

**ELECTRONIC CASE FILING: BALANCING PUBLIC ACCESS WITH THE  
NEED TO PROTECT THE INTEGRITY OF INVESTIGATIONS  
AND THE SAFETY OF WITNESSES**

~ Edward Kang and James I. Glasser\*

The advent of Electronic Case Filing ("ECF") in federal criminal cases is a double-edged sword.<sup>1</sup> On the one hand, ECF has dramatically increased access to court documents and allows interested parties as well as the public to obtain information about a pending case in an efficient and expeditious manner. On the other hand, ECF, which is available to any person with access to the Internet, facilitates the widespread dissemination of information that may pose a risk of harm or that may jeopardize ongoing law enforcement investigations.

ECF systems are now in use in 98 percent of federal courts, including 92 district courts. Almost 29 million cases are on ECF systems. Attorneys practicing in courts offering electronic filing capability are able to file documents directly with the court over the Internet. The ECF system uses standard computer hardware, an Internet connection, and a browser, and accepts documents in portable document format ("PDF"). Filers using ECF prepare a document using conventional word processing software, then save it as a PDF file. After logging onto the court's web-

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## ELECTRONIC CASE FILING: BALANCING PUBLIC ACCESS WITH THE NEED TO PROTECT THE INTEGRITY OF INVESTIGATIONS AND THE SAFETY OF WITNESSES (CONT'D)

site with a court-issued password, the filer enters basic information relating to the case and document being filed, attaches the document, and submits it to the court. A notice verifying court receipt of the filing is generated automatically. Other parties in the case then automatically receive e-mail notification of the filing.

Through an electronic public access service called the Public Access to Court Electronic Records ("PACER"), ECF allows the public to access and print

case information including docket sheets, notices of proceedings, case filings, listings of parties, and court orders. Once registered, a PACER user has immediate access to all documents made available by federal courts through ECF. There are no restrictions on who may register for access to PACER, and registration is free. PACER charges \$0.08 per page accessed or printed. In contrast, to obtain a paper copy from the Clerk's Office, a person must travel to the courthouse and pay \$0.50 per page. Furthermore, an individual may file a motion with the court to obtain free access to PACER. Once printed, documents obtained from PACER may be reproduced without permission. Consequently, the ECF system, coupled with PACER, significantly facilitates access to documents filed in federal courts.

Federal courts have traditionally sought to balance the public's right of access to criminal proceedings with the right of parties and other individuals to be free

from the harms associated with the dissemination of sensitive materials. To that end, numerous decisions have defined the contours of when, and under what circumstances, criminal proceedings and/or case-related court filings may be closed to the public. Significantly, the developed law on this issue pre-dates the advent of ECF and its concomitant complications.

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This article will discuss the competing interests of public access to criminal proceedings and the need to protect individuals and ongoing investigations through the closure of certain proceedings or documents. The law in the various circuits on this issue is predominantly uniform.<sup>2</sup> This article will focus on decisions from the Second Circuit addressing closed proceedings and sealed documents as an illustrative example, and explore shortcomings, given the advent of ECF.

### Right of Public Access to Criminal Proceedings

"The tradition of the public trial has roots deep in English history, originating in the Anglo-Saxon moots."<sup>3</sup> Chief Justice Warren Burger, writing for the plurality in *Richmond Newspapers, Inc. v. Virginia*,<sup>4</sup> traced the history of the modern public trial, from the days of the moot courts before the Norman Conquest in England, to the use of public trials in colonial America, to the approval of public trials by the First Continental Congress in 1774. Justice Berger wrote that the openness of public trials "gave assurance that the proceedings

were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."<sup>5</sup>

The Second Circuit has noted that "[b]eyond enhancing the fairness of the trial itself, openness has broader value in the general administration of justice."<sup>6</sup> "[T]he sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known, thereby contributing to the public's perception of fairness in the criminal justice system and 'heightening public respect for the judicial process.'"<sup>7</sup> Additionally, "[f]ree access of the press and public to criminal proceedings informs the populace of the workings of government and fosters more robust democratic debate."<sup>8</sup> Lastly, "open trials serve a therapeutic function for the community, providing an outlet for public outrage at crimes and 'vindicat[ing] the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.'"<sup>9</sup>

Thus, not only does a criminal defendant have a right to a public trial firmly rooted in the Sixth Amendment, but the public also has a First Amendment right to attend criminal trials.<sup>10</sup> Importantly, while the Supreme Court has held that the public's right to be present at court proceedings is rooted in the First Amendment, it has expressly held that the public's right to open proceedings is not founded in the Sixth Amendment.<sup>11</sup> Sixth Amendment rights are personal rights to be exercised by a criminal defendant and cannot be invoked by a surrogate. As discussed below, when there is tension between these competing rights, the Sixth Amendment rights of a defendant are paramount.

The Supreme Court has held that the public's right of access to criminal proceedings extends beyond simply the trial phase of a criminal prosecution. For

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example, in *Press-Enterprise Co. v. Superior Court*,<sup>12</sup> (“*Press-Enterprise I*”), the Court held that the public has a right to observe the examination of jurors during voir dire.<sup>13</sup> Two years after *Press-Enterprise I*, the Supreme Court held that the right of access extends to a preliminary hearing in a criminal case.<sup>14</sup> The Second Circuit has further extended the presumption of openness to pretrial suppression hearings,<sup>15</sup> plea hearings,<sup>16</sup> and sentencing hearings.<sup>17</sup>

Furthermore, the Second Circuit has held that the public’s right of access attaches to written documents that are submitted in connection with judicial proceedings that themselves implicate the right of access.<sup>18</sup> A presumption of openness has even been extended to court docket sheets.<sup>19</sup>

### Sixth Amendment Rights and Qualified First Amendment Rights

Notwithstanding the need for public access to criminal proceedings and documents, both the Supreme Court and the Second Circuit have held that the public’s First Amendment right of access to criminal proceedings is not completely unfettered.<sup>20</sup> In *Press-Enterprise Co. v. Superior Court*,<sup>21</sup> (“*Press-Enterprise II*”), Chief Justice Burger, writing for the majority, noted that “[a]lthough many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly.”<sup>22</sup> Therefore, the Court held that the presumption of openness “may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>23</sup> The *Press-Enterprise II* Court held that one such “overriding interest” is the right of the accused to a fair trial, provided there is a substantial probability that the defendant’s fair trial right will be prejudiced by publicity and that reasonable alternatives to closure cannot adequately protect that

right. For example, in *Globe Newspaper Co. v. Superior Court for Norfolk County*,<sup>24</sup> the Supreme Court held that the need to safeguard the physical and psychological well-being of a minor, although insufficient to justify a mandatory closure rule, was compelling enough to warrant closure under appropriate circumstances.<sup>25</sup> In *United States v. Doe*,<sup>26</sup> the Second Circuit surveyed interests compelling enough to justify closure, including: the defendant’s right to a fair trial; privacy interests of the defendant, victims, or other persons; the integrity of significant government activities entitled to confidentiality, such as ongoing undercover investigations or detection devices; and danger to persons or property.<sup>27</sup>

### Procedure Governing Closure of Proceedings

The Second Circuit’s procedure relating to the closure of proceedings was set forth in *United States v. Haller*,<sup>28</sup> and again most recently in *United States v. Alcantara*.<sup>29</sup> In *Alcantara*, the court considered whether it was appropriate for a district judge to conduct a plea proceeding and a sentencing proceeding in a private robing room with no public access, where no motion to close the proceedings had been filed and no public notice of the closed proceeding had been provided in the docket. The appellate court concluded that the public has a First Amendment right to attend plea and sentencing proceedings, “[h]olding these significant criminal proceedings behind closed doors – without notice to the public or any statement of reasons for the closure – is inconsistent with our open system of justice.”<sup>30</sup>

The *Alcantara* court concluded that before closing a proceeding to which a qualified First Amendment right of access attaches, “a district court must make specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>31</sup> Conclusory findings are not sufficient to justify clo-

sure.<sup>32</sup> The court reasoned that specific findings are necessary “[s]ince by its nature the right of public access is shared broadly by those not parties to the litigation, vindication of that right requires some meaningful opportunity for protest by persons other than the initial litigants, some or all of whom may prefer closure.”<sup>33</sup> Specific findings are, of course, also required to facilitate appellate review.<sup>34</sup>

The *Alcantara* court further noted that a motion for courtroom closure must be docketed in the public docket.<sup>35</sup> That motion, however, may be filed under seal, where appropriate, but the publicly maintained docket entries should reflect the fact that the motion was filed, the fact that the motion and any supporting or opposing papers were filed under seal, the time and place of any hearing on the motion, the occurrence of such hearing, the disposition of the motion, and the fact of courtroom closure, whether ordered upon motion of a party or by the Court *sua sponte*.<sup>36</sup> This type of general public notice is provided to “afford an adequate opportunity for challenge to courtroom closure.”<sup>37</sup> A similar procedure applies to sealing of documents.<sup>38</sup>

### Competing Interests of Public Trial and Compelling Reasons for Closure

A primary goal of ECF and PACER is to increase public access to court documents and, with the widespread use of the Internet, that goal has largely been accomplished. The ease with which court documents can now be accessed furthers the laudable goals noted in *Richmond Newspapers*: to give “assurance that the proceedings were conducted fairly to all concerned, and [to] discourage[] perjury, the misconduct of participants, and decisions based on secret bias or partiality.”<sup>39</sup> The impact of ECF and PACER, however, has been much more far-reaching. With broader and easier access to court documents and records comes greater concern and risk that safety of witnesses and victims will be jeopardized and ongoing criminal investigations compromised.

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Conclusory findings are not sufficient to justify closure.

Take, as an example, a multi-defendant federal narcotics investigation, for which evidence was gathered, *inter alia*, through the use of court-authorized wiretap surveillance. At the conclusion of such an investigation, it is not unusual to develop and use cooperating witnesses, both to corroborate evidence obtained during the investigation, and to develop cases against others. In either context, it is essential that the cooperator's identity remain confidential, both to ensure that the cooperator does not become a target for revenge, and to prevent compromising an ongoing investigation by "tipping off" the targets of the investigation.

**A motion for closure in connection with a defendant's guilty plea hearing publicly telegraphs that the defendant is cooperating with the government.**

In this context, frequently, the cooperator will execute a written cooperation agreement and contemporaneously plead guilty to one or more offenses. At the time that the cooperating defendant's guilty plea is entered, the district judge will also canvass<sup>40</sup> him about the cooperation agreement, to ensure that the cooperator is precisely aware of the terms of the agreement. Although district judges have varying practices concerning how and where the canvass is conducted, some judges choose to conduct the portion of the canvass that addresses the terms of the cooperation agreement only *in camera* and to seal the corresponding transcript. The necessity for having this limited portion of the otherwise public proceeding conducted *in camera* are critical for the reasons discussed above.

Under *Alcantara*, a motion to close the courtroom and to seal the portions of the transcript relating to the plea canvass on the cooperation agreement must be made and docketed on the public docket.<sup>41</sup> Moreover, that motion may itself be filed under seal, by leave of court, but the public docket is required to reflect the fact that the motion was filed, the fact that the motion and any supporting or opposing papers were filed under seal, the time and place of any hearing on the motion, the occurrence of such hearing, the dis-

position of the motion, and the fact of courtroom closure, whether ordered upon motion of a party or by the Court *sua sponte*.<sup>42</sup> Moreover, all of this is to be done in advance of the anticipated sealed proceeding to allow the public "an adequate opportunity for challenge to courtroom closure."<sup>43</sup>

The advance notice provision was developed to balance the need, in certain circumstances, to close courtrooms with the public's interest in attending criminal proceedings. However, the practical reality is that there is rarely a reason to file a motion to close a courtroom in connection with a defendant's guilty plea other than to canvass a defendant on a cooperation agreement. Consequently, a motion for

closure in connection with a defendant's guilty plea hearing publicly telegraphs that the defendant is cooperating with the government. This *de facto* disclosure of the identity of cooperating defendants multiplies the risk of danger and of compromising ongoing investigations.

In the pre-ECF era, the concerns associated with public docketing and advance notice of motions for closure were far less pronounced. An interested person would have to travel to the clerk's office in the federal courthouse, know precisely which defendant's file to examine, sign a record that they had accessed the court's file, and then determine whether a motion for closure had been filed in connection with that defendant's scheduled guilty plea hearing. This was labor-intensive and left a paper trail thus making it more cumbersome and difficult for a confederate or other with criminal design to discover a defendant's status as a cooperator.

With ECF/PACER, however, it is practically effortless to discover whether a motion for closure has been filed in connection with a defendant's guilty plea hearing. ECF/PACER allows the public docket for any unsealed criminal case to be viewed on a computer screen and printed out with a few clicks of the mouse.

Depending on the nature of the case, this access to information may place cooperators (and their families) at serious risk for acts of violence, either as retribution or to "silence" those cooperators before they are able to testify at trial. These acts of violence can also have serious collateral consequences, as it will become more difficult for law enforcement officers to convince cooperating witnesses to come forward in future investigations.<sup>44</sup>

Indeed, a website called [www.whosarat.com](http://www.whosarat.com), publishes the names of cooperating defendants (referred to as "rats"), which are gathered from information contained in publicly docketed materials available on ECF/PACER. There is a burgeoning concern that the information contained on this website is being used for the purpose of intimidating, harassing, or retaliating against cooperating individuals. This website has fueled much debate as to what limits should be drawn on access to court documents and appears to have played a role in the Southern District of Florida's decision, in October 2006, to remove all plea agreements from ECF/PACER, as well as the Eastern District of Pennsylvania's decision, in July 2007, to restrict ECF/PACER access to sentencing and plea documents in all criminal cases. These developments underscore the need for closure motions and sealed documents to be handled with greater care in the ECF/PACER era.

The Second Circuit, apparently recognizing the potential dangers associated with the public notice requirement, stated in *In re Herald* that:

We do not foreclose a trial judge, in unusual circumstances, from ordering that docketing of closure proceedings be delayed for some brief interval, provided that the interval ends upon a specified date or the occurrence, within

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a reasonable time, of a specified event and that the judge's reasons for delaying docketing of the closure proceedings are set forth, under seal if appropriate, for eventual appellate scrutiny.<sup>45</sup>

Although this language indicates that the Second Circuit may be willing to allow a delay in the docketing of motions for closure, it is not sufficiently flexible to address the concerns raised in this article. *In re Herald's* language permits delay in docketing only in "unusual circumstances," allows the delay to last only for a "brief interval," and requires an articulation of a specified date or event upon which the need to delay docketing would terminate. It is a very real possibility that a district court may find that these strict requirements have not been satisfied in the context of canvassing a cooperating witness. For example, a district court may find that canvassing a cooperator on a cooperation agreement is not a circumstance sufficiently "unusual" to warrant courtroom closure. Moreover, given that the need to protect the safety of witnesses and the integrity of ongoing investigations may extend for a long duration, a district court, applying *In re Herald*, may deny a request to delay docketing on grounds that it is not for a "brief interval" or that there is not a sufficiently specific date or event upon which the need to delay docketing would terminate. For these reasons, the current law pertaining to delay in docketing fails to adequately address the concerns addressed in this article.

Finally, the Victim and Witness Protection Act,<sup>46</sup> and the Attorney General's Guidelines pertaining to implementation and enforcement of those rights, must also be considered. For example, the Attorney General's Guidelines require prosecutors to consider the security of witnesses in every case, to advise the court of potential threats and risks to witnesses, and to devise a reasonable plan to promote the safety of witnesses.<sup>47</sup> Under these Guidelines, it is incumbent upon prosecutors to alert the

court and take reasonable steps to protect the security of witnesses. For the reasons discussed in this article, ECF/PACER, coupled with present law requiring public docketing of motions for closure, will likely jeopardize the safety of cooperating witnesses and, in so doing, conflict with the prosecutors' duty to ensure the safety of all government witnesses.<sup>48</sup>

### Conclusion

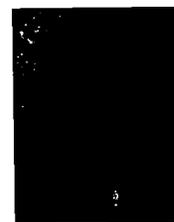
The qualified First Amendment right of access to criminal proceedings must be considered in view of advances in technology where a document filed with a court, or even a notation in a docket sheet, can be transmitted across the globe at the speed of light. ECF/PACER has altered the landscape on information access and has facilitated the public's ability to obtain sensitive information concerning cooperating defendants, witnesses, or applications for warrants pertaining to ongoing investigations. The ease with which the public can now access such information will, ineluctably, lead to greater threat of harm to the safety of witnesses and their families, as well as the integrity of ongoing government investigations. As technology has evolved, so too must the law.

The authors submit that public access to court proceedings is a central and vital characteristic of our criminal justice system. That system will not be undermined, however, if courts have authority to allow a finite universe of documents to be filed under seal, without public notice, where those filings are narrowly tailored and promote an overriding government interest. Illustrative examples of such overriding interests can already be found in the United States Code. For example, 18 U.S.C. § 2518(8)(b) authorizes district judges to allow federal wiretap applications to remain confidential and to be maintained outside the public clerk's files. Similarly, the Federal Rules of Criminal Procedure make allowance for the protection of information that "if disclosed,

might result in physical or other harm to the defendant or others."<sup>49</sup> Similar treatment is appropriate for documents or proceedings that multiply the risk of harm to witnesses or jeopardize important ongoing investigations. In this fashion, the qualified First Amendment right of access and its pellucid effects on the criminal justice system described by Chief Justice Burger are respected, while overriding government interests and obligations such as protection of witnesses and ongoing investigations are honored. ☞

The ease with which the public can now access such information will, ineluctably, lead to greater threat of harm to the safety of witnesses and their families.

*The views expressed in this article are those of the authors, and are not those of the United States Department of Justice.*



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