CONFERENCE ON PRIVACY AND INTERNET ACCESS TO COURT FILES

PANEL SIX: TRANSCRIPTS (INCLUDING VOIR DIRE TRANSCRIPTS)

MODERATOR

*Hon. John Koeltl**

PANELISTS

Hon. Gary Lancaster[1]

Hon. Randolph Treece[2]

Victor Kovner[3]

Nora Dannehy[4]

Ben Campbell[5]

Lori McCarthy[6]

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.[7] 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

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7. *See* PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, http://www.pacer.gov (last visited Sept. 23, 2010).

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?
- 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.[8] 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.

8. W.D. PA. LCVR 5.2(D) (also listing dates of birth and financial account numbers).

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 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.[9] We have 28 U.S.C. Section 1867,[10] which discusses certain nondisclosures. We relied significantly upon the guide of judicial policies and procedure,[11] 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),[12] we go a little further than the Federal Rules of Criminal Procedure 49.1,[13] 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.[14] Then, in our General Order 24, section 12,[15] 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;

9. FED. R. CRIM. P. 49.1.

10. 28 U.S.C. § 1867(f) (2006).

11. 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.

12. N.D.N.Y. L.R. 47.2(e).

13. FED. R. CIV. P. 49.1.

14. N.D.N.Y. GEN. ORDER 22, § 11.2 (2010).

15. N.D.N.Y. GEN. ORDER 24, § XII (2009).

- 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
- 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.[16] .

In the case of *United States v. Bruno*,[17] Judge Gary Sharpe conducted a dual-stage prescreening of jurors. First, there was the normal screening—the seven questions—that goes to the clerk.[18] 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.[19]

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

16. 28 U.S.C. § 1867(f) (2006).
17. 700 F. Supp. 2d 175 (N.D.N.Y. 2010).
18. *See id.* at 178.
19. *See id.* at 178–79.

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.[20] They were not judicial 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.[21] He also referred to our local rules and general orders.[22]

Next, he discussed the general content of those questionnaires. He found that the answers to the questionnaires had extraordinarily sensitive information.[23] 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].[24] He also found that there were present countervailing factors regarding the public's common law access to the questionnaires.[25]

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.[26]

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

20. *Id.* at 184.
21. *See id.* at 180.
22. *See id.* at 180, 183.
23. *Id.* at 185.
24. *Id.*
25. *Id.*
26. *Id.* at 184.

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.[27] 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 disclosure, but the district court chose thereafter to bar the media from attending voir dire while providing subsequent release of voir dire transcripts.[28] 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.[29] It cited the cases that would hold that documentary access is not a substitute for concurrent access,[30] 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.[31] 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.[32]

Only two months later, in the state Supreme Court, we had *People v. Kozlowski*,[33] 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.

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27. United States v. Stewart, 317 F. Supp. 2d 426 (S.D.N.Y. 2004).
28. United States v. Stewart, No. 03 Cr. 717, 2004 WL 65159 (S.D.N.Y. Jan. 15, 2004).
29. ABC, Inc. v. Stewart, 360 F.3d 90 (2d Cir. 2004).
30. *Id.* at 99–100.
31. *Id.* at 100–01.
32. *Id.* at 99.
33. 898 N.E.2d 891 (N.Y. 2008).

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*[34]—Frank Quattrone, a senior executive at Credit Suisse. After 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.[35] 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.[36] That opinion asked the court to consider other methods to mitigate unrestricted publicity.[37]

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 tittle 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 *Kozslowski*, 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.[38] 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

34. 277 F. Supp. 2d 278 (S.D.N.Y. 2003).

35. *See* United States v. Quattrone, 402 F.3d 304, 307 (2d Cir. 2005) (mentioning district court's order).

36. *Id.* at 312.

37. *Id.* at 311.

38. 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).

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 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 49.1[39] on the criminal side and 5.2[40] 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

39. FED. R. CRIM. P. 49.1.
40. FED. R. CIV. P. 5.2.

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*[41] challenge or some appeals issue that we need," to, "We order 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

41. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986).

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.[42]

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—and 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.

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42. 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.

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"?

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.