minority of cases, prosecutors were filing 5K motions when there was no substantial assistance). As the authors point out, "such individually made equity judgments open the door to race, gender, and social-class bias, notwithstanding the good intentions of individual AUSAs hoping to 'save' sympathetic defendants." *Id.* at 535-36.

⁶⁰ *See* Lee, *supra* note 51, at 125-26 (in C.D. Ill., "the U.S. Attorney's Office will not file a 5K1.1 motion unless the defendant goes undercover and wears a 'wire' to help law enforcement authorities apprehend other criminals").

warranted by the cooperation. Should the government even recommend a particular magnitude of departure? Some districts do, while others do not, leaving the entire matter to the discretion of the sentencing judge.⁶¹ How much credit should the defendant be given for cooperation? Once again, it depends. Some U.S. Attorney's Offices recommend a specific number of levels to the sentencing court.⁶² Other offices recommend a percentage discount of anywhere between 10 and 50 percent.⁶³

Cooperation potentially provides a great benefit to the successful cooperator, who might ultimately get years off his sentence, or even avoid prison altogether.⁶⁴ But it is a benefit that is unevenly, if not arbitrarily, bestowed. Any attempt to remedy the situation is complicated by the fact that we do not even know how many defendants cooperate. The United States Sentencing Commission, which tracks federal sentencing, keeps statistics on how many substantial assistance departures are granted at sentencing,⁶⁵ but not on how many are made after sentencing pursuant to Rule 35(b),⁶⁶ or how many substantial

⁶¹ See, e.g., Richman, *Cooperating Clients*, *supra* note 50, at 99-100 & n.108 (describing practice in E.D.N.Y. and D.C.).

⁶² See Saris, *supra* note 16, at 1046-47 (reporting that in one district "the AUSA will recommend a two-level reduction for a defendant who agrees to testify against another person, and a four-level departure where the defendant participates in an investigation").

⁶³ See, e.g., Ronald S. Safer and Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon?*, 12 FED. SENT'G REP. 41, 43-44 (1999) (N.D. Ill. U.S. Attorney's Office "typically insisted upon agreed sentences for cooperation plea agreements. . . . [that] typically reflected a 33% or 50% reduction of the applicable guideline"); Saris, *supra* note 16, at 1050 (50% reduction in D. Mass.); *Sentence Reductions*, *supra* note 57, at 21, 23 (25% reduction in sentence in "Site D" and 33% in "Site F").

⁶⁴ See, e.g., *United States v. Featherstone*, 1988 WL 142472, at *1-3 (S.D.N.Y. Dec. 27, 1988) (former Westies member, responsible for four murders, sentenced to five years' probation); Joseph P. Fried, *Ex-Mob Underboss Given Lenient Term For Help as Witness*, N.Y. TIMES, Sept. 27, 1994, at A1 (celebrated mob turncoat Salvatore Gravano sentenced to five years' imprisonment despite involvement in 19 murders).

⁶⁵ In 2007, 13.8% of federal defendants, or 10,049 people, cooperated and received downward departures for substantial assistance. See U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS [hereinafter 2007 SOURCEBOOK], Table 30 n.1, available at <http://www.ussc.gov/ANNRPT/2007/Table30.pdf>.

⁶⁶ See *supra* note 46 and accompanying text (describing use of Rule 35(b) in E.D. Va.). In 2000, 1,453 offenders received 35(b) sentence reductions. See United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 106 (2004), available at http://www.ussc.gov/15_year/chap3.pdf.

assistance motions are denied by the court.⁶⁷ More critically, these statistics do not account for occasions when cooperation is rewarded in ways other than the classic combination of cooperation agreement and substantial assistance motion, such as reduced charges or fact-bargaining.⁶⁸ It further fails to account for “unsuccessful” cooperators who violate the terms of their agreement and receive no motion.⁶⁹

In addition, the rates of downward departure for substantial assistance vary widely, from slightly more than three percent in some districts to 36% in others.⁷⁰ While some of these differences might be due to regional differences in the types of crimes prosecuted, the composition of the bench, and internal U.S. Attorney’s Office policy, there are striking contrasts even in neighboring U.S. Attorney’s Offices.⁷¹ Finally, there appear to be racial and gender disparities in the

⁶⁷ See, e.g., *United States v. Winters*, 117 F.3d 346, 350 (7th Cir. 1997) (dismissing defendant’s appeal of district court’s refusal to grant downward departure for substantial assistance); *United States v. Mittelstadt*, 969 F.2d 335, 337 (7th Cir. 1992) (same); *United States v. Hayes*, 939 F.2d 509, 511 (7th Cir. 1991) (same); *United States v. Castellanos*, 904 F.2d 1490, 1497 (11th Cir. 1990) (same).

⁶⁸ Fact-bargaining involves agreement between the parties as to which facts should be relied on by the sentencing court and typically involves understatement of critical facts, such as the weight of narcotics or whether a firearm was used. See Nagel & Schulhofer, *supra* note 59, at 547. While such bargaining runs contrary to the Sentencing Guidelines’s mandate that plea agreements be based on a defendant’s actual conduct in committing the offense of conviction, see U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (2007), in practice “parties can handicap the judge’s ability to detect how their recommended disposition deviates from the Guidelines by managing the information that is revealed during the presentence investigation.” Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 295 (2005). See also Richman, *Challenges*, *supra* note 16, at 76 (“The challenge is for an outsider to figure out exactly *when* charge discounts or sentencing fact discounts are used in lieu of § 5K1.1 motions. . . . and it is not one that the Commission or anyone else appears equal to.”) (emphasis in original).

⁶⁹ See *supra* note 47 and accompanying text.

⁷⁰ In 2007, the rate of substantial assistance departures among sentenced defendants in the District of New Mexico (3.3%), the District of South Dakota (3.4%), the District of Rhode Island (3.5%), the Western District of Wisconsin (3.6%), the District of Alaska (4.0%), and the Southern District of California (4.4%), was much lower than in the Eastern District of Pennsylvania (33.6%), the District of Columbia and the Middle District of Alabama (both 33.9%), the Middle District of Pennsylvania (35.5%), the Southern District of Ohio (35.7%), and the Eastern District of Kentucky (36%). See 2007 SOURCEBOOK, *supra* note 65, Table 26.

⁷¹ Even in neighboring districts, such as the Western District of Pennsylvania (11.7% of substantial assistance departures) and the Middle District of Pennsylvania (35.5%), the Western District of Virginia (22.6%) and the Eastern District of Virginia (5.9%), or the Northern District of Mississippi (29.9%) and the Southern District of Mississippi (8.5%), the disparities are striking. See 2007 SOURCEBOOK, *supra* note 65, Table 26.

rate of substantial assistance motions and in the magnitude of departures granted, for which there is no apparent satisfactory explanation.⁷²

B. What Can Be Revealed Through Electronic Access

It was within this environment that the federal courts began experimenting with ways of making information more easily accessible to litigants and to the public, with concomitant benefits in convenience, speed, and economy.⁷³ PACER began as a sluggish dial-up system that provided access to docket information in just a few courts.⁷⁴ Today, all ninety-four district courts offer PACER access over the Internet⁷⁵ to anyone with a valid registration.⁷⁶ A complementary system, Case Management/Electronic Case Filing (“CM/ECF”),⁷⁷ enables parties to file papers with the court electronically instead of scanning in paper records.⁷⁸ These documents are then available to PACER users, who

⁷² See Maxfield & Kramer, *supra* note 55, at 13-14 & n.30 (African-Americans are 8% to 9% less likely than Caucasians to receive substantial assistance departures, Latinos 7% less likely). The statistics also show that when minority defendants do receive substantial assistance departures, the magnitude of departure is less than for white defendants. See *id.*

⁷³ See Silverman, *supra* note 12, at 176-78.

⁷⁴ Early reports on PACER describe it as “agonizingly slow.” M.J. Quinn, *PACER Today and Tomorrow: The Court’s System Improves with Age*, 212 N.Y.L.J. 5, Dec. 6, 1994.

⁷⁵ See U.S. Courts About CM/ECF, www.uscourts.gov/cmecf/cmecf_about.html. PACER handled over 200 million requests for information in 2006. See *Access to Court Information Ever Expanding*, THIRD BRANCH (Admin. Off. U.S. Cts., Off. Pub. Affs, D.C.) July 2007, available at <http://www.uscourts.gov/ttb/2007-07/accesstocourts/index.html>.

⁷⁶ Anyone with a name, address and email address can register at <http://pacer.psc.uscourts.gov/psc/cgi-bin/register.pl>; with a valid credit card, registration is almost instantaneous. Without a credit card, a user will receive a password by mail. See PACER FAQ, *supra* note 2.

⁷⁷ As described by the CM/ECF website, “CM/ECF is a comprehensive case management system that [allows] courts to maintain electronic case files and offer electronic filing over the Internet. Courts can make all case information immediately available electronically through the Internet.” ECF Frequently Asked Questions, <http://pacer.psc.uscourts.gov/cmecf/ecffaq.html> [hereinafter ECF FAQ]. By the beginning of 2008, all 94 district courts were using the system.

⁷⁸ Rule 49(d) of the Federal Rules of Criminal Procedure authorizes electronic filing by incorporating by reference Rule 5(e) of the Federal Rules of Civil Procedure. FED. R. CRIM. P. 49(d) & advisory committee’s note. Rule 5(e) provides that “[a] court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with the technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local

can access them by clicking on the links in the docket sheet.⁷⁹ To navigate the system, the U.S. Party/Case Index allows searches by defendant name in the criminal index, obviating the need for a user to comb through each district court's files.⁸⁰

In terms of convenience, accessing court records over the Internet is a vast improvement over paper records. Before the advent of PACER, anyone who wanted to consult a criminal case file had to go to the courthouse, stand in line at the clerk's office, and request the case file by number. The clerk would then go to the stacks, look for the case folder, and bring it to the requestor. If the file was misplaced, or had been checked out by a court's chambers, the requestor would have to come back another day. If the file was found, the person could then examine the file in the clerk's office, or could use the archaic, coin-operated photocopying machine to make copies. If the requestor wanted a closed file that had been sent to archives, she had to fill in a form, then wait several weeks for the file to be retrieved from an off-site storage facility.⁸¹ In short, while court files were then, as now, publicly available, they were effectively available only to the very patient.⁸²

This accessibility takes some of the guesswork out of identifying cooperators. Because the number of cases that go to trial is so low,⁸³ the vast majority of cooperating defendants never testify and their identities are not formally disclosed. Indications of their cooperation can nonetheless subsist in court records and docket sheets. For thousands of non-testifying cooperators, electronic access becomes a way by which they can be exposed, not only through PACER, but also through

rule constitutes a written paper for the purpose of applying these rules." FED. R. CIV. P. 5(e).

⁷⁹ Documents filed in criminal cases prior to November 1, 2004 are only accessible by the attorneys of record, but for documents filed on or after that date, "any PACER user can view the docket sheet and filings for all non-sealed cases." ECF FAQ, *supra* note 77. The public access component of CM/ECF can be accessed with the user's PACER login and password; a specific CM/ECF login is only necessary when filing documents with the court. *See id.*

⁸⁰ *See supra* note 3.

⁸¹ These observations are based on my experiences as a judicial clerk in the Eastern District of New York in the late Nineties, before the widespread adoption of PACER.

⁸² For an entertaining description of how information moved from index cards to the Internet, *see* Silverman, *supra* note 12, at 176-78.

⁸³ The rate of cases resolved by guilty plea is around 95%. *See* 2007 SOURCEBOOK, *supra* note 65, Figure C (95.8% of cases resolved by guilty plea in fiscal year 2007).

websites that capitalize on the growing public hostility to “rats” and “snitches.”⁸⁴

There are of course numerous informal ways of identifying cooperators, including unexplained absences from the cellblock, prison gossip, and “word on the street.”⁸⁵ In the notoriously paranoid world of federal detention centers, most defendants suspect each other of cooperating and, in many cases, they are correct. But easy access to court documents can confirm these suspicions. Typically, the most revealing documents are the defendant’s cooperation agreement or the government’s substantial assistance motion. Certain other documents, such as letters from the government to delay sentence until an investigation is concluded or until all co-defendants and other targets are sentenced, can also be strong indicators of cooperation.⁸⁶

Even if these documents are filed under seal, the sealing itself may serve as a “red flag” of cooperation.⁸⁷ In addition, sealing is

Sealing
=
Cooperation

⁸⁴ News reports indicate that cooperators, or “snitches,” are currently objects of a popular culture backlash. The “Stop Snitching” campaign was sparked by an underground DVD of purported drug dealers threatening violence against informants, see Rick Hampson, *Anti-Snitch Campaign Riles Police, Prosecutors*, USA Today, Mar. 29, 2006, at 1A, and quickly gained the attention of the national media. See, e.g., *America’s Most Wanted: Gang Violence Boston Special Edition* (FOX television broadcast Feb. 11, 2006); *60 Minutes: Stop Snitchin’* (CBS television broadcast Apr. 22, 2007). Though the “Stop Snitching” movement initially targeted individuals who sought to cooperate with law enforcement by implicating others in exchange for leniency, the campaign against snitching has become more expansive and is now aimed even at witnesses and family members of crime victims. See Richard Delgado, *Police and Race Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1204-05 (2008). Furthermore, the prohibition on snitching applies “not just when the crime is minor, such as drug possession, but also when it is major, such as homicide.” *Id.* at 1205. In Baltimore and Boston, where the “Stop Snitching” message has been heavily espoused by rappers and gangs, “prosecutors estimate that witnesses face some sort of intimidation in 80 percent of all homicide cases.” David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES, Mar. 1, 2007, at A1.

⁸⁵ Proponents of unlimited access contend that these informal risks of exposure eclipse that of court records. See NACDL Comment, *supra* note 26, at 6 (“Jailhouse gossip and ‘word on the street’ are far more likely sources of information for persons intending harm to a witness than plea agreements accessible on PACER.”).

⁸⁶ This can mean that some cooperators plead guilty years before they are ever sentenced. This too, can be a “flag” for any person with familiarity with the federal system. See Letter from John R. Tunheim, Chair, Comm. on Court Admin. & Case Mgmt., & Paul Cassell, Chair, Comm. on Criminal Law, to Judges, U.S. Dist. Courts & U.S. Magistrate Judges at 1-2 (Nov. 9, 2006) (noting that motions to reschedule sentencing hearings might reveal cooperation).

⁸⁷ A study conducted by the Federal Judicial Center into remote public access to criminal court files in eleven pilot districts found that most practitioners believed that

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disfavored in most jurisdictions⁸⁸ and a sealed motion or a motion to seal a proceeding must itself be part of the public record.⁸⁹

More generally, a docket sheet can also reveal cooperation, a fact that is not lost on criminal defendants looking to identify those who might have informed against them.⁹⁰ Sometimes the information is unambiguous, such as docket entries explicitly identifying government motions for substantial assistance.⁹¹ More often, docket sheet information can be “read” for markers of cooperation, such as sealed documents and proceedings around the time of plea or sentence, an unusually long delay between plea and sentence, or missing document numbers,⁹² all of which are strongly suggestive of cooperation.

“a sealed document or a sealed hearing prior to sentencing may be evidence of cooperation by the defendant.” See David Rauma, REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS: A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS 26 (2003) [hereinafter Pilot Project Report], available at [http://www.fjc.gov/public/pdf.nsf/lookup/remotepa.pdf/\\$file/remotepa.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/remotepa.pdf/$file/remotepa.pdf).

⁸⁸ See, e.g., *United States v. Cojab*, 996 F.2d 1404, 1405 (2d Cir. 1993) (noting that the power to seal court documents “is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons.”).

⁸⁹ The law in the majority of circuits requires that if a document is filed under seal, there must be a notation of the sealing on the docket sheet. See *In re Application of The Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984); *United States v. Criden*, 675 F.2d 550, 558 (3d Cir. 1982). The *Herald* court noted that “[e]ntries on the docket should be made promptly, normally on the day the pertinent event occurs,” although it allowed for delayed docketing in exigent circumstances. See 734 F.2d at 102-03 & n.7.

⁹⁰ “Some incarcerated clients advise me that they are under tremendous pressure from other inmates to produce their docket sheets for indications of cooperation.” Judiciary Employee (Aug. 31, 2007) in Privacy Comments, *supra* note 26, Comment 3; see also Karen Moody, Chief, Probation & Pretrial Services, D. Maine (Sept. 23, 2007), in Privacy Comments, *supra* note 26, Comment 46 (local practice prohibits inmates from having court paperwork in their possession “because they are ‘shaken down’ by other inmates who want to read their documents in order to determine whether they are cooperating.”).

⁹¹ This is surprisingly frequent. A search of Westlaw’s district court docket sheet database (DOCK-DCT-ALL), which collects information from PACER and repackages it in text-searchable form, turned up 3,208 cases where the term “substantial assistance” appeared in docket entries, and 5676 cases where the term “5K1.1” appeared. Only 614 docket sheets contained the term “3553(e),” the statutory basis for downward departure for substantial assistance to the government. See Westlaw, <http://www.westlaw.com> (last visited June 3, 2008). Nor were these docket entries subtle. Many of them state, “Motion by United States of America for Substantial Assistance as to [full name of defendant],” or words to that effect.

⁹² See Pilot Project Report, *supra* note 87, at 26 (“If [a substantial assistance] motion is filed under seal, it may be accompanied by a docket entry that describes a sealed motion. Alternatively, that sealed motion may not be recorded in the online docket.”).

C. What Might Be Lost

The perceived risks of electronic access give prosecutors and defense counsel greater incentives to avoid the combination of cooperation agreement and motion for substantial assistance, and instead to bargain for other, less visible benefits. If prosecutors begin to feel that fewer defendants are willing to cooperate and that they might lose evidence, some may feel pressure to “sweeten the deal” by promising benefits with less public exposure. These can include charge-bargaining, which effectively conceals any sentence reductions,⁹³ fact-bargaining, which “often involves misleading the court and the probation department,”⁹⁴ dismissing federal charges and referring the cooperator’s case for state prosecution,⁹⁵ or simply agreeing not to oppose a downward departure motion by the defense. And circumvention, “unlike overt downward departure, is hidden and unsystematic. It occurs in a context that forecloses oversight and obscures accountability.”⁹⁶

In some districts, the courts themselves are finding ways to camouflage cooperation agreements. The District of North Dakota has implemented a policy which requires prosecutors to file a generic plea agreement in all cases with no references to cooperation, as well as a sealed plea supplement.⁹⁷ The sealed supplement either contains a cooperation agreement or a statement that there is no cooperation

The result is a skip in the numbering of docket entries, which may be taken as evidence that a sealed document was filed with the court.”)

⁹³ A charge bargain is a deal where the government allows a defendant to plead to a lesser crime than would otherwise be provable, or to which the defendant has admitted, obviating the need for a motion for sentence reduction. See Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 959 (2002) [hereinafter Simons, *Departing Ways*] (charge-bargaining, while not lawless, “hides, or at least disguises, the sentencing reduction”). See also Nagel & Schulhofer, *supra* note 59, at 541-42 (describing how in one district, charge reductions were routinely used in lieu of substantial assistance motions; local probation officers estimated that this occurred in 50% of cooperation cases).

⁹⁴ Simons, *Departing Ways*, *supra* note 93, at 959. See also *supra* note 68.

⁹⁵ A 1998 study by the Sentencing Commission found that, in the district with the fewest substantial assistance departures, the government regularly engaged in charge bargaining “that allowed defendants to plead to lesser charges or referred the case to state/local courts for prosecution.” *Sentence Reductions*, *supra* note 57, at 26.

⁹⁶ Nagel & Schulhofer, *supra* note 59, at 557.

⁹⁷ Rob Ansley, Clerk of Court, D.N.D. (Sept. 11, 2007), in Privacy Comments, *supra* note 26, Comment 6. Ansley writes that his district would be implementing a policy change that would mandate that “all plea agreements” would be filed as “public (unsealed) documents, sanitized by the drafter (USA) of any references to cooperation.”

SEARCH
AGREEMENTS
SO YOU
CAN TELL
WHICH IS
WHICH,

agreement.⁹⁸ Therefore, to anyone accessing records over the Internet, “every plea in North Dakota will appear identical: plea agreement void of cooperation language and sealed plea supplement.”⁹⁹ Whether or not such a blanket sealing policy could withstand a legal challenge,¹⁰⁰ the policy leaves one with the uneasy feeling that even the pretense of keeping the public informed about the disposition of criminal cases has been abandoned.

Similarly, in New Hampshire, certain plea agreements contain boilerplate language conditionally referring to cooperation;¹⁰¹ it therefore cannot be determined by reading the plea agreement whether a defendant is cooperating or not. These “hide in plain sight” approaches might help preserve the security of cooperators, but they undermine public oversight and understanding.

Generic
Language

This is exactly what the system does not need. One judge, well before the migration of federal court records to the Internet, already denounced the substantial assistance motion as “unprincipled, undocumented, unreviewable, and secret.”¹⁰² More courts adopting measures like these, despite their prophylactic utility, can only add to the unhealthy obscurity that shrouds the practice. What is needed is more information, not less, in order to achieve public oversight and maintain some rough proportionality in the process.

⁹⁸ *See id.*

⁹⁹ *Id.*

¹⁰⁰ *See, e.g.,* *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (state statute mandating blanket provisional sealing of all criminal cases which did not result in conviction violated First Amendment); *CBS, Inc. v. U.S. District Court*, 765 F.2d 823, 826 (9th Cir. 1985) (“Confidence in the accuracy of its records is essential for a court . . . Such confidence erodes if there is a two-tier system, open and closed. If public records cannot be compared with sealed ones, all of the former are put in doubt.”).

¹⁰¹ In the District of New Hampshire, many plea agreements contain the following paragraph: “If the defendant provides substantial assistance in the investigation or prosecution of another person who has committed an offense, the United States may file a motion pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) advising the sentencing Court of all relevant facts pertaining to that determination and requesting the Court to sentence the defendant in light of the factors set forth in § 5K1.1(a)(1)-(5).” *See, e.g.,* plea agreement in *United States v. Campos*, No. 08-Cr-40 (D.N.H. Jun. 2, 2008), available at <https://ecf.nhd.uscourts.gov/doc1/1171490967>; *United States v. Nguyen*, No. 07-Cr-51 (D.N.H. Feb. 29, 2008), available at <https://ecf.nhd.uscourts.gov/doc1/1171450670>; *United States v. Mesa*, No. 07-Cr-210 (D.N.H. Feb. 20, 2008), available at <https://ecf.nhd.uscourts.gov/doc1/1171446438>.

¹⁰² Saris, *supra* note 16, at 1062.

II. THEORETICAL FOUNDATIONS OF PUBLIC ACCESS

The body of law that granted the public and press an affirmative right of access to court proceedings was premised on the ideal of democratic self-government. Court proceedings have been held in public since the earliest days of the common law, “not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.”¹⁰³ It is to these concerns that the Article now turns.

A. *The Right to Informed Self-Government*

Proponents of online access frequently couch their arguments in terms of the First Amendment, a theory that comes with a rich set of rationales. Open access to judicial proceedings is said to encourage a sense of responsibility on the part of public servants,¹⁰⁴ facilitate community catharsis,¹⁰⁵ and enhance the appearance of fairness that is necessary to public confidence.¹⁰⁶ Above all, it enables the informed discussion of matters of public interest. Yet despite the fervor with which the First Amendment is currently invoked to justify continued

¹⁰³ *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.).

¹⁰⁴ “Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.” *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 569 (1980); *In re Oliver*, 333 U.S. 257, 270 (1948) (“The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”).

¹⁰⁵ “Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner.’” *Richmond Newspapers*, 448 U.S. at 571 (quoting the 1677 Concessions and Agreements of West New Jersey, reprinted in *SOURCES OF OUR LIBERTIES* 188 (R. Perry ed. 1959)).

¹⁰⁶ See *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring) (“Public access is essential . . . if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.”).

electronic access to court records,¹⁰⁷ the recognition of an affirmative right of access to judicial information is of fairly recent vintage and has never been extended to a right to receive information in a particular medium.¹⁰⁸

1. *The Supreme Court.* Until 1980, when the Supreme Court decided *Richmond Newspapers, Inc. v. Virginia*,¹⁰⁹ the suggestion that the First Amendment could be used to demand openness from the government or to vindicate an independent “right to know” had encountered stiff resistance from the Court.¹¹⁰ The year before

¹⁰⁷ See, e.g., NACDL Comment, *supra* note 26, at 2 (“Depriving the public of access to court records at any stage of the criminal process has been viewed by the federal judiciary as a paramount risk to the fundamental principles of our constitutional government”); MLRC Comment, *supra* note 26, at 3 (“The proposed blanket policy of denying Internet access to all plea agreements . . . offends the public’s First Amendment right to access judicial records”).

¹⁰⁸ See, e.g., *Mayo v. U.S. Gov’t Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1993) (operator of electronic bulletin board service not entitled to direct personal access to the Printing Office’s electronic bulletin board containing Supreme Court slip opinions); *Westbrook v. County of Los Angeles*, 32 Cal. Rptr. 2d 383, 387 (Cal. App. Ct. 1994) (seller of criminal background information not entitled to periodic copies of computer tapes from the municipal court information system). The *Mayo* court, which considered a claim under the common law, held that the public’s right to information did not mean “that a citizen has the right to obtain free of charge in the form he desires public records that are readily available in another form,” in other words, paper copies at the library. *Mayo*, 9 F.3d at 1451.

¹⁰⁹ 448 U.S. 555 (1980). *Richmond Newspapers*, for the first time, held that the First Amendment granted a qualified right of public access to criminal trials. *Id.* at 580.

¹¹⁰ See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”). In *Zemel*, the Court rejected a U.S. citizen’s claim that the State Department’s restrictions on travel to Cuba burdened his First Amendment rights to see conditions there for himself. *See id.* at 16. The Court hewed to this rationale over the next decade. In a series of cases involving regulations restricting press access to prisons, the Court rejected news organizations’ claims that the burden on their ability to gather news violated the First Amendment. *See Pell v. Procunier*, 417 U.S. 817, 835 (1974) (upholding prison regulation preventing press from conducting interviews with specific prisoners at California state prisons); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (applying *Pell* reasoning to similar federal prison regulation); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (plurality opinion) (restricting access to prison area where inmate had allegedly committed suicide did not violate First Amendment). The prison access cases were widely viewed as constituting “the most explicit repudiation of the argument that the First Amendment might be wielded as a sword of access to a criminal trial or other government-controlled information.” Eugene Cerruti, “*Dancing in the Courthouse*”: *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 250 (1995).

Richmond Newspapers was decided, a divided Court had upheld the exclusion of the press from a pretrial suppression hearing in *Gannett Co. v. DePasquale*.¹¹¹ The Court held that the constitutional guarantee of a public trial was “personal to the accused”¹¹² and conferred no right of access to pretrial proceedings that could be enforced by the public or the press.¹¹³ This appeared to close the door on an independent public right of access to judicial proceedings.¹¹⁴

Nonetheless, an opposing perspective, primarily championing the First Amendment as intimately linked to the processes of republican self-government, was gathering strength. This doctrine, most powerfully elaborated by Alexander Meiklejohn,¹¹⁵ had already taken root in eloquent dissents,¹¹⁶ dicta,¹¹⁷ and public opinion.¹¹⁸ In retrospect,

¹¹¹ *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979).

¹¹² *Id.* at 379-80. Although Justice Stewart, writing for the Court, gave a ceremonial nod in the direction of “the strong societal interest in public trials,” *id.* at 383, he concluded that “the public interest is fully protected by the participants in the litigation.” *Id.* at 384.

¹¹³ *See id.* at 385. The Court decided the case on the basis of the Sixth Amendment, rather than the First Amendment. *See id.* at 391.

¹¹⁴ *See* Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 13 (1980) (“The decision in *Gannett* was widely perceived, and deplored, as a drastic reduction on access to a traditionally open institution.”).

¹¹⁵ Meiklejohn is credited with crystallizing what is now the classic justification for the First Amendment as derived “from the necessities of self-government by universal suffrage.” ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (1948). For Meiklejohn, the First Amendment was essentially political in nature. “The guarantee given by the First Amendment . . . is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to consideration of matters of public interest.” *Id.* While he did not address directly questions of public access to government proceedings, the import of his thinking is clear: “The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.” *Id.* at 88-89.

¹¹⁶ The most notable example was Justice Powell’s dissent in *Saxbe*, one of the prison access cases, arguing that what was at stake was “the societal function of the First Amendment in preserving free public discussion of governmental affairs.” *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting). In Justice Powell’s view, the First Amendment “embodies our Nation’s commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed.” *Id.* at 862-63. Justice Powell acknowledged Meiklejohn’s contribution to the idea that “[t]he principle of the freedom of speech springs from the necessities of the program of self-government.” *Id.* at 862 n.8 (quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH* 26 (1948) (alteration

Gannett probably provided the impetus the doctrine needed to flower.¹¹⁹ A year to the day after the *Gannett* decision was handed down, the Court located a right of access to criminal trials “implicit in the guarantees of the First Amendment.”¹²⁰ Although the opinion of the Court¹²¹ gave an extensive survey of the history of the public trial,¹²² the more potent justification was that the “expressly guaranteed freedoms” in the First Amendment “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”¹²³

added)). Justice Stevens’s dissent in *Houchins* echoed the theme that the First Amendment “serves an essential societal function. Our system of self-government assumes the existence of an informed citizenry.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 31 (1978) (Stevens, J., dissenting).

¹¹⁷ See, e.g., *Gannett*, 443 U.S. at 383 (noting the “strong societal interest in public trials”); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (“Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (“The free press has been a mighty catalyst in awakening public interest in governmental affairs”).

¹¹⁸ The *Gannett* decision sparked a wave of controversy as district courts took it “as a broad license to close courtrooms.” Lewis, *supra* note 114, at 14. The press reaction was predictably critical. See, e.g., Editorial, *Private Justice, Public Injustice*, N.Y. TIMES, July 5, 1979, at A16 (“Now the Supreme Court has endorsed secrecy in language broad enough to justify its use not only in a pre-trial context but even at a formal trial.”). What was more unusual was that many of the Justices responded to the criticism personally, in a flurry of post-*Gannett* interviews. See, e.g., *Burger Suggests Some Judges Err In Closing Trials*, N.Y. TIMES, Aug. 9, 1979, at A17; Linda Greenhouse, *Powell Says Court Has No Hostility Toward Press*, N.Y. TIMES, Aug. 14, 1979, at A13; Linda Greenhouse, *Stevens Says Closed Trials May Justify New Laws*, N.Y. TIMES, Sept. 9, 1979, at 41; Walter H. Wagoner, *Brennan Protests Criticism by Press*, N.Y. TIMES, Oct. 18, 1979, at B6.

¹¹⁹ Some commentators were of the opinion that “*Gannett* in fact helped significantly to create the conditions for Supreme Court acceptance of a doctrine of public access to public institutions under the First Amendment.” Lewis, *supra* note 114, at 14.

¹²⁰ *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion). The speed with which the Court reversed course prompted Anthony Lewis, referring to Hamlet’s mother, to observe: “Not since Gertrude has anyone posted with such dexterity from one sets of sheets to another.” Lewis, *supra* note 114, at 1.

¹²¹ While seven of the Justices concurred in the result, *Richmond Newspapers* was a particularly fractured decision in terms of its rationale, resulting in seven separate opinions. Only Justice Rehnquist dissented, see 448 U.S. at 604-06; Justice Powell took no part in the case. “Despite the near unanimity of the result,” wrote Lillian BeVier, “the Court was unable to present even the façade of a unifying rationale.” Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311, 313 (1982).

¹²² See 448 U.S. at 564-75.

¹²³ *Id.* at 575. As one commentator noted, “[t]he words could have been Meiklejohn’s.” Lewis, *supra* note 114, at 16.

Justice Brennan's concurrence, drawing on various proponents of the political theory of the First Amendment,¹²⁴ argued that the First Amendment "embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government."¹²⁵

Two years later, in *Globe Newspaper Co. v. Superior Court*,¹²⁶ a majority of the Court struck down a state statute requiring courtroom closure during the testimony of minor victims of sexual offenses.¹²⁷ The Court adopted Justice Brennan's view that "the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government,"¹²⁸ and noted that "the institutional value of the open criminal trial is recognized in both logic and experience."¹²⁹

The Court extended the right of access beyond criminal trials proper to voir dire in *Press-Enterprise Co. v. Superior Court*,¹³⁰ observing that openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."¹³¹ In its last major case on the public right of access, also called *Press-Enterprise Co. v. Superior Court*,¹³² the Court formulated a

¹²⁴ *Id.* at 587 (Brennan, J., concurring in the judgment) (citing J. ELY, *DEMOCRACY AND DISTRUST* 93-94 (1980); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 23 (1971)).

¹²⁵ *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring in the judgment) (emphasis in original). Justice Brennan suggested that the right of access should be informed by "two helpful principles": first, whether a particular process had been historically open, because "a tradition of accessibility implies the favorable judgment of experience," and second, whether access furthered the functioning of the process. *Id.* at 589.

¹²⁶ 457 U.S. 596 (1982).

¹²⁷ *Id.* at 610-11. The opinion of the Court was written by Justice Brennan.

¹²⁸ *Id.* at 604 (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940)).

¹²⁹ *Id.* at 606.

¹³⁰ 464 U.S. 501, 510 (1984) (*Press-Enterprise I*). The case involved the rape and murder of a teenage girl; the trial was highly publicized and the attempt to find an impartial jury took six weeks. *Id.* at 503.

¹³¹ *Id.* at 508.

¹³² *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*). The *Press-Enterprise Company* sought access to the transcript of the 41-day preliminary hearing in the case of Robert Diaz, a nurse who had allegedly murdered 12 patients at the hospital where he worked. The Court noted the "'community therapeutic value' of openness," particularly in the context of violent crimes, which "provoke public concern, outrage, and hostility." *Id.* at 13.

two-part test to determine whether the public has a right of access to government information: first, “whether the place and process have historically been open to the press and general public”¹³³ and second, “whether public access . . . plays a particularly significant positive role in the actual functioning of the process.”¹³⁴ If so, closure is subject to a form of strict scrutiny.¹³⁵

2. *The Lower Courts.* After the Supreme Court’s spate of public access cases, the federal circuit courts extended the First Amendment right of access beyond criminal trials and pretrial hearings to other phases of the criminal process. As one court put it, “[i]t makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases.”¹³⁶ Accordingly, the courts of appeals have found a First Amendment right of access to bail hearings,¹³⁷ suppression hearings,¹³⁸ guilty pleas,¹³⁹ and sentencing hearings.¹⁴⁰

Whether there is a First Amendment right of access to judicial documents remains open to question. The Supreme Court’s only explicit pronouncement regarding a right of access to judicial documents was couched in terms of the common law: “[T]he courts of this country recognize a general right to inspect and copy public records and

¹³³ *Id.* at 8.

¹³⁴ *Id.* at 11. This was a return to Justice Brennan’s “two helpful principles” from *Richmond Newspapers*. See *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

¹³⁵ Court proceedings cannot be closed “unless specific, on the record findings are made demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” *Press-Enterprise II*, 478 U.S. at 13-14 (quoting *Press-Enterprise I*, 464 U.S. at 510).

¹³⁶ *In re Application of The Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984).

¹³⁷ See, e.g., *Seattle Times Co. v. U.S. Dist. Ct.*, 845 F.2d 1513, 1515 (9th Cir. 1988); *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983).

¹³⁸ See, e.g., *Herald Co.*, 734 F.2d at 98; *United States v. Brooklier*, 685 F.2d 1162, 1169-71 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982).

¹³⁹ See, e.g., *United States v. Alcantara*, 396 F.3d 189, 191-92 (2d Cir. 2005); *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989); *United States v. Haller*, 837 F.2d 84, 86-87 (2d Cir. 1988); *In re Washington Post Co.*, 807 F.2d 383, 388-89 (4th Cir. 1986).

¹⁴⁰ See, e.g., *United States v. Eppinger*, 49 F.3d 1244, 1253 (7th Cir. 1995); *Alcantara*, 396 F.3d at 191-92; *Washington Post*, 807 F.2d at 388-89.

documents, including judicial records and documents.”¹⁴¹ Moreover, “the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”¹⁴²

Still, most circuits have found a qualified First Amendment right of access to court documents,¹⁴³ including plea agreements,¹⁴⁴ sentencing motions,¹⁴⁵ and other filings.¹⁴⁶ Some courts have further held that access to docket sheets too is constitutionally protected. In *United States v. Valenti*,¹⁴⁷ the Eleventh Circuit invalidated a practice in the Middle District of Florida of maintaining two docketing systems in criminal cases, one sealed and one public, as “an unconstitutional

¹⁴¹ *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). In *Nixon*, Warner wanted to copy and sell the secret recordings made by President Nixon in the White House, but the Court held that the common law right of access did not authorize release of the tapes, finding the existence of the Presidential Recordings Act to be dispositive. *See id.* at 605-06.

¹⁴² *Id.* at 598.

¹⁴³ The only circuits that have not yet recognized a First Amendment right of access to judicial documents are the Fifth, Sixth, and Tenth Circuits. The Eleventh Circuit appears to be on the fence. *Compare* *United States v. Santarelli*, 729 F.2d 1388, 1390 (11th Cir. 1984) (“[T]he public has a First Amendment right to see and hear that which is admitted in evidence in a public sentencing hearing”) *with* *United States v. Kooistra*, 796 F.2d 1390, 1391 n.1 (11th Cir. 1986) (“this case may be governed by the somewhat less zealously protected common law right to inspect and copy court records.”).

¹⁴⁴ *See, e.g., In re Copley Press, Inc.*, 518 F.3d 1022, 1028 (9th Cir. 2008); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991); *Oregonian Publ’g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990); *Haller*, 837 F.2d at 86; *Washington Post*, 807 F.2d at 390.

¹⁴⁵ *See, e.g., Washington Post*, 807 F.2d at 390 (documents filed in connection with plea and sentencing hearings); *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (documents filed in connection with motion for reduction of sentence under Rule 35).

¹⁴⁶ *See, e.g., United States v. Eppinger*, 49 F.3d 1244, 1253 (7th Cir. 1995) (criminal proceedings and documents); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (judicial records and documents); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (documents filed in support of search warrant); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (documents filed in connection with suppression hearing); *United States v. Smith*, 776 F.2d 1104, 1111-12 (3d Cir. 1985) (pretrial documents); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *In re Globe Newspaper Co.*, 729 F.2d 47, 59 (1st Cir. 1984) (documents filed in support of the parties’ arguments at bail hearings); *Associated Press, Inc. v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (bill of particulars).

¹⁴⁷ 987 F.2d 708 (11th Cir. 1993).

infringement on the public and press's qualified right of access to criminal proceedings."¹⁴⁸

Faced with a similar practice in Connecticut state court,¹⁴⁹ the Second Circuit held that there was a qualified First Amendment right to inspect docket sheets,¹⁵⁰ stating that "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible. In this respect, docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment."¹⁵¹ Therefore, if the First Amendment protects the public's right to access court documents and docket sheets, at least in some circuits, Internet access cannot be limited without maintaining the availability of these records at the courthouse.

B. Privacy as a Possible Limitation on Access

As discussed above, information in court records, while nominally accessible to the public, had previously led a life of mostly undisturbed repose. Because of the costs associated with finding and copying this information, it existed in a state of "practical obscurity."¹⁵² This, in turn, lessened concerns that private information would be wrongly disclosed to the public. Today that picture has changed. As Daniel Solove has observed, "in light of the revolution in accessibility

¹⁴⁸ *Id.* at 715. The practice apparently did not die, because the court revisited the issue 12 years later in *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005). In that case, the defendant sought to unseal documents relevant to cooperating co-defendants, including motions. One of the potential witnesses, who was never called at trial, had a separate criminal case that was entirely under seal. *Id.* at 1024-25 & n.5. Although the docket sheets had been unsealed by the time of the appeal, the court had to "remind the district court that it cannot employ the secret docketing procedures that we explicitly found unconstitutional in *Valenti*." *Id.* at 1029.

¹⁴⁹ In *Hartford Courant v. Pellegrino*, 380 F.3d 83, 85 (2d Cir. 2004), the newspaper challenged the Connecticut state court practice of sealing certain docket sheets as well as entire case files in civil cases.

¹⁵⁰ *Id.* at 96.

¹⁵¹ *Id.* at 93. To date, none of the other circuits have reached the question.

¹⁵² *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

provided by modern computer capabilities and the Internet, we must rethink the accessibility of the information in public records.”¹⁵³

1. *The Emergence of Informational Privacy.* Although the word “privacy” has powerful, almost visceral connotations,¹⁵⁴ its meaning is elusive.¹⁵⁵ Courts have equated privacy with secrecy,¹⁵⁶ personal autonomy,¹⁵⁷ and freedom from unreasonable government searches.¹⁵⁸ Today, even though people are more concerned with privacy than ever, the most salient fact about privacy may be “that nobody seems to have any very clear idea what it is.”¹⁵⁹

¹⁵³ Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN L. REV. 1393, 1456 (2001) [hereinafter Solove, *Privacy and Power*].

¹⁵⁴ See William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 U. KAN. L. REV. 1, 2 (1974) (“‘Privacy’ in today’s lexicon is a ‘good’ word; that which increases privacy is considered desirable, and that which decreases it is considered undesirable. It is a ‘positive’ value.”); U.S. DEP’T. OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS 33 (1973) (“There is a widespread belief that personal privacy is essential to our well-being—physically, psychologically, socially, and morally.”). Conversely, “[w]hen we contemplate an invasion of privacy—such as having our personal information gathered by companies in databases—we instinctively recoil.” Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 480 (2006) [hereinafter Solove, *Taxonomy*].

¹⁵⁵ As Lillian BeVier has observed, “Privacy is a chameleon-like word, used denotatively to designate a range of wildly disparate interests—from confidentiality of personal information to reproductive autonomy—and connotatively to generate goodwill on behalf of whatever interest is being asserted in its name.” Lillian R. BeVier, *Information about Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 458 (1995) [hereinafter BeVier, *Privacy Protection*].

¹⁵⁶ See, e.g., *Smith v. Maryland*, 442 U.S. 735, 742-43 (1979) (no expectation of privacy in telephone numbers dialed since numbers are not kept secret); *Keweenaw Oil Co. v. Bicon Corp.*, 416 U.S. 470, 487 (1974) (fundamental right to privacy is violated when trade secrets are stolen).

¹⁵⁷ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (right to privacy protects use of contraceptives by married couples); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (use of contraceptives by unmarried couples); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (decision to have an abortion); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (sexual relations between gay couples).

¹⁵⁸ See, e.g., *Winston v. Lee*, 470 U.S. 753, 759 (1985) (“surgical intrusion into an individual’s body . . . implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime”); *Schmerber v. California*, 384 U.S. 757, 770 (1966) (unreasonable searches are forbidden by the Fourth Amendment for the sake of “human dignity and privacy”).

¹⁵⁹ Solove, *Taxonomy*, *supra* note 154, at 480 (quoting Judith Jarvis Thomson, *The Right to Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 272, 272 (Ferdinand David Schoeman ed., 1984)). Solove proposes a conception of privacy

The modern understanding of privacy can be traced back to Warren and Brandeis' famed article, *The Right to Privacy*,¹⁶⁰ which defined privacy as "the right to be let alone"¹⁶¹ and spurred courts and legislatures to create a variety of torts to protect these newly-identified interests.¹⁶² In 1960, Dean William Prosser classified the hundreds of cases so generated into four distinct causes of action,¹⁶³ one of which, public disclosure of private facts, echoes the current concern in the electronic age for informational privacy, or "freedom from unwanted disclosure of personal data."¹⁶⁴

The Supreme Court's recognition of a constitutional right to privacy was originally grounded in an understanding of privacy as involving the right to make important choices in personal matters free from government interference,¹⁶⁵ sometimes referred to as decisional privacy.¹⁶⁶ But the Court quickly acknowledged a related right, closer to the unwanted disclosure of personal facts, of what is now termed

encompassing information collection, dissemination, and processing, as well as intrusion into people's private affairs. *See id.* at 490-91. Employing Solove's categories, the privacy concerns raised by electronic access to court records from the point of view of cooperating defendants include aggregation ("the combination of various pieces of data about a person"), identification ("linking information to particular individuals"), insecurity ("carelessness in protecting stored information from leaks and improper access"), secondary use ("the use of information collected for one purpose for a different purpose without the data subject's consent"), disclosure ("the revelation of truthful information about a person that impacts the way others judge her character"), and increased accessibility ("amplifying the accessibility of information").
Id.

¹⁶⁰ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV L. REV. 193 (1890). The central thesis of their article was that existing law did not adequately protect privacy and that new legal concepts were needed to do so. *See id.* at 198.

¹⁶¹ *Id.* at 195 (quoting THOMAS COOLEY, ON TORTS 29 (2d ed. 1888)).

¹⁶² *See* Solove, *Privacy and Power*, *supra* note 153, at 1432.

¹⁶³ These were intrusion upon seclusion, public disclosure of private facts, false light, and appropriation. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). These categories were adopted by the Restatement (Second) of Torts as the four recognized privacy torts. *See* RESTATEMENT (SECOND) OF TORTS §§ 652B, 652C, 652D, 652E (1977). The definition of publicity given to private life, or invasion of privacy, is publicity of a matter concerning the private life of another "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.* at § 652D.

¹⁶⁴ BeVier, *Privacy Protection*, *supra* note 155, at 459.

¹⁶⁵ *See supra* note 157 (listing cases). Although "[t]he Constitution does not explicitly mention any right of privacy . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe v. Wade*, 410 U.S. at 152.

¹⁶⁶ This right is arguably more accurately viewed as protecting personal autonomy.

informational privacy. In *Whalen v. Roe*,¹⁶⁷ the Court recognized that the constitutional protection of “privacy” involves two distinct but related interests: “the individual interest in avoiding disclosure of personal matters”¹⁶⁸ and “the interest in independence in making certain kinds of important decisions.”¹⁶⁹

In *Whalen*, a group of doctors and patients challenged the constitutionality of a New York statute that required doctors to disclose the names and addresses of all patients for whom they had prescribed certain drugs with a potential for abuse, which the state would maintain “in a centralized computer file.”¹⁷⁰ The appellees claimed that both their decisional and informational privacy interests were impaired by the statute.¹⁷¹

While the Court upheld the statute as a reasonable exercise of the police power,¹⁷² it was “not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.”¹⁷³ Justice Brennan concurred that “[t]he central storage and easy accessibility of computerized data vastly increase the potential for abuse of that

¹⁶⁷ 429 U.S. 589 (1977).

¹⁶⁸ *Id.* at 599. The Court revisited this aspect of privacy in *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977), in which the Court acknowledged that President Nixon probably had a constitutionally protected privacy right in some of the recordings he had made at the White House, even though it was preempted by the Presidential Recordings Act. *See id.* at 457.

¹⁶⁹ *Whalen*, 429 U.S. at 599-600.

¹⁷⁰ *Id.* at 591.

¹⁷¹ *See id.* at 600. Specifically, they argued that because the information about their use of the drugs existed “in readily available form,” they had a genuine concern that the information might become public, which in turn, led them to be reluctant to prescribe and use the drugs even when medically indicated. *Id.* at 600. As Daniel Solove noted, the risk of disclosure itself led to the interference with their decisional privacy. *See Solove, Taxonomy, supra* note 154, at 558-59. While a similar link could be at play in the possible chilling effect of electronic access on cooperation, the question of whether cooperators have a protectable right of privacy in their decision to cooperate with the government—either conceptualized as cooperators exercising some right of association (by joining sides with the government) or making a personal decision about the relationships they wish to protect (children or family, for instance) and those they do not (former criminal associates)—is beyond the scope of this article. Such a theory would be open to the critique that the autonomy of such a choice is undermined by the inherently coercive aspect of making a deal with the government when the alternative is a long prison term.

¹⁷² *See Whalen*, 429 U.S. at 603-04.

¹⁷³ *Id.* at 605. The Court later stated that its opinion in *Whalen* “recognized the privacy interest in keeping personal facts away from the public eye.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 769 (1989).

information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.”¹⁷⁴

2. *The Modern View.* Even before *Whalen*, the Court had begun to recognize some of the dangers to privacy presented by the modern ability to compile, maintain, and analyze data. The right to informational privacy was given perhaps its most detailed review in the Court’s cases dealing with claims arising under the Freedom of Information Act.¹⁷⁵ Although these cases did not deal with court records,¹⁷⁶ the values at stake were similar. In *Department of Air Force v. Rose*,¹⁷⁷ editors of the N.Y.U. Law Review sued under the FOIA for access to case summaries of honor and ethics hearings involving Air Force cadets, with personal references and other identifying information deleted.¹⁷⁸ One of the bases upon which the Air Force had denied access was that disclosure of the records “would constitute an unwarranted invasion of privacy.”¹⁷⁹ The information had already been distributed within the Air Force Academy, but had not been disseminated to the public.¹⁸⁰

While the Court upheld the release of the records,¹⁸¹ its opinion is notable for the serious view it took of privacy. The Court did not discount the fact that re-publicizing damaging information that might have been “wholly forgotten” could be a separate harm,¹⁸² observing that “the risk to the privacy interests of a former cadet, particularly one who has remained in the military, posed by his identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial.”¹⁸³ The Court later referred to *Rose* as a case that had “recognized the privacy interest inherent in the nondisclosure of certain

¹⁷⁴ *Whalen*, 429 U.S. at 607 (Brennan, J., concurring).

¹⁷⁵ Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006).

¹⁷⁶ By its terms, the FOIA does not apply to the judiciary. See 5 U.S.C. § 552(f)(1).

¹⁷⁷ 425 U.S. 352 (1976).

¹⁷⁸ See *id.* at 355.

¹⁷⁹ 5 U.S.C. § 552(b)(6).

¹⁸⁰ “A case summary consisting of a brief statement, usually only one page, of the significant facts is prepared by the Committee. As we have said, copies of the summaries are posted on 40 squadron bulletin boards throughout the Academy, and distributed among Academy faculty and administration officials.” *Rose*, 425 U.S. at 359.

¹⁸¹ See *id.*

¹⁸² “Despite the summaries’ distribution within the Academy, many of this group with earlier access to summaries may never have identified a particular cadet, or may have wholly forgotten his encounter with Academy discipline.” *Id.* at 380-81.

¹⁸³ *Id.* at 381.

information even where the information may have been at one time public.”¹⁸⁴

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,¹⁸⁵ the Court expanded the privacy concerns raised in *Rose* to prohibit the release of an individual’s rap sheet.¹⁸⁶ The case made three important points. First, the Court re-emphasized its view that the fact that information may at one time have been public does not scuttle an individual’s privacy claim.¹⁸⁷ Second, the Court noted the importance of the passage of time, as well as the way in which a privacy claim is affected by compilation of information and increased accessibility.¹⁸⁸ Third, the Court held that the purpose of the FOIA was to enable citizens to keep an eye on their government—the classic First Amendment self-government rationale.¹⁸⁹

In *Reporters Committee*, the media sought access to the rap sheet of Charles Medico, an individual with ties to organized crime, whose company “allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman.”¹⁹⁰ The respondents argued that because a rap sheet is merely a compilation of otherwise public information, “Medico’s privacy interest in avoiding disclosure of a federal compilation of these events approaches zero.”¹⁹¹

¹⁸⁴ U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 767 (1989).

¹⁸⁵ 489 U.S. 749 (1989).

¹⁸⁶ In *Reporters Committee*, the Court considered the applicability of the FOIA exemption that excluded records or information compiled for law enforcement purposes, “to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).

¹⁸⁷ 489 U.S. at 763 (“[B]oth the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another.”). This surprisingly modern view is championed by Solove. See Solove, *Privacy and Power*, *supra* note 153, at 1457 (“courts must abandon the notion that privacy is limited to concealing or withholding information, and must begin to recognize that accessibility and uses of information—not merely disclosures of secrets—can threaten privacy.”).

¹⁸⁸ See 489 U.S. at 763-64. “Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.” *Id.* at 764.

¹⁸⁹ See *id.* at 773.

¹⁹⁰ *Id.* at 757.

¹⁹¹ *Id.* at 762-63.

The Court rejected this “cramped notion of personal privacy,”¹⁹² looking back instead to the informational privacy interest it had identified in *Whalen* of “avoiding disclosure of personal matters.”¹⁹³

In the Court’s view, the private character of the information, while potentially eroded by wide dissemination, could be restored by the passage of time and the fading of memory.¹⁹⁴ The increased accessibility represented by a “compilation of otherwise hard-to-obtain information”¹⁹⁵ that “would otherwise have surely been forgotten”¹⁹⁶ altered the balance that practical obscurity represented. In contrast, the clear purpose of the FOIA was to protect the “citizens’ right to be informed about ‘what their government is up to,’”¹⁹⁷ and this purpose was “not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct.”¹⁹⁸

Ultimately, the Court held that there was a strong privacy interest in practical obscurity itself¹⁹⁹ and that a third party request for law enforcement information about a private citizen would not only be “reasonably . . . expected to invade that citizen’s privacy,” but also, if the request sought no official information about a government agency, that invasion of privacy would be “unwarranted.”²⁰⁰

¹⁹² *Id.* at 763.

¹⁹³ *Id.* at 762 (quoting *Whalen v. Roe*, 428 U.S. 589, 599 (1977)).

¹⁹⁴ *See id.* Referring to its decision in *Rose*, the Court observed, “If a cadet has a privacy interest in past discipline that was once public but may have been ‘wholly forgotten,’ the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.” *Id.* at 769 (citing *Dep’t of Air Force v. Rose*, 425 U.S. 352, 380-81 (1976)).

¹⁹⁵ *Id.* at 764.

¹⁹⁶ *Id.* at 771.

¹⁹⁷ *Id.* at 773 (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting Henry Steele Commager, N.Y. REV. OF BOOKS, Oct. 5, 1972, at 7)).

¹⁹⁸ *Id.* Again, the Court relied on *Rose* to support its point; in that case, the summaries were material to an investigation of how the government operated, while the identifying information about particular cadets was not. “The deletions [of identifying information] were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a ‘clearly unwarranted’ invasion of individual privacy.” *Id.* at 773-74.

¹⁹⁹ “The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high.” *Id.* at 780.

²⁰⁰ *Id.* at 780. The Court recently reaffirmed its holding that the privacy interest “is at its apex” when documents requested under the FOIA concern private citizens. *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 166 (2004) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989)). In *Favish*, a unanimous Court held that Exemption 7(C) of FOIA prevented the disclosure

Reporters Committee, Rose, and Whalen therefore reflect a sensitivity on the part of the Court to issues of privacy that might be broad enough to halt the march towards instantaneous disclosure of all criminal court records over the Internet.

III. A NORMATIVE FRAMEWORK FOR ELECTRONIC ACCESS

In discussing whether to limit Internet access to criminal court records, it bears repeating that paper records remain accessible at clerk's offices in every district. Electronic access is but an alternative means of consulting these records, albeit a much more convenient and economical one. Since neither the First Amendment nor the common law mandates electronic access to court records,²⁰¹ courts are free to evaluate electronic access as a matter of policy.²⁰² This issue recently has had the attention of the Justice Department, the Judicial Conference, the media, and the public, providing an opportunity to make meaningful improvements to the system.

A. *The Instigator: Whosarat.Com*

The catalyst for the renewed debate on electronic access was Whosarat.Com, a website started by a federal defendant now serving a twelve-year sentence for distribution of marihuana.²⁰³ Despite its notoriety, the website is far from comprehensive.²⁰⁴ It functions

of death scene photographs of President Clinton's deputy counsel, Vince Foster. *See id.* at 174-75. The Court reiterated its belief that the FOIA functions as means for citizens to know "what their government is up to." It continued, "This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Id.* at 171-72.

²⁰¹ *See supra* note 108.

²⁰² The federal judiciary has been wrestling with this question for the past decade. *See* JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES A-3 (June 26, 2001), available at www.uscourts.gov/Press_Releases/att81501.pdf.

²⁰³ *See* PACER docket sheet, 03-cr-10220 (D. Mass.). Revenues from Whosarat.Com are helping defray the legal costs of his appeal. *See* Who's A Rat, About Us, <http://www.whosarat.com/aboutus.php> (last visited Aug. 4, 2008).

²⁰⁴ It is, however, the largest and most professional-looking site of its type. The other informant websites I visited either contained little information or were more overtly activist. *See, e.g.,* Belleville, Ontario, Rat Listings, <http://www.geocities.com/bellevillerat/> (last visited Aug. 8, 2008) (tagline: "Snitches get stitches"); Women's Anarchist Black Cross, <http://www.wabc.mahost.org> (last visited Aug. 8, 2008) ("Our goal is not a punitive one, our goal is to eradicate one of the government's most devastating weapons—The Confidential Reliable Informant");

primarily as a community bulletin board, where individual members post profiles of informants and undercover officers;²⁰⁵ there is no centralized attempt to mine information from PACER or other online sources.²⁰⁶ Anyone can pay the subscription fee and join the site, and only members may post profiles of alleged “rats.”²⁰⁷ These profiles list the cooperator or informant’s name, alias, age, gender, address, illegal activity, known drug use, and specify the agency or law enforcement organization that uses the cooperator or informant.²⁰⁸ Some of the profiles include a photograph, as well as links to the cooperator’s criminal record and any court documents the posting member has found. At time of writing, there were 4,610 profiles of informants and cooperators posted on Whosarat.Com,²⁰⁹ of which 1,026 contained links to court documents.²¹⁰ Of these profiles, 873 profiles contained links to documents available through PACER, including 607 plea agreements and 141 government motions for downward departure for substantial assistance.²¹¹ Fifty-five of those profiles contained links to the alleged cooperator’s PACER

RCMP Informants, <http://rcmpsitches.blogspot.com> (last visited Aug. 8, 2008) (contains only five profiles).

²⁰⁵ As the site explains, “Who’s A Rat is a database driven website designed to assist attorneys and criminal defendants with few resources. The purpose of this website is for individuals and attorneys to post, share and request any and all information that has been made public at some point to at least 1 person of the public prior to posting it on this site pertaining to local, state and federal Informants and Law Enforcement Officers.” Who’s A Rat About Us, <http://www.whosarat.com/aboutus.php> (last visited Aug. 8, 2008). Under its category of “informants,” the site lists both cooperating defendants and paid informants.

²⁰⁶ Data mining allows the extraction of discrete information from large databases, more usually employed to reveal customer buying patterns, formulate marketing strategies, and more recently, identify terrorism suspects. See Daniel J. Steinbock, *Data Matching, Data Mining, and Due Process*, 40 GA L. REV. 1, 14-15 (2005).

²⁰⁷ Subscriptions cost \$22.99 for six months or \$7.99 per week. See Who’s A Rat Membership Page, <http://www.whosarat.com/membership.php> (last visited Aug. 8, 2008).

²⁰⁸ Whosarat.Com disclaims any connection with violence or retaliation. “This website does not promote or condone violence or illegal activity against informants or law enforcement officers. If you post anything anywhere on this site relating to violence or illegal activity against informants or officers your post will be removed and you will be banned from this website.” Who’s A Rat About Us, <http://www.whosarat.com/aboutus.php> (last visited Aug. 8, 2008).

²⁰⁹ See <http://www.whosarat.com> (last visited June 10, 2008). There were only 433 profiles of law enforcement agents. See *id.*

²¹⁰ See spreadsheet on file with author (information collected in March 2008).

²¹¹ See *id.* It is notable that this represents only a small fraction of cooperator information currently available on PACER. See *supra* note 91 and accompanying text.

docket sheet.²¹² Despite the website's protestations that it does not condone or seek to facilitate violence, it appears to capitalize on the widespread hostility against "rats" and "snitches." Nonetheless, in spite of the Justice Department's fears that Whosarat.Com would increase retaliation against cooperators,²¹³ there has only been one reported instance of anyone using Whosarat.Com to facilitate witness intimidation, which was promptly prosecuted.²¹⁴

B. Recent Proposals for Electronic Access

1. *Department of Justice Proposals.* In its proposals to the judiciary sparked by its concern about the Who's a Rat website, the Department of Justice focused on plea agreements as the primary vehicle for exposing the identity of cooperators. Its main proposal was to remove all plea agreements and corresponding docket notations from

²¹² See spreadsheet on file with author.

²¹³ Violent retaliation against cooperators is a pervasive problem, of which cases where the perpetrators are identified and prosecuted only represent a fraction. *See, e.g.*, *United States v. Stewart*, 485 F.3d 666, 668-69 (2d Cir. 2007) (drug crew's code of vengeance mandated that if anyone cooperated with law enforcement, the "informer must die"); *United States v. Carson*, 455 F.3d 336, 346-47 (D.C. Cir. 2006) (drug dealer who entered into cooperation agreement with government killed to prevent his testimony in a murder case); *United States v. Rivera*, 412 F.3d 562, 570 (4th Cir. 2005) (witness in murder trial killed to prevent him from testifying); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1035 & n.27 (11th Cir. 2005) (Colombian drug traffickers allegedly murdered five people suspected of cooperating with American law enforcement); *United States v. Cherry*, 217 F.3d 811, 813-14 (10th Cir. 2000) (cooperating witness murdered by defendant after cooperator provided evidence in drug conspiracy case); *United States v. Emery*, 186 F.3d 921, 925-26 (8th Cir. 1999) (defendant killed federal informant in order to prevent further cooperation with law enforcement against him); *Grievance Committee v. Simels*, 48 F.3d 640, 642-43 (2d Cir. 1995) (cooperating witness in narcotics case shot two days before trial was due to begin); *United States v. Amuso*, 21 F.3d 1251, 1254-57 (2d Cir. 1994) (mob boss ordered murders of numerous associates suspected of cooperating); *United States v. Galvan*, 949 F.2d 777, 779-80 (5th Cir. 1991) (cooperator shot by co-defendant after cooperation with law enforcement discovered); *United States v. Thevis*, 665 F.2d 616, 624 (Former 5th Cir. 1982) (cooperating witness murdered by defendant against whom he was going to testify); *State v. Maynard*, 316 S.E.2d 197, 216 (N.C. 1984) (cooperating witness who agreed to testify pursuant to plea agreement murdered to prevent testimony). Nor are reprisals limited to the informants and cooperators themselves. *See, e.g.*, *United States v. Johnson*, 903 F.2d 1084, 1086 (7th Cir. 1990) (mother shot in retaliation after son cooperated with law enforcement in high-profile trials of gang members).

²¹⁴ The defendants pled guilty to witness tampering on April 2, 2008. *See* Maryclaire Dale, *Couple Admits Witness Tampering in Whosarat.Com Case*, ASSOCIATED PRESS, Apr. 2, 2008.

PACER,²¹⁵ leaving the documents available for inspection at the courthouse. This suggestion had the virtue of treating all cases alike, thus avoiding any “red flag” issues. But while the Department’s proposal closed one avenue by which cooperation could be exposed, it did nothing to address the possible exposure of cooperation through sentencing documents or docket information. It was also the most restrictive proposal in terms of public understanding; in the absence of any docket notations on PACER regarding pleas, only a trip to the courthouse would reveal whether a defendant had pled guilty at all.

The Department also offered four alternative proposals. One was that all plea agreements be filed electronically, but that Internet access to these plea agreements would be limited to the court, counsel for the defendant, and counsel for the government, with all unsealed plea agreements available to the public at the courthouse.²¹⁶ Apart from added convenience for the parties, this suggestion would have had roughly the same effect as removing all plea agreements from PACER, with the same costs and benefits.

Another proposal was that the clerk of court in each district block remote Internet access for particular plea agreements or other documents containing sensitive information on a case-by-case basis, upon filing of a motion for a protective order.²¹⁷ While this would have been a less restrictive solution than blocking access to plea agreements in all cases, it would treat cooperation cases differently from non-cooperation cases and hence would create a “red flag” problem. In addition, just as for sealing, under the law of most circuits the filing of a motion for a protective order would have to be docketed, and would therefore serve as another indication of cooperation.²¹⁸

The Department of Justice also proposed that prosecutors could file a generic plea agreement in all cases containing standard and hypothetical references to cooperation.²¹⁹ If actual cooperation occurred, “the prosecutor could notify the court of a defendant’s cooperation through a non-public document.”²²⁰ While this suggestion

DOJ
PROPOSALS

²¹⁵ See Battle Letter, *supra* note 25, at 2, 7; Kenneth E. Melson, Dir., Executive Office for United States Attorneys, U.S. Dep’t of Justice, *Response to Request for Comments on the Privacy and Security Implications of Public Internet Access to Federal Plea Agreements* (Oct. 26, 2007), in Privacy Comments, *supra* note 26, Comment 65 [hereinafter DOJ Comment], at 2-5.

²¹⁶ See DOJ Comment, *supra* note 215, at 5.

²¹⁷ See *id.*

²¹⁸ See *supra* note 89 and accompanying text.

²¹⁹ See DOJ Comment, *supra* note 215, at 6.

²²⁰ *Id.*

would have homogenized cooperation agreements and ordinary plea agreements, it would also have done away with even the limited oversight the public currently has over the cooperation process. Under this proposal, while all unsealed documents would remain available over the Internet, they would serve little informational purpose because they would hide whether a given defendant was cooperating or not. Indeed, because the actual terms of the agreements would be filed under seal, they would not even be available at the courthouse, and useful information would be further obscured.²²¹

The Justice Department's final proposal was the most promising: a uniform system of tiered electronic access, where certain documents would be restricted to that defendant's counsel and the government, others would be available to a broader group of counsel, and a third category would be available to the general public.²²² Under such a system, plea agreements and other documents would be filed electronically, but Internet access would be limited to the court, counsel for the defendant, and counsel for the government. All unsealed documents would remain accessible at the courthouse as before. This system has the advantage of flexibility and security, although, like any system with a large discretionary component, it could prove to be difficult to administer and subject to abuse. Some districts have already begun to employ a system of access privileges, so it appears to be a workable option.²²³ This proposal, however, only addresses half of the equation: the risk to cooperators and the integrity of criminal investigations. It does nothing to shed light on how the cooperation process is administered across the country.

Plea Agreements
Treated Like
Social
Security
Cases.

2. *The "Public Is Public" Approach.* Unsurprisingly, the majority of comments submitted to the Judicial Conference, particularly those from the media, defense lawyers, and the public, advocated a

²²¹ This is the approach already taken in some districts, such as North Dakota. See *supra* notes 97-101 and accompanying text.

²²² See DOJ Comment, *supra* note 215, at 6.

²²³ In the Eastern District of Pennsylvania, neither plea agreements nor sentencing documents are accessible via PACER, and the docket sheet gives only generic information. See Letter from Harvey Bartle III, Chief Judge, E.D. Pa., to John R. Tunheim, Dist. Judge, D. Minn. (Oct. 5, 2007), in Privacy Comments, *supra* note 26, Comment 53, at 1 ("If this protocol saves one life or one prosecution or prevents one injury, our court firmly believes our effort has been a success."). In the Northern District of Illinois, only case participants can access documents filed in criminal cases over the Internet. See U.S. Dist. Ct, N.D. Ill. Webpage, Electronic Filing Frequently Asked Questions, http://www.ilnd.uscourts.gov/PUBLIC/Dkt_Info/FAQ-CMECF.pdf (last visited Aug. 5, 2008).

“public is public” approach, where electronic case files would enjoy the same level of accessibility as paper files.²²⁴ One private citizen summed up much of the pro-access argument as follows: “If they are public files, then they ought to be public. Period.”²²⁵ This approach echoes the classic First Amendment rationale that “[p]ublic debate must not only be unfettered, it must also be informed.”²²⁶ What better way to inform the public than to give it unlimited access to court records in the most convenient and fastest form the world has ever seen? Apart from its enviable simplicity, this argument has intuitive appeal: why should we treat electronic records differently than records in any other form? The information contained in a cooperation agreement is the same, whether the agreement was filed electronically or written with a quill and delivered to the courthouse by a coach and four.

This approach has been successful in the civil context. When civil court records were first made available online, there was widespread concern that the disclosure of sensitive personal information in court documents, such as social security numbers, home addresses, medical information, financial information, and names of minor children, could lead to identity theft, credit card fraud, or worse.²²⁷ But the

²²⁴ See, e.g., Alexander Bunin, Federal Public Defender, *Electronic Public Access to Plea Agreements* (Oct. 1, 2007), in Privacy Comments, *supra* note 26, Comment 50, at 1; Mark C. Zauderer, President, Federal Bar Council, *Comments on the Proposal to Limit Access to Certain Documents in Federal Court Criminal Case Files* (Oct. 25, 2007), in Privacy Comments, *supra* note 26, comment 62, at 4; MLRC Comment, *supra* note 26, at 1; NAA Comment, *supra* note 26, at 11; Reporters Comm. for Freedom of the Press et al., *Comments of the Reporters Committee for Freedom of the Press et al.* (Oct. 26, 2007), in Privacy Comments, *supra* note 26, Comment 66, at 3; NACDL Comment, *supra* note 26, at 3. In addition, 27 out of 28 comments posted by members of the public advocated open access. See, e.g., Privacy Comments, *supra* note 26, Comments 15-17, 20-22.

²²⁵ Private Citizen, Minneapolis, Minn. (Sept. 13, 2007) in Privacy Comments, *supra* note 26, Comment 32. The “public is public” approach has been adopted by several state courts in their own struggles with online access. See, e.g., N.Y. STATE COMM’N. ON PUB. ACCESS TO COURT RECORDS, REPORT TO THE CHIEF JUDGE 1 (2004), available at http://www.courts.state.ny.us/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf (“public access to court case records should be the same whether those records are made available in paper form at the courthouse or electronically over the Internet.”).

²²⁶ *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting).

²²⁷ See Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 83 (2006) (“Apart from identity theft and credit card fraud, public information in court records can be used to commit crimes involving blackmail, extortion, stalking, and sexual assault.”); Silverman, *supra* note 12, at 207 (“certain categories of personal

solution was relatively simple: such information could simply be redacted from the court records without infringing on the public's right of access.²²⁸ As one commentator observed, "the general education that an individual might be expected to acquire from the perusal of court records does not include committing to memory the street addresses of fellow citizens, their Social Security numbers, or their bank accounts."²²⁹

The sensitive personal information contained in civil court records could be separated from "the adjudicatory facts upon which a court relies to dispose of a case."²³⁰ But in the case file of a cooperating defendant, the sensitive personal information (that a particular defendant is a cooperator) and the adjudicative information (that defendant pleading guilty to a cooperation agreement) cannot be disentangled. The personal information that can later be misused is generated by the adjudicative process itself.²³¹

Redaction
works for
Crim, Not
For
PERA
Agreements

Proponents of the "public is public" approach point out that, in cases where there is a genuine concern that disclosure will jeopardize an investigation or the safety of an individual, the information can be sealed.²³² While sealing has been the primary protective mechanism in the paper world, its efficacy is undermined in an online setting. The first

information render a person particularly vulnerable to malfeasance and harm: these include a person's address, telephone number, social security number, driver's license identification number, bank accounts, debit and credit card numbers, and personal identification numbers").

²²⁸ This practice has been codified by Rule 49.1(a) (providing for redaction from court filings of personal information, including social security numbers, taxpayer-identification numbers, birth dates, name of minor children, financial account numbers, and home addresses). FED. R. CRIM. P. 49.1(a).

²²⁹ Silverman, *supra* note 12, at 209-10.

²³⁰ *Id.* at 209.

²³¹ Attempting to redact the "cooperation paragraph" from the body of the plea agreement will not be of much help, as one federal judge observed: "if an order to redact the cooperation information from the plea agreement under pending Rule 49.1 is issued and docketed, it would serve as a red flag of cooperation, raising the same concerns as if the cooperation were detailed in the plea agreement." Chief Judge Kimba Wood, S.D.N.Y., Comment 2 (Aug. 31, 2007), in Privacy Comments, *supra* note 26.

²³² See NAA Comment, *supra* note 26, at 11 ("the judiciary should maintain its traditional case-by-case approach, which does not preclude motions to seal names from all copies of a plea agreement electronic and hardcopy—or motions to make certain plea agreements accessible only at the courthouse"); NACDL Comment, *supra* note 26, at 7 ("To the extent such remedies can be useful, moving the trial court to seal the plea agreement restricts specific knowledge of its terms from publication."); MLRC Comment, *supra* note 26, at 2 ("The MLRC urges the Federal Judiciary . . . to adopt a policy requiring U.S. Attorneys to file plea agreements and cooperation agreements and that the latter only be sealed by motion, for good cause shown, on a case-by-case basis.").

problem is that sealing, like courtroom closure, cannot be a stealthy process: to comport with due process it must call attention to itself.²³³ Most circuit courts have concluded that sealing requires notice to the public, and therefore that motions for sealing and sealed documents should be listed on the docket sheet.²³⁴ As discussed above,²³⁵ sealed documents on a docket sheet can serve as “markers” of cooperation, a greater problem given the easy accessibility of docket sheets on PACER.

SEALING
ITSELF IS
A
REDFLAG.

In addition, because sealing is supposed to be limited to extraordinary cases, where there is a risk of imminent harm to an individual or an investigation,²³⁶ it cannot counter the chilling prospect of worldwide exposure on the Internet. And because sealing is not supposed to be more than a temporary measure,²³⁷ it is of no comfort to former cooperators once their plea agreements and sentencing documents are unsealed.

C. How Electronic Information Is Different

1. *Consequences for Privacy.* Ultimately, the larger problem with the “public is public” approach is that it fails to acknowledge that, measured against paper records, electronic information has very different consequences for privacy. Electronic information can be reproduced without limit at minimal cost and without loss of quality, it can be accessed simultaneously by any number of people anywhere in the

²³³ See *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring) (“If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion.”).

²³⁴ See *supra* note 89 and accompanying text.

²³⁵ See *supra* notes 87-92 and accompanying text.

²³⁶ See *Gannett*, 443 U.S. at 441-42 (Blackmun, J., concurring and dissenting in part) (defendant seeking closure must establish substantial probability that irreparable damage to his fair-trial right will result from open proceeding, alternatives to closure will not adequately protect that right, and closure will be effective in protecting against the perceived harm); *Seattle Times Co. v. U.S. Dist. Ct.*, 845 F.2d 1513, 1517-18 (9th Cir. 1988) (applying test); *Associated Press, Inc. v. United States Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) (same); *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982) (same); *United States v. Criden*, 675 F.2d 550, 557-58 (3^d Cir. 1982) (same). Sealing is probably a lot more widespread in practice, as in my experience documents could be sealed with nothing more than a pro forma statement that disclosure would “jeopardize the safety of a witness.”

²³⁷ “Even where a court properly denies the public and press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the danger of prejudice has passed.” *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) (citing *Gannett*, 443 U.S. at 393).

world, and once it has been disseminated, there can be no certainty that it has been entirely deleted.²³⁸ Compared to the information filed in folders in clerk's offices throughout the land, it is public to a degree unparalleled in history.

In addition to its potential for limitless dissemination, the other signal feature of electronic information is its state of permanent availability. As Anita Allen writes, "[e]lectronic accessibility renders past and current events equally knowable. The very ideas of 'past' and 'present' in relation to personal information are in danger of evaporating."²³⁹ In cyberspace, there is no such thing as yellowing paper, fading ink, or documents too hard to reach because they are squashed at the back of a rusty filing cabinet. In this world, summoning up the past is as effortless as clicking a mouse.²⁴⁰

The rules that were developed to protect sensitive information in the world of paper records represented a consensus as to the proper balance between the competing interests of public information and privacy, transparency, and security. As one commentator pointed out, applying the same rules to electronic records alters that balance, privileging the free flow of information to the exclusion of other interests.²⁴¹ Not everyone will be disturbed by this: one can make a robust argument that the privacy of convicted felons and turncoats is not a good that needs to be preserved. This kind of privacy is painted as merely a desire to evade personal responsibility, or as Judge Posner puts it, to have "more power to conceal information about [oneself] that others might use to [one's] disadvantage."²⁴² At worst, privacy can be seen as tantamount to cheating: if most people abide by social norms in order to maintain a good reputation, "[t]he ability to conceal discreditable facts about oneself permits one to acquire that benefit without having to pay the full behavioral price."²⁴³

²³⁸ While Internet pages can be taken down, there is no way of knowing whether the information contained in them has not been copied many times over.

²³⁹ See Anita L. Allen, *Dredging Up the Past: Lifelogging, Memory, and Surveillance*, 75 U. CHI. L. REV. 47, 62 (2008).

²⁴⁰ See *id.* at 62.

²⁴¹ See Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 315 (2004) ("When the same rules that have been worked out for the world of paper records are applied to electronic records, the result does not preserve the balance worked out between the competing policies in the world of paper records, but dramatically alters that balance.")

²⁴² RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 271 (1981).

²⁴³ BeVier, *Privacy Protection*, *supra* note 155, at 470. For former cooperators, however, the "good reputation" that risks being tainted by disclosure is that of being a

But other values achieved by protecting privacy could answer these objections. One of these is a sense of community with our fellow citizens. At the most universal and benign level, everyone makes mistakes and commits acts they would just as soon forget. In order to distance themselves from regrettable past acts, people “need to be safe from memory: they need to forget and need others to forget, too.”²⁴⁴ This need for beneficial forgetting is complicated in the case of cooperators, whose mistakes and bad acts may be of greater magnitude than those of the average, law-abiding citizen. But “[p]eople grow and change, and disclosures of information from their past can inhibit their ability to reform their behavior, to have a second chance, or to alter their life's direction.”²⁴⁵ In *Reporters Committee*, the Court echoed its earlier observation in *Rose* that there may be a privacy interest in bad acts long forgotten: “If a cadet has a privacy interest in past discipline that was once public but may have been ‘wholly forgotten,’ the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.”²⁴⁶ The Court therefore ascribed legal significance, even positive value, to the act of forgetting. Even a convicted felon, implied the Court, should be able to leave the past behind.²⁴⁷

2. *Consequences for Rehabilitation.* Rehabilitation is another reason to allow a cooperator to escape being branded a felon and a rat. Constant access to a person's criminal past is unlikely to have a positive effect on potential rehabilitation. While the goal of rehabilitation may not enjoy the theoretical ascendancy it once did,²⁴⁸ in practical terms it

“stand-up guy”—someone who would rather go to prison than cooperate with the government. The people most disadvantaged by this reputational “fraud” would presumably be those engaged in criminal behavior.

²⁴⁴ Allen, *supra* note 239, at 57.

²⁴⁵ Solove, *Taxonomy*, *supra* note 154, at 532.

²⁴⁶ U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769 (1989) (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 381 (1976)).

²⁴⁷ In any event, felons remain subject to a whole host of disabilities under state and federal law. See *North Carolina v. Rice*, 404 U.S. 244, 247 & n.1 (1971) (noting that a convicted criminal may be disenfranchised, lose the right to hold federal or state office, be barred from entering certain professions, and disqualified from serving as a juror); Brian K. Pinaire et al., *Barred from the Bar: The Process, Politics, and Policy Implications of Discipline for Attorney Felony Offenders*, 13 VA. J. SOC. POL'Y & L. 290, 292 (convicted felons may also lose firearms privileges, public benefits such as housing and food stamps, and eligibility for certain federal student loans).

²⁴⁸ See generally, FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 5 (1981).

remains a social value. The United States claims the world's largest prison population,²⁴⁹ which pumps thousands of ex-convicts and cooperators back onto the street every year.²⁵⁰ Creating a "criminally stigmatized underclass screened out of legitimate opportunities, steered towards criminal careers and further incarceration"²⁵¹ only reinforces this cycle.

Courts have long recognized the link between rehabilitation and the anonymity that could gradually be regained in a world of practical obscurity. In *Melvin v. Reid*,²⁵² a former prostitute, acquitted of murder, had gone on to a respectable married life until her story and maiden name were used in a movie.²⁵³ The court held that the defendants' use of the plaintiff's real name was actionable, particularly in light of her efforts to rehabilitate herself.²⁵⁴ "One of the major objectives of society, as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal," wrote the court. "Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime."²⁵⁵

This principle was extended to a convicted, rather than acquitted, felon in *Briscoe v. Reader's Digest Association*,²⁵⁶ where the court held

²⁴⁹ See Adam Liptak, *Inmate Count In U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

²⁵⁰ In the year 2006, the federal government released 47,920 inmates from prison. See William J. Sabol & Heather Couture, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007 (June 2008), Table 4, available at <http://www.ojp.gov/bjs/pub/pdf/pim07.pdf>.

²⁵¹ Jacobs, *supra* note 20, at 387.

²⁵² 297 P. 91 (Cal. 1931).

²⁵³ See *id.* at 91. Dean Prosser put it best: "The plaintiff, whose original name was Gabrielle Darley, had been a prostitute, and the defendant in a sensational murder trial. After her acquittal she had abandoned her life of shame, become rehabilitated, married a man named Melvin, and in a manner reminiscent of the plays of Arthur Wing Pinero, had led a life of rectitude in respectable society, among friends and associates who were unaware of her earlier career. Seven years afterward the defendant made and exhibited a motion picture, called 'The Red Kimono,' which enacted the true story, used the name of Gabrielle Darley, and ruined her new life by revealing her past to the world and her friends." Prosser, *supra* note 163, at 392.

²⁵⁴ See *id.* at 93-94. *Melvin* became one of the bases for the tort of publicity given to private life in the Restatement of Torts. See RESTATEMENT (SECOND) OF TORTS §§ 652D, Illustration 26.

²⁵⁵ *Id.* at 93.

²⁵⁶ 483 P.2d 34 (Cal. 1971), *overruled by* Gates v. Discovery Comms., Inc., 101 P.3d 552 (Cal. 2004).

that the plaintiff, who had been convicted of truck hijacking eleven years earlier, had a valid cause of action against a magazine for using his name.²⁵⁷ The court acknowledged that soon after a crime is committed criminals can be the object of legitimate public interest, but that this interest fades with time.²⁵⁸ Even though Briscoe's conviction had been a matter of public record, the court found that with the passage of time, he had regained an expectation of anonymity.²⁵⁹

While *Melvin* and *Briscoe* no longer have legal force,²⁶⁰ they still have normative appeal. "It would be a crass legal fiction to assert that a matter once public never becomes private again," noted the *Briscoe* court. "Human forgetfulness over time puts today's 'hot' news in tomorrow's dusty archives. In a nation of 200 million people, there is ample opportunity for all but the most infamous to begin a new life."²⁶¹ When it made this observation, the court was expressing not only a view of information that may now seem quaint, but was also making a point about the beneficial nature of limited information.

Now that "crass legal fiction" has become a reality. In a world of imperishable, easily accessible criminal court records, the former cooperator can truly become "a prisoner of his recorded past."²⁶² In some areas of the law, courts have deemed that such a burden is acceptable.²⁶³ Sexual offenders, for example, can constitutionally have

²⁵⁷ See *id.* at 40.

²⁵⁸ See *id.* (citing RESTATEMENT OF TORTS § 867, comment c).

²⁵⁹ See *id.* at 41 ("One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts").

²⁶⁰ The Supreme Court subsequently held that the First Amendment prohibits the sanctioning of publication of true information contained in public records. See *Cox Broad. v. Cohn*, 420 U.S. 469, 496 (1975) (press could not constitutionally be exposed to tort liability for truthfully publishing the name of a rape and murder victim released to the public in official court records); see also *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (invalidating state statute imposing damages on newspaper for publishing name of rape victim); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 98 (1979) (state criminal statute prohibiting publication of juvenile offender's name); *Okla. Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 308 (1977) (per curiam) (invalidating district court order enjoining newspapers from publishing name and picture of juvenile offender). *Briscoe* was therefore overruled and *Melvin* discredited. See, e.g., *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002) (Posner, J.) (stating that *Melvin* was "dead").

²⁶¹ *Briscoe*, 483 P.2d at 41.

²⁶² U.S. DEP'T. OF HEALTH, *supra* note 154, at 112.

²⁶³ Some courts see no problem with the disclosure of "legitimately discreditable information about a person, such as his criminal record," particularly if that person is running for office. *Willan*, 280 F.3d at 1163 (holding that a mayoral candidate had no

their identities and criminal pasts disseminated to the communities in which they live under state and federal Megan's Laws; most states allow this information to be posted on the Internet.²⁶⁴ But this is a narrow class of cases in which the courts have found the offenders' privacy claims to be outweighed by concerns for public safety, and their desire for rehabilitation to be offset by their high recidivism rates.²⁶⁵ The situation of cooperators, who have committed a range of criminal offenses, is considerably more ambiguous.²⁶⁶ They are the only ex-offenders who have been publicly acknowledged as rendering a service to the government. Unsavory though many cooperators may be, the government may owe them some kind of obligation to ensure that their assistance is not later turned against them when they attempt to reenter society.²⁶⁷

D. Towards a New Role for Electronic Access

Given the dual nature of the problems raised by Internet access, any attempt to ameliorate these difficulties would have to address both the specter of cooperator retaliation and the disarray surrounding the use of cooperators. No solution will be perfect, as any initiative has its costs, and any proposal can become obsolete as technology continues to

claim against law enforcement officers for disseminating his criminal history, which included a prior burglary conviction).

²⁶⁴ See *Smith v. Doe*, 538 U.S. 84, 90-91 (2003) (upholding Alaska's Megan's Law, which requires sex offenders in the state to register information with authorities, including their names, addresses, and crimes of conviction, which the state then posts on the Internet). Many other states provide online access to their sexual offender registries, and one site, www.familywatchdog.us, provides visitors with the ability to conduct national searches across state registries. See Family Watchdog Offenders Searchpage, <http://www.familywatchdog.us/Search.asp> (last visited Aug. 5, 2008).

²⁶⁵ See *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999) ("[t]he public interest in knowing where prior sex offenders live" outweighs any privacy interest offenders might have in preventing disclosure of their home addresses); *Cutshall v. Sundquist*, 193 F.3d 466, 476 (6th Cir. 1999) (noting high rates of recidivism and egregiousness of sex crimes as impetus for registering and monitoring sex offenders); *Russell v. Gregoire*, 124 F.3d 1079, 1091 (9th Cir. 1997) (Megan's Laws alert "the community to the presence of sexual predators adjudged likely to offend again").

²⁶⁶ This is all the more so as empirical research supports the thesis that the older the criminal conviction, the less likely it is to be predictive of future criminal conduct. See Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 71 (2007).

²⁶⁷ While such a responsibility is not grounded in a legal duty, it seems appropriate as a matter of fair play.

evolve. Nonetheless, it is worth trying to see our way out of the current impasse.

1. *Limiting Unwarranted Exposure.* The Department of Justice's proposal of a system of tiered access privileges seems to be a good starting point to address the first problem. Internet access to docket sheets and case documents on PACER could be limited to the parties and the court,²⁶⁸ while all non-sealed documents would remain available for inspection at the courthouse.²⁶⁹ This would help curtail exposure of cooperators' identities over the Internet, which should ease concerns about increased retaliation attributable to remote accessibility of electronic court records.

Of course, even the tightest limits on electronic access cannot protect against all leaks of cooperator information.²⁷⁰ Every prosecutor who investigates targets capable of violence is haunted, to a greater or lesser degree, by her own imagined Billy Costigan scenario. If these fears make her hesitate to file an explicit cooperation agreement that might be read by a target online, the question becomes less one of provable harm than of how the possibility of harm, however remote, shapes behavior. Cooperators cannot be insulated from retaliation, short

²⁶⁸ See *supra* notes 222-23 and accompanying text; see also Winn, *supra* note 241, at 325 (suggesting that access to criminal court records be controlled through a system of privileges whereby judges, law clerks and defense attorneys and prosecutors have full online access in specific cases, while members of the press could have access on consent of the parties).

²⁶⁹ This proposal might arguably fall afoul of the E-Government Act, which requires the federal courts to provide public access to information over the Internet. See E-Government Act of 2002, 44 U.S.C. § 3501 note (2002) (directing each federal court to establish and maintain a website that contains or provides links to court information, including access to docket information for each case, the substance of all written opinions issued by the court, documents filed with the courthouse in electronic form, and "[a]ny other information . . . that the court determines useful to the public."). So far, however, it appears that the courts believe that they can limit electronic access to court files under their supervisory power, see *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 598 (1978), and no court has yet interpreted the E-Government Act as limiting their discretion to manage their own records. Cf. Winn, *supra* note 241, at 318 (E-Government Act "indicates a congressional deference to the courts to be responsible for the management and oversight of their own records"). Certainly the Eastern District of Pennsylvania and the Northern District of Illinois have not let the E-Government Act stop them from suspending public access to criminal case files. See *supra* note 223 and accompanying text.

²⁷⁰ There are many sources of cooperator exposure, of which court files are only one part. See *supra* note 85 and accompanying text. This suggestion is not intended to be an answer to the larger problem of witness intimidation.

of all being placed in the Witness Protection Program.²⁷¹ But if the examples of New Hampshire and North Dakota are anything to go by, the concern that a cooperator's identity will be exposed on the Internet is a potent one.

One counter-argument to this proposal is that even if electronic access were curtailed, nothing prevents a motivated individual from physically visiting the clerk's office and reviewing the court files of a suspected cooperator. Equally, a more enterprising version of Whosarat.Com might send runners to the courts to scan criminal case information into mobile devices for subsequent dissemination online. While these risks will always exist so long as there is a right of access to court records,²⁷² if nothing else, raising the costs of access can slow this process and lessen the risks of cooperators' identities being discovered online. To the extent that placing limits on electronic access could protect even a small number of cooperating defendants from unnecessary exposure, and more importantly, reassure prosecutors and courts that cooperation bargains can be conducted more openly, it is still worth attempting.

Such a proposal is likely to displease those who insist that the public's right of access includes electronic access to every case.²⁷³ As one of the members of the public put it, "[t]he public's need to know far outweighs the needs of those made uncomfortable by scrutiny. How else can the public be informed about what's going on?"²⁷⁴ This is a fair question, but it begs another: What is the information of value that the public needs to know? Does the public need to know that an individual

²⁷¹ And even that has its limits. *See, e.g.*, *United States v. Thevis*, 665 F.2d 616, 624 (Former 5th Cir. 1982). In *Thevis*, the cooperator, a small-time mob associate, was scheduled to enter the Witness Protection Program, but wanted to conduct one last business transaction—selling a piece of property—before he did. He was shot to death by the defendant, along with the person to whom he was showing the land. *Id.*

²⁷² Indeed, they have always existed, minus perhaps the development of technology to enable people to secretly photograph or scan court records while examining them at the clerk's office.

²⁷³ *See, e.g.*, NAA Comment, *supra* note 26, at 6 (arguing that the public, through press reports about individual plea agreements, gains insight not only into the functioning of the judicial system, but also "the substance of specific court proceedings"). The NAA did not explain why access to specific court proceedings was an important interest, but contented itself with saying that in criminal cases, "the public interest in learning the particulars and the results of individual cases is obvious." *Id.* The NAA then listed nine news reports to illustrate the use of plea agreements in news coverage, all of which included some significant aspect of public corruption, bribery, corporate fraud, terrorism or the involvement of a sports figure. *See id.*

²⁷⁴ Private Citizen, Wayland, Mass. (Sept. 13, 2007), in *Privacy Comments*, *supra* note 26, Comment 29.

indicted for distributing five kilograms of cocaine, which would ordinarily entail a mandatory minimum sentence of ten years,²⁷⁵ cooperated with the government and received a sentence of 36 months, or does it need to know that Billy Costigan, in particular, cooperated with the government? In the vast majority of federal narcotics, weapons possession, extortion, and fraud cases, the truly valuable information is not the name of the cooperator, but what information was traded for what criminal liability in order to achieve a sentence that might be years shorter than the one attached to the offense of conviction.

The other difficulty with a rule limiting electronic access to the litigants and the court is that such a rule would need exceptions, particularly in cases of high public interest where the names do matter.²⁷⁶ In high-profile cases, the usefulness of electronic access—its ability to ease the administrative burden on court personnel, facilitate the fact-gathering of news outlets and increase the public's own ability to seek out information—militates against its limitation. That said, "high-profile" is not a category susceptible to easy definition. Such an exception could obviously encompass cases where the public interest was at stake, such as cases of public corruption or bribery of governmental officials,²⁷⁷ but would become more difficult to define when the celebrity of the defendant or the heinousness of the crime merely piqued the public's interest. A possible bright line could be drawn between those cases that went to trial and those that did not. In a case headed for trial, discovery obligations require that the government disclose all impeachment material relating to its witnesses, including cooperation agreements, therefore the marginal difference in having the information posted on the Internet would be negligible. Since reporters and the public will probably be attending most of the court proceedings

²⁷⁵ See 21 U.S.C. § 841(b)(1)(A)(ii) (2006).

²⁷⁶ During a two-year moratorium on access to the content of criminal case files on PACER, though not to docket information, initiated in 2001, the Judicial Conference carved out an exception for extremely high-profile criminal cases that placed extraordinary demands on clerks' offices, such as the prosecution of the "20th hijacker" Zacarias Moussaoui. See Press Release, U.S. Courts, Web Sites Help Courts, Public in High-Profile Cases (May 22, 2003), available at <http://www.uscourts.gov/newsroom/highprofilecases.htm>.

²⁷⁷ Jack Abramoff, the lobbyist at the center of several recent public corruption scandals, who cooperated with the government and was sentenced to five years' imprisonment, is a frequently-cited example. See MLRC Comment, *supra* note 26, at 2; Michael E. Stowell, Attorney (Sept. 12, 2007), in Privacy Comments, *supra* note 26, Comment 24; Private Citizen (Sept. 13, 2007), in Privacy Comments, *supra* note 26, Comment 35.

anyway, it makes little sense to limit accessibility to paper files at the courthouse.

For cases that did not go to trial, someone would have to decide whether a case was high-profile or not, and what the criteria should be. As a preliminary matter, these questions would probably be best answered by the district judge presiding over the case, considering the totality of the circumstances and with input from the parties.²⁷⁸ In formulating its own high-profile exception, the Judicial Conference determined that in order to obtain the “high-profile” exemption, “[c]onsent of the parties would be required as well as a finding by the trial judge . . . that such access is warranted under the circumstances.”²⁷⁹

High-Profile
EXCEPTION

Nonetheless, the foreseeable difficulties of formulating and administering exceptions to a regime of limited Internet access pale in comparison with the potential gains in terms of halting the trend towards prosecutorial evasion and loss of legitimate information. Limiting online access to criminal court records, which would curb the incentives for prosecutors to hide the nature of the bargains they enter into with cooperators, could at least maintain the level of information currently available to the public.

2. *Increasing Public Oversight.* No matter what limits are placed on electronic access, there remains the vexing issue of how to achieve meaningful oversight of cooperation practices. The cooperation system remains “a great source of dishonesty and evasion and a still uncertain amount of unwarranted disparities among individual defendants.”²⁸⁰ As discussed above, the lack of information as to how cooperation is administered within and among the districts,²⁸¹ coupled with a lack of standards and guidance to inform prosecutorial discretion, has led to an undermining of the goals of sentencing uniformity and

²⁷⁸ Factors might include the likelihood of retaliation if cooperation was revealed, the nature of the crime charged, the nature of the public interest and the privacy concerns of the litigants.

²⁷⁹ Judiciary Privacy Policy webpage, *Limited Exceptions to Judicial Conference Privacy Policy for Criminal Case Files* (adopted March 2002), available at <http://www.privacy.uscourts.gov/privacypolicy.htm> (follow “Limited Exceptions” hyperlink) (last visited Aug. 4, 2008). This could be supplemented by a requirement that consent not be unreasonably withheld.

²⁸⁰ Weinstein, *supra* note 32, at 617.

²⁸¹ Scholars, judges, and practitioners have called for data to be collected for years. See, e.g., Saris, *supra* note 16, at 1051-52; Bowman, *supra* note 37, at 65; Marcus, *supra* note 45, at 8; King, *supra* note 68, at 306.

fairness. Instead, these ideals have been replaced by the reality of hidden, unprincipled, ad hoc decisions by individual prosecutors.²⁸²

The open access advocates are right to demand greater public oversight into the federal criminal justice system, particularly in the subterranean area of cooperation agreements. Where they are wrong is in their method of achieving reform. Insisting on Internet access to cooperation agreements simply triggers fears of retaliation, encouraging prosecutors to find ways to avoid creating a paper trail, which in turn creates the risk of even greater disparities and increasingly ineffective review.

Nearly 20 years ago, Graham Hughes proposed a mechanism for review of cooperation decisions that would require prosecutors to file the details of their plea and cooperation agreements with a public commission that would periodically examine and report on these agreements.²⁸³ Cooperation agreements deserved special scrutiny, Hughes argued, precisely because they were not standardized or governed by a consistent set of rules and therefore protection of the public interest and fairness in the administration of justice were implicated “with a special sharpness.”²⁸⁴ Because of the power of the government over such agreements, Hughes found that a cooperator’s fate under a particular cooperation agreement was “an important index of the fairness and integrity of the prosecutorial system.”²⁸⁵ A review process, he believed, could help develop standards and criteria to measure what the cooperator would have to do in order to fully cooperate, as well as what actions would constitute a breach of that agreement.

If anything, his proposal is even more relevant today. The best way to disentangle the sensitive personal information from the adjudicatory facts in a cooperator’s case²⁸⁶ is to organize the information differently, outside of the confines of a criminal case file with a specific person’s name on it. If the traditional way of making cooperation

²⁸² As William Stuntz has observed, “The real law of crimes and sentences is the sum of those prosecutorial choices. That law is nearly opaque; even those who study the criminal justice system for a living know very little about it.” William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2569 (2004).

²⁸³ Hughes, *supra* note 4, at 20.

²⁸⁴ *Id.* Hughes also noted that cooperation agreements were different from ordinary plea agreements in that the possibility of leniency they provided could be entirely unrelated from reduced culpability on the part of the cooperator, and they could sometimes risk licensing continuing criminal activity. *See id.* at 21.

²⁸⁵ *Id.* at 40.

²⁸⁶ *See supra* notes 230-31 and accompanying text.

agreements public has been to seal, redact, or otherwise hide the terms of the cooperation bargain, a far more enlightening alternative would be to disclose cooperation agreements with the explicit terms of the bargain intact, but the personal identifying information excised.²⁸⁷ Since most government agreements are boilerplate, the agreements should be released in the context of an anonymous defendant “profile.” Each defendant profile, which could be organized by the type of crime charged, could then include: (1) a copy or a statement of the initial charges;²⁸⁸ (2) all subsequent and superseding charges; (3) plea documents; (4) an indication of whether the defendant cooperated, and if so, the substance of his cooperation;²⁸⁹ and (5) sentencing information. If the defendant did cooperate, the cooperation could be sorted into one of four general categories:²⁹⁰ providing background information,²⁹¹ agreeing to testify, providing testimony, or taking active part in an investigation. Finally, it would be helpful to note the race and gender of the defendants (and possibly the targets) in order to monitor the disparities earlier recognized by the Sentencing Commission.²⁹²

Overall, such a system would help identify charge bargaining,²⁹³ reveal the frequency of cooperator breaches, enable comparison between cooperation outcomes and the outcomes of “straight” pleas, and give an overview of what type of cooperation leads to what sentencing reductions across districts. In this way, the computerization of the federal courts could give the government an opportunity to shed light on its cooperation practices without triggering fears of increased retaliation or a massive loss of individual privacy.

²⁸⁷ The fact that there would be anonymity for the individual line Assistant making the bargain as well as for the defendant could encourage candid reporting.

²⁸⁸ In many cases, criminal complaints can be very fact-intensive, containing information such as conversations captured on wiretaps, detailed descriptions of physical surveillance, or specific events reported by confidential sources. If the complaint cannot be redacted sufficiently to protect the anonymity of the case, or would be meaningless without the specific identifying information such as names, places and dates, it might be better replaced by a simple statement of the crimes charged and a general description of the facts.

²⁸⁹ This would replace disclosure of the government’s substantial assistance motion, another typically fact-intensive document which, if redacted to remove identifying information, would probably be unintelligible.

²⁹⁰ See Marcus, *supra* note 45.

²⁹¹ This category could be further subdivided into provision of background information or information leading to search warrants or arrest warrants.

²⁹² See *supra* note 72 and accompanying text.

²⁹³ See Nagel & Schulhofer, *supra* note 59, at 516 (“[O]ur best window on potential circumvention is to trace the differences between indictment charges and conviction charges”).

One practical question is who should be tasked with reporting this information. Because prosecutors are in the best position to collect information and report on their own cases, the most obvious choice would be the line assistants who sign up the cooperators. They could be responsible for redacting any markers that would identify the target, the cooperator, or the assistant, and for organizing the information into relevant categories. A periodic reporting requirement²⁹⁴ would lessen both the administrative burden on the assistants and the chances that interested individuals could “decode” the defendant profiles and identify cooperators. There remains the risk that some prosecutors will continue to reward sympathetic defendants even where no assistance is given, and simply certify that they provided “background information.” But the sense of greater public scrutiny, at a minimum, will remind prosecutors of their accountability and could encourage more honesty.²⁹⁵

Such a proposal is not likely to be met with unmitigated enthusiasm by the government. No bureaucrat—line assistants included—welcomes the thought of more paperwork, particularly a new reporting requirement without which they have managed quite nicely for years. Yet, realistically, the Department of Justice and the U.S. Attorney’s Offices are faced with a choice. Public opinion is almost universally against removing plea agreements from PACER and, for the moment, the Judicial Conference is not taking steps to do so, leaving the decision-making to the individual districts. While certain districts have taken steps to limit access to criminal court records,²⁹⁶ many more simply post all their files on PACER.²⁹⁷ If the Department wants to convince the courts to limit the information on PACER, proposing a good-faith alternative might help overcome public resistance. There are also several benefits to the government from such a requirement. Individual line assistants might be encouraged to think through their decisions more carefully. The awareness that their charging decisions

²⁹⁴ Depending on the district’s caseload, quarterly or yearly reporting might be appropriate.

²⁹⁵ Better information would help prosecutors “develop a self-image of independence and fairness that can be a guarantor of liberty. . . . A proper understanding of the power they wield, and its quasi-judicial nature, should facilitate this development.” Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2150 (1998).

²⁹⁶ See *supra* note 223.

²⁹⁷ See David L. Snyder, Note, *Nonparty Remote Electronic Access to Plea Agreements in the Second Circuit*, 35 *FORDHAM URB. L.J.* 1263, 1307 (2008) (listing 65 districts that make plea agreements available on PACER to the same extent that they are available at the courthouse).

will be made public, even if not directly attributable to them, might increase a sense of professionalism. It might also provide guidance to the well-meaning assistant who is unsure what to do. The decision whether to “sign up” a defendant to a cooperation agreement is not an easy one. Assistants frequently find themselves under pressure from agents who often want to sign up defendants in the shortest time possible and with the fewest proffers sessions.²⁹⁸ Substantial assistance motions can also be enthusiastic or grudging,²⁹⁹ and the choice between these extremes is often made with only cursory input from supervisors who might be distracted by their own cases. Awareness of how prosecutors in other offices make decisions in similar circumstances, or even having a better sense of how their colleagues in the same office operate, should encourage more thoughtful determinations.

The benefits to the public could also be considerable. Even with all the advances in technology, there has never been a systematic overview of what cooperation deals are made in particular types of cases, and how they compare to “straight” pleas in similar cases. Making this information available for study and debate would be an important step towards encouraging greater prosecutorial accountability, avoiding unfair results and arbitrariness, and bringing greater rationality to the process. As one of the members of the public wrote to the Judicial Conference, “Access to these agreements provides the American people with a window into a contract that is being made with a defendant on behalf of the American people.”³⁰⁰ Such a reporting requirement would provide everyone—courts, litigants, the public, the press, and scholars—with a much clearer view.

If we are to take seriously the promise of well-informed public debate on the justice system in general and the practice of cooperation in particular, we should be able to make the information about “what the government is up to” available in a way that does not conflict with law enforcement concerns and the privacy rights of the cooperators

²⁹⁸ Once the cooperator has been fully debriefed, agents often have little patience with Colombo-like assistants who schedule additional proffers just to probe every contradiction.

²⁹⁹ While in the Eastern District of New York, cooperators were only violated if they had clearly lied or committed another crime since signing the cooperation agreement, cooperators who had been economical with the truth early in the process or had committed other bad acts would usually receive a “warts and all” 5K letter, informing the judge of everything, good and bad, the cooperator had done of which the government was aware.

³⁰⁰ Private Citizen, Portland, Ore., (Sept. 13, 2007), in *Privacy Comments*, *supra* note 26, Comment 30.

themselves. The student editors in *Rose* were onto something—they wanted to conduct a study of the Air Force’s disciplinary proceedings without infringing on the privacy of the cadets or the integrity of the Air Force’s process. Their request for the case summaries without identifying personal information permitted them to achieve both goals. We can build something similar for plea information in the criminal justice system generally—we have the technology.

CONCLUSION

The grant of electronic access to criminal files in the federal courts is likely to disappoint those who hope it will usher in a new era of governmental accountability. Spurred by fears of retaliation against cooperating defendants and a consequent hampering of law enforcement efforts, prosecutors and courts will find ways of concealing the terms of cooperation bargains reached. Information that was at least somewhat helpful when it was practically obscure now risks being degraded beyond legibility once it is released over the Internet. One possible way to reverse this trend would be to limit access, in exchange for an organized reporting system that concealed only the names and other identifying information of the defendants involved. This would answer the serious privacy concerns raised by imperishable electronic records and give the public more insight into the nature of federal plea bargains.

The use of cooperating defendants, one of the most difficult law enforcement techniques to regulate, and possibly the most susceptible to arbitrary application, could then endeavor to become more transparent and more fair, both through self-policing by U.S. Attorneys and through public oversight.