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NACDL Comments on Privacy and Security Implications of Public Access to Certain Electronic Criminal Case File Documents

I. Introduction

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, non-profit, voluntary association of criminal defense lawyers founded in 1958 to improve the quality of representation of the accused and to advocate for the preservation of constitutional rights in criminal cases. NACDL has a membership of more than 12,800 attorneys and 92 state, local and international affiliate organizations with another 35,000 members including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. We welcome the opportunity to offer comment to the Judicial Conference's Committee on Court Administration and Case Management on the question of whether the policy should be changed to prohibit public Internet access through the Public Access to Court's Electronic Records (PACER) to plea agreements and other related documents in criminal case files.

On October 20, 2007, by unanimous resolution, NACDL's Board of Directors opposed the exclusion of plea agreements from the PACER system. NACDL now offers this commentary in support of its position. The paragraphs of the NACDL resolution are presented below in bold with accompanying commentary.

II. Since the founding of the Nation, the right to a public trial and the right of public access to court records have been conveyed to us by the Sixth and First Amendments as fundamental to popular self-government, to public awareness of government actions, and to the public scrutiny of the fairness of the criminal justice process.

The Committee on Court Administration and Case Management's request for comment rightly speaks of the deep roots of open access to public court records. The principle of public access to courts has roots dating from the Norman Conquest to Colonial America and into the halls of the Continental Congress in 1774. The right to a public trial and the right of access to court records of trials is guaranteed to us under both the Sixth Amendment and the First Amendment. These rights are so fundamental that they are universally protected by the states and are applicable to the states under the due process clause of the Fourteenth

Amendment. The federal courts have long respected the role that public access to court proceedings plays in the civil peace and polity of our Nation.

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. Whenever restraint of public access has been permitted, the restraint has always been counterbalanced by the presumption that only an absolutely persuasive showing of exceptional circumstances makes the restraint necessary for the preservation of another premier constitutional right. Such restraints have been judiciously framed in the most restrictive and specific contexts.

The established law recognizes the presumption that documents filed in a court proceeding are subject to public scrutiny. We can only judge their fairness and maintain respect for our judicial process to the degree that courts and their proceedings are subject to open public scrutiny. Neither precedent nor experience allows any calculator for the merits of the occasional special exception other than the sound judgment of a trial court weighing competing constitutional interests in a fact-based, case-by-case determination with specific findings. Conclusory findings have not been considered adequate to justify closure in individual cases, and surely should not suffice for what amounts to a categorical concealment of records from public view.

If policy changes result in the removal of plea bargains from PACER, members of the public and the Bar who have access to court records only through PACER -- because of economic, geographical or physical limitations -- will be deprived of knowledge of all those proceedings in which there was a public filing of a plea agreement, as well as to all plea agreements in cases in which a motion to seal was made and denied. Under such a restrictive condition, there could be no meaningful public opportunity for protest by anyone other than the litigants in any court proceeding in which the court seals, or refuses to seal, a plea agreement or related document. Not only would the court's rulings on such issues be erased from public view, but so, too, would all terms and conditions of all plea agreements, whether involving cooperation or not, be inaccessible to the general public on PACER.

This presumption of public access trumps any such categorical restriction on public access to plea agreements as is currently proposed and requires specific findings to be made in individual cases. The proposed blanket prohibition of all references to plea agreements in the PACER system turns this precedent on its head. The presumption of general public access to plea agreements becomes one of presumptive denial of general access. Amorphous and undocumented anxieties about the possible harm that public disclosure could bring in a few cases results in the absolute dismissal of all the people's right of access to an entire category of documents in all court proceedings on PACER.

Such a general prior restraint of publication of all plea agreements on PACER sacrifices the principle of public access in obeisance to unspecified and conjectural benefits for those who are particularly fearful of being in peril. And it protects those persons only to the slightest degree, by restricting access to one possible source of information about their cooperation with law enforcement only when such exposure might come about through the contents of the PACER system.

III. In this day of digital mass communication and public discourse, nothing less than court publication of trial and pre-trial documents on the PACER website meaningfully fulfills the right to a public trial and to public access to court proceedings.

The trend toward electronic court files is just as irreversible and as essential for an efficient and effective system of criminal justice as global Internet communications and the World Wide Web have become to our nation's economy, culture and government. The Justice Department's encouragement of the Courts to relegate the publication of court records to the sheet of paper documents stored in the

courthouse clerk's office is an anachronistic position as utterly out of step with history as it is with the modern times in which we live.

Public access has always meant access in the forum and in the media most broadly communicative of the message that is being published. Television, radio newspapers, and the printed word itself were all once freshly minted technologies for the dissemination of information to the public. No one has ever doubted, for example, that radio and television broadcasters are part of "the press" within the meaning of the First Amendment, even though no type is "pressed" onto paper in their operations. Nor should anyone doubt that stored computer files are "papers" within the meaning of the Fourth Amendment. In the same way, the fact that digital mass communication through the Internet has greatly extended the public audience and access to the public information to which we are entitled should not encourage restraint, but adoption, of this new medium of communication. When other branches of our government communicate information rightfully belonging to the public, they do not nail it to the door of the courthouse in the public square, as might have been done in 1791, they use the Internet. So do the courts. "Public access" is not defined by technology, but by the expectations of the public to receive knowledge of the state of their democracy and its courts in the media most familiar and accessible to them.

Today, public governance is synonymous with putting public information and public notice in the broadest possible bandwidth of mass communication, but there remains the carefully carved out exception of trial proceedings, where the interests of the fair trial are balanced against the right to broadcast a public trial beyond the courtroom. (This is not to say that NACDL would always strike that balance in the same way that the judiciary has done.) In this digital era, of high public expectations of accessibility to the broadest range of information, the fact that many court proceedings can only be witnessed by those present in court is a more compelling reason for the fullest publication of information through the Internet on PACER, because the social, political, and economic integration of our society through digital technologies has brought all Americans, and indeed, much of the world's population, into a technological commonwealth of 'vox populi', the people's voice.

The scope of the federal courts' criminal jurisdiction, the broad impact of criminal trials on the politics of the nation, and on the course of world events, dictate that the publications of its proceedings, judicial rulings and court documents extend to the fullest reach that modern technology affords. The principles seeking protection in public scrutiny are not to be defended only by those few who could be afforded access to court proceedings in a court room, or in a clerk's file, but defended by the many through the technologies of our time and those of the future. The difference between access to court records on PACER and in the courthouse is the difference between the speed of light and the quill.

IV. No unique capacity or consequence of this new communication medium justifies the suppression of the people's right to a transparent criminal justice process consistent with the constitutional guarantees afforded the accused and the general public.

Inherent in the proposal to bar court documents relating to plea agreements from the PACER system is the contention that the Internet is different, that its exponential expansion of the range of publication as compared to the printed page endows it with a more subversive and disruptive potential than the more familiar and traditional ways of archiving information. It is considered threatening to those who believe that secrecy is security, because it ensures that, to put it most simply, lots of people will 'get the word'- many, many more than will 'get' the printed page. And it is true that it is harder to keep whatever 'the word' might be from public awareness once it is on the Internet than it would be if stored in one place in a file folder.

There is also apprehension about what is convenient, accessing case information over the Internet as compared to what is tiresomely time consuming: accessing court records at the clerk's office in a courthouse. The thinking that ease of use abets crime relies upon the shaky assumption

that we only have to fear lazy criminals. There is also the equally quaint notion that the Internet is a place without accountability, unlike the court clerk's office, where one must sign in to obtain a file. Like most every commercial website charging money for services, PACER retains, for billing purposes, a record of every user identity that accesses every page of information contained within it and like most websites, automatically logs unique identifying information about the user's computer. From a criminal investigative point of view, law enforcement might well favor the latter over the former.

The Executive Office for the U.S. Attorneys' letter does not suggest that PACER itself and the many legitimate ways in which it is used put anyone at risk of retaliation, but rather that PACER should be compromised by selective exclusion in order to "lessen the degree to which federal court case file documents showing cooperation of witnesses appear on websites such as www.whosarat.com," ascribing to that website the "clear purpose" of "witness intimidation, retaliation and harassment." The contention is that the exclusion of all plea agreement content from PACER and the denial of all the legitimate benefits afforded the public and the Bar by having such documents on PACER are overwhelmed by the assumption that cooperating defendants will possibly be put at risk. The Justice Department's remedy of total exclusion also presumes every cooperating witness is at risk and every accused person who is not cooperating is a threat to those who are. Were that so, the number of cases of retaliation against cooperators would overwhelm the system. The truth is that such cases are rare.

The existence of one website should not be a catalyst for a change in federal judicial policy any more than occasional offensive and provocative speech should be a catalyst for abolishing the First Amendment. No one would reasonably propose the abolition of the murder mystery novel because the methods of murders and their concealment are explained in gruesome and meticulous detail. No one does so, because our laws and constitutional principles do not criminalize the ear that hears, or the eye that reads, but the hand that strikes. What attribute of the information itself, rather than the moral qualities of those who might misuse it, justifies the forfeit of the many virtues of total public access to plea agreements on PACER because there exists even the prospect of a malicious use of information within them? What court information on PACER, or countless other government websites, including the Justice Department's, could withstand imaginative speculation about every possible risk factor using that standard for compelling the removal of content from a website?

The Committee's own study found no evidence of criminal conduct resulting from the dissemination of information on PACER, although admittedly this was some years ago. The pilot project by the Federal Judicial Center found no significant reports of misuse of criminal case documents, nor any reports of harm resulting from the availability of these documents by means of public Internet access. We are not presented by any new threat deserving of drastic action merely because information is being distributed more broadly on the Internet through the PACER website. Motivation to commit a criminal act is not aroused by information alone and, once aroused, is hardly limited to the contents of PACER for its fulfillment. Until there is some statistically credible correlation between the increase in public access to plea agreement information as a result of their publication on PACER and an increase in crimes of retaliation directly attributable to persons accessing PACER, the proposition that PACER publication of plea agreements is a contributing factor in the incidence of retaliation against cooperating informants and defendants will remain only a theory about the Internet and criminal causality in search of its proof.

V. Because public access to court records is essential to the right to a public trial, to the criminal defense function and the most efficient administration of the courts, restraint must be exercised in the exclusion of case records from public access.

The impact of the removal of plea agreement content from PACER would have negative consequences for criminal defense attorneys seeking to fulfill their Sixth Amendment mission to afford effective counsel to the accused. Attorneys will not have the ability to compare terms of plea bargains

in similar cases or gain information to advise their clients as to what plea terms have been negotiated in like cases. Federal prosecutors, and to some extent Public Defender's offices, will still have knowledge of their offices' own general plea practices in similar cases and circumstances and assistant U.S. attorneys will have the national resources of the Justice Department in recognizing plea and cooperation trends among the U. S. Attorney's offices. The privately retained and court appointed defense counsel and their clients will be deprived of the invaluable contextual and comparative insight about the terms and conditions of all plea agreements of record in similar cases, not just in those plea agreements securing cooperation -- especially where the terms of cooperation, the prohibitions and conditions that a defense lawyer's client may be confronted with are critical to the performance of the defense function.

The benefits that knowledge of district wide practices and customs that are afforded federal prosecutors will be unavailable to retained and appointed counsel for the purpose of understanding patterns of plea agreements and other conditions and exceptions important to the scrutiny of the process and individual representation. The denial of PACER access and assistance in the analysis of existing trends and practices in plea negotiation increases defense costs and impairs the defense's evaluation of the case as a whole and the potential benefits to the client of accepting a plea offer and potential cooperation. It also gives tactical advantage to the federal prosecutors with alternative automated pathways to similar information.

Compelling counsel to seek plea agreements in courthouse case files also returns the unwelcome burden of pulling physical files to retrieve case documents to the clerks' offices who have been relieved of a considerable volume of labor by the accessibility of court documents through PACER. Accessing plea agreement information by personal visits to the courthouse or by phone calls to the clerk's office would waste many hours of time for lawyers and clerk personnel, the very inefficiency which motivated the establishment of PACER in the first place.

VI. Since the Justice Department's request cannot substantially realize its stated purpose of denying access to plea agreements to those intending harm to cooperators by extracting documents only from PACER, the prohibition is without sufficient justification in that it only encourages commercial access to court documents, but creates no diminished risk to informers and cooperating witnesses.

It is impossible to achieve the result sought by the Executive Office for the U.S. Attorney with the proposed ban on PACER plea agreement content because the bulk of the information published on websites like www.whosarat.com is not from court records, but from social networks of 'snitch activists' who provide information from personal knowledge, rumor, Internet research and attendance at court proceedings. Their motives are as diverse as the people who pay the website to read its contents¹ The narrow exclusion of plea bargains from PACER will handicap legal professionals far more than it will limit this online community's ability to share information about informants, officers and attorneys. Interest in this type of information did not begin and would not end with its inaccessibility on PACER. A sub-culture of resistance has developed around cooperation with police and prosecutors that won't be curtailed because cooperators' pleas aren't accessible on PACER.

Other Internet sources beyond the reach of Court's prohibition supply more information that would give notice of cooperation than does PACER. Westlaw has its Court Express service by which the user can search terms within all federal court electronic documents across multiple jurisdictions. Google, FaceBook and MySpace and all social networking websites could be used for the purpose of gaining information about or exposing cooperating individuals and informants. There are any number

¹ On one [whosarat.com](http://www.whosarat.com) message board, a posting concerned the author being attacked by the government with radiation from satellites in outer space.

of avenues on the Internet that can be employed to exchange information about cooperating defendants and police tipsters no differently than whosarat.com's message boards, without that website's minimum \$7.95 charge (and without the recording of a traceable credit card number).

The unverified assumption that removal of plea agreements from PACER would "lessen the degree" to which court documents appear on websites ignores the fact that web-based information, in and of itself, does not promote crimes of retaliation and the disappearance of plea agreements from PACER will not diminish the will of those who would commit such crimes to do so.

The motivated retaliator is not deterred because he unable to access a plea agreement on PACER. Jailhouse gossip and "word on the street" are far more likely sources of information for persons intending harm to a witness. The crime of retaliation isn't spawned at a keyboard, but in the vengeful survival instincts of criminals and criminal organizations who are both proximate to and knowledgeable about the individuals being tried, as well as those who are cooperating in their prosecution.

Typically, information about who is 'snitching' is obtained by far more primitive means, such as fellow detainees' paying attention to who was taken over to the courthouse and federal building and how frequently. It doesn't take Internet access for prisoners to communicate on jailhouse pipes or during recreational periods or to give or get word of a cooperator through a visitor. The essence of this Justice Department overture is that the emphasis is utterly misplaced on PACER's role in "outing" cooperators to the great detriment of those who use PACER for lawful purposes. The proposal under consideration does not seem to even know the difference between the baby and the bath water. If we truly seek a deterrent effect, broadly defined, overly general, content prohibitions applied to websites like PACER are far less effective than actions taken against the individuals who employ or communicate such information for unlawful purposes.

All that the Justice Department can hope to accomplish by restricting plea agreements from PACER but not from courthouse files is a choke point that will impede the lawful online user and simply inconvenience the motivated retaliator before he redirects his attention to other sources of the information he seeks. It would impose this hardship because its advocates accept as fact the irrational assumption that people who are close enough to the courthouse to go and request a court record are somehow less dangerous people than those who would want to review the same record on a computer through PACER.

This appeal for curtailing the content of PACER comes at a time when others seek the expansion of PACER's facility to assist attorneys and the general public with the publication of court transcripts. The expansion, not the restraint of PACER content and utility, is in the public interest. Once transcripts of proceedings, such as sentencing hearings, are available on PACER (as is already the case in certain districts), would the Executive Office's position then include the redaction of all cooperating defendants' testimony and cross-examinations?

Even if the Administrative Office of the Courts were to restrict plea agreements from PACER, the primary effect would be to enrich court record research contractors and document aggregators who would upload to their own databases whatever courthouse records are marketable for a price. The same content that would be barred from PACER would still become available through other websites, but at a higher cost per page.

VII. Restraint of select public court records, without a factual showing that the restraint would produce any results justifying the surrendering of a public right, sets a dangerous precedent because it encourages further undocumented justifications for restrictive policies and further erodes the public's right of access to court records.

The only factual showing bearing on the Committee on Court Administration and Case Management's decision is the Federal Judicial Center Pilot Project's own finding "that there were no significant reports of misuse of criminal case documents, nor were there any reports of harm stemming from the availability of these documents via public Internet access"² In the face of such contrary findings, the Executive Office of the U.S. Attorney's office pursues an objective that presumes consequences where there is no evidence of any. If we shift our decision making process away from one that rationally weighs only known costs against known benefits in a framework of commitment to constitutional standards, then a mere complaint becomes enough reason for restraint of public access, and once successful, that argument has a thousand uses. Once one accepts the premise that protection lies in concealment, that the best deterrence against a crime is ignorance of a fact, there is no limit to the prospective editorial purge of the electronic court documents that are available now, and others that likely will become accessible on PACER.

VIII. NACDL members who defend the accused in federal courts recognize that there are occasions when the legitimate interests of the defendant and the prosecution warrant the nondisclosure of the terms of plea agreements.

Criminal defense lawyers well understand that in their exercise of their professional and constitutional duties to their clients, occasions do arise when a defendant believes that cooperation with the prosecution is in his or her best interests. Whenever the defendant has reason to believe that such cooperation will result in an endangerment to themselves or to their families there is cause for concern. It is a fact of a life as a criminal defendant that there are conduits of information about cooperation that cannot be controlled. 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. The notation of a document being under seal typically reveals less than is accessible by other means than the PACER review of the court record.

More acknowledgment of risk factors in the drafting of plea agreements so as to exclude identity information might obviate the need to seal in the first instance. Addressing the security of the cooperating defendant, in those instances where there is a perceived risk, is a more discreet and less drastic method of protecting the individual client's needs than the global exclusion of all defendants' plea agreements from PACER.

IX. The proper forum for deciding whether to seal documents is the trial court, where a case-by-case determination can be made on the basis of specific findings, rather than general assumptions, in order to reach a proper balance between the right of public access, the rights of the accused, and public safety.

There has until now always been a general consensus that the trial court is best suited to determine whether to seal a court document based on the merits of the motion brought by a litigant. There has also been a consensus that the presumption is in favor of publication, absent very specific determinations that this public right is outweighed by the right to a fair trial. Preemptive exclusion from the public court record has not been the currency of our jurisprudence. Courts have proven more than capable in fashioning specific remedies when needs arose, and court policy makers have shown no lack of initiative in sponsoring particular omissions from the public record where the demonstrable potential for exploitation existed.

The Committee on Court Administration and Case Management's request for comment outlined several initiatives that are either in effect or will soon come into effect, such as the redaction

² Quoting the Committee's Request for Comment on page 2

of personal information from all case files now prescribed by the Supreme Court and the pending rule Fed. R. Crim. P. 49.1(e) that allow courts to seal documents or limit public Internet access on a case-by-case basis for good cause. These two practices significantly limit the risk of retaliation by addressing the exposure of personal information and the selective omission of court records from either or both the physical court file and the virtual files on PACER.

X. Conclusion

In September 2003, the Judicial Conference adopted a privacy policy for criminal case files that included providing the same level of public access to electronic case files as it has provided to paper case files. That policy should be jealously guarded as one well founded in good constitutional principle and good judicial policy. The NACDL believes that better deterrents exist to address concerns about retaliation against cooperating defendants than indulging overly reactive proposals that stymie the legitimate uses and expansion of the PACER system, preempt the public's right of broadest available access, and offer such a small benefit to the administration of justice and law enforcement that is vastly disproportional to their own negative consequences. Our judicial system is capable of addressing the problems presented by Internet access without extreme measures. The Committee on Court Administration and Case Management should reject the Executive Offices of the U.S. Attorney's proposal and continue to include plea agreements not under seal on the PACER system.