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PANEL 4: Secrecy and the Courts: The Judges' Perspective

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PANEL IV: SECRECY AND THE COURTS: THE JUDGES' PERSPECTIVE

DEAN WEXLER: Good afternoon. Welcome to our final panel on secrecy and the courts, the judges' perspective.

Today's panels have considered secret justice from the perspective of reconciling the interests of plaintiffs, defendants, government agencies, the press and the public. We have already focused on how the judiciary could resolve conflicting interests among parties over secrecy without particular consideration of the judicial interest involved.

Of course, secrecy in judicial proceedings can have another consequence. Even when all the parties desire secrecy, in some cases, at least, a judge may be concerned that the effect of keeping information under wraps would erode public confidence in the integrity of the judicial process and the judiciary itself. How far should a judge go in resisting secrecy in such a case? That is the topic for this afternoon's panel. And we have an enormously distinguished panel of judges to ponder it.

Brief highlights from their biographies are provided in your program. As you might have guessed, they have all graduated from college and law school. Almost all of them serve on the bench of the Southern District of New York and we consider them imports to our home district, the Eastern District, which is represented here by Judge David G. Trager.

I thought that by way of introducing them I would tell you some things that you would not necessarily know about them from appearing before them or reading their opinions or reading about them in the papers.

To my left is Judge Shira A. Scheindlin, who obviously wants to get the most out of her lifetime tenure. Every morning Judge Scheindlin wakes up at 5:30 a.m. and spends an hour working out at the gym before she even goes to her chambers. When you are having your first cup of coffee, she is having lunch.

To my right is Judge Denise Cote. Now, when she wants a change of venue, she usually opts for an exotic one. And there are

no phones. I personally have tried to reach her and have been told there is no way of reaching her. Her *fora non conveniens* have included two-week rafting adventures and gorilla watching in Rwanda.

Judge Sidney H. Stein and Judge John G. Koeltl are both athletes. Judge Stein is a cross-country runner. In fact, he has run marathons and he has ridden his bicycle from Manhattan to Montauk and also around the Gaspé Peninsula. Judge Koeltl plays a mean game of tennis. His doubles partners or opponents are almost all well-known government or defense attorneys.

Judge John S. Martin, Jr. has cross-country aspirations of his own, but he plans to fulfill them by traveling around the United States in a Winnebago. And, by the way, this audience will be particularly interested in knowing that it was Judge Martin who ruled that West Publishing Company could not claim a copyright in the actual judicial decisions that it reprinted in its reporter series and its online services.¹

And, at last, and, as he would be the first to tell you, definitely not least, is our beloved Judge David G. Trager. Now, I could tell you many things about David, but I want to keep my job. Judge Trager was born in Flatbush, Brooklyn, and as a child used to travel with the Brooklyn Dodgers. It occurs to me as I look out at all of you seated here, there is something I can tell you that will clear up a mystery for any of you who have visited his chambers. It was Judge Trager who selected the seats that you are sitting in this afternoon. And that is why, as some of you may have noticed, he actually has a pair of these auditorium seats in his chambers right next to his desk.

So now you know why this symposium has not only been informative and really terrific thus far, but exceedingly comfortable for you all as well. I invite you to sit back in your seats while we turn to the hypotheticals.² You all have them and our hope here on

¹ *Matthew Bender Co. v. West Publ'g Co.*, No. 94-0589, 1997 U.S. Dist. LEXIS 6915, at *12 (S.D.N.Y. May 19, 1997).

² Dean Wexler had prepared a series of hypotheticals that served as the basic structure of the panel discussion. After reading the hypotheticals to the audience and the panel, the panelists then responded directly during the discussion.

the panel is to be somewhat informal. This is not a shy group. So I hope that they will jump right in.

We will start with the first hypothetical about unsealing grand jury submissions. As is well known, in connection with the grand jury investigations in the Monica Lewinsky matter, the United States District Court in Washington, D.C. sealed almost all matters pertaining to those proceedings in an effort to safeguard grand jury secrecy. The most central of these matters were various claims of evidentiary and constitutional privileges asserted by associates of the President. The sealing included legal briefs, oral arguments, judicial decisions and even docket sheets, so that the public had no idea what types of arguments and assertions were being made. Although the press will often seek to intervene to assert the public's right to know, what is the judge's role to resist secrecy because of its impact on the judiciary and the public's perception of it?

JUDGE SCHEINDLIN:³ With respect to the grand jury context, I think that the judge's role here is a minimal one. Grand juries are traditionally secret and there are good reasons for that. There really are investigations, ongoing investigations, and people who undergo investigations often never come further than that. People are not always indicted. People are not always before the public and a dangerous question presents itself as to how much should become public in this very investigatory and early stage.

I think one of the dangers for a judge is to assume that she has the knowledge to opine that this proceeding should be open or that one should be closed. The truth is, a judge does not know very much about the goings on of a grand jury proceeding. In fact, most often there is a huge investigatory mechanism that is really going on behind the scenes, and it has little to do with the judiciary. Again, I must stress that in the grand jury area I am not sure the

³ United States District Court Judge, Southern District of New York. A graduate of the University of Michigan and Cornell Law School, Judge Scheindlin was appointed to the federal bench in 1994. She served as a law clerk to the Honorable Charles L. Brieant of the Southern District of New York, as an Assistant United States Attorney in the Eastern District of New York, as General Counsel to the New York City Department of Investigations, and as a Magistrate Judge in the Eastern District of New York.

judiciary has an independent reason, in terms of the integrity of the institution, to worry about the secrecy that is there by statute.⁴

Now, it is true that the press or an outside party often seeks to open some material such as the ancillary proceedings that were sought to be opened in the Lewinsky case. Obviously, the judge needs to consider that request. But at the court's own initiative, *sua sponte*, I am troubled by that in the grand jury context. I would not feel that, as a matter of the court's integrity, as an institution, we need to do that.

JUDGE MARTIN:⁵ I think that keeping specific facts that may relate to a grand jury investigation secret is certainly something that the prosecutor knows better than the judges he or she is appearing before. But, having been a federal prosecutor for a good part of my life, and now sitting as a federal judge, I have become more wary of completely relying on what the prosecutor does.

It seems to me that in the matters referred to in the first hypothetical problem there are overriding public interests that have nothing to do with the need for grand jury secrecy. Obviously, what the grand jury is investigating and what the witnesses are saying are matters traditionally covered by grand jury secrecy. When the President of the United States, however, comes into an investigation of which he is a well known subject and begins to assert governmental privilege to block certain inquiries in the grand jury, it seems to me, that is a matter of public importance. A judge, therefore, has an obligation to examine whether the papers and arguments can be redacted in a way that will protect grand jury

⁴ FED. R. CRIM. P. 6(e)(2). Rule 6(e)(2) announces a general rule of grand jury secrecy. In relevant part, the rule provides that no person shall "disclose matters occurring before the grand jury" subject to certain enumerated exceptions. *Id.* These exceptions, among many others, include disclosure at the direction of the court or presentation of the same facts to a separate grand jury. FED. R. CRIM. P. 6(e)(3)(C).

⁵ United States District Court Judge, Southern District of New York. A graduate of Manhattan College and Columbia University Law School, Judge Martin was appointed to the federal bench in 1990. He served as law clerk to the Honorable Leonard P. Moore of the United States Court of Appeals for the Second Circuit, as an Assistant United States Attorney for the Southern District of New York, as Assistant to the Solicitor General of the United States, and as the United States Attorney for the Southern District of New York.

secrecy, but still make a public record of what is a matter of important public concern.

JUDGE KOELTL:⁶ I share Judge Scheindlin's views. It seems to me that when a judge imposes himself or herself into the grand jury process and requires disclosure, the judge is essentially acting as an advocate for the public interest. In doing so, the judge must balance competing interests. A judge must, for example, consider (1) whether all of the parties to the grand jury proceeding are claiming that there are important reasons for the government investigation; (2) the privacy rights of individuals not to have their identities disclosed, because they may be the subjects or targets of the investigation; and (3) whether the details of what the grand jury is investigating inevitably point to one or more individuals. Here, a judge must be extremely cautious about dismissing the views of the parties.

This all, however, plays out somewhat differently on appeal where the arguments are far more crystallized. It would not be uncommon to have the court of appeals write, in cases like *United States v. Doe*,⁷ about what the underlying facts were and the established law that you can apply in the context of grand juries. The court of appeals can do it in a published opinion, and on a level of generality where you do not know, for example, which corporation was involved, or who the employees were who were involved. The court of appeals can also write on such a general level that the law is established, but the opinion does not interfere

⁶ United States District Court Judge, Southern District of New York. A graduate of Georgetown University and Harvard Law School, Judge Koeltl was appointed to the federal bench in 1994. Judge Koeltl served as a law clerk to the Honorable Edward Weinfeld of the Southern District of New York and to the Honorable Potter Stewart of the United States Supreme Court. Judge Koeltl also served as an Assistant Special Prosecutor, Watergate Special Prosecution Force, Department of Justice and later became a partner with the law firm of Debevoise & Plimpton.

⁷ 1 F.3d 87, 93 (2d Cir. 1993) (holding that the compelled production of a witness' calendar pursuant to a grand jury subpoena duces tecum did not violate the witness' Fifth Amendment privilege where the calendar had been voluntarily prepared and where the act of producing it was not testimonial because the witness had previously produced a copy to the Securities and Exchange Commission and the government could authenticate the calendar).

with the rights either of the government investigation or of the individual. In reading many of those court of appeals cases,⁸ I still have not been able to determine who the corporations or the individuals were who were actually involved in those decisions.

JUDGE STEIN:⁹ There is one interest we have not talked about in the context of this grand jury discussion – the interest of transparency in the process. By that I mean that there is an independent interest in having what we as judges do in our courtrooms be transparent and obvious to the public.

One of the reasons the federal judiciary enjoys the high regard and confidence of the people that it does, is that by and large our system is very transparent, very open. The public interest in transparency is different from the particular interests of the litigants. However, if there ever were a case where the interest of transparency should yield to other interests, it is in the context of a grand jury proceeding where a wide range of other rights are implicated, specifically the rights of the targets and the subjects of the investigation.

If there were hard and fast answers to any of these questions we would not have a panel discussion on the subject. On all these issues, however, we have to consider the ability of the public to see what the court system – and specifically, judges – are doing and what their decisions are based upon. At some point, perhaps at the point of grand jury submission, that interest in transparency yields to other, more critical interests.

JUDGE TRAGER:¹⁰ Well, I am with my colleague at the

⁸ See, e.g., *In re Three Grand Jury Subpoenas Duces Tecum* Dated Jan. 29, 1999, 191 F.3d 173 (2d Cir. 1999); *Doe*, 1 F.3d at 88-90; *In re Two Grand Jury Subpoenae* [sic] *Duces Tecum* Dated Aug. 21, 1985, 793 F.2d 69 (2d Cir. 1986).

⁹ United States District Judge, Southern District of New York. A graduate of Princeton University and Yale Law School, Judge Stein was appointed to the federal bench in 1995. Judge Stein served as a law clerk to the Honorable Stanley H. Fuld, Chief Judge of the New York Court of Appeals and was a member of the law firm of Stein, Zauderer, Ellenhorn, Frisher & Sharp.

¹⁰ United States District Court Judge, Eastern District of New York. Judge Trager received his undergraduate degree from Columbia University and his LL.B. from Harvard Law School. Judge Trager served as law clerk to Chief Judge Stanley H. Fuld and Associate Judge Kenneth H. Keating of the New York Court of Appeals. Judge Trager was the United States Attorney for the Eastern

other end of the bench, Judge Martin. In fact, the source of the idea for this program was what went on in the Washington courtroom during the Lewinsky litigation.¹¹ "Grand jury secrecy" was used as a sort of talisman for judges to avoid doing their jobs, as difficult as it might be. As Judge Stein noted, the judiciary is probably the most respected branch of government in the country, in good part because of its openness. And we are at risk as an institution if we do anything that permits unnecessary secrecy.

It should not matter, therefore, that the press was greatly interested in the Monica Lewinsky case. It could be any case. We have an independent institutional interest in seeking to avoid unnecessary secrecy. And although the phrase "grand jury secrecy" was tossed about in the Washington case, no one really analyzed the issue closely. I hate to criticize a fellow federal judge whom I have never met, but procedures do matter. Process makes for more careful consideration of the issues at stake. In the Lewinsky matter, however, the process was, as a practical matter, ignored.

Moreover, many of the arguments proffered for the need for secrecy in the Monica Lewinsky case were secrets to no one. No effort was made to parse out those areas that truly had to be kept confidential, as opposed to the parts that the parties claimed for unrelated reasons had to be kept secret. Furthermore, people should understand that major constitutional decisions were being made on important and novel issues of constitutional law that had never been decided before and were being decided in a closed courtroom and in an appeal that was not even docketed.

As I said, the federal judiciary has an independent institutional interest in avoiding that kind of situation. In the long run, our credibility as judges and the respect that we enjoy with the American people will be lost if we, in effect, leave it to the litigants or the press to protect our institutional interest in openness.

District of New York from 1974 to 1978 and the former Dean and Professor of Law at Brooklyn Law School from 1978 to 1993.

¹¹ *In re* Motions of Dow Jones & Co., 142 F.3d 496, 499-506 (D.C. Cir.), *cert. denied*, 525 U.S. 820 (1998) (deciding various motions brought by members of the media to allow press access to the different proceedings related to the special prosecutor's investigations involving Monica Lewinsky).

JUDGE SCHEINDLIN: A brief rebuttal. First, based upon the Lewinsky case, which I think is an exceptional one-of-a-kind case that we may never see again and we may never have seen before, it would be dangerous to generalize about anything to do with grand jury secrecy. Because, as Judge Trager correctly noted, everybody knew who the witnesses were; everybody knew who the targets were. They were leaving the grand jury and going directly to the television cameras and giving interviews. They were repeating their testimony by the hour and by the minute. This is atypical of a grand jury investigation and there should be no mistake as to that point left on this panel. This is not what goes on in a typical grand jury investigation.

Typically, people's safety and lives may be at stake, or other very important interests, and people may have high stakes in maintaining that privacy. I want to add that in the Lewinsky case, the press did seek access to the grand jury material. This was not something the court thought up. Therefore, again, the Lewinsky case is not an appropriate example for our topic of the court's role in *sua sponte* resisting grand jury secrecy. Of course, the press submitted motions in the district court seeking the information, and, of course, they appealed to the circuit court.¹² There was plenty of outside interest.

I thought our topic to some degree was whether we have an institutional interest ourselves in saying, "Wait a minute, this grand jury does not need to be secret." And that is where I was troubled. I do not think that a judge should insert the judiciary into the grand jury process and into the issue of grand jury secrecy unless an outside interest is brought to our attention. Then, of course, judges

¹² *Id.* at 499-506 (holding that the press' motions seeking access to all proceedings, papers and transcripts related to Monica Lewinsky's objections to the grand jury subpoena or President Clinton's motions against Kenneth Starr for alleged violation of grand jury secrecy were to be remanded for reconsideration). The *Dow Jones* court specifically noted that in light of Federal Rule of Criminal Procedure 6(e), "the press must take a narrow view of the purported First Amendment right of access." *Id.* at 500. Indeed, the court rested its conclusions upon "[a] settled proposition" that "there is no First Amendment right of access to grand jury proceedings" in light of the Grand Jury Clause of the Fifth Amendment. *Id.* at 499.

have the obligation to address it and to do so carefully. To that degree, I agree with Judge Trager. The judge in the Lewinsky case, as every judge, had an obligation to consider what could have been public or not and to parse it probably more carefully than what was done.

In the end, that is what the circuit court said. The circuit court sent it back to the district court judge to parse more carefully and to see if anything could be public, at least the docket entry.¹³ Thus, I think the system in fact worked and our integrity was maintained.

JUDGE MARTIN: A brief sur-rebuttal. One of the problems with secret proceedings is that they are secret. If the secrecy really works, then the press is not aware of the proceeding and cannot do its job, and I say this even though I am not necessarily a great fan of the press in all instances. But the fact is that if a proceeding is truly secret, and the only ones who are aware of it are the parties who want to keep it secret and the court, then the only one who can look at the question whether there is a legitimate interest in keeping it secret is the court.

I agree with all the considerations of grand jury secrecy and I think it will be a rare instance when a judge will mandate public disclosure. But the fact is that the parties come to us for various types of relief in the course of a grand jury proceeding. It may well be that there are certain parts that should not necessarily be secret, and we are the only ones who can raise the issue.

JUDGE COTE:¹⁴ I want to add just one example to follow up on Judge Martin's remarks. Take, for instance, contempt proceedings in connection with grand jury testimony. Contempt proceedings customarily are not secret. They are litigated in open court and people will or will not testify when immunized, and the court has

¹³ *Id.* at 504.

¹⁴ United States District Court Judge, Southern District of New York. A graduate of St. Mary's College at Notre Dame and Columbia University Law School, Judge Cote was appointed to the federal bench in 1994. She served previously in the Department of Justice as the Special Assistant to the Chief of the Criminal Division, in the United States Attorney's Office for the Southern District of New York as the first woman Chief of the Criminal Division, and as a partner in the law firm of Kaye, Scholer, Fierman, Hays & Handler.

to decide whether to try to compel such testimony by imprisonment, etc. Important public policy is worked out in the context of contempt proceedings.

Thus, in one sense it is absolutely essential to the way a grand jury operates to get every person's testimony before it. In another sense, it is ancillary and there are other public policy issues being worked out, and they are best resolved in a public forum. This appropriately allows everyone to judge whether this part of the law is working or not working.

DEAN WEXLER: I would like to now entertain some questions from the audience. Go ahead, Judge Borman.

JUDGE BORMAN: How does the panel feel about the possibility of a party seeking access to the questionnaires of the people who would be on the grand jury after indictment because they want to challenge a grand jury selection process, going even into the questionnaires of the grand jurors themselves? Is that something that you would say is private or public?

JUDGE SCHEINDLIN: In our federal trial juries we certainly have had challenges to the racial and ethnic makeup of the trial jury. I have not seen one, but it does not mean that there is no basis to make that challenge. Just to take a quick shot at responding to your question, however, I do not see why that would have to be confidential. It does not seem to me that confidentiality would protect what the secrecy was intended to protect. Thus, the identity and racial make up of the jury should remain secret, but the process of how we select our jury members can be open.

AUDIENCE MEMBER: I thought the panel really illuminated the distinction between the court and the grand jury as separate institutions. What does the panel think about the role of the judge in protecting the grand jury's secrecy? The front page of today's *New York Times* has what *Times* counsel calls imaginative reporting and what some people might call a massive grand jury leak coming out of the Sotheby's matter.¹⁵ What does the panel perceive as its

¹⁵ Douglas Frantz et al., *Ex Leaders of Two Auction Giants Are Said to Initiate Price Fixing*, N.Y. TIMES, Apr. 7, 2000, at A1 (reporting that the prosecutors in a federal antitrust investigation of Sotheby's and Christie's auction houses were given evidence of a scheme to limit competition by fixing commissions of buyers and sellers that was set in motion by the chairmen of the

obligation with respect to a breach of grand jury secrecy? I am making reference to Judge Starr and the Lewinsky matter as well.

JUDGE MARTIN: I think the problem is that it is almost impossible to determine if there has been a leak. How do you know anything has been leaked from a grand jury? There is nothing that prohibits a witness before a grand jury from going out and talking to whomever he or she pleases.¹⁶

Now, since the press may not want anyone to know who their source is, we see the frequently cited "people close to the investigation." Well, a witness who goes before the grand jury is certainly "close to the investigation." Absent a well-litigated motion in the context of a criminal indictment, we really do not have the resources to go out and conduct an investigation to try and find out what is happening.

DEAN WEXLER: Okay, let us go to our next hypothetical, which relates to decisions on juvenile offender status. In federal or state criminal proceedings involving juvenile offenders, the determination of whether the defendant should be afforded juvenile offender status or treated as an adult can be pivotal. Often the prosecution and defense each urge that the determination itself be made in secret hearings and deliberations. But in certain cases, because of the impact of the crime on the community, it may be very important, whichever way the decision about juvenile offender status comes out, for the public to understand the justification for the decision and have confidence that it was reached for proper reasons. To what extent should the judge reach out and try to find

two companies).

¹⁶ *In re Motions of Dow Jones & Co.*, 142 F.3d at 498. In describing the atmosphere surrounding the grand jury investigation of President Clinton and Monica Lewinsky, the *Dow Jones* court noted the following:

Since mid-January the press has staked out the courthouse, photographing and attempting to intercept anyone who, because of his or her suspected status as witness or lawyer in the investigation, might shed light on the grand jury's progress. Some individuals have paused to give their versions of what transpired during their grand jury appearances; others have refused to be interviewed or to give a public statement.

Id.

justification for opening the determination when the parties are pressing for secrecy?

JUDGE TRAGER: Well, federal law provides that the decision whether a juvenile should be treated as an adult is to be made behind closed doors.¹⁷ If in fact the determination is that the juvenile should be treated as an adult, then the entire proceeding, including that decision, generally becomes a public record.¹⁸ But if the decision is to maintain the juvenile status, presumably the entire proceeding, and the reasons for that result, would remain secret.

This hypothetical is based upon a case that I had before me, the Crown Heights/Lemrick Nelson case.¹⁹ In adjudicating that case,

¹⁷ 18 U.S.C. § 5038 (1994). Section 5038(a) requires that “[t]hroughout and upon the completion of the juvenile delinquency proceeding, the records shall be safeguarded from disclosure to unauthorized persons.” *Id.* The only persons privy to the juvenile records are the judge, the juvenile’s counsel and the government. *Id.* § 5038(c). The statute further provides that the “[d]istrict courts exercising jurisdiction over any juvenile shall inform the juvenile, and his parents or guardian, in writing in clear and nontechnical language, of rights relating to his juvenile record.” *Id.* § 5038(b).

¹⁸ *Id.* § 5038(e).

¹⁹ *United States v. Nelson*, 22 Media L. Rep. (BNA) 2320 (E.D.N.Y. Sept. 8, 1994), *vacated*, 68 F.3d 583 (2d Cir. 1995), *remanded*, 921 F. Supp. 105 (E.D.N.Y. 1996), *aff’d*, 90 F.3d 636 (2d Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997). In *Nelson*, a sixteen year old defendant was charged with using force and willfully injuring or attempting to injure Yankel Rosenbaum, an Orthodox Jew, because of his religion. *Nelson*, 68 F.3d at 585. The narrative of events is as follows: In August of 1991, a Hasidic motorist accidentally struck two African-American children in the Crown Heights section of Brooklyn, New York. *Id.* As a crowd of predominantly African-American onlookers gathered, a rumor spread amongst them that the responding paramedics focused their treatment on the injured Hasidic driver rather than the two injured children, trapped beneath the automobile. *Id.* As a result, a riot ensued. During the course of the riot, Yankel Rosenbaum, a rabbinical student, was stabbed to death by Lemrick Nelson. *Id.* at 586. The incident sparked a firestorm of controversy throughout the press and public of the greater New York City area. The defendant was sixteen years old when the incident occurred and nineteen years old when the United States filed an indictment against him. *Nelson*, 921 F. Supp. at 108. Eventually, the defendant was tried as an adult. In October 1992, Nelson was acquitted by a Brooklyn jury of intentional murder, murder by depraved indifference, and first and second degree manslaughter. Robert D. McFadden, *Teen-Ager Acquitted in*

I had to determine initially whether to treat Lemrick Nelson as a juvenile. Considering the public interest and the public controversy surrounding the matter, a federal judge – even with lifetime tenure – must consider the question of public confidence where a critical decision is being made in secret with no reasons given to the interested communities.

The government, and especially the defense, had no interest in having disclosure. The press did intervene, but, to be truthful about it, they were somewhat my tool. The press' intervention led me to Third Circuit case law that assisted me in opening the proceedings to the public.²⁰ My real reason for this holding was not that I was trying to cater to the press, but that courts cannot make such important decisions without publicly giving the reasons for those decisions, and considering the public controversy surrounding the case and the public interest in the issues. Thus, the federal courts as an institution – and in my view I was representing the judiciary here – had an independent interest in disclosing whether or not the public was interested at all in this controversy. To the extent a statute requires unnecessary secrecy, it is a very dangerous matter. It is one thing if the decision was made in open court to thereafter proceed in secrecy. In that event, at least the public would have known what the basis was for this “irrational” and “crazy decision” I made; a decision, by the way, which was reversed.²¹ I thought then, and still think now, that the public had a right to know about it. Ultimately, as judges we have an interest in letting the public know what we are doing and why we are doing it, even if the parties do not care.

Slaying During '91 Crown Heights Melee, N.Y. TIMES, Oct. 30, 1992, at A1. In 1997, Nelson was convicted on federal charges of violating Yankel Rosenbaum's civil rights. He is currently serving a nineteen and one-half year sentence at a federal prison in Beaumont, Texas. Joseph P. Fried, *Following Up: Appeals Continue for 2 Convicted in 1991 Unrest*, N.Y. TIMES, Sept. 24, 2000, at A41. Nelson is currently appealing his 1997 conviction. Mark Hamblett, *New Trial Sought Over Crown Heights Jury Pool*, N.Y.L.J., May 4, 2000, at 1.

²⁰ *United States v. A.D. PG Publ'g Co.*, 28 F.3d 1353, 1361 (3d Cir. 1994) (rejecting the notion that closure of court proceedings are justified by the policy of rehabilitation of juvenile defendants).

²¹ *Nelson*, 68 F.3d at 591.

JUDGE SCHEINDLIN: But of course you did open the proceedings in the Lemrick Nelson case, because it had already been tried in state court and there was no one in town who did not know the name, Lemrick Nelson.

I believe that it is more instructive to examine the more typical cases confronted by judges involving juveniles. Suppose some young person is being investigated or has been charged, and the question presented is whether these proceedings should be sealed. Certainly, the word of the day is "balancing." You must have heard it a thousand times already today. You will balance what might be the public's interest with the interest of this particular juvenile.

This problem seems to me to be a fairly easy one to solve. With the typical juvenile, I do not see why you cannot redact the caption and take your reasons public. Why can't this juvenile be Juvenile M, or Juvenile S? It is done all the time. We always have cases captioned *In re M* or *In re S*. Lemrick Nelson had to be done publicly, because there was very little privacy interest left to protect. The man had been tried right here and the whole world knew it.

So it is, again, a unique case from which I am afraid to generalize bad principles. Typically, it seems to me that there is a privacy interest in juvenile proceedings, but the court's reasoning can be made known to the public by the simple method of redacting the caption.

JUDGE KOELTL: I would also be troubled if the statute provided that these proceedings cannot be disclosed, and then for the court to say, well, there are other interests involved that perhaps were not taken into account when the statute was passed. I hasten to add that I am not familiar with what the statute provides in circumstances such as these. One of the important institutional considerations that we have is to follow the law as the law is. In the same way that grand jury secrecy is provided for in Rule 6(e),²² and we have to make good faith decisions as to whether

²² FED. R. CRIM. P. 6(e)(2). Rule 6(e)(2) provides:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph 3(A)(ii) of this subdivision shall not disclose matters

the law applies or it does not apply in a given case, so too we would have to follow the law in this case. In the one case that I did have involving a question with respect to a juvenile, there was never any issue of whether it should be public, because there was a determination that the individual was not subject to juvenile offender status and the entire proceeding was public. I think, therefore, that our institutional considerations are within the framework we are given.

JUDGE TRAGER: Do I get a rebuttal? The issue here is a pure matter of statutory interpretation. The Third Circuit, much to my delight and amazement, in order to avoid constitutional issues, read the statute in a narrow way that permitted me, despite what I thought was its clear language, to achieve an appropriate goal.²³ While I believe that Judge Scheindlin is correct when she says that with most cases you can redact the case caption, and the public interest concern is disposed of, this is not always the case. My concern stems more from the very fact that we have such a statute in the first place, because I think that it is not just the high publicity of the case that matters. What is critical are the numerous decisions that different judges will make over time, which educate judges and the public about what the appropriate standards and considerations are in deciding a particular issue. If all is secret and we are all none the wiser, then I do not know what other judges based their reasoning on and they cannot know what I based my decision upon. This is the paramount concern. Giving the statute a broad reading, therefore, would be inimical to not only our own enlightenment as judges but to the public discourse as well.

DEAN WEXLER: Let us now move to the criminal area, and discuss participation in feigned proceedings. In unusual circum-

occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Id.

²³ *A.D. PG Publ'g Co.*, 28 F.3d at 1361 (holding that the Juvenile Delinquency Act affords district court judges the requisite discretion to regulate access to the record of proceedings on a case-by-case basis through a balancing of interests of the juvenile and the First Amendment rights of the public).

stances, in order to protect the security of a cooperating witness or defendant in a serious criminal case, the judge will be made aware of or even participate in proceedings that are designed to mask the fact that the person is cooperating with the government. This may take the form of setting a sham trial date to make it appear that a defendant or witness is hostile to the government and is being actively prosecuted. Under what circumstances and to what extent should a judge participate, though arguably for powerful reasons, in what is essentially a misleading statement?

JUDGE COTE: I think the judge should not participate in any such proceeding. I am not quite sure what a sham trial date means. I am assuming under the hypothetical that the defendant has actually been indicted and deserves a trial date. Thus, in all honesty, it would only be a sham if a guilty plea had been entered or if it were the judge's practice not to set trial dates.

As you know, it is common practice for many of us to try to set trial dates as soon as the case is before us or at the earliest opportunity that makes sense, unless there is some good reason not to because of the complexity of the case. For instance, you would not immediately set a trial date in a death penalty prosecution where you need to wait and see what the Justice Department is going to do. But if the court allows itself to do anything that is misleading, I think it is very undermining. I think that ultimately all parties, the public and our colleagues need to think of us as open, frank, and honest. There is no benefit to the government or cooperators, ultimately, for us to be involved in anything that is misleading.

JUDGE STEIN: I agree with Judge Cote. Part of it is how we have defined the term "sham trial." Everyone is in favor of motherhood and apple pie; everyone is opposed to misleading and sham things. I include myself as someone who is opposed to sham proceedings.

As Judge Cote does, I try to set a trial date as early in the proceeding as practicable in order to give some certainty to the proceedings and to help the litigation move forward to an end point. In the course of litigation, defendants will peel off and enter into plea agreements with the government. The trial date, however, is still set on the court calendar, as long as at least one remaining defendant is still going to trial. That is not a sham trial date as I

see it. It may be a sham in the sense that some people are cooperating. But it is not a sham because at least one person is going to trial.

With that definition, I have no problem in there being a trial date, even though some people are cooperating and the remaining defendants may not be aware of that. In the typical case where the issue is relevant – a multi-defendant case – many of the co-defendants seem to know a lot more than the judges, and they instantly know who is cooperating and who is not. But it is not because of anything that the judge has done.

JUDGE MARTIN: Let me take the other view a little bit. While I agree with most of what Judge Cote said, it is hard to be absolute in any of these areas. Let us assume for a minute that a prosecutor comes to you and says, "Judge, today you are supposed to be sentencing an individual who was a major informant in a Colombian drug prosecution. We have information that the drug lord in Colombia has his henchmen at the home of this individual, and if there is anything that indicates that this individual has been cooperating, they intend to kill his wife and children. What we were hoping we would do today is have you sentence him under the guidelines to the guideline, but not actually sign the judgment of conviction. And that subsequently we could have another proceeding in which the actual sentence is imposed."

Personally, I would have a hard time in that circumstance saying, "Sorry, I am not going to get involved." I think it presents a difficult question, but ultimately what I would hope is that we would try to do that which we think is right in the circumstance and that which we think the public, upon knowing the entire facts, would agree with us is right.

JUDGE COTE: Just to take on your hypothetical, is the sentence a real sentence? Are you articulating in court all of your reasons? Is all that you are doing is not filing the judgment of conviction?

JUDGE MARTIN: No. What I am going to say in court is as follows: "The guideline range here is three hundred fifty months to life and it is the judgment of the court that you are hereby sentenced to custody of the Bureau of Prisons."

JUDGE COTE: Is that the sentence that you are ultimately going to impose?

JUDGE MARTIN: No. Ultimately, I am probably going to give him time served. He is cooperating. The reason people want to kill him and his family is because they think he is going to cooperate.

DEAN WEXLER: Well, I think that sort of moves us directly to the next problem where we will assume that there are no elements of deception and it is a little closer to what Judge Martin

JUDGE TRAGER: Before you move on, would you like another hypothetical similar to Judge Martin's?

DEAN WEXLER: Sure.

JUDGE STEIN: Before you get to the other hypothetical, I must say, Judge Martin, that is quite a problem. [laughter]

DEAN WEXLER: I was letting you off the hook there.

JUDGE STEIN: You certainly have put the issue very starkly. The way to solve this issue is to find some way to have it be a genuine sentence, but to find a provision that allows you to change it for cooperation at some point in the future.

JUDGE MARTIN: No. No. None of this wishy-washy stuff! Let's change the facts and make it more interesting. [laughter]

JUDGE STEIN: You have put the issue starkly.

JUDGE COTE: I think that you either seal the courtroom at sentencing or you adjourn the sentence. But you cannot pronounce a sentence that is not the real sentence.

JUDGE TRAGER: Well, are you persuaded that even if you adjourn the sentence they are going to think that something is wrong and they will waste these people?

JUDGE SCHEINDLIN: Exactly. I will jump right in, Judge Martin, and defend you because I am in trouble here anyway. [laughter]

To take your side of it, the main point of it is that it is a one in a thousand sentencing scenario. And that is the point you have to understand. There is the rare, rare moment when you know that in Colombia the house is surrounded with guns. And you know that an adjournment is as big a tip-off as an unreasonably low sentence. Either way the message is clear: this is a cooperator in a major case. So for this one and only time we have the flexibility to make this exception. And I am not troubled that Judge Martin would do such a thing. [laughter]

JUDGE TRAGER: I was just going to say, Judge Martin's hypothetical is wonderful. It is an easy one. I had a more difficult one. In my case there were two defendants. One had already publicly indicated he would take a plea. With respect to the remaining defendant, there was a question of a conspiracy to murder the cooperating witness. Were the second, now cooperating, defendant to take a plea, at that point it would be clear that the investigation of the attempted murder would come to an end. So, at the joint request of the government and the defense, I rescheduled the trial for some time later, knowing very well that the defendant would take a plea. By simply adjourning the case, nothing would appear on the calendar that would even suggest that the second defendant was cooperating.

It was not as dramatic a situation as Judge Martin's hypothetical. I was not fearing for the loss of someone's life because the targets were being monitored. Nevertheless, I recognize that my solution jeopardizes public reliance on the integrity of our judicial system. Still, there was a conspiracy to murder a cooperating witness about which I had some concerns.

But I have to tell you, although Judge Cote's point is well made, the issue is still troubling. I looked for another way to avoid having to engage in this charade, but I was unable to find one. The government persuaded me that there was no other way to resolve the situation without compromising the investigation. If I could have found another way that avoided the sham trial date, I certainly would have chosen it. I was not happy about the choice I faced.

DEAN WEXLER: Have any of you accepted a secret guilty plea or had closed sentencing proceedings on the theory that you were protecting a cooperating defendant?

JUDGE MARTIN: Well, going back historically, we used to take sealed pleas all the time. There was a change in the Department of Justice guidelines and now the government cannot consent

to a sealed plea.²⁴ They are supposed to get permission in advance.²⁵

Today, the defendant comes before the court. Defense counsel then indicates that the defendant will plead guilty, but then adds, "If it becomes known that my client is going to plead guilty it will indicate that he is an informant. The safety of him and his family will be in jeopardy. And I would ask that you seal the courtroom."

As a Judge, you turn to the government and say, "What is the government's position?"

The government then replies, "As you know, Your Honor, we cannot consent."

I would say, "Fine. Do you agree with the defense counsel that if this is made known to the public this defendant's life is in jeopardy and there could be danger to his family?"

And they say, "Yes." And then I seal the proceeding.

JUDGE KOELTL: There is one slight variant to that. I am concerned about the First Amendment interests in an open courtroom,²⁶ not because of the importance to the judiciary of

²⁴ "The Government should take a position on any motion to close a judicial proceeding, and should ordinarily oppose closure; it should move for or consent to closed proceedings only when closure is plainly essential to the interests of justice." 28 C.F.R. § 50.9 (2000). Section 50.9 sets forth several guidelines to be followed in the event closure is necessary. These guidelines require the lack of any reasonable alternative to closure allowing for the protection of the interests at stake. *Id.* § 50.9(c)(1). The guidelines also require closure to be minimized, adequate notice of any proffered closure to be given to the general public, and any request for closure to be made on the record if possible. *Id.* §§ 50.9(c)(3), (c)(4).

²⁵ The United States Attorney's Manual mandates that a closure motion cannot be sought "without the express authorization of the Deputy Attorney General." United States Attorney's Manual § 9-5.150, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrn.htm. In the event a closure motion is sought, the U.S. Attorney should contact the Criminal Division, the Policy and Statutory Enforcement Unit and the Office of Enforcement Operations, or the appropriate division of the Department of Justice. *Id.*: The manual, moreover, requires that procedures of § 50.9 of the Code of Federal Regulations be adhered to. *Id.*

²⁶ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the

having open courtrooms, but because of the constitutional requirements of the First Amendment and the cases that have interpreted the First Amendment in terms of open courtrooms.²⁷ Thus, when there is an effort to seal the courtroom, it is something that does require the showing, and if we are to follow the law it does require the showing.

There is a way to work that out. You can schedule the plea at the end of the day when there is no one there. When you do that, almost invariably, the motion to seal the courtroom is mooted out because there is no one there. You are then left with the issue of the transcript and whether the transcript of that plea will be a public record. And if, as will often be the case, the transcript of the proceeding itself indicates that the disclosure at that time will result in any possible physical danger to the defendant or members of the defendant's family, then there certainly is a compelling reason to seal the transcript until such time as it becomes public.

I had a similar situation in the other part of the hypothetical, where I had a defense witness who could not testify in open court because the nature of the witness's testimony was such as to put the witness in danger. So you had the defendant arguing for a sealed courtroom and the government saying, "We cannot take the position that the courtroom should be closed" or "We take the

Government for a redress of grievance." U.S. CONST. amend. I. As the Supreme Court has noted, the "right of access to criminal trials is not explicitly mentioned in terms in the First Amendment. But . . . [t]he First Amendment is . . . broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 604 (1982) (citations omitted).

²⁷ See, e.g., *Globe Newspaper*, 457 U.S. at 609-10 (holding that under the First Amendment the state interest in safeguarding the psychological well being of a minor and encouraging minors to come forward and provide testimony cannot justify a statute requiring trial judges to exclude the press and general public from a courtroom during the testimony of a minor victim in a sex offense trial); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (holding that the right to attend criminal trials is implicit within the First and Fourteenth Amendments); *United States v. Doe*, 63 F.3d 121, 130 (2d Cir. 1995) (holding that a district court is vested with "broad discretion" in determining whether a substantial probability of danger will result from the lack of closure of trial proceedings).

position that the courtroom should be open.” This is a good example of the court applying the law of the First Amendment. I ended up scheduling it at a time when the courtroom was open and no one came in.

JUDGE SCHEINDLIN: Again, it is a matter of balance and degree. I think if it is rarely used, as opposed to frequently used, parties will begin to over-ask for this closing of the courtroom. That is what we have to be aware of. There are the rare occasions where you really should seal a plea, and there is a mechanism to do it, as we have all reported here.

But what happened in the state courts, anyway, was an awful lot of trials where an undercover officer testified in narcotics cases.²⁸ The state courts were routinely asked to close the criminal trial at the point when the undercover witness testified. The court, without asking for any reasons, frequently sealed the courtroom.²⁹

Then, these cases found their way into the federal courts via habeas petitions, and we had some very interesting district court rulings that have led to an en banc decision of our circuit³⁰ and, I am told, another en banc decision coming in a sister circuit.³¹ And so the point is that when it is an exceptional situation there is a way to do it. And it is sometimes the right thing to do. But what we have to guard against is the abuse of it and prevent the exception from becoming routine.

²⁸ See, e.g., *People v. Vera*, 685 N.Y.S.2d 659, 659 (App. Div. 1999) (reviewing testimony of participants in a street-level drug operation); *People v. Akaydin*, 685 N.Y.S.2d 737, 738 (App. Div.), *appeal denied*, 93 N.Y.2d 965 (1999) (reviewing evidence indicating that defendant participated in sale of narcotics to an undercover police officer); *People v. Ramos*, 662 N.Y.S.2d 739, 744 (App. Div. 1997) (examining the testimony indicating that defendant purchased narcotics from an undercover police officer).

²⁹ See *Vera*, 685 N.Y.S.2d at 659; *Akaydin*, 685 N.Y.S.2d at 738; *People v. Rivera*, 673 N.Y.S.2d 102, 102 (App. Div. 1999).

³⁰ See, e.g., *Ayala v. Speckard*, 131 F.3d 62, 64 (2d Cir. 1997) (en banc) (holding that a “trial judge, having already considered closure during the testimony of one witness as an alternative to complete closure, is not required to consider *sua sponte* further alternatives to closure but needs to consider only further alternatives suggested by the parties”).

³¹ *Bell v. Jarvis*, 198 F.3d 432 (4th Cir. 1999). The Fourth Circuit opinion was subsequently vacated, and a request for a rehearing en banc was granted. *Id.*

JUDGE STEIN: What we are all struggling with is, again, the powerful idea that there is a strong presumption of openness to our judicial proceedings. It is embedded in the common law,³² in the First Amendment,³³ and the Sixth Amendment right to a public trial.³⁴ To the extent that we allow the exceptions to become bigger and bigger, then we start to look like the Star Chamber,³⁵ or *lettres de cachet*³⁶ or similar items that really should not find their way into our system of justice.

The Second Circuit in *Ayala v. Speckard*,³⁷ and the Supreme

³² See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978) (examining the scope of the common law right of access); see also *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 505 (1984) (observing that “[t]he roots of open trials reach back to the days before the Norman Conquest”); *Richmond Newspapers*, 448 U.S. at 569 (concluding that “the historical evidence demonstrates that at the time our organic laws were adopted, criminal trials both here and in England had long been presumptively open”).

³³ See *Richmond Newspapers*, 448 U.S. at 576 (ruling that “the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors”).

³⁴ *Id.* at 574.

³⁵ See *In re Oliver*, 333 U.S. 257, 266 (1948), quoted in *Estes v. Texas*, 381 U.S. 532, 539 (1965), also quoted in *Richmond Newspapers*, 448 U.S. at 574; see also *Brown v. Kuhlmann*, 142 F.3d 529, 536 (2d Cir. 1998); *United States v. Cojab*, 996 F.2d 1404, 1407 (2d Cir. 1993). The Star Chamber was an “English court having broad civil and criminal jurisdiction at the King’s discretion and noted for its secretive, arbitrary, and oppressive procedures, including compulsory self-incrimination, inquisitorial investigation, and the absence of juries.” BLACK’S LAW DICTIONARY 1414 (7th ed. 1999).

³⁶ *Lettres de cachet* were orders issued by the French monarchs of pre-revolutionary France consigning citizens to the Bastille. See *Barrera-Echavarria v. Rison*, 21 F.3d 314, 319 (9th Cir. 1994). “The main thrust [of the adoption of the Fourth Amendment] was directed at the invasion of privacy through general warrants of assistance and *lettres de cachet*.” *Ford v. United States*, 352 F.2d 927, 932 (D.C. Cir. 1965).

³⁷ 131 F.3d 62 (2d Cir. 1997) (en banc). In *Ayala*, courtroom closure was sufficiently justified during the testimony of an undercover police officer in three separate criminal trials of drug “buy and bust” operations. The officer intended to continue his undercover work in the same geographic area where the defendant was arrested after testifying at trial. The court determined that preserving the continued effectiveness of an undercover officer was a substantial state interest. *Id.* at 72. Courtroom closure, therefore, was justified to protect the state interest from severe prejudice by requiring the officer to testify in open

Court in *Waller v. Georgia*,³⁸ laid down some pretty good guidelines and factors that the district court has to weigh. That court instructed the district judges to put specific findings on the record before the courtroom can be closed for limited portions of a public trial. The guidelines are designed to permit limited exceptions to an open trial, which is exactly how it ought to be.

JUDGE COTE: I think one factor to consider here is whether you are sealing something for a limited period of time that will then become public. If it is only sealed for a limited period then, ultimately there will be full public access to the record and a full ability to scrutinize and understand what happened in a particular case. That is why sealing the record of a guilty plea with a cooperator in a dangerous case (e.g. a drug case, a gang case), where the person is in the witness protection program, or otherwise protected, is not troubling. The latter scenario presents a very different situation than some of the other problems we have been dealing with here, because ultimately there is full public access to what has happened in the case.

DEAN WEXLER: Let's move to the civil side. Our next hypothetical raises questions about sealed settlement agreements. Very often, parties seek judicial approval of a confidentiality agreement to seal a court file and proceedings in conjunction with

court. The court emphasized the limited nature of this closure since the courtroom was sealed for only one witness and there was no limitation on the public right to obtain the transcript of the officer's testimony. *Id.*

³⁸ 467 U.S. 39, 48 (1984). In *Waller*, the Supreme Court reversed the lower court's decision to close a hearing on a motion to suppress certain wiretap evidence. The closure of the entire suppression hearing was unjustified because it was not clear whose privacy interests would be prejudiced by an open courtroom and the trial court did not consider alternatives to immediate closure, such as requiring a more detailed explanation as to the necessity of a closed courtroom. *Id.* at 48.

The Court applied a four-factor test to determine the appropriateness of courtroom closure: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) it must make findings adequate to support the closure. *Id.* Applying these standards to the facts of this case, the trial court's findings were too broad and general to justify closure of the entire hearing. *Id.*

the settlement of a civil matter. There may be a possibility that third parties may come forward in the future seeking access to the sealed materials; but none has presently done so. What is the judge's obligation to take such a possibility into account in approving the sealing order, and what should the judge do when third parties later appear to modify that order? More broadly, how closely should the court scrutinize and justify requests to seal proceedings in order to protect the court's institutional integrity?

JUDGE KOELTL: I have gotten into the habit of adding a clause at the bottom of each confidentiality agreement providing that the court can change this confidentiality agreement at any time. This serves to put the parties on notice that if at any time there is a reason to change the agreement, whether it be because a third party comes in or there is some other change in the case, the court reserves the right to do it. Thus, the parties should not rely on the existence of an iron-clad confidentiality agreement.

The other thing I always do is look very carefully at obligations the parties are attempting to impose on the court. It is remarkable the number of confidentiality agreements that contain, if you read them, obligations on what the court can do with the allegedly confidential materials. One example is a clause that required the court to destroy all materials or return them to the parties. It's true!

Moreover, if the agreement has not been sufficiently carefully worded, I add another clause that says, "This agreement does not apply to the court or court personnel." Then the parties know that if they give those materials to the court, those materials may well be filed and subject to public inspection.

JUDGE COTE: I understand the focus of this to be really on settlement agreements. My feeling is that if I am signing something, then it should be part of the public record. If you want me to sign your settlement agreement, or so order it, I am happy to do so, but it is going to be a public document. Further, when parties submit settlement agreements to me that indicate that they expect it to be sealed, we contact them and tell them if they want me to sign this document, it will be filed in the public record. It is their choice.

I feel that if I am part of the process, it should be available to the public. If a party is doing something that they do not want the public to know about – and many parties do – then sign settlement

agreements and give the court a stipulation of discontinuance. All I am signing is a stipulation of discontinuance pursuant to a private settlement agreement.

JUDGE TRAGER: Suppose the stipulation of discontinuance says that you will retain jurisdiction to enforce the settlement agreement entered into by the parties?

JUDGE COTE: Let us say there is a dispute about that settlement agreement and someone wants to come in and litigate it. Then they are going to have to file all of that in the public record. Therefore, when they want me to act, again, it is going to be part of the public record.

JUDGE SCHEINDLIN: I feel that this is a complicated question and, once again, there really cannot be a blanket rule that applies to every case. There is the odd case where confidentiality is a term of the settlement agreement. It could arise in one of two ways. First, as part of their negotiations, the parties believe the settlement needs to be confidential, and they have good cause for that and they make a showing of that good cause. The question then becomes who would have the burden of persuading the court at a later time to, nonetheless, disclose the settlement. It could be the government, it could be a non-party, or it could be one of the parties to the settlement changing their mind at a later time. Any one of those three could come to the court, and the only question is whether they meet the requisite burden of persuasion. Who would have the burden to show the judge that the original agreement can be modified now?

The second interesting question that presents itself occurs when the settlement is public, but a term of the settlement agreement states that the discovery material produced during the litigation must be kept confidential. That is not uncommon. In fact, recently, the Advisory Committee on the Federal Rules of Civil Procedure passed a new rule that there will be no public filing of any discovery materials anywhere in the country.³⁹ Although many districts have had that rule as a local rule,⁴⁰ it was not part of the

³⁹ FED. R. CIV. P. 5(d) (effective Dec. 1, 2000) (proposing that disclosure materials not be filed with the court without an express order from the court).

⁴⁰ See, e.g., LOCAL CIV. R. 5.1 (S.D.N.Y. & E.D.N.Y.).

federal rules. This new federal rule takes effect December 1, 2000, unless Congress steps in. It has gone all the way up the ladder into Congress. As a result, we are not going to have public filing anyway. This discovery material will be in lawyers' offices, and there is nothing in the Advisory Committee notes that requires those lawyers to maintain those files.

All I am trying to say is that there is often a term of the settlement that keeps the discovery material or the terms of the settlement itself confidential. In either situation, to me, the ultimate question is who has the burden to persuade the court to modify that. I am not opposed in all instances to agreeing with the parties' assessment if there is good cause in the first place for that confidentiality. But, I agree with Judge Cote that it can be modified if a showing is made. The question then presented is who has the burden to make that showing.

JUDGE TRAGER: My only point is that I think there are judges who are signing these stipulations and then treating them as contractual arrangements. My view, which is in agreement with most of you, is that we really cannot be parties to such agreements without considering the consequences. We have an institutional interest to protect. Even if the rules permit such agreements, our concurrence is discretionary. We should as a matter of policy insert a clause in every one of them reserving the right to reopen the case. Otherwise, at some point down the road, a party will show up and say, "Hey, Judge, I want to see this. My client was defrauded or hurt by this guy and I need to know what was learned in your case." Because the settlement agreement essentially is a contractual agreement, you may be prevented from reopening it. It seems to me that judges should not be parties to such open-ended agreements.

JUDGE STEIN: Has anyone ever had an experience where a third party came forward after a settlement agreement was sealed and sought to make the agreement public?

JUDGE SCHEINDLIN: I did. In a particular civil case that had little or no public interest to anyone, the parties had agreed on

confidentiality as a term of the settlement.⁴¹ They convinced me that they had good reason to do that. I agreed to it.

Two years later, a non-party walked in and said, "I need to see that settlement. I was not here at the time. I did not even read about it at the time. But now I have learned about it and I have a need to see it." So the only question, which I addressed in an opinion,⁴² was who had the burden of persuading me. Was it the parties who originally sealed the settlement or was it the newcomer who had not previously been heard? The interesting story, and maybe Judge Martin knows more about this than I do, is that it was appealed to the Second Circuit and I was eagerly awaiting their guidance. Judge Martin was sitting by designation on the panel, but we later heard that the appeal was withdrawn.

DEAN WEXLER: What did you decide? Who did have the burden?

JUDGE SCHEINDLIN: I said, in that particular case and for that particular reason, that the newcomer had the burden of showing the high level of need that would cause me to overturn what the parties had relied on as a term of the settlement.⁴³ The outsider had the burden to show me that. And, in fact, he did.

JUDGE MARTIN: I had an interesting variation of this problem. In a particular case, I signed a settlement agreement that the parties wished to keep confidential.⁴⁴ I had, however, appointed a guardian *ad litem* to represent the plaintiffs. I then had to decide a contested motion with respect to the guardian *ad litem*'s fee. Since he was appointed by the court and was being awarded a substantial fee, I thought I had to, in that opinion, at least talk about the amount he had recovered on behalf of the children he represented.⁴⁵ I received some objection as to that and was asked

⁴¹ *Crothers v. Pilgrim Mortgage Corp.*, No. 95-4681, 1997 WL 570583 (S.D.N.Y. Sept. 11, 1997).

⁴² *See id.*

⁴³ *Id.* at *7 (holding that good cause exists for modification of a protective order that was both overly broad and where circumstances at the time of its issuance made it foreseeable that a future party would attempt to modify it).

⁴⁴ *Debruyne v. Clay*, No. 94 Civ. 4704, 2000 WL 145752, at *1 (S.D.N.Y. Feb. 8, 2000).

⁴⁵ *Id.* at **3-5 (analyzing the calculation of the guardian *ad litem*'s fee and

to withdraw it. I refused to do so because I thought the public interest required an understanding of the basis on which the court was awarding a substantial amount of money to someone the court itself had appointed.

JUDGE STEIN: Let me go back to something Judge Scheindlin referred to: the proposed amendment to Federal Rule of Civil Procedure 5(d).⁴⁶ The proposed rule will prohibit the filing of discovery materials. As most of you know, the local rules of the Eastern and Southern Districts are similar on this point. They provide that discovery materials are not to be filed with the court.⁴⁷

noting the difficult legal hurdles surmounted by the guardian *ad litem* justifying his compensation). The guardian's recovery was in excess of one million dollars and the guardian's fee was approximately four hundred thousand dollars. *Id.* at *1.

⁴⁶ The proposed amended Rule 5(d), effective December 1, 2000, reads as follows:

All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.

FED. R. CIV. P. 5(d) (effective Dec. 1, 2000).

⁴⁷ Local Rule 5.1 of the Southern and Eastern District Courts of New York reads as follows:

(a) Depositions and notices of depositions, subpoenas, interrogatories, requests for documents, requests for admissions, and answers and responses thereto, and other discovery requests and materials produced in pretrial disclosure and discovery, shall not be filed with the clerk's office except by order of the court.

(b) A party seeking relief under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure shall quote or attach only those portions of the depositions, interrogatories, requests for documents, requests for admissions, or other discovery or disclosure materials that are the subject of the motion, together with the objections thereto.

(c) When discovery or disclosure material not on file is needed for an appeal, upon an order of the court, the necessary portion of the material shall be filed with the clerk.

I believe the origin of local Rule 5 lies in the space needs of the clerk of court. That is, the court files were in danger of being overwhelmed with discovery materials.⁴⁸ We have already discussed the presumption of openness that surrounds court proceedings and specifically materials that are filed: pleadings, motions, legal memoranda and so forth. I feel far less strongly about materials that are not traditionally filed in the Southern District, such as discovery materials. Assuming Federal Rule of Civil Procedure 5(d) is amended as has been proposed, then no discovery material will be filed in any federal district court in the country. Therefore, that material will remain private, unless the parties themselves disclose it. I am not anywhere near as offended about people wanting discovery material to be confidential. Discovery material is largely material that is exchanged between the parties and not submitted to the court.

JUDGE TRAGER: I just want to add a point to that. This situation is going to get increasingly more complex, as the courts go to electronic case filing. The Southern District's Bankruptcy Court as well as the Eastern District are pilot courts for electronic filing, and they have already made great progress towards implementing Electronic Court Filing ("ECF").⁴⁹ ECF will be available,

LOCAL CIV. R. 5.1 (S.D.N.Y. & E.D.N.Y.).

⁴⁸ *In re Nasdaq Mkt. Makers Antitrust Litig.*, 164 F.R.D. 346, 352 (S.D.N.Y. 1996) (noting that Local Rule 18(a) is based upon "pedestrian considerations" and was "adopted due to the volume of discovery materials in the Southern and Eastern Districts of New York") (citation and internal quotation marks omitted); see MICHAEL C. SILBERBERG, *CIVIL PRACTICE IN THE SOUTHERN DISTRICT OF NEW YORK* § 2.10 (2d ed. 1999).

⁴⁹ See Kyle Christensen, *Electronic Filing: Efficient Court Documentation Services Are on the Way*, 13 NAT'L B.A. MAG. 37, 37 (1999). ECF will streamline and automate the process of court filing, thereby increasing efficiency and convenience for law firms and courthouses around the country. *Id.*; see also Robert Plotkin, *Electronic Court Filing: Past, Present, and Future*, 44 B. B.J. 4, 4 (2000); Hon. Arthur M. Monty Ahalt, *Remaking the Courts and Law Firms of the Nation: Industrial Age to the Information Age*, 31 TEX. TECH. L. REV. 1151, 1158 (2000). The ECF system consists of three basic elements. First, an electronic filing interface, which provides security and authentication for senders and receivers of electronic information. *Id.* Second, a document management service (DMS), which permanently stores data and will act as the hub for the sharing of information between agencies, firms and the courts. *Id.* Third, a case

I am sure, in the not too distant future on the Internet. What that means is that all the briefs that previously had contained information obtained during discovery will automatically be accessible unless certain protective steps are taken. Our ability to maintain confidentiality of discovery materials will diminish. Moreover, it is almost impossible in dealing with some cases involving complex business materials to write a decision that does not contain confidential business information. And when I raise this issue with the parties, they usually say: "Judge, we understand that." And there it is. Once you go to court in this age of radical technology change, it is almost inevitable that confidentiality cannot be maintained to the same extent as in the past.

JUDGE COTE: I think the point that was made by Judge Stein is an important one. I think the public's right of access to documents connected to judicial decision-making is important because of the public's right to scrutinize our conduct to make sure that they can comment effectively.

Discovery, however, has nothing to do with how a judge reaches a conclusion. Discovery is, for the most part, materials that are produced between the parties and are not, for instance, submitted to us in support of or in opposition to a summary judgment motion. This raises different issues. These documents do not shed light on anything the court is doing in connection with its decision-making process. Under our standards of discovery, it is a very broad right of access to information between the parties. Therefore, there is no public right to review that material in order to make a judgment about judicial decision-making. I think that is an important distinction to keep in mind.

DEAN WEXLER: The next hypothetical is a slight variant on this theme. It relates to the sealing of arbitration proceedings. Occasionally, parties to an arbitration who have involved a court in aspects of their proceeding – for example, to compel compliance with stipulated discovery methods or to enter an enforceable arbitration award – will agree to seal the arbitration panel's

management system (CMS), which allows the courts to complete paper functions like docketing and calendaring in electronic format, while the CMS automatically updates this information on the DMS. *Id.*

findings as part of the settlement arrangement. If the judge discovers items in the findings which arguably may be of potential interest and concern to the public – for example, that a business or business person has engaged in questionable practices – what is the judge’s obligation to insist on openness as a condition for settlement?

JUDGE TRAGER: Well, Judge Weinstein this morning referred to a case of mine.⁵⁰ Essentially, it involved an arbitration dispute in which, because of an earlier discovery proceeding, I learned of serious allegations of fraud against one of the parties. Lo and behold, when the parties completed discovery, they proceeded to an international arbitration in London before a very distinguished panel. One day, a year later, I received in the mail a motion to enforce the judgment of this arbitration panel together with a five hundred page opinion from the arbitration panel. And okay, I was ready to grant the motion. Two days later there was a phone call to chambers from the moving party. The losing party in arbitration had agreed to pay the judgment. The parties were now asking me to forget about the motion and, by the way, seal all the papers.

This is an instance when I said to myself, “Hey, wait a minute.” Since I was already aware of the basic allegations of fraud, I asked myself: “What am I signing on to?” Meanwhile, I had a lot of other work to do. The parties went forward with their settlement, but this is why I am going to get Judge Koeltl’s stamp. Ultimately, I wrote a short opinion saying in effect: “Look guys, when you come into federal court you may have your agenda, but now you want to make a judge a party to your deal. I, therefore, cannot simply just rubber stamp it.” I had a student intern sit down and read the five hundred page decision and summarize it for me. Then, I read the critical portions. Fortunately, the arbitrators addressed the issue of fraud, so I could rest comfortably knowing that the distinguished panel of arbitrators had determined that they did not think punitive damages were appropriate. The conduct was not the type of conduct that endangered the public.

The fact that the arbitrators took these concerns into account made me quite happy. But what if they had not? In this case I

⁵⁰ *In re* [Sealed], 64 F. Supp. 2d 183 (E.D.N.Y. 1999).

could comfortably agree to file the motion under seal, but my opinion said: "Listen guys, I am putting you all on notice: do not think that just because you are coming to court to seal an arbitration agreement we are just going to be your enforcement mechanism." Federal judges have to take an independent look at these requests for secrecy because otherwise we are at risk of being used as a tool to hide the existence of serious fraud and quasi-criminal conduct.

JUDGE SCHEINDLIN: I want to go back to the point about discovery material, and if I can, for a moment, move away from arbitration. While it is true that discovery often occurs between private parties, the fact is that the lawsuit is brought in the courts. The lawsuit is settled. The public has very little way to evaluate whether that settlement makes any sense.

In the old days, when there was public filing of discovery material, enterprising people could go through the record, summarize it, write it up, and make an independent evaluation of whether the settlement made sense, or was collusive, or did any good for anybody. They could determine what the settlement was really all about. The lack of public filing under the new proposed Rule 5(d) is no small issue.⁵¹ In fact, I wanted to refer to the *Agent Orange* case.⁵² It is a little bit old now, but some of the hypotheticals that we developed here come out of that case.

One of the terms of the *Agent Orange* settlement was that the discovery material would be maintained in confidence and would not become publicly available.⁵³ After the settlement was put to bed, so to speak, an outside party, the Vietnam Veterans of America, came to the court and said, "Wait a minute. We want access to that discovery material. And we are not interested in this private agreement that resulted in the settlement. We have a right to see what was turned up." I should think this would resonate with some of you with respect to the tobacco litigation.⁵⁴ What was

⁵¹ See *supra* note 46 and accompanying text.

⁵² See *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987).

⁵³ *Id.* at 143.

⁵⁴ See, e.g., *In re Tobacco Litig.*, 192 F.R.D. 90 (E.D.N.Y. 2000). Currently, there are a dozen separate tobacco suits pending before Judge Jack B. Weinstein in the Eastern District Court of New York, and these cases have recently been

found in all that discovery? We as the public have some desire to know what you turned up in years of litigation. If the tobacco discovery was capped with confidentiality, we would be five years behind where we are now.

So in the *Agent Orange* case, the Vietnam Veterans of America came in and made a motion to the court claiming that despite the fact that confidentiality was part of the settlement, they wanted to see it.⁵⁵ Again, the issue was who had the burden there, and the court held that because the sealed information was of the greatest public interest, the party that wanted to maintain the confidentiality would have to show good cause for continuing the protection.⁵⁶ So the court shifted the burden back. The burden was not placed upon the outside parties seeking to reopen the case but on the parties to the settlement agreement.⁵⁷

DEAN WEXLER: I think we can move now to our last hypothetical concerning unpublished opinions. Appellate courts frequently hand down "unpublished" decisions, which are not widely distributed and, more importantly, are not precedential, at least in the Second Circuit.⁵⁸ What is the district court judge's

filed as a consolidated single class action. *In re Simon (II) Litig.*, No. 00-CV 5332, 2000 U.S. Dist. LEXIS 12611 (E.D.N.Y. Sept. 6, 2000). The plaintiffs in these cases (trustees of health funds, health insurance providers, and others who have paid out medical claims to smokers) claim that the tobacco companies conspired to deceive the public about the health problems related to smoking. *Bergeron v. Philip Morris, Inc.*, 100 F. Supp. 2d 164 (E.D.N.Y. 2000); *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560 (E.D.N.Y. 1999). These lawsuits have survived defendants' motions to dismiss and have been consolidated for the purpose of settlement negotiations. *In re Tobacco Litig.*, 192 F.R.D. at 90. For a commentary on the recent jury verdicts against "Big Tobacco," see generally Anthony J. Sebok, *What Big Tobacco Did Wrong*, available at http://writ.findlaw.com/commentary/2000-0718_sebok.html (visited Sept. 14, 2000) (examining the basis of intentional tort liability and reasonable reliance).

⁵⁵ *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d at 143-44.

⁵⁶ *Id.* at 145-47.

⁵⁷ *Id.* at 147-48.

⁵⁸ See, e.g., *Marshall v. Strack*, No. 98-2798, 1999 U.S. App. LEXIS 17918 (2d Cir. Apr. 29, 1999); *Ferguson v. McDonnell Douglas Corp.*, No. 97-7179, 1998 U.S. App. LEXIS 1327 (2d Cir. Jan. 30, 1998); *Lehoczky v. Commodity Futures Trading Comm'n*, No. 97-4181, 1997 U.S. App. LEXIS 27164 (2d Cir.

obligation when the judge becomes aware that there is a direct contradiction between a published decision and either an earlier or subsequent “unpublished” ruling? Similarly, how does it reflect on our justice system if district courts are deciding cases unaware of or unable to rely on relevant “unpublished” opinions?

JUDGE KOELTL: I am not offended by unpublished opinions. The way in which this came about, at least to my recollection from days of working with the bar association, is that at one time the court of appeals affirmed or reversed judgments from the bench. The judges would turn to each other and consult during argument and then in the middle of the argument the presiding judge would say, “We will affirm.”

The bar association was concerned with the fact that a lawyer could not explain to his or her client why the court rendered a certain disposition. The court was not required to explain to anyone in any understandable way why it reached the conclusion it did. So, the court of appeals over time has come out with summary dispositions. There was a time when summary decisions were “unpublished.” Now, however, they are reported by Westlaw, so that everyone knows about them, although they are subject to the caveat that they do not have precedential value. I am reasonably confident that is because not as much time is spent on them due to the volume of work before the court. Judges will, nevertheless, still try to come out with the result that is correct for the parties, whether the decision is published or unpublished. When district court judges, in doing their research, come across a decision by the court of appeals, even if it is an unpublished summary order, they read it for understanding and guidance as to how the court of appeals is thinking with respect to a certain issue. We certainly take it into account. We look to see if it has been followed in other cases and we take it into account. The situation is much better than it used to be. If we were to go to a system that said, “No, everything that the court of appeals says must be a published decision in the sense that it can be cited,” I believe that we would go back

Oct. 1, 1997); *Sledge v. Guest*, No. 96-2283, 1996 U.S. App. LEXIS 34429 (2d Cir. Dec. 30, 1996).

to the old way of doing things – that is, leaving the parties in the dark.

JUDGE MARTIN: I happen to think we should not have unpublished opinions. I think we should have opinions that are *per curiam* and state that such opinions will not be given the weight of precedent in future cases.

The main problem with unpublished opinions is that they are not generally circulated. Thus, you are precluded from seeing what the trend of the law is within the circuit. There are people who come to me and say, “The Second Circuit never affirms a sanctions order of a district court.” I have been affirmed on sanction orders several times by unpublished opinion. Others proclaim, “The Second Circuit never affirms summary judgment in employment discrimination cases.” However, you get summary orders affirming them all the time. In fact, these types of orders are rather routine. We cannot continue to do this. The public cannot continue to lose so much information. And frankly, without meaning to be critical to my betters, there are times where I think the circuit buries difficult issues in unpublished opinions.

JUDGE KOELTL: But “unpublished” is sort of a misnomer. They are not really unpublished.

JUDGE STEIN: It is Orwellian to call them unpublished, since now they are published by the electronic services.

JUDGE MARTIN: No, they are not. They are not distributed

JUDGE KOELTL: Hold on. The difference is, as some of you know, that if it is called unpublished, if it is a summary order, it does not come out in a slip sheet.⁵⁹ If it does not come out in a slip sheet, it is not sent to the people who normally get slip sheets, including district court judges. District court judges read everything the court of appeals does in the slip sheets, but we would be overwhelmed if we had to read, in addition to that, all of the summary orders that are issued by the court of appeals. If you are interested in knowing whether the Second Circuit has affirmed any sanctions,

⁵⁹ A slip sheet opinion is a court ruling “that is published individually after being rendered and then collectively in advance sheets before being released for publication in a reporter. Unlike an unpublished opinion, a slip opinion can usually be cited as authority.” BLACK’S LAW DICTIONARY 1119 (7th ed. 1999).

all you have to do is go to Westlaw and search the Second Circuit database for all decisions including summary orders, to find out what the record on that is.

JUDGE STEIN: Let me make a couple of factual points to put this in context. I went to the publication entitled *Judicial Business in the United States Courts*.⁶⁰ It just came out a couple of weeks ago for 1999. It reports that the percentage of unpublished opinions, as against all opinions, for the Fourth Circuit, is ninety percent.⁶¹ In other words, nine out of ten of their decisions are “unpublished.” Seventy one percent of Second Circuit opinions are unpublished. Moreover, six of the twelve circuits are at eighty percent or more unpublished.⁶²

⁶⁰ 1999 ADMIN. OFF. OF U.S. CTS. ANN. REP. 49.

⁶¹ *Id.*

⁶² *Id.* For example, the relevant rules of three circuits are as follows. Rule 0.23 for the Second Circuit Court of Appeals reads:

The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in the open court or by summary order.

Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

2D CIR. R. 0.23.

The Seventh Circuit Court of Appeals' equivalent, Rule 53(b)(2)(iv), reads as follows: “Except to support a claim of res judicata, collateral estoppel or law of the case, [an unpublished opinion] shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument; or (b) by any such court for any purpose.” 7TH CIR. R. 53(b)(2)(iv).

The corresponding Ninth Circuit Court of Appeals rule states:

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or

As it now stands, there is a significant body of appellate decisions out there that is “unpublished.” Not only are most or all of them now published on the Westlaw or LEXIS systems, but each one has the caption required by the relevant local rule of that circuit stating in essence that the decision does not have precedential value.⁶³

I had more of a problem with these unpublished opinions a few years ago when they truly were unpublished. The electronic services either did not exist or were in limited use. An informal consortium of large firms in Manhattan would send a clerk down to the Second Circuit to pick up all the unpublished opinions – they have always been available at the clerk’s office – and these firms circulated the opinions among themselves. As a result, there were certain firms whose lawyers had easy access to the unpublished opinions and others who did not by virtue of not having the resources or ability to routinely obtain them. That situation exists no longer. Now, anyone who has access to LEXIS or Westlaw can study them and I believe those services are very widely available throughout the legal profession.

Nonetheless, the unpublished opinion still strikes me as a very odd animal because it cannot be used for precedential purposes. There is a reason behind the unpublished opinions — the circuit wants to resolve the case, but it does not want to have to worry about every single word and phrase in the opinion or spend time on the craftsmanship. Nevertheless, I am troubled by what this animal is.

JUDGE TRAGER: Well, I would like to intervene here, because I think this is all wrong. [laughter] I start from Judge Martin’s basic premise that it would be best to publish these opinions. In my own view, the situation was better when the court of appeals just affirmed without opinion, because then you knew for certain that the case had no precedential value. Unpublished opinions, I believe, have been an extraordinarily negative develop-

orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

9TH CIR. R. 36-3.

⁶³ See, e.g., *supra* note 62.

ment in the law. Those who follow the law in just our circuit come to see that incoherence is the result of the present situation. Indeed, this point is going to be made in a forthcoming en banc opinion on the issue of sealing the courtrooms during the testimony of undercover cops. One of my colleagues granted a writ of habeas corpus to a state prisoner because the undercover police officer was still doing work in Brooklyn.⁶⁴ He thought that was enough. A summary order reversed him and denied the writ.⁶⁵ About a month or two later a decision by the circuit was handed down holding that Manhattan was too broad to justify closure.⁶⁶ What does that say for the coherence of the law and people's respect for what judges are doing? You get one panel and it yields one particular result; you get another panel and it reaches a directly opposite result. Again, this is very destructive to the law.

JUDGE COTE: But you do not have to go to unpublished opinions to get incoherence.

JUDGE TRAGER: Well, that is true. But those lawyers who honestly try to follow the rule and do not cite unpublished opinions are put in a worse position than the lawyer who ignores the rule against citation, knowing very well that it will affect the district judge. It has to. Moreover, I cannot comprehend how a panel of three judges thought a reversal was so clear that it did not warrant a full opinion.

This is a very serious problem that must be addressed. The federal courts have an institutional need to address this question as the present situation yields incoherence in the law and unfairness to the parties before the court. The disposition of a matter cannot come to rest on whether an opinion was published or not when the issues are identical.

JUDGE STEIN: It is also a misnomer to say that they are without precedential value.

JUDGE TRAGER: I agree.

JUDGE MARTIN: While the circuit court of appeals says it is not precedential when it affirms in an unpublished opinion, the

⁶⁴ Vaughn v. Artuz, No. 97-2442, 1998 U.S. App. LEXIS 20641 (2d Cir. Mar. 13, 1998) (unpublished table decision).

⁶⁵ *Id.*

⁶⁶ Brown v. Andrews, 180 F.3d 403 (2d Cir. 1999).

district court opinion is cited thereafter as a decision that has been affirmed by the Second Circuit.

JUDGE SCHEINDLIN: Actually, I agree with what Judge Trager said on this issue, but I wanted to point out one more thing. The legend that we get across the top of those Second Circuit opinions is not uniform throughout the country. Interestingly, some circuits have a different legend and I saw one recently, the Tenth Circuit's, that said you may cite this non-published opinion if absolutely necessary.⁶⁷ I thought that was wonderful and I immediately cited the case in one of my opinions.

JUDGE COTE: Well, I am just going to take an opposite point of view here. Well, maybe not opposite. I do not see any problem with this. I think we have plenty to read as it is in terms of the workload of the circuit. Obviously, it can be abused from case to case and it affords judges the opportunity to duck hard questions. By and large, however, they probably do not need to write as much as they write now.

We generally speak about moving the law forward, and adding to the growth of the law. This does not mean that we need to write opinions re-adopting what was said ten years ago. We do not need to write on everything. Everything has a right to be appealed.

JUDGE STEIN: A better way to handle that is simply to write "affirmed on the opinion below."

JUDGE TRAGER: That's even better!

DEAN WEXLER: I first want to thank our panel for letting us hear a frank discussion by federal judges on the important topics of secrecy and the courts. And I want to thank the audience for remaining with us until almost five o'clock on a Friday afternoon. You were terrific. Thank you for being with us today.

⁶⁷ 10TH CIR. R. 36.3. An "unpublished decision may be cited if (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion, and (2) it would assist the court in its disposition." *Id.*