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Administrative Office of the Courts
Court Administration Policy Staff
Attn: Privacy Comments
Suite 4-560
One Columbus Circle NE
Washington, DC 20544

RE: Electronic Public Access to Plea Agreements

Dear Judge Tunheim and Committee Members:

I write in support of continued public electronic access to all non-sealed aspects of criminal case files, including plea agreements.¹ I serve as the Federal Public Defender for the district of Maine. I spent twenty years in private practice defending criminal cases in both state and federal court. I have been using PACER for the past 10 years.

I have and continue to represent individuals who are cooperating with the government and others who are going to trial. When my clients choose to cooperate, I personally attend all proffers, and meetings the clients have with the government. I am aware of the fear and safety concerns held by some of my clients who cooperate. In 20 years, I have not had a client physically assaulted based on cooperation. Some clients have been threatened both verbally and in writing. I am unaware of any threats since the use of ECF (or PACER) which were related to dissemination of information electronically. In the past three years, I have experienced threats to a few cooperating clients while being held pre-trial, and in each situation, the basis for the threats came from paper discovery received, often in a state case.²

¹ These are my views. I do not speak for any institution, government agency or for the Defender Services program.

² Several non-cooperating clients have also been threatened pre-trial, due to both unfounded suspicion of cooperation, and for offense related conduct, for example in child sex offense cases.

A few clients have suffered property damage; a set of slashed tires and broken car windows are two specific events I recall from two different cases. Both occurred before the advent of ECF. I am unaware of any threats or harm that has occurred in the district of Maine since the advent of ECF and the PACER availability of pleadings, including plea agreements.

Full on-line electronic access to pleadings, including plea agreements has served as a very valuable tool in our representation of clients. I am now able to regularly check on the status of cases, both ours and those of others in the District. When I am on the phone with a client who calls from a jail, I can quickly go on-line and report back the case status of codefendants in a multi-defendant case. When preparing pleadings, updating our calendar regarding anticipated trial dates, and preparing, I can view the docket in close to “real time.” The cost savings is considerable. We no longer need to send someone to the clerk’s office to obtain photocopies of docket items nor do the clerks need to locate such items and copy them for us. We rarely need to have items attested by the clerk as the ECF identifiers normally validate authenticity.

Finally, I suggest the Department of Justice can avoid most of their concerns by using Cooperation Agreements that are separate from Plea Agreements³. In my view, there is an overuse of “Plea and Cooperation” Agreements. In many cases, there is no reason the cooperation aspect need be included as part of a plea agreement. The documents serve different purposes and hold different relationships with the court. Plea Agreements are an aspect of Rule 11 and are addressed by the rule. A plea agreement is filed on the docket and must be disclosed to the judge, generally in open court. Fed. R. Crim. P. 11(c)(2). The court has discretion to accept or reject a plea agreement despite the fact that a plea agreement is legally viewed as a contract between the government and the defendant. Cooperation Agreements are not mentioned in Rule 11. A Cooperation Agreement may be entered after a client has pled or convicted at trial. It outlines the terms of a client’s cooperation, not the terms of a guilty plea. A Cooperation Agreement may address sentencing or a “substantial assistance departure” but need not. A Cooperation Agreement may or may not need to be disclosed to the judge, depending in part on the terms of the agreement. A cooperation agreement need not be filed nor made part of the docket, obviating any need to seal, or any concern of electronic dissemination.

³ Cooperation agreements are legally analogous to plea agreements, see generally *United States v. Brown*, 801 F.2d 352, 354 (8th Cir. 1986); *United States v. Ramsey*, 2007 U.S. Dist. LEXIS 65210, docket # 06-CR-226, (D.N.Y. 2007) (the *Ramsey* plea agreement is available on PACER (docket entry 229, the cooperation agreement and pleadings related to it are sealed.)

In conclusion, the current system is working. All documents not under seal should remain available electronically through PACER. In those situations where the parties have a specific concern about an aspect of a plea agreement they should move to seal, and once granted, sealed documents should not be available electronically.

Sincerely,

/s/ David Beneman

David Beneman
Federal Defender, District of Maine