NEW YORK COUNCIL OF DEFENSE LAWYERS

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Re: CACM Guidance on Cooperator Safety

Dear John:

I write to provide you with the views of the New York Council of Defense Lawyers (the "NYCDL" or the "Council") on the Committee on Court Management's proposal to protect cooperating witnesses by limiting access to court records and judicial proceedings.

As you know, the Council is a not-for-profit professional association of approximately 300 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases. While our members practice primarily in the federal courts of the New York metropolitan area, many of our members practice in federal courts throughout the country on occasion. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. We often appear as *amicus curiae* in the Supreme Court and Second Circuit. And the Council frequently weighs in on proposed changes to the Federal Rules of Criminal Procedure and similar issues, on behalf of our membership, and criminal defendants and their counsel.

The Council does not, on the current record, support any changes to the Federal Rules to address the issues discussed in The Federal Judicial Center's June 2015 "Survey of Harm to Cooperators" and related memoranda. Although we of course acknowledge the compelling governmental interest in ensuring that cooperating defendants are safeguarded from intimidation or physical harm, and recognize the Judiciary's appropriate sensitivity to any possible misuse of court records to identify and abuse witnesses, we do not believe that a nationwide legislative remedy in the form of rulemaking – a "one size fits all" solution -- is necessary or ultimately

sustainable. Based upon our members' experience, both in our local districts and nationally, we believe that most cooperation settings do not implicate risk or threats of harm, and thus question the need for an every-case solution. Moreover, we submit that any consideration of rules changes should await analysis of any local policy changes that Chief Judges, District Clerks, United States Attorneys and other stakeholders may adopt in light of the CACM Guidance circulated this summer (June 30 Memo); we believe that tailored responses, consistent with existing local practice and limited to apparent need, ought to be given a chance to improve security. We also worry that rules requiring across-the-board sealing in all prosecutions to camouflage the minority of sensitive cases will inevitably be rejected, or at least substantially trimmed, on constitutional grounds that all parties seem to recognize, and we are concerned that the aftermath of such litigation could leave judges with less discretion to fashion necessary safeguards in appropriate cases. Finally, we believe that some of the measures spelled out in the CACM Guidance, in spite of their salutary goals, tend too much to involve judges and lawyers in a process that not only conceals important proceedings from the press and public, but comes uncomfortably close to misleading them as to the true status of the case.

Our experience over the years, including now decades under the Guidelines-driven 5K1.1 regime, is that cooperation though ubiquitous is usually not dangerous. We do not contest the reported numbers from gang and narcotics-related prosecutions in many districts, and concede the necessity of sealing and like procedures in appropriate cases. On the supposed need for national uniformity, however, we understand the principal argument to be that incarcerated cooperators, in the absence of a uniform regime, are at risk of other inmates or their confederates puzzling out their status by demanding their legal documents or reviewing docket entries. We believe that those concerns are best managed by BOP policies and, if necessary, clerical security measures implemented by individual districts. At the BOP level, we believe that a variant of the CACM Standard 6 – essentially a policy statement that would restrict all inmates' access to their PSRs, plea and sentencing materials to a secure area – could go a long way to preventing pressure on witnesses to "prove" they are not cooperators. Similarly, in districts where access to PACER by the public at large has caused witnesses to be identified and harassed, local rules could be amended to require in person review, or even production of identification and signing a log, for access to plea and sentencing materials. Ultimately we believe that where potential threats of harm exist, tighter record security will not necessarily prevent harassment, as there are many ways in which co-defendants can and do divine cooperation: trial testimony, markedly reduced sentences, formal or informal withdrawal from common-interest defense groups, etc. Docket security is only part of the problem and can be only part of the solution, and we submit that potential resort to nationwide changes should be measured against that reality.

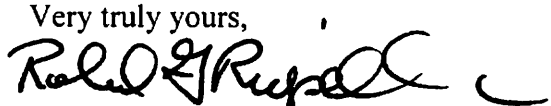
The other reality that counsels against rules changes – or at least changes that would codify sealing protocols like those in the CACM Guidance – is the likelihood that Courts will invalidate them on some combination of First Amendment, Sixth Amendment and common law grounds, as they plainly restrict public access to the substance of criminal prosecutions. Having reviewed the thorough July 20 memorandum to the Cooperators Subcommittee from Professors Beale and King, we see little prospect that across-the-board sealing rules could withstand media challenge. To the extent the Supreme Court has required that sealing and like restrictions be "narrowly tailored" to meet specific circumstances, and that such remedies be supported by actual record findings, it is hard to imagine that a broad-based confidentiality requirement,

premised on general security goals that will usually not be implicated in the particular case, could survive scrutiny. (We also think there is a very strong public policy argument against sealing cooperation in the ordinary course. In the case of a politician or other public figure, for instance, one who cooperated but did not have to testify in open court, restricting the sentencing court's ability to articulate aloud the reasons for a lenient sentence would almost certainly confuse or mislead the public, and distort the actual administration of justice. For that reason, and based on our concerns that Section 3553 requires an accurate statement of the bases for the sentence imposed, we are concerned about CACM Standard 10's suggestion that judicial orders should avoid mention of cooperation where practicable.)

Finally, we have some concerns about the practical implications of the measures contained in the CACM Guidance. Our principal questions go to Standards 2, 3 and 4, through which actual cooperation would be sealed in every case, and non-cooperation would similarly be masked by phantom "supplements" and "conferences" for which there is no need, and as to which there is no substance. We recognize that these measures are a logical outgrowth of the docketing device that places all plea agreements – straight pleas and cooperation deals – in sealed wrappers to prevent scrutiny by potential wrongdoers. Whatever the necessity and wisdom of that common-sense measure, we are concerned that asking lawyers actually to file non-existent papers under seal, and asking courts (and officers of those courts) to conduct sidebar conferences where they actually pretend to be conducting business, would potentially be corrosive to public confidence in the administration of justice. Where there is no cooperation to discuss, for instance, it would seem that merely tagging the bench for five seconds would betray that reality to most observers, but the alternative, an extended pantomime where the players assemble and pretend for a sufficient interval, is somehow not what judges and lawyers ought to be about. We believe that many would balk at such an exercise. At a more practical level, it is not clear whether any defendant or her lawyer who wanted the world to know whether or not she was cooperating could, or should, be prevented by court rule from saying so, but in the absence of such a restriction the cover-all-pleas approach might be untenable.

We share these observations only to summarize our current reluctance to endorse a national rules-based response. We wholly support the Committee's ongoing efforts to enhance cooperator protections, and believe that continued focus on the part of decision makers at the district level, including the studied review of the CACM recommendations, can hopefully further improve witness safety.

Very truly yours,



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