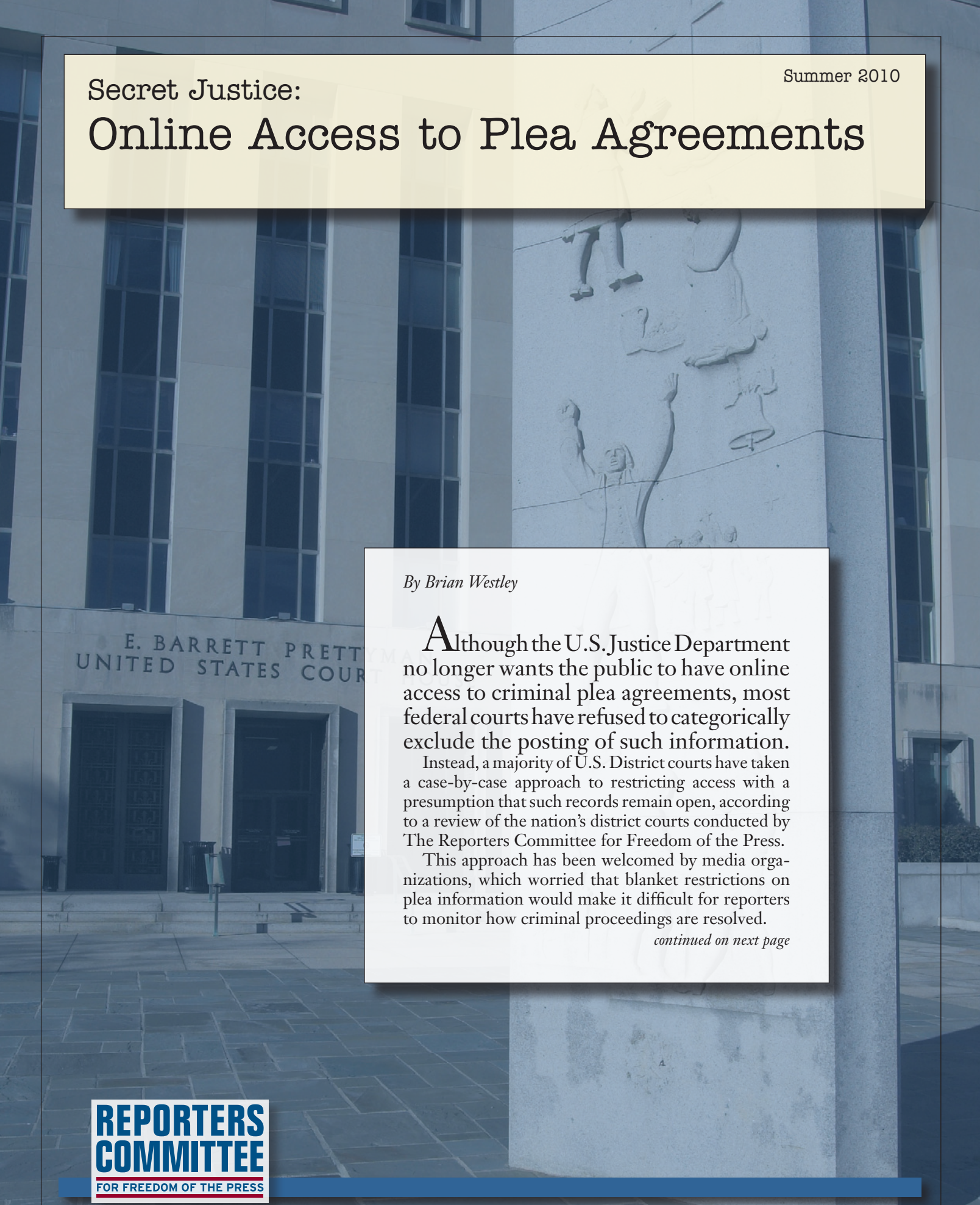
Summer 2010

Secret Justice:

Online Access to Plea Agreements



By Brian Westley

Although the U.S. Justice Department no longer wants the public to have online access to criminal plea agreements, most federal courts have refused to categorically exclude the posting of such information.

Instead, a majority of U.S. District courts have taken a case-by-case approach to restricting access with a presumption that such records remain open, according to a review of the nation's district courts conducted by The Reporters Committee for Freedom of the Press.

This approach has been welcomed by media organizations, which worried that blanket restrictions on plea information would make it difficult for reporters to monitor how criminal proceedings are resolved.

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REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

Secret Justice:
A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection.

Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of "the people" for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a "class" of persons similarly situated. The public, therefore, should be informed — well informed — about trials of public interest. The media, as the public's representative, need to be aware of threats to openness in court proceedings, and must be prepared to fight to insure continued access to trials.

In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We examine trends toward court secrecy, and what can be done to challenge it.

For the complete series of "Secret Justice" publications, visit www.rcfp.org/readingroom.

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Research for this guide was conducted by Reporters Committee legal interns Ellen Biltz, Mike Torralba and Brian Westley. Publication was funded by a grant from the McCormick Foundation.

"It would greatly hamper our ability," said Ken Ward Jr., a *Charleston Gazette* reporter who recently convinced the U.S. District Court for the Northern District of West Virginia to relax its policy of withholding all plea agreements from the public – both online and at the courthouse. *(see sidebar, "Fighting for access," p. 4)*

The Justice Department became alarmed about the public's ability to access plea agreements on the Internet after information about defendants who agreed to cooperate with authorities began appearing on websites like "Who's A Rat" (whosarat.com). That prompted the agency in 2006 to urge the federal courts to eliminate the public's access to plea agreements on PACER, the courts' online docketing site.

"We are witnessing the rise of a new cottage industry engaged in republishing court filings about cooperators on Web sites . . . for the clear purpose of witness intimidation, retaliation and harassment," a memo from the agency said.

The Justice Department wanted the courts to come up with a uniform, nationwide policy for PACER access. In response, the Judicial Conference of the United States asked the public for feedback about the agency's demands. The comments overwhelmingly favored retaining public Internet access.

Rather than adopting a mandatory policy, in 2008 the U.S. Judicial Conference, the federal court entity that implements practices and procedures for all federal courts, asked the federal courts to consider a half-dozen approaches aimed at striking a balance between protecting information about those who cooperate with law enforcement and the need to maintain legitimate public access to court files.

Two-and-a-half years later, The Reporters Committee has found that a majority of the 94 federal judicial districts restrict Internet access to the plea agreements on a case-by-case basis. This means that plea agreements that reveal cooperation by the defendant are presumptively open to the public. However, in instances where revealing such cooperation could lead to a substantial probability of harm, defense attorneys can move to seal the information.

About a dozen other courts have decided to file all plea agreements publicly, without any references to cooperation. In those courts, a supplementary document, which is sealed, contains information about the defendant's cooperation or a statement that no such agreement exists.

Media lawyer Jeffrey Hunt, who successfully urged the U.S. District Court for the District of Utah to adopt a case-by-case approach to sealing plea agreements, said he believes the Justice Department overreacted to concerns about witness intimidation.

"Courts were afraid that whosarat.com would put all this information out there and there would be all kinds of negative consequences, and that just hasn't been borne out," Hunt said. "Once courts dug into the issue and gave it a thoughtful examination, they realized the fear had been greatly exaggerated."

Indeed, the Middle District of Georgia decided over the summer to soften its policy of automatically sealing plea agreements. Now, all plea agreements are open to the public unless the prosecutor or another party makes a motion to seal them and the judge agrees.

Gregory Leonard, the court clerk for the Middle District of Georgia, said that decision squares with the trend toward greater openness that he has seen over the 26 years that he's been on the job.

"Back in the old days when I was clerk . . . lawyers would ask the court to seal a lot of things just because they prefer them not to be public." Today, judges are less willing to grant such requests unless there is a strong justification, he said.

However, not all courts are moving toward more openness.

At least three courts have adopted the Justice Department's request that all plea agreements be removed from PACER: the Northern District of California, the Eastern District of North Carolina and the Southern District of Ohio. In these districts, the public — including the news media — must obtain the information directly from the clerk's office at the courthouse.

"We think it's actually a pretty sound policy in the sense that we're trying to make this information publicly available but at the same time we're trying to offer some protections to cooperating witnesses," said James Bonini, clerk for

the U.S. District Court in the Southern District of Ohio.

Plea agreements in the Eastern District of North Carolina were freely available on PACER until August 2009. In a standing order, Chief U.S. District Judge Louise Flanagan explained that "[c]ase by case review would not work because one of the dangers identified by the Court is the use of this information to encourage generalized reprisals against all cooperators."

Court clerk Dennis Iavarone said the change was endorsed by a committee consisting of the U.S. Attorney's Office, a senior U.S. District Court judge, the federal public defender and the court clerk. So far, he said, the new policy has not prompted any complaints.

"Anybody can see a plea agreement," he said. "They just [have] to come down to the courthouse to do so."

But critics elsewhere note that news organizations don't always have the resources

The Policies:

There are three basic approaches that federal district courts have taken regarding the establishment of policies for when or whether to seal plea agreements. The following three districts are examples of these approaches.

Open Everywhere — U.S. District Court of the District of Columbia: The district views all plea agreements like any other document filed in the court. "Absent statutory authority, no cases or documents may be sealed without an order from the Court. Any pleading filed with the intention of being sealed shall be accompanied by a motion to seal. The document will be treated as sealed, pending the outcome of the ruling on the motion. Failure to file a motion to seal will result in the pleading being placed on the public record." The vast majority of district courts have similar practices to D.C., although many don't have formal or written policies. Instead the courts seal plea agreements on a case-by-case basis under an order by the judge. In these districts, if the agreements aren't ordered to be sealed, they include any cooperation information and are open to the public and available on PACER, the federal online docketing system.

Separation of Cooperation Agreements — U.S. District Court of North Dakota: The district enacted a policy in 2007 to ensure that the public could not identify cooperating defendants. Basically, a plea agreement is filed and is available to the public, and a supplement to that document with cooperation information is filed under seal. The policy states: "Plea Agreements must no longer identify whether a criminal defendant has agreed to cooperate with the United States. A second document entitled 'Plea Agreement Supplement' must be filed under seal in conjunction with every Plea Agreement. If a criminal defendant has agreed to cooperate, the Plea Agreement Supplement must contain the cooperation agreement. If the criminal defendant and the United States have not entered into a cooperation agreement, the Plea Agreement Supplement will indicate that no such agreement exists." More than ten districts have policies similar to the one in North Dakota although other districts have varying names for the "Plea Agreement Supplement," including "Cooperation Agreement."

Only at the Courthouse — U.S. District Court of the Eastern District of North Carolina: The court established a policy making all plea agreements available to the public only at the courthouse. According to the policy, "As to all plea agreements in criminal cases filed after August 28, 2009, the Clerk of this Court is directed to file said plea agreements in such a manner that there is no remote electronic public access to plea agreements … The public, including members of the news media, may have access to filed plea agreements at the public terminal in the clerk's office, subject to existing rules regarding these access methods." At least two other district courts have a similar policy, the U.S. District Court of the Northern District of California and the U.S. District Court of the Southern District of Ohio.

to send reporters to the federal courthouse — particularly as reporters take on more responsibilities amid staffing cuts.

"As a matter of practice and with newsrooms getting smaller, it's a tough sell for my boss to say that I need to drive to Wheeling [a three-hour drive] to get a paper copy for my file that might only produce a 12-paragraph story," said Ward, the *Charleston Gazette* reporter.

Ward said that even if the local court six blocks away stopped putting documents online, it would "pose some real problems." He said that as the policy stands now, if an attorney files a document at 4:58 p.m., he is able to go online and print the document in time to make his deadline.

"If I had to walk the ten minutes to the courthouse, I wouldn't get there [before the court closed] and wouldn't be able to make the copies and get back before my deadline," he said.

In response to Ward's concerns, the U.S. District Court for the Northern District of West Virginia decided in July to adopt a case-by-case approach for restricting online access to plea agreements.

Ellen Biltz contributed to this story..

Fighting for access: One reporter can make a difference

By Ellen Biltz

Ken Ward Jr. won a battle over the summer to get the U.S. District Court for the Northern District of West Virginia to change its policy on withholding plea agreements from the public.

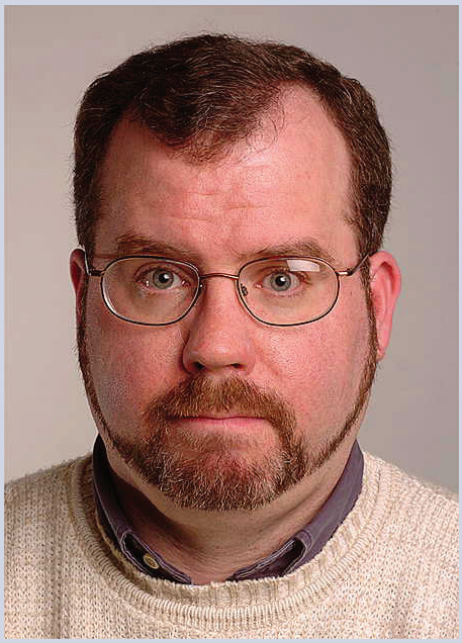
"The press is supposed to play a role in informing the public, and we couldn't do that," said Ward, a reporter at the state's largest daily newspaper, the *Charleston Gazette*.

The court had created a policy, enacted last November, to keep all plea agreements out of the public record in response to concerns over websites that called attention to "rats" or people who cooperate with authorities and strike plea deals.

In February, Ward broke an in-depth story about a mining foreman who was cutting corners on safety precautions and misreporting his safety evaluations, a felony. At the time, the foreman's attorney told Ward that his client was cooperating with police and exposing the many others within the mining company involved in the safety scandal.

If ever there was a time when a defendant's cooperation was out in the open, it was this one, Ward said. The plea agreement was read aloud in open court and reiterated what Ward already knew of the case.

But despite that, the clerk's office refused to turn over a written copy of the agreement to Ward, much less post it online as most courts do.



CHARLESTON GAZETTE PHOTO

Ken Ward Jr.

"They just said that was the court's policy," he said.

So he fought back. And now, sixth months after Ward hit a roadblock, the secrecy has been replaced with openness.

After jumping through hoops at the clerk's office and going up the ladder of federal judges in the district trying to find out what exactly the policy even said and who enacted it, he finally got to talk to Chief Judge Preston Bailey, who asked Ward to write a letter, detailing his concerns and suggesting a solution.

In the March 30, 2010 letter Ward wrote, "I hope you will carefully reconsider your district's new policy and adopt policies and procedures that make plea agreements available to the public except in circumstances where judges make specific findings that explain why the presumption of access has been overcome."

Ward didn't get a response from Bailey for months. But at the beginning of July, he said got a phone call from the judge, telling him the policy was being changed and records would be presumptively open. Bailey was very receptive to his concerns, Ward said.

An e-mail sent July 9 from the court to attorneys practicing in the district, wrote, "Beginning July 12, 2010, all plea agreements and related filings will be filed as public documents and available via [the online system], unless sealed by Order of the Court. Restrictions on plea agreements and related filings from November 1, 2009 to July 9, 2010 will be removed allowing the public to view the documents."

Ward said he wasn't aware of any other reporters who complained to the court about the process, but he felt it was important to fight for openness.

The new policy puts the district in good company, with the majority of the 94 district courts choosing a similar route: a case by case evaluation when there's a motion to seal a plea agreement.

And Ward said he considers the new policy a battle won, as long as it's carried out in practice as it appears on paper.

"Now that it's enacted, we'll see how it's implemented," he said.