# CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

## PANEL FIVE: COOPERATION AND PLEA AGREEMENTS—JUDGES' ROUNDTABLE

MODERATOR

*Hon. Steven Merryday**

PANELISTS

*Hon. Raymond Dearie*[1]

*Hon. Loretta Preska*[2]

*Hon. K. Michael Moore*[3]

*Hon. Henry T. Wingate*[4]

*Hon. Michael Baylson*[5]

*Hon. Stefan Underhill*[6]

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 letters[7] in particular. There has developed a practice, I think, in part because of some of the types

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7. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).

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 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*[8] 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.[9]

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,

8. 396 F.3d 189 (2d Cir. 2005).
9. *See id.* at 199–200.

Whosarat.com,[10] 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.

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."[11]

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.[12] 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.

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10. WHO'S A RAT—LARGEST ONLINE DATABASE OF INFORMANTS AND AGENTS, http://www.whosarat.com (last visited Sept. 23, 2010).

11. Adam Liptak, *Web Sites Expose Informants, and Justice Dept. Raises Flag*, N.Y. TIMES, May 22, 2007, at A1.

12. *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)).

Thus, in almost all instances, the public will know why, for example, Sammy the Bull[13] got five years after admitting to nineteen murders. The public just might not know it on the day the individual pleads.

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,[14] 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

13. United States v. Gotti, 171 F.R.D. 19 (E.D.N.Y. 1997).
14. S.D.N.Y. R. 39.1.

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 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.[15]

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

15. *See supra* note 4.

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 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.[16]

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

16. N.D. MISS. & S.D. MISS. L.U. CIV. R., *available at* http://www.msnd.uscourts.gov/FINAL%20CIVIL%20RULES%20w%20amendment%20.pdf.

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.

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.[17] 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 35[18] or Section 5K1.1 of the United States Sentencing Guidelines[19] or 18 U.S.C. Section 3553(e)[20] 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.

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17. D. N.D., Plea Agreements & Plea Agreement Supplements (2007), *available at* http://www.ndd.uscourts.gov/pdf/Plea_Agreements.pdf.

18. FED. R. CRIM. P. 35.

19. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).

20. 18 U.S.C. § 3553(e) (2006).

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 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 motion[21]—and in the sentencing guidelines the word "motion" is used—was, under the pre-*Booker*[22] regime, a necessary motion for a judge to depart downward from the guidelines. Post-*Booker*, I 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

21. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).
22. United States v. Booker, 543 U.S. 220 (2005).

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*,[23] 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.[24]

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*,[25] in which the Second Circuit set forth four steps for closing a court,[26] that is essentially what our

23. 396 F.3d 189 (2d Cir. 2005).
24. *Id.*
25. 63 F.3d 121 (2d Cir. 1995).
26. *See id.* at 128.

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.

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,[27] 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.

27. FED. R. CRIM. P. 11(c).