



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

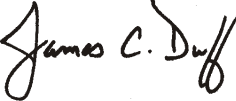
THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

March 20, 2008

MEMORANDUM

To: Chief Judges, United States Courts of Appeals
Judges, United States District Courts
United States Magistrate Judges

From: James C. Duff 

RE: PUBLIC INTERNET ACCESS TO PLEA AGREEMENTS
(ACTION REQUESTED)

For the past year, the Judicial Conference Committee on Court Administration and Case Management (CACM), in conjunction with the Committee on Criminal Law, has been considering the implications of websites such as www.whosarat.com, whose purpose is to identify undercover officers, informants, and defendants who provide information to law enforcement. A small number of the posted documents on this website are from federal criminal case files, some of which were scanned from clerks' offices' paper copies, while others were electronic documents retrieved from the Judiciary's Public Access to Court Electronic Records (PACER) system.

In November 2006, the chairs of the CACM and Criminal Law Committees sent a memorandum to all district court judges, requesting that they "consider sealing documents or hearing transcripts in accordance with applicable law in cases that involve sensitive information or in cases in which incorrect inferences may be made." The two chairs also wrote a letter to the Department of Justice, asking for its comment on the Conference's privacy policy as it pertains to Internet access to criminal case files. In December 2006, the Department provided its response, requesting changes to the policy. Among other things, it suggested a uniform policy of eliminating public Internet access through PACER to all plea agreements.

After reviewing the Department's comments, the CACM Committee decided to solicit public comment on the suggestion to remove plea agreements from PACER. A request for public comment was published in the *Federal Register* in September 2007 and

sent to all courts, as well as to other interested groups.¹ The comment period was open for six weeks, and during that time 68 comments were submitted.² While some comments came from within the Judiciary, many more were from private citizens and attorneys. The comments, by a margin of four-to-one, overwhelmingly favored retaining public Internet access to plea agreements.

At its meeting in December 2007, the Committee discussed the proposal and the public comments received. The Committee noted, as a preliminary point, that there was no evidence that anyone had been harmed as a result of the disclosure of information from a federal court case file. It also reasoned that the Department of Justice proposal would be an inadequate solution to the perceived problem, in that it would prohibit public Internet access to all plea agreements, most of which do not disclose cooperation, while simultaneously leaving all plea agreements (including those that contain cooperation information) available to the public in clerks' offices. Additionally, the Committee noted that several districts have developed solutions that work locally but – given the variations in circuit case law – would not be appropriate as national policy. For these reasons, the Committee declined to endorse the Department of Justice proposal.

Therefore, instead of recommending that the Conference adopt a national policy, the Committee is asking each court to consider adopting a local policy that protects information about cooperation in law enforcement activities but that also recognizes the need to preserve legitimate public access to court files.³

To this end, your court might want to consider the following suggestions received by the Committee during the public comment period:

- Ask the parties to convey cooperation information to the judge in a document other than the plea agreement, which could be held outside of the clerk's office's case file. For example, this process could include a government exhibit at the plea hearing (returned to counsel at the end of the hearing), as a letter in the judge's chambers file or in the probation officer's

¹ To ensure that the appropriate persons were aware of the comment period, the request was posted on www.uscourts.gov, mailed to public interest organizations involved in privacy issues, and e-mailed to every district judge, magistrate judge, clerk of court, and appellate court chief judge.

² The comments are posted at <http://www.privacy.uscourts.gov/2007comments.htm>

³ The Committee emphasized that many of the comments received expressed appreciation for the high levels of electronic access the Judiciary provides to its case files, and how such access has strengthened their understanding of and appreciation for the judicial process.

file. The cooperation document could be filed and included in the clerk's office file at a time when the fact of cooperation is no longer a sensitive matter in the case or never filed.

- Seal plea agreements, consistent with circuit case law – keeping in mind that having a sealed entry on the docket sheet near the plea agreement may indicate cooperation.
- Enter a court order restricting Internet access to the plea agreement to the parties on a case-by-case basis.
- Order the parties to perform additional redaction, under Fed. R. Crim. 49.1(e)(1) to remove information regarding cooperation from the publicly available version of the plea agreement, with the unredacted plea agreement being filed under seal.
- Restructure the court's practices to make each case appear identically on PACER. For example, in the District of North Dakota, this was accomplished by filing all plea agreements as public [unsealed] documents, sanitized by the drafter of any references to cooperation. All pleas are accompanied by a sealed document, "plea supplement." The sealed plea supplement contains either a cooperation agreement or a statement that no agreement exists. To the public, every plea in that court will be displayed in identical form: a plea agreement devoid of any cooperation language and a sealed plea supplement.
- Delay the publication of any plea agreement that includes cooperation information, perhaps until after sentencing.

For more information on these suggestions, please contact Susan Del Monte of the Court Administration Policy Staff at (202) 502-1560 or via email at Susan.Del.Monte/DCA/AO/USCOURTS, who, as a member of the staff to the CACM Committee, will be gathering local court policies and information about how courts are handling the issue. The CACM Committee plans to monitor the development of local court policies and may revisit this issue in the future to determine if there is a need for a national policy.

cc: Federal Public/Community Defenders
District Court Executives
Clerks, United States District Courts
Chief Probation Officers
Chief Pretrial Services Officers