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By Email: Privacy Comments/DCA/AO/USCourts

October 25, 2007

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

Dear Sir or Madam:

Please accept these comments in response to the solicitation of public comments by the Committee on Court Administration and Case Management of the Judicial Conference of the United States on the subject of Electronic Public Access to Plea Agreements. The comments are submitted on behalf of the American Bar Association and were developed by its Defense Function Committee of the Criminal Justice Section.

Electronic filing of plea agreements and other documents in criminal cases has provided a wide range of benefits to litigants and their lawyers. The instantaneous access to filings through the Public Access to Court's Electronic Records system (PACER) has provided a convenient, economical and efficient method of monitoring developments in each case. Unfortunately, in criminal cases, access to electronically filed plea agreements and sentencing memoranda has been used by individuals who want to know whether a defendant is cooperating with the government as a witness in a criminal investigation. These individuals have used the knowledge gained on PACER to intimidate or harm cooperating witnesses and their families.

In response to these events, "cooperation plea agreements" have been filed under seal in many criminal cases. However, after some time, the sealed filings themselves became red flags, indicating that a cooperating plea agreement had been filed. In December 2006 the Department of Justice requested that the Judicial Conference consider restricting remote electronic access to plea agreements to

court users and participants in the case only. In response, the Conference has requested comments on the DOJ proposal and recommendations on a course of action.

The American Bar Association's position on this issue is stated in the Criminal Justice Standards on Fair Trials and Free Press, approved by the ABA House of Delegates in February 1991

. Generally, our standards oppose restrictions on the public's right to access to court proceeding and pleadings. See Standard below. However, we believe that the Judicial Conference should consider the procedures recently adopted by the United States District Court for the Eastern District of Pennsylvania, which we believe are consistent with the existing ABA standards and which provide an alternative means of addressing the problem posed by the Department of Justice.

These procedures are:

1. All documents on the ECF System related to pleas and sentencing and orders relating to these documents will be designated on the docket as Plea Documents, Sentencing Documents and Judicial Documents respectively, no matter their content. This procedure provides some uncertainty on the docket as to exactly what type of document has been filed but provides notice that an event has occurred.
2. All documents not under seal will remain available for inspection by the public in the Office of the Clerk as heretofore. This provides reasonable access to the public but provides obstacles to those who seek information for illegal purposes: the necessity of going to the clerk's office to view documents deprives the individual of anonymity and is less convenient.
3. Passwords will be provided to all appropriate parties such as judges, law clerks, the Government, specific defense counsel involved in the filing, Probation, and where necessary, personnel at the Court of Appeals, so as to provide electronic access to all documents, not under seal and related to pleas and sentencing and orders related to those documents.

These procedures, which provide the public and parties with access to the records while providing a measure of protection to cooperating defendants, are consistent with the pertinent ABA Criminal Justice Standards:

**Standard 8-3.2. Public access to judicial proceedings and related documents and exhibits**

**(a) In any criminal case, all judicial proceedings and related documents and exhibits, and any record made thereof, not otherwise required to remain confidential, should be accessible to the public, except as provided in section (b).**

(b) (1) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or related document or exhibit only after reasonable notice of and an opportunity to be heard on such proposed order has been provided to the parties and the public and the court thereafter enters findings that:

(A) unrestricted access would pose a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's right to a public trial;

(B) the proposed order will effectively prevent the aforesaid harm; and

(C) there is no less restrictive alternative reasonably available to prevent the aforesaid harm.

(2) A proceeding to determine whether a closure order should issue may itself be closed only upon a prima facie showing of the findings required by Section b(1). In making the determination as to whether such a prima facie showing exists, the court should not require public disclosure of or access to the matter which is the subject of the closure proceeding itself and the court should accept submissions under seal, in camera or in any other manner designed to permit a party to make a prima facie showing without public disclosure of said matter.

(c) While a court may impose reasonable time, place and manner limitations on public access, such limitations should not operate as the functional equivalent of a closure order.

(d) For purposes of this Standard, the following definitions shall apply:

(1) "criminal case" shall include the period beginning with the filing of an accusatory instrument against an accused and all appellate and collateral proceedings;

(2) "judicial proceeding" shall include all legal events that involve the exercise of judicial authority and materially affect the substantive or procedural interests of the parties, including courtroom proceedings, applications, motions, plea-acceptances, correspondence, arguments, hearings, trial and similar matters, but shall not include bench conferences or conferences on matters customarily conducted in chambers;

(3) "related documents and exhibits" shall include all writings, reports and objects, to which both sides have access, relevant to any judicial proceeding in the case which are made a matter of record in the proceeding;

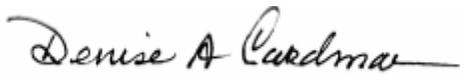
(4) "public" shall include private individuals as well as representatives of the news media;

(5) "access" shall mean the most direct and immediate opportunity as is reasonably available to observe and examine for purposes of gathering and disseminating information;

(6) “closure order” shall mean any judicial order which denies public access.

In conclusion, the ABA urges the Judicial Conference to maintain procedures under rules that are consistent with ABA Standards and to consider the procedures now followed in the Eastern District of Pennsylvania if it concludes that it is necessary to modify existing filing procedures to protect cooperating defendants while providing access to the public and to interested parties.

Sincerely,

A handwritten signature in cursive script that reads "Denise A. Cardman". The signature is written in black ink and has a fluid, connected style.

Denise A. Cardman  
Acting Director