

**REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS:
A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS**

**Prepared for the Court Administration and Case Management Committee
of the Judicial Conference**

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THE QUESTION AND A SUMMARY OF FINDINGS

The Question Before the Committee and the Purpose of the Report

The Court Administration and Case Management Committee (Committee) recommended to the Judicial Conference of the United States in 2001 that the Conference prohibit remote public access to electronic criminal case files. The Judicial Conference agreed, and agreed that it would reconsider the policy in two years, during which time the Committee would study the implications of allowing remote public access. The Committee asked the Federal Judicial Center (Center) to conduct an evaluation of a pilot project authorizing ten district courts and one circuit court to make available remote public access to electronic criminal case documents. This report summarizes the results of that evaluation, with the purpose of providing information to the Committee as it re-examines the policy prohibiting remote public access to electronic criminal case files.

Summary of Major Findings

Study Design. The pilot project began in the spring of 2002. Ten district courts and one court of appeals were granted exemptions to the Judicial Conference policy that “public remote electronic access to documents in criminal cases should not be available at this time [September 1, 2001].”¹ The Committee selected four additional districts to serve as comparison courts for purposes of this evaluation. These comparison courts had made electronic images available prior to 2001 but were not granted exemptions by the Judicial Conference to continue allowing remote public access during the pilot. The Administrative Office (AO) issued a set of operational guidelines for the pilot courts that specified which documents could not be displayed under any circumstances and what information was to be redacted from all criminal filings (see the Appendix for the exact text of the operational guidelines).

The goal of the pilot project evaluation was to generate answers to a set of questions, agreed to by the Committee, the AO, and Center. The evaluation questions address these areas of concern: (1) what rules and procedures did the courts promulgate for remote public access; (2) what advantages and/or disadvantages are there to parties, judges, and court staff of such access;

¹ JCUS-SEP 01, p. 49

and (3) what harm and potential harm of remote public access to criminal case documents did the Center's evaluation of the pilot program identify? This report is organized around these questions.

In addition to harm or potential harm from remote public access, the Committee asked the Center to study the potential harm posed by online criminal dockets, which contain entries such as hearings, filings of motions, and issuance of orders for a given criminal case. These entries are accompanied by descriptions of the entries, regardless of whether electronic images of documents are available. The question is whether these descriptions can contain harmful information. The Committee selected six additional districts to serve as comparison courts for the supplemental study of docketing information.

The sources of information for this report are: 1) telephone interviews with chief judges, clerks of court, federal defenders, CJA panel attorneys and U.S. Attorneys in the eleven pilot courts and four comparison courts; 2) a survey of district and magistrate judges in the ten pilot district courts; 3) a study of defense attorney location relative to the federal courthouses in the ten pilot district courts; and 4) a study of docket sheets in the six additional comparison courts. Results from U.S. Attorney interviews are reported separately and any information obtained from U.S. Attorneys is identified as coming from that source.

Modes of Access. The pilot courts' most common means of accessing online case information is PACER (Public Access to Court Electronic Records). Less common is the use of RACER (Remote Access to Court Electronic Records).

Court Practices. The actual practices of the pilot courts cannot be easily summarized and compared, as these practices vary considerably. Most of the pilot courts had allowed remote public access before the formal pilot program began, and each court had a different set of criminal case documents that it made available in electronic form online. The pilot courts that had offered remote access to criminal case documents before the pilot project sought to conform their practices to the AO's operational guidelines on document availability and redaction, but with varying results. The variation in the adoption of the operational guidelines is most apparent when these practices are considered in terms of the number and types of documents the courts make available via remote public access.

The operational guidelines prohibit remote public access to certain documents such as pretrial and presentence investigations, Statements of Reasons, and sealed documents. As respondents in the district courts often noted, the prohibited documents were not made available

online before the pilot project and, therefore, posed no implementation issues for the pilot district courts.

The pilot district courts that make a limited subset of other criminal case documents available online adopted the operational guidelines with few or no reported problems. Respondents in the district courts with greater numbers of documents available online often reported concerns about the operational guidelines and the need to balance competing demands of document availability (to meet the needs of users), document redaction, and monitoring of guideline compliance by filing parties. Several of the courts with more extensive online offerings found that they had to make changes in their practices to comply with the operational guidelines. These changes included one or more of the following: changes to document formats, special document scanning procedures, exemptions to the redaction rules, and removal of certain documents from remote public access. Virtually every pilot court respondent, however, whether they were judges, clerks, or defense attorneys, agreed that redaction had to be the responsibility of the filing parties. And they were in agreement as to why: clerks' offices have neither the personnel nor the training and experience to redact each filed document.

The Eighth Circuit reported no problems in implementing the operational guidelines.

Local Rules. None of the pilot courts had instituted new local rules for the pilot project at the time this report was prepared. Some courts had working or advisory groups address the issue of redaction, with input from the U.S. Attorney's office and the defense bar. One court, which makes virtually all unsealed documents available online, turned the task over to its local rules committee. However, that committee did not reach an agreement on a new rule for document availability and redaction, and that court has not implemented the operational guidelines. While this report was being prepared, another of the pilot courts had proposed an amendment to its local rules that specified how identifying information in pleadings and other filed documents would be made available to the court but not to the public.

Advantages/Disadvantages to Parties. Interview respondents in the pilot courts reported four categories of advantages of remote access to parties (and attorneys): access to information; case tracking; organizational/operational benefits; and general public benefits.

Most interview respondents extolled the advantages of access for attorneys and, to a lesser extent, for defendants and the general public. When asked about possible advantages to the public of remote access, the most common response was that it created or reinforced the concept of the courts as an open, public institution. This response came from chief judges, clerks, and defense attorneys. Respondents reported few disadvantages of remote public access. The only

disadvantage reported by more than one respondent was the potential misuse of criminal case documents, in the form of identity theft or the identification of cooperating defendants.

Advantages/Disadvantages to Judges and Staff. Respondents reported four categories of advantages to judges and court staff:

- savings of time and money;
- remote access by judges;
- organizational benefits (separate from time and money savings); and
- highlighting of the open and public nature of the court.

Respondents described few disadvantages to the court. Those mentioned fall into three categories:

- the court must take on a gate-keeping function, deciding which documents are available via remote public access;
- the organizational burden of scanning documents and ensuring that only selected documents are available to the public; and
- loss of control over publicly available documents and the information therein.

Sealed Documents. When asked if requests by government or defense attorneys in the pilot courts to seal documents might increase, to prevent document availability via remote access, most respondents were not concerned that it would become a widespread practice. Several defense attorneys said that they rely on judges to make reasonable decisions about requests to seal any portion of a case or the entire case.

Harm. For the period of the pilot project, interview respondents reported no instances of harm resulting from remote public access in any of the pilot courts.²

The majority of the pilot courts and all of the comparison courts made criminal case documents available through remote public access prior to September 2001. For the period before the pilot project, interview respondents reported no verifiable instances of harm resulting from remote public access in any of the pilot court or comparison courts. A CJA Panel attorney in a comparison court reported a threat to a client who was cooperating with the government.

² During the pilot project there was a case of alleged identity theft filed in federal court in the Middle District of Florida, a non-pilot court. The defendants targeted prominent and wealthy individuals who had been charged with crimes in federal court, used the Internet and publicly available federal court records to gather identifying information about these individuals, and with that information, established credit cards and lines of credit. According to investigators, the case does not involve the misuse of documents available via remote public access. The defendants allegedly used PACER to track the progress of their victims' criminal cases, but obtained by mail copies of documents filed in federal courts around the country.

However, the source of the information behind the threat could not be traced directly to remote public access to online documents. The information could have been obtained from other sources that include co-defendants, the online docket (without accessing criminal case documents) and the paper file kept in the clerk's office. This was the only reported incident in any of the comparison courts.

U.S. Attorney Interviews. The views of the U.S. Department of Justice (DOJ) on remote public access are contained in the Department's formal comment to the AO on privacy and public access to electronic case files as to public access to electronic criminal case files³ DOJ urges the Judicial Conference to consider during its policy deliberations the potential for harm to individuals or to criminal investigations and prosecutions of widespread public dissemination of criminal case information. Our interviews of U.S. Attorneys or their designees revealed no specific instances of harm to individuals, such as cooperating defendants, from remote public access nor did they report problems with investigations or prosecutions, but the pilot district courts are a small sample of all 94 districts, whose experiences may not be representative of what would happen across all federal districts.

Survey Results. The survey results confirmed many of the findings of the interviews. The district and magistrate judges we surveyed saw more advantages than disadvantages to allowing remote public access to criminal case files. This was especially the case with judges who used remote access to electronic criminal case files. When judges were asked about restrictions on access to criminal case documents, 57 percent of the district judges and 56 percent of the magistrate judges responded that there should be unlimited remote public access to criminal case documents (excluding sealed documents). Only 4 percent of the district judges and 6 percent of the magistrate judges responded that there should be no public access. The judges were asked whether, to their knowledge, any harm had resulted from remote public access in their district. The response was 100 percent no.

THE REPORT: STUDY CONTEXT AND DESIGN

Context

At its September 2001 meeting, the Judicial Conference adopted recommendations by the Committee concerning remote public access to electronic civil, criminal, bankruptcy and

³ U.S. Department of Justice, Comments Regarding the Privacy and Security Implications of Public Access to Electronic Case Files, February 2001.

appellate case files. With regard to criminal case files, the Judicial Conference adopted this recommendation:⁴

Public remote electronic access to documents in criminal cases should not be available at this time, with the understanding that the policy will be reexamined within two years of adoption by the Judicial Conference.

At its March 2002 meeting, the Judicial Conference endorsed a recommendation by the Committee to create a pilot project to study the impact of remote public access to electronic criminal case files. The Center conducted the evaluation of the first year of the pilot project, May 2002 to March 2003), under the guidance of the Committee's Subcommittee on Privacy Policy Implementation.

The evaluation was designed to answer five general questions.

1. **Description of Court Practices.** What kinds of documents and information are the courts making available electronically?
2. **Rules.** What rules and procedures have the courts promulgated?
3. **Party Advantages/Disadvantages.** What is the utility of remote public access and electronic filing to parties in criminal cases?
4. **Judge and Staff Advantages/Disadvantages.** What effect does a policy that limits public access have on judges and court staff?
5. **Harm.** Has anyone been harmed or threatened with harm because of information contained in case documents that were obtained through remote public access?

The pilot courts were asked by the AO to implement operational guidelines, which specified that certain documents and certain information could not be made available via remote public access. Consequently, the rules and procedures implemented by the courts largely concern which documents and information are made available and how these restrictions are effected.

Therefore, the first two questions will be answered together.

Study Design

The study has four parts that will help answer the evaluation questions: interviews with chief judges, clerks of court, federal defenders, CJA panel attorneys, and U.S. Attorneys in the pilot courts and a set of comparison courts; a survey of district and magistrate judges in the pilot

⁴ JCUS, *supra* note 1.

district courts; a study of defense attorney location relative to the federal courthouse in the pilot district courts; and a study of docket information in a second set of comparison courts. This section describes the pilot and comparison courts and the purposes and data sources for these parts of the study.

Selection of Courts. To answer the study questions, the Committee selected three categories of courts. These categories of courts represent a range of experiences with public access and include courts that are currently making case documents available electronically to the public as well as courts that did so before September 2001. The courts in each category are listed in Table 1. The first category, the Pilot Courts, consists of ten district courts and one court of appeals, to all of which the Judicial Conference granted an exemption to the policy prohibiting remote public access to electronic images of criminal case documents. Nine of the district courts offered remote public access to criminal case documents before September 2001, and as a result have considerable experience with such access. Therefore, these courts can speak to many of the study questions and speak more authoritatively than other courts about the impact of permitting remote public access. Two other courts were added to the list: the District of the District of Columbia and the Eighth Circuit. At the time of the Committee's recommendation, the District of the District of Columbia planned to begin making documents available online and the court of appeals made briefs available online in electronic form before September 2001.

The second category of courts in Table 1 displayed electronic images of criminal case documents prior to September 2001, but were not granted an exemption to the Judicial Conference policy (Comparison Courts, Group I). These courts have prior experience with electronic public access and therefore can speak to many of the study questions. These courts can also speak about the impact of not permitting remote public access to criminal case documents. The third category in Table 1 consists of courts that have never made criminal case documents available online to the public (Comparison Courts, Group II). We used this third set of courts for a study of online criminal dockets (see below).

Table 1

Pilot Courts	Comparison Courts Group I	Comparison Courts Group II
S.D. Cal.	S.D. Iowa	D. Colo.
D. D.C.	W.D. N.C.	M.D. Fla.
S.D. Fla.	W.D. Okla.	S.D. N.Y.
S.D. Ga.	D. Vt.	M.D. Tenn.
D. Idaho		W.D. Va.
N.D. Ill.		W.D. Wisc.
D. Mass.		
N.D. Okla.		
D. Utah		
S.D. W.Va.		
Eighth Circuit		

Interviews. Between September 2002 and April 2003, Center staff conducted interviews in the pilot courts and Group I of the comparison courts. In the pilot courts, the chief judges and clerks of court were interviewed at the beginning of the study and at the end of the study to inquire about changes in court policies or procedures since the first interview. In the pilot district courts, federal defenders⁵ or assistant federal defenders, CJA panel attorneys, and U.S. Attorneys or their designees were interviewed once. In the Group I comparison courts, chief judges, clerks of court, and federal defenders were interviewed once.

For various reasons, not all of these individuals were interviewed in every pilot court. For example, in six of the ten pilot courts and the court of appeals, the chief judge chose not to be interviewed, deferring to the clerk instead. One of the pilot courts does not have a federal defender; the CJA panel attorney representative was interviewed instead. The District of the District of Columbia has not yet implemented the pilot project because of the time and resources required to do so. This court did not have remote public access before September 2001 and, after the pilot project began, devoted its resources to the implementation of the Case Management and Electronic Case Filing System (CM/ECF). As a result, only the chief judge of the District of the District of Columbia was interviewed; no other interviews were conducted in that district.

⁵ Several of the pilot district courts have Community Defenders. For purposes of this report, the terms “federal defender” and “defender” will refer to Community Defenders as well as Federal Defenders.

Finally, interviews could not be scheduled with two of the remaining nine U.S. Attorneys by the time this report was prepared.

The interviews dealt with the questions listed earlier: harm, advantages and/or disadvantages to parties, judges, court staff, and the public, court practices, and rules. Respondents were also asked about document availability and redaction and the operational guidelines. A basic set of questions was asked of all respondents, with more in-depth questions tailored to the respondent. For example, chief judges and clerks were asked about court practices and rules; attorneys were asked about their everyday use of remote access. In addition, the interviews in the Group I comparison courts included questions about the impact of ending remote public access to electronic criminal case documents at the conclusion of the pilot study.

Pilot Court Survey. The Center sent a questionnaire to 62 magistrate judges and 133 district judges in the ten pilot district courts. The questions dealt with a subset of the issues covered in the interviews, with a focus on advantages and disadvantages of remote public access, document availability, and redaction. Questionnaires were returned by 32 of the 62 magistrate judges (52 percent) and 64 of the 133 district judges (48 percent). The range of responses from both groups was substantial and we are confident that they are representative of the views of magistrate and district court judges in the pilot courts.

Distance of Attorney Offices from the Federal Courthouse. To better gauge the advantages of remote access to parties, a study was conducted of defense attorneys in a sample of criminal cases filed in the ten pilot district courts during fiscal year 2001. The purpose was to obtain information about: 1) the proportion of cases in which the defense attorney is a private attorney (as opposed to a federal defender), and 2) the location of defense attorneys' offices relative to the federal courthouse. Federal defenders are typically located in or near the federal courthouse, whereas private attorneys may or may not be located in the same city as the courthouse. Remote access to electronic criminal case files is likely to be of greater value to attorneys who do not have easy access to the federal courthouse.

Criminal Docket Sheets. The electronic docket, which is publicly available regardless of whether electronic criminal case documents are available, contains a significant amount of information and entries about a criminal case: initial charges, pretrial release status, final charges, trial information, plea, sentence disposition, and other information. We were especially interested in determining whether there is information in the docket that is potentially harmful, whether to defendants, victims, witnesses, or 3rd parties. The interviews addressed this question, but to supplement the interview data, we undertook a modest analysis of docketing information in the Group II Comparison Courts (see Table 1). Docket sheets were downloaded for a random sample

of 100 cases filed in fiscal year 2001 from each of these six comparison courts. Our examination of the docketed information was guided by information we obtained during the interviews about potentially harmful docket entries.

FINDINGS FROM THE PILOT COURTS

The majority of findings reported in this section come from the interviews with chief judges, clerks, federal defenders and assistant federal defenders, and CJA panel attorneys. As a reporting convention, the term federal defender will refer to both federal defenders and assistant federal defenders,⁶ and defense attorney will refer to both federal defenders and CJA panel attorneys. In general, interview results will not be reported in terms of the numbers or proportions of respondents expressing a view or reporting a piece of information. The number of interviews is too small to give meaning to frequencies, proportions, or percentages. Results from U.S. Attorney interviews are reported separately and any information obtained from U.S. Attorneys is identified as coming from that source.

The Pilot Courts

As context for the discussion of findings, Table 2 gives some information about the pilot district courts. This information is taken from tables published in Judicial Business of the United States Courts.⁷ Note that the range of criminal filings is quite large, from less than 200 to almost 4,000 criminal filings per year.

⁶ See Footnote 5.

⁷ Judicial Business of the United States Courts, 2001 Annual Report of the Director.

TABLE 2
2001 FILINGS IN THE PILOT DISTRICTS

District	Authorized Judgeships^a	Criminal Filings^b	Civil Filings^c
S.D. Cal.	8	3,853	2,618
D. D.C.	15	464	2,958
S.D. Fla.	17	1,841	8,961
S.D. Ga.	3	418	1,128
D. Idaho	2	161	697
N.D. Ill.	22	647	10,340
D. Mass.	13	403	2,884
N.D. Okla.	3.5	121	1,001
D. Utah	5	745	1,158
S.D. W.Va.	5	235	1,253

^a Table X-1A

^b Table D-1

^c Table C-3

Court Practices and Rules

The pilot project began in May 2002 when the pilot courts were sent the AO's operational guidelines on document availability and redaction (see Appendix). Upon receipt of the guidelines, the courts were authorized to allow remote public access to criminal case documents. Six of the eleven pilot courts had never stopped remote public access to criminal case documents. Four of the remaining five courts re-established remote public access (one of these courts had implemented remote access for the U.S. attorney's and federal defender's offices after September 2001). The remaining court, the District of the District of Columbia, has not yet implemented the pilot project because of the time and resources required to do so. This court did not have remote public access before September 2001 and, after the pilot project began, devoted its resources to the implementation of the Case Management and Electronic Case Filing System (CM/ECF). Therefore, this court is not included in the interview results reported here. The court is included in the results of the survey and the attorney distance study.

Mode of Access. The most common means of accessing online case information is PACER. PACER is an electronic public access service available in most federal courts. It allows a user to request information about a particular individual or case in the participating districts. It is supported through the PACER Service Center, the judiciary's centralized registration, billing,

and technical support center. Members of the public can register online for PACER accounts by providing their name, address, phone number, and e-mail address. Users are billed for their usage. The individual courts maintain their own PACER databases.

Nine of the ten pilot courts with access to criminal case documents use PACER, although in three of these courts criminal case documents are accessible only through RACER, an alternative system for requesting case information. RACER does not have a centralized system and can be set up so that it either does or does not require an ID and password. The tenth court uses RACER exclusively.

Court Practices. The guidelines prohibit remote public access to certain documents such as pretrial and presentence investigations, Statements of Reasons, and sealed documents (see the Appendix for a complete list of documents). The guidelines also require the redaction of certain information from all criminal filings: Social Security Numbers, financial account numbers, dates of birth, names of minor children, and home addresses. Redaction is the responsibility of the filing parties, with the possibility of sanctions by the court for failure to comply.

The Eighth Circuit reported no problems implementing the operational guidelines. Attorneys are sent a notice with the guideline information on redaction when a case is docketed. That notice also instructs attorneys not to include Presentence Reports and Statements of Reasons in their briefs.

The pilot district courts described varied experiences implementing the operational guidelines. As respondents often noted, the prohibited documents were not made available online before the pilot project and, therefore, posed no implementation issues for the pilot courts. However, the redaction requirements produced a variety of experiences among the pilot district courts. Several courts reported no problems implementing the redaction requirements. Several other courts described significant problems that had to be resolved before and after the guidelines were put into effect. A chief judge in one pilot district described the redaction requirements as a “disaster” when applied to certain types of pretrial documents (*e.g.*, bail surety documentation) that, of necessity, contain identifying information on the list of information to be redacted. A clerk in another pilot district said that he would have opposed participation in the pilot project had he known about the redaction requirements beforehand. Another pilot district could not reach an agreement about a local rule for redaction and, consequently, never implemented that portion of the operational guidelines. From the beginning of the pilot project to the time this report was prepared, there has been no redaction of documents filed in and available via remote public access from this court.

Based on the interviews and examination of the courts' online dockets, much of the variation in implementation experiences seems to be associated with the number and variety of criminal case documents the district courts make available online. The courts that offer more criminal case documents online tended to report more issues with implementation than did the courts with fewer types of documents available. If there was an effect of the number or variety of documents on the implementation, it may have been enhanced by the fact that document availability was also associated with the number of criminal filings. Courts with larger numbers of filings also tended to offer more documents online. However, any associations should be viewed cautiously in a sample of nine district courts.

There is no typical list of criminal case documents available online among the pilot district courts. At a minimum, a pilot district court might have indictments, informations, motions, orders, and the Judgment and Commitment Order (less the Statement of Reasons). The districts that offer more documents online have, in addition to those cited above, one or more of the following: warrants, supporting documents for bond applications, magistrate information sheets, financial affidavits, petitions in supervised release violation cases, sentencing memoranda, plea agreements, and transcripts. Many of these documents contain information that the operational guidelines require be redacted.

One of the pilot district courts makes every unsealed document publicly available online (except transcripts and documents on the prohibited list). The clerk of this court stated that attorneys rely heavily on the availability of these documents in the course of their work. This court proposed a local rule for redaction, but the local rules committee could not come to an agreement on the rule. A member of the local rules committee was specific in stating that the U.S. attorney's office did not want to redact any of its filings and sought exemptions to any redaction requirements. The committee could not reach agreement and the redaction portion of the operational guidelines had not been implemented at the time this report was prepared.

Another court established a working group to implement the operational guidelines; the group included representatives from the U.S. attorney's office, the federal defender's office, and the local defense bar. This court also has an extensive list of documents available to the public online. The clerk of this court described PACER as a "workhorse" and an important factor in keeping their high volume of criminal cases moving. The court had issued a general order at the beginning of the pilot project that was modeled on the operational guidelines. Based on the working group's efforts, a revised general order was issued, adding a number of documents to the prohibited list that it decided could not be redacted easily.

Somewhere in the middle of these varied experiences is the pilot district that has taken a measured approach to making documents available online. Although it does extensive scanning of documents for internal use, only indictments, informations, and orders are publicly available on the court's web site. A working group, with representatives from the U.S. Attorney's office and the local bar, has met to make decisions about which documents to make available. But, according to the clerk, they have moved slowly, and intentionally so.

Several districts had a more specific implementation matter: 18 USC § 3612(b)(1)(A) requires that a "judgment or order imposing, modifying, or remitting a fine or restitution order of more than \$100 shall include the name, social security account number, and residence address of the defendant." Several courts interpreted this statute as a prohibition on redacting Judgment and Commitment Orders. This interpretation led to various solutions. One district simply blocked the social security number and date of birth with opaque tape before scanning the documents. Another district moved these identifiers to the Statement of Reasons. This same district was also concerned about the identifiers in the petition filed in supervised release violation cases. The clerk did not want to produce two versions of the petition (or of the Judgment and Commitment Order)—redacted and unredacted—and these petitions are now filed under seal. A third district decided to not make Judgment and Commitment Orders available online.

Compliance and Monitoring. The operational guidelines put the responsibility for redaction of criminal filings on the filing parties. Based on the guideline's recommended language for notice to the bar of the pilot project and its redaction requirements (see Appendix), the courts were not obligated to check each document for compliance. In fact, one clerk read the guidelines to mean that the court was not obligated to do anything different than what it had been doing. Apart from the district courts' redaction of internally-generated criminal case documents, the courts did not seem to monitor compliance, or monitor it closely. Several clerks expressed the concern that the volume of documents processed by their courts made monitoring difficult, particularly monitoring of private defense attorneys unfamiliar with the redaction requirements. At the same time, defense attorneys in several districts reported receiving assurances from their respective courts that they would not be sanctioned for inadvertent failures to redact.

Advantages and Disadvantages to Parties

In the interviews, most respondents extolled the advantages of access for attorneys and, to a lesser extent, for defendants and the general public. Defense attorneys were generally very positive about the benefits to them and their staffs of remote access. The advantages cited in the interviews can be grouped generally into four categories: access to information; case tracking; organizational/operational benefits; and general public benefits.

Access to information. Remote access provides immediate, remote, and simultaneous access to case information and documents, 24 hours a day. In other words, attorneys can access case documents from their offices, any time of the day, regardless of who else might be accessing the documents. Everything—the docket and filed documents—is in one place (depending on the documents a court makes available online). And access to all of the filed cases creates a research tool for attorneys (as well as for law students and academics). These were the most common responses, and they came from judges, clerks, and attorneys. Several respondents noted that this is a form of equal access that helps “level the playing field” for defense attorneys who might be located some distance from the court and for whom trips to the clerk’s office could be burdensome.

Case tracking. With remote access, attorneys, defendants, defendants’ families, and other members of the public can track cases. U.S. attorneys and defense attorneys can check for new filings in their cases, without waiting for documents to be sent to them by the court or by opposing counsel.

Organizational/Operational Benefits. Attorneys can print documents as they are needed or, if documents are not available online, they can determine which documents to request from the clerk’s office. Federal defenders can use online charging documents to assign cases in their offices. In response to questions, the clerk’s office can direct the media to cases online for more information.

General Public. When asked about possible advantages to the public of remote access, the most common response was that it created or reinforced the concept of the courts as an open, public institution. This response came from every type of respondent: chief judges, clerks, and defense attorneys. In fact, this served as the basis for many respondents to state that there should be remote public access to all or most unsealed documents and that as little redaction as possible should take place.

The chief judges, clerks, and defense attorneys cited few disadvantages of remote public access to attorneys, defendants, or to the general public. The only disadvantage cited more than once was harm caused by misuse of documents or the information therein (*e.g.*, identity theft). The most commonly cited concern was identity theft, followed by the identification of and possible harm to cooperating defendants, informants, witnesses, or victims. In a typical criminal case, identifying information about a defendant might be scattered throughout the range of filed documents—indictments and informations, documents in support of bond applications, financial affidavits, and Judgment and Commitment Orders contain or may contain identifying information such as social security numbers, financial account numbers, dates of birth, and home

addresses. As a counterpoint, several respondents stated that criminal defendants do not represent good targets for identity thieves (but see footnote 2). As for cooperating defendants, some respondents were skeptical that documents posed much of a threat. Several respondents said that they assume a defendant is cooperating if a case does not go to trial. One defense attorney said that information about cooperation “gets around the street” and that the last place anyone would look for it is online.

Other disadvantages, each reported by no more than one respondent, are:

- easy access by jurors or witnesses to criminal case documents;
- remote access requires a certain level of technology—a computer, Internet service, and a PACER account—that may be beyond the reach of some individuals; and
- inconsistency within and between districts as to the number and types of documents available—remote public access is no guarantee that certain documents and information are available in this format.

Advantages and Disadvantages to Judges and Court Staff

Only chief judges and clerks of court in the eleven pilot courts were asked about advantages and disadvantages to judges and court staff. They reported advantages that can be grouped into four categories: savings of time and money; remote access by judges; organizational benefits (separate from time and money savings); and enhancements to the public nature of the court.

Savings. Most of the chief judges and clerks discussed the time and money savings to the court of remote public access. These savings stem from the fact that staff spend less time pulling files, making copies of documents, and answering questions. One clerk did point out that these savings are assumed to occur; no empirical assessment of the savings in time and money has been made.

Remote Access by Judges. With remote public access, judges have access to information and documents from their cases regardless of location. If a judge travels to another place of holding court, docket and case file information are still readily available. Remote access is particularly valuable for court of appeals judges, who are located throughout their respective circuits.

Organizational Benefits. Respondents cited several organizational benefits apart from savings of time and money: less traffic in the clerk’s office; errors are more likely to be detected, and detected earlier because attorneys and others have fast and ready access to documents; the media and the general public can be referred to the online docket for answers to questions; scanning of documents facilitates fax notification of attorneys of newly filed documents; and the use of a new technology positions the court to take advantage of future technological changes.

Public Nature of the Court. Many of the chief judges and clerks cited this as an advantage of remote public access. The courts are a public institution, and ready access to information highlights and reinforces that quality.

The chief judges and clerks of court identified few disadvantages to the court of remote public access. Those reported were of three types generally: gate keeping function; organizational; and loss of control over information. Several respondents reported that there were no disadvantages to judges nor to the court of remote public access.

Gate keeping. Remote public access forces the court to make decisions about which documents and what information in those documents the public can and cannot view online.

Organizational. Remote public access requires extra work by the clerk's office, scanning documents and ensuring that the correct documents are made available (*i.e.*, ensuring that sealed documents are not inadvertently made available).

Loss of Control. Once documents are available online, the court no longer has any control over who views them, nor the uses to which they are put.

Harm Resulting From Remote Public Access

The majority of the pilot courts had made documents available online prior to September 2001. These documents were also made available as part of the pilot project, however, the pilot courts were not required to redact the pre-September 2001 documents for the pilot project. These unredacted documents were accessible alongside the redacted documents filed under the operational guidelines of the pilot project. There were exceptions as several courts prohibited access to documents filed during the pilot project that could not be easily redacted (*e.g.*, bond documents, Judgment and Commitment Orders) and, in one district, extended that prohibition to these documents filed before the pilot project. In the majority of pilot districts the documents filed prior to the pilot courts' implementation of the operational guidelines constitute a higher level of risk than do those filed afterwards. Consequently, the availability of both redacted and unredacted documents tests the efficacy of the redaction requirements in the operational guidelines.

For the period of the pilot project, there were no reports of misuse of criminal case documents, nor were there any reports of harm stemming from the availability of these documents via remote public access.

A CJA panel attorney in a Group I comparison court reported threats to a client who had cooperated with the government. However, the source of the information behind the threats

could not be traced directly to online documents (which would have been available in that district before September 2001). The information about this defendant's cooperation could have been obtained from a number of sources that include co-defendants, the online criminal docket (without accessing criminal case documents) and the paper file kept in the clerk's office. Otherwise, for the period prior to the beginning of the pilot projects, there were no documented instances of misuse of online documents nor of harm stemming from their availability online in any of the pilot or comparison courts.

U.S. Attorney Interviews

The views of the U.S. Department of Justice (DOJ) on remote public access are contained in the Department's formal comment to the AO on privacy and public access to electronic case files as to public access to electronic criminal case files⁸ DOJ urges the Judicial Conference to consider during its policy deliberations the potential for harm to individuals or to criminal investigations and prosecutions of widespread public dissemination of criminal case information. Our interviews of U.S. Attorneys or their designees revealed no specific instances of harm to individuals, such as cooperating defendants, from remote public access nor did they report problems with investigations or prosecutions, but the pilot district courts are a small sample of all 94 districts, whose experiences may not be representative of what would happen across all federal districts.

Document Availability and Redaction

The Operational Guidelines. All respondents were asked about the document availability and redaction portions of the operational guidelines. With a few exceptions, respondents agreed with the list of prohibited documents. This result should not surprise, since the documents prohibited by the operational guidelines are treated by the courts as if they were sealed documents. In other words, these documents are not available to the public, even in the clerk's office. The lone exception is the pilot district court that makes Statements of Reasons available to the public. Respondents in that district thought that the Statement of Reasons should not be on the prohibited list. Otherwise, if respondents in the pilot courts proposed changes to the prohibited list, it was to add documents. Proposed additions to the list include: sentencing memoranda by defense attorneys, documents with mental or physical health information, financial statements, CJA vouchers, pretrial diversion information, any document involving departures, grand jury target letters, witness lists, and trial memoranda.

⁸ U.S. Department of Justice, Comments Regarding the Privacy and Security Implications of Public Access to Electronic Case Files, February 2001.

Similarly, most respondents agreed with the list of information to be redacted. Only one respondent, a defense attorney, suggested an addition to that list. This respondent would like to see the entire social security number redacted rather than just the first seven digits. Finally, virtually every respondent, whether they were judges, clerks, or attorneys, agreed that redaction had to be the responsibility of the filing parties. And they were in agreement as to why: the clerk's office does not have the personnel nor the training and experience to redact each filed document. Only the parties will be able to redact reliably the documents they file with the court.

Sealed Documents. Many respondent, especially the attorneys, brought up the issue of sealed documents. Most of the defense attorneys said that, if they were concerned about a document or the information therein, they would request that the document be sealed. When asked if requests by government and/or defense attorneys in the pilot courts to seal documents might increase, to counter document availability via remote access, most respondents were not concerned that it would become a widespread practice. Several defense attorneys said that they rely on judges to make reasonable decisions about the need to seal any portion of a case or the entire case.

FINDINGS FROM THE GROUP I COMPARISON COURTS

The four districts in comparison Group I (see Table 1 above) were selected because they had had remote public access before September 2001, for varying lengths of time, but these courts did not receive exemptions to continue that access as part of the pilot project. The chief judges, clerks, and federal defenders in these districts were interviewed after the pilot project had been in operation for approximately eight months. Since these courts were not participating in the pilot project, there was no need for multiple interviews nor for interviews at the beginning of the pilot project.

Access

These courts ended remote public access to criminal case documents when the Judicial Conference approved the policy prohibiting such access. However, three of the four courts developed alternative systems, through PACER or RACER, to allow the U.S. attorneys, federal defenders, and private defense attorneys to access online the documents for their cases. In these districts, the chief judges and clerks reported no complaints or issues resulting from the end of public access. The fourth district did not develop such a system. The clerk of court in that district reported that the U.S. Attorney's office complained about the lack of access and the federal defender reported that the lack of remote access to documents was an inconvenience.

Findings

The interviews with respondents in the comparison courts echoed those reported in the pilot courts. Respondents reported the same types of advantages and disadvantages of remote public access and the same range of views on document availability and redaction. This is not a surprising result since these courts have some history of remote access. If there was one difference that stood out, it was more ambivalence toward unrestricted remote public access, defined as no restriction on who can have remote public access. Almost half of the respondents were either undecided about unrestricted access or favored access limited to parties. The remainder were in favor of unrestricted remote public access.

SURVEY RESULTS IN THE PILOT COURTS

Advantages and Disadvantages

The mail survey of judges included questions about the advantages and disadvantages of remote public access. Judges were presented with separate lists of advantages and disadvantages and asked, for each item in each list, whether they agreed that it was an advantage or disadvantage, respectively. The lists were drawn from the interviews with chief judges, clerks, federal defenders, and CJA panel attorneys. Figure 1 contains a chart of the percentages of magistrate and district judges, separately, who agreed that each item was an advantage. There is one item missing from the chart. Since no judge agreed that there were no advantages, it is omitted from the chart.

The chart in Figure 1 (see below) shows high rates of agreement with the potential of remote public access. The percentages for district judges range from 82 percent for “attorneys can track cases” to 48 percent for “saves case preparation time.” The percentages for magistrate judges tend to be lower, ranging from 88 percent for “attorneys can track cases” to 38 percent for “creates a spirit of public openness.” When asked whether they access documents online, 73 percent of the judges reported doing it occasionally or regularly. Figure 2 lists the same advantages, but excludes district and magistrate judges who never use remote access. The percentages increase in virtually every category: judges who use remote access are more likely to see advantages to parties, the clerk’s office, the court, and to themselves than judges who never use remote access to criminal case documents.

Figure 1
Advantages of Online Public Access

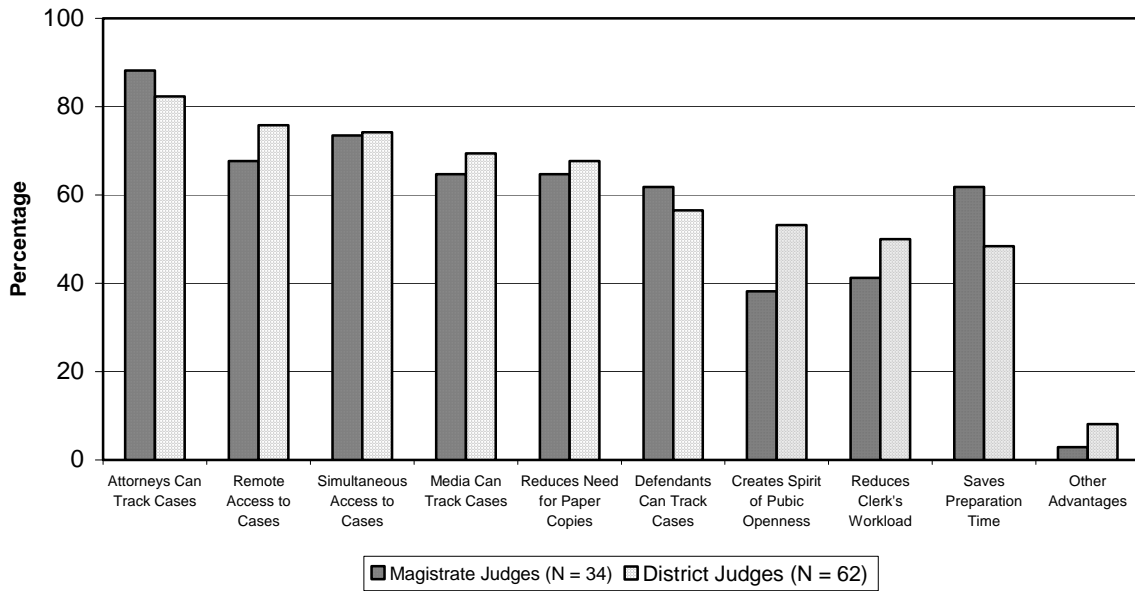
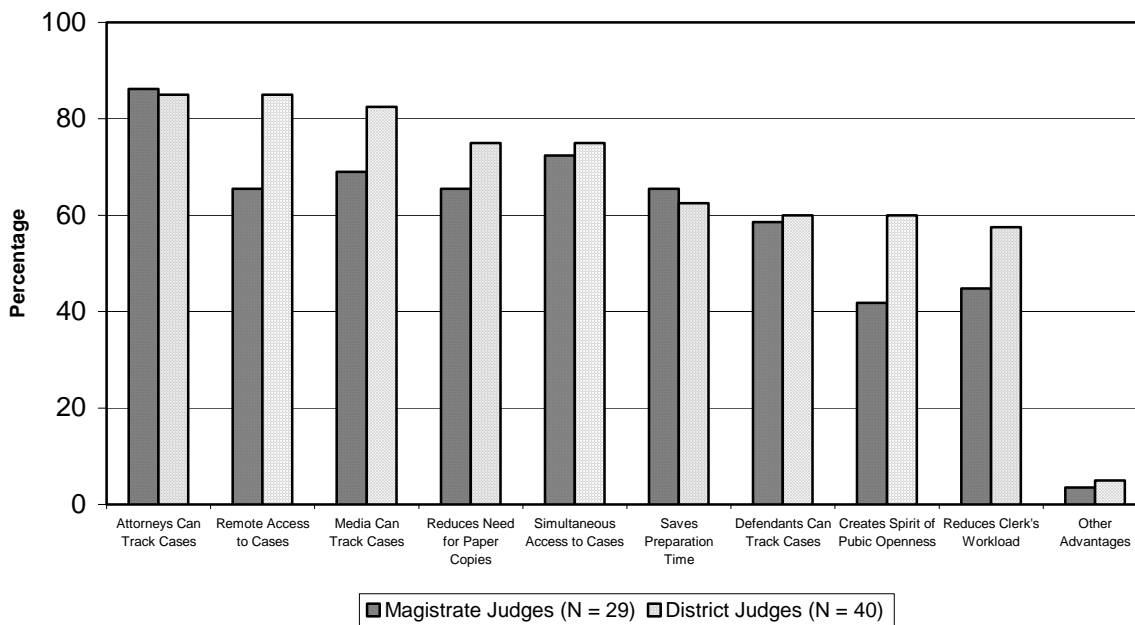


Figure 2
Advantages of Online Public Access
Judges Who Use Online Access



Although high proportions of judges see advantages in remote public access, the chart in Figure 3 shows fewer judges think there are potential disadvantages of remote public access. In Figure 3, the high and low categories are the same for magistrate and district judges: 56 percent and 55 percent for “jurors can access cases,” respectively, and 41 percent and 29 percent for “potential of identity theft,” respectively. Whereas no judges said there were no advantages of remote access, 21 percent of the magistrate judges and 15 percent of the district judges said there were no disadvantages to remote access. Figure 4 lists the same disadvantages, but for judges who use remote access. The results are more mixed than for advantages, but internally consistent. Judges with remote access are as or slightly more likely to see its risks, and therefore more likely to view danger to cooperating defendants and 3rd parties and identity theft as disadvantages. In the other categories of potential disadvantages, judges with remote access are as or less likely to see these as disadvantages.

Figure 3
Disadvantages of Online Public Access

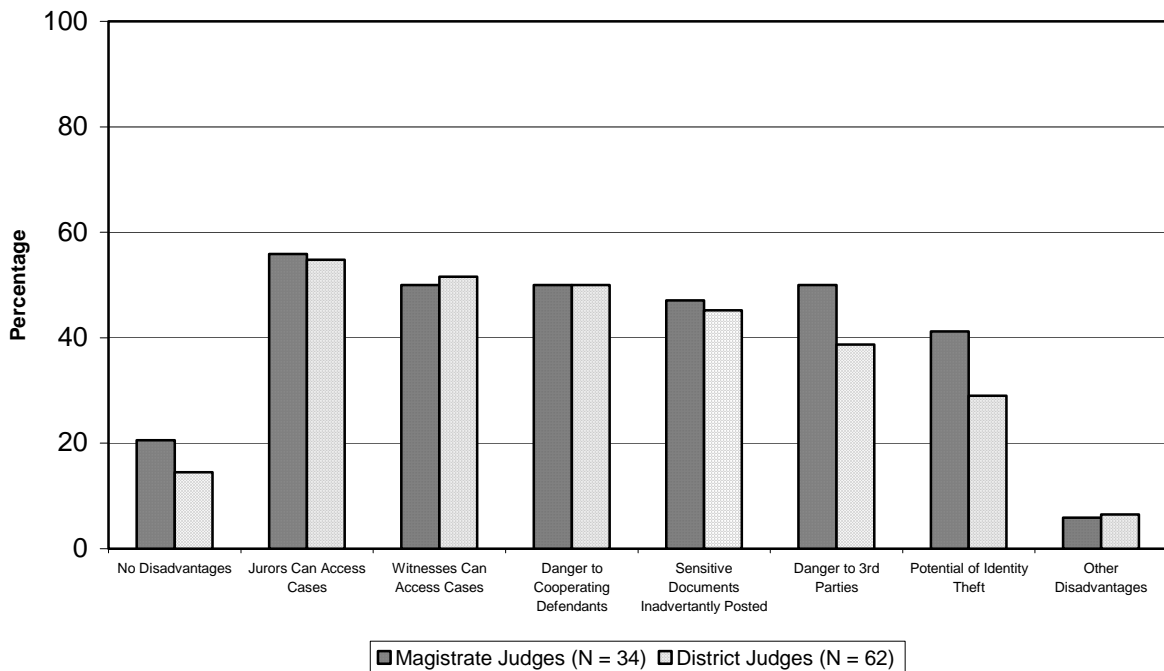
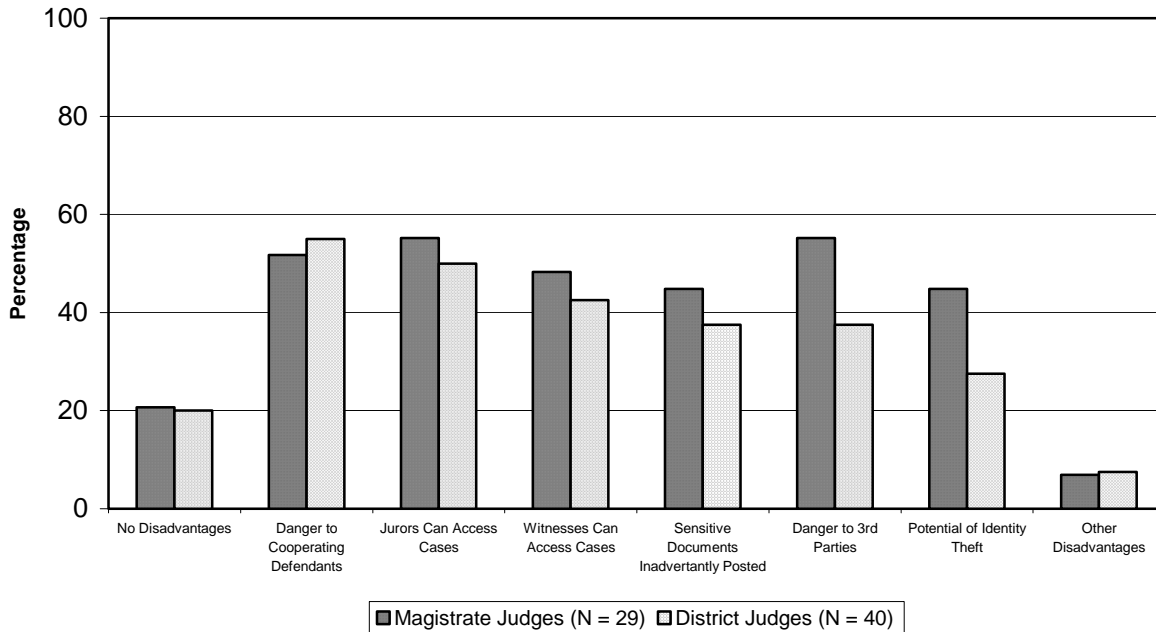


Figure 4
Disadvantages of Online Public Access
Judges Who Use Online Access



Document Availability and Redaction

Judges were asked about the operational guidelines for the pilot project, specifically whether they agreed with list of criminal documents prohibited from remote access and the list of information to be redacted from criminal documents filed with the court. With respect to the documents, 83 percent of the district judges and 88 percent of the magistrate judges agreed with the list. Judges were given an opportunity to name the documents that they would remove from that list; thirteen judges responded and each named the Statement of Reasons in the Judgment and Commitment Order. Seven of these responses were from judges in the pilot district that makes Statements of Reasons available online.

With respect to redacted information, 97 percent of the district judges and 100 percent of the magistrate judges agreed with the list. One judge suggested that “information ... material to a judicial decision” should be exempted from redaction.

When district judges were asked if there were other documents that should be prohibited or information redacted, 27 percent said additional documents should be prohibited and 9 percent said additional information should be redacted. The figures for magistrate judges are 30 percent

and 21 percent, respectively. When asked which documents they would add to the prohibited list, judges gave a variety of responses that ranged from the very general (“any doc[ument] that would endanger the safety or health of others”) to the very specific (“motions to seal”), but with no pattern. There was a similar variety of unpatterned responses as to what additional information should be redacted.

Restrictions on Remote Access

When judges were asked about restrictions on access to criminal case documents, 57 percent of the district judges and 56 percent of the magistrate judges responded that there should be unrestricted remote public access to criminal case documents (excluding sealed documents). Only 4 percent of the district judges and 6 percent of the magistrate judges responded that there should be no public access. Of the remaining judges, 19 percent of the district judges and 24 percent of the magistrate judges indicated that access should be restricted to parties and their attorneys.

Harm

The judges were asked whether, to their knowledge, any harm had resulted from remote public access in their districts. The response was 100 percent no.

ATTORNEY LOCATION IN RELATION TO THE FEDERAL COURTHOUSE

To supplement the interview and survey data, a study was conducted of the location of defense attorneys, both federal defenders and private attorneys, relative to the courthouses in their respective districts. The purpose was to determine whether, based on their distance from the court and the clerk’s office, remote access to criminal case documents presented a real advantage. Distance to the courthouse was measured by the attorneys’ postal Zip Codes, which provides a proximate distance.

Samples of 110 cases were drawn from each of the ten pilot districts. Cases for which addresses were not available were eliminated from the sample, as were a small numbers of cases represented by both federal defenders and private attorneys. If more than one private attorney was listed on the docket, only the first attorney was used. Table 3 contains information about the distribution of the sampled cases for federal defenders and private attorneys.⁹

⁹ The data in Table 3 were weighted to adjust for the fact that a fixed size rather than proportionate size sample was drawn from each district.

Table 3
Attorney Distance to the Courthouse

Attorney	N	Distance to the Courthouse (in Miles)		
		Median	75 th Percentile	90 th Percentile
Federal Defender	382	0.5	0.7	59.3
Private Attorney	649	1.1	16.0	52.2

The median value reported in Table 3 is the mid-point of the distribution of distances to the courthouse—half of the distances are below that value. The 75th and 90th percentiles are similar measures of the distribution of distances—75 percent and 90 percent of the distances are below their respective percentile values. The results show, first, that private attorneys represent more cases than federal defenders. One of the pilot districts—the Southern District of Georgia—has no federal defender; private attorneys represent all cases in this district. If this district is removed from that total, private attorneys still outnumber federal defenders. Second, in the majority of cases, the attorneys are within about one mile of the courthouse. In 75 percent of the cases with a federal defender, that attorney is still located within one mile. But in 75 percent of the cases with a private attorney, the attorney is located within 16 miles of the courthouse. Alternatively, in 25 percent of the cases in their respective categories, federal defenders are located .7 miles or more from the courthouse and private attorneys are located 16 miles or more from the courthouse.

One conclusion to be drawn from this analysis is that the vast majority of defense attorneys are local. Another conclusion is that, given the distances involved, private attorneys can benefit more from remote public access than federal defenders. They are located farther from the courthouse and therefore do not necessarily have ready access to the clerk's office. In the interviews, one federal defender stated that private attorneys gain the most from remote access, for this reason. Two other federal defenders reported that their offices were not in the courthouse, albeit nearby, and that remote access compensated for their more remote location.

FINDINGS FROM THE STUDY OF DOCKET INFORMATION

The final question on which we focused was whether information on the docket sheets could pose a risk to defendants, witnesses, victims, or others, regardless of which criminal case documents are available via remote access. All respondents were asked during the interview about this possibility. The interview information was used to guide a study of this potential risk.

The data source for this study was a sample of docket sheets from the Group II comparison courts.

When asked about the possibility that docket information posed any sort of risk, no interview respondent could name any possibilities except the identification of cooperating defendants. When asked about this possibility, some respondents felt that it was a real risk, but most respondents did not think that the risk would arise solely from docketing information.

How would a cooperating defendant be identified through docketing information? The pilot district courts as well as the Group II comparison courts differ somewhat in how they record information about docket entries. Here are some of the ways in which information about cooperating defendants can be recorded. If the government files a motion for a downward departure based on substantial assistance to the government,¹⁰ for example, there will be entry in the docket describing a government motion, and that motion may be described as a motion by the government for downward departure. If that motion is filed under seal, it may be accompanied by a docket entry that describes a sealed motion. Alternatively, that sealed motion may not be recorded in the online docket. The result is a skip in the numbering of docket entries, which can be taken as evidence that a sealed document was filed with the court. If there is a hearing on that motion, it may be sealed and recorded in the docket in a manner similar to that for the motion. Either way, a sealed document or a sealed hearing prior to sentencing may be evidence of cooperation by the defendant. Regardless of what is or is not sealed, the docket contains information about the original charges and the sentence. These two pieces of information, when compared, may indicate that the defendant received a reduced sentence in exchange for assistance to the government. For example, one defense attorney asserted that he could identify substantial assistance with almost 100 percent accuracy by examining the initial charges, the charges of conviction, the sentencing guideline range for the charges of conviction, and the actual sentence. A defendant rewarded for cooperation will receive a sentence below the guideline range for the charges of conviction, even when that guideline range is proscribed by a mandatory minimum sentence.

Why did interview respondents discount the risk posed by online docketing information? Respondents gave a number of reasons. First, except for sealed documents, any documents filed with the court are available in the clerk's office. Many clerks' offices now have public terminals that access the court's internal system and display not only the docket but also unsealed documents that are not available remotely. No identification is needed to access documents in the clerk's office, and copies may be requested for a fee. Second, remote access requires a computer,

¹⁰ USSG §5K1.2

Internet access, and, in most districts, a PACER account. One defense attorney said that online is the last place he would expect someone interested in detecting cooperation to look. There are alternative sources for this information, including the clerk's office, co-defendants, attorneys, and "word on the street." Third, several respondents made the point that, in multi-defendant cases, cooperation at some level may be the norm. One of these respondents, a defense attorney, said that he assumes cooperation occurred if a defendant in a multi-defendant case did not go to trial. Finally, several respondents argued that a certain level of knowledge and sophistication is required to read and interpret docketing information that does not clearly report that the government moved for a downward departure based on substantial assistance.

A random sample of 100 criminal cases filed in Fiscal Year 2001 was selected from each of the six Group II comparison courts (see Table 1 above) for the docketing information study. The docket sheets for these cases were downloaded and examined. We do not report exact numbers because they would give a false sense of precision. We found sufficient variance in how docket entries are written within and between districts to conclude that the results of the docket study should be viewed cautiously. This result is not limited to these six courts. A clerk in one of the pilot courts felt that periodic reminders to the docketing clerks of the court's guidelines for composing docket entries was a good practice.

The results of docket sheet study from the Group II comparison courts are consistent with the information obtained from interviews. In three of the six districts, we found a few docket entries describing government motions for downward departures, sometimes with a notation that the motion was sealed. But not all of the motions were sealed. In the other districts, we found docket entries that described sealed documents, and sealed hearings on these documents, following a guilty plea and preceding sentencing. In these instances, it would take a sophisticated observer to guess that the defendants were cooperating with the government.

APPENDIX

Operational Guidelines for Courts Participating in the Study of Public Remote Electronic Access to Criminal Case Files

Your court has agreed to participate in a study of remote public electronic access to criminal case file documents. As part of this study, your court will be granted an exemption to the Judicial Conference policy prohibiting remote public access to electronic criminal case files and will be allowed to provide such access, within certain parameters. This document is intended to establish those parameters.

Each court will be allowed to return to the level of remote public access to criminal case files that it was providing before September 19, 2001, the date on which the Judicial Conference adopted the policy prohibiting such access. If your court was not providing remote public access to electronic criminal case file documents at that time, as part of the study, you may provide remote public access to all criminal case file documents, except those documents described below. It is important to note that the Judicial Conference policy on privacy and public access to criminal case files does not prohibit public remote electronic access to orders or opinions.

No court should provide remote public access to the following documents under any circumstances:

- unexecuted warrants of any kind (*e.g.*, search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records; and
- sealed documents

The following personally identifying information should also be redacted by the filing party from all criminal filings as follows:

- Social Security numbers to the last four digits (*e.g.*, redact the Social Security number on a Judgment and Commitment form);
- financial account numbers to the last four digits;
- dates of birth to the year only;
- names of any minor children to initials; and

- the home address of any individual (*e.g.*, victims).

You should make every effort to inform all filers and other court users that documents filed in criminal cases will be available to the general public on the Internet and that the filer has the obligation to redact the specified identifying information from the document prior to filing. It is recommended that you include a notice of electronic availability of criminal case file documents on your court's website, in the clerk's office and through the normal means used by your court to disseminate critical information to the bar and the public. Such notice might state:

Please be informed that this court is participating in a pilot program pursuant to which, for a limited period of time, certain documents filed in criminal cases will be electronically available to the general public via the Internet.

You should not include certain types of sensitive information in any document filed with the court unless such inclusion is necessary and relevant to the case in which it is filed. If sensitive information must be included, certain personal and identifying information, *e.g.*, Social Security numbers, financial account numbers, dates of birth and the names of minor children, must be redacted in the document.

Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion, redaction and/or exclusion of certain information may be made. It is the sole responsibility of counsel, the parties, and any other person preparing or filing a document to be sure that the document complies with this redaction requirement. The clerk will not review each document for redaction. Counsel, the parties and any other person preparing or filing a document are cautioned that failure to redact personal identifiers and/or the inclusion of irrelevant personal information in a document or exhibit filed with the court may subject them to the full disciplinary and remedial power of the court.

Thank you for agreeing to participate in this study regarding public remote electronic access to criminal case files. Your assistance and experiences will provide valuable information that will make it possible to assess the current state of electronic access to criminal case file information and to develop appropriate levels of access to this information in the future. If you have any questions regarding this document or your participation in the study, please contact Katie Simon, Attorney-Advisor, Court Administration Policy Staff via e-mail at Katie.Simon@ao.uscourts.gov, phone at 202-502-1560, or fax at 202-502-1022.