



COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

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June 30, 2016

MEMORANDUM

To: Chief Judges, United States District Courts
District Judges, United States District Courts
District Court Executives
Clerks, United States District Courts

From: Judge Wm. Terrell Hodges, Chair 
Committee on Court Administration and Case Management

Judge Roger W. Titus, Chair, Privacy Subcommittee 
Committee on Court Administration and Case Management

RE: INTERIM GUIDANCE FOR COOPERATOR INFORMATION

On behalf of the Committee on Court Administration and Case Management (CACM), we would like to share interim guidance that the Committee developed concerning the treatment of cooperator information in criminal cases. This guidance is “interim” because the issue has been referred to the Committee on Rules of Practice and Procedure for formal consideration. As discussed below, however, the Committee believes this is an issue of such importance that it requests each court to consider adopting the provisions of the guidance, in a manner consistent with local practice, applicable case law, and the court’s rule-making authority, pending consideration through the Rules Enabling Act process.

Background

The CACM Committee has responsibility for issues relating to court operations, including the task of helping courts maintain their records in a way that protects both the public right of access to case filings and the legitimate privacy interests of litigants. Perhaps the most challenging example of this responsibility is balancing public access to criminal cases against the potential exposure of government cooperators. Remote electronic access dramatically increased

the potential for illicit use of case information regarding cooperators, and it is largely for this reason that the Judicial Conference initially delayed public electronic access to criminal case files. This concern also prompted the Committee in 2008 to endorse practices aimed at minimizing the use of case documents to identify cooperators, and encourage all courts to consider their implementation. March 2008 Report of the CACM Committee to the Judicial Conference, pp.8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350.

Since then, the CACM Committee has continued to track the use of criminal case information to identify cooperators. Despite courts' individual efforts, the problem continues to grow. Based on increasing concerns expressed by judges about harm to cooperators, this Committee, in August 2014, asked the Federal Judicial Center (FJC) to survey judges, U.S. attorneys, federal defenders, Criminal Justice Act panel representatives, and probation and pretrial services chiefs to measure the scope and severity of the problem.

The FJC analyzed the responses to these surveys and collected its findings in a report entitled "Survey of Harm to Cooperators," which is now available on the FJC website at [http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/\\$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf) ("FJC Report"). The FJC Report fully substantiates the concern that harm to cooperators persists as a severe problem. For example, district judge respondents reported 571 instances of harms or threats – physical or economic – to defendants and witnesses between the spring of 2012 and the spring of 2015, including 31 murders of defendant cooperators.

The Committee believes these threats and harms should be viewed in the context of a systemic problem of court records being used in the mistreatment of cooperators. The FJC Report presents 363 instances in which court records were known by judges to be used in the identification of cooperators. This is a particular problem in our prisons, where new inmates are routinely required by other inmates to produce dockets or case documents in order to prove whether or not they cooperated. If the new inmates refuse to produce the documents, they are punished. The FJC Report confirms the existence and widespread nature of this problem,¹ which is aggravated by prison culture and the prevalence of organized gangs.

The conditions cooperators face in prison also impact the sentences imposed by the judiciary. Multiple respondents in the FJC Report noted that cooperators' fear of harm is so great that some forgo the potential benefits of U.S. Sentencing Guidelines Manual § 5K1.1 out of fear that the related case documents will identify them as cooperators. If they are identified as cooperators after arriving in prison, in many cases the only effective protection available is to move the threatened inmate into a segregated housing unit or solitary confinement, with an attendant loss of the privileges that would otherwise be available to that inmate – an ironic and more onerous form of punishment not typically contemplated by the sentencing judge.

Chief Judge Ron Clark of the Eastern District of Texas recently held a hearing regarding a motion to unseal plea agreements that involved extensive factfinding on these issues.² The hearing involved the participation of the local United States Attorney's Office, the Office of the

¹ See FJC Report, Appendix I: Open-Ended Comments (discussing practices in BOP facilities).

² *United States v. McCraney*, 99 F. Supp. 3d 651 (E.D. Tex. 2015).

Public Defender, counsel for five defendants, and counsel for the newspaper who had requested the unsealing, as well as an amicus filing by another newspaper. At the hearing, the court heard testimony from two Bureau of Prisons (BOP) representatives and a federal prosecutor concerning the experiences of cooperators in prison. Based on its factfinding, the court concluded that the disclosure of information in plea agreements that identifies cooperating defendants “puts those defendants at risk of extortion, injury, and death.” It therefore found “an overriding interest in preventing disclosure of information that states or even hints that a defendant has agreed to be an informant or cooperating witness.” The court’s local rules regarding criminal case management were updated as a result, so that all plea agreements from that point forward include a sealed supplement containing any discussion of cooperation. *See* E.D. Tex. L. R. CR-49(c)-(d). The court found that this new procedure – which it applied to the case at hand – “balances the public’s right of access against the higher need to protect the lives and safety of defendants” and other individuals, as well as “the need to encourage accused individuals to provide the truthful information that is crucial to the successful prosecution of serious offenses.”

Certainly, U.S. attorneys and the BOP must continually strive to protect cooperators and ensure the safety of prisoners. The Committee believes, however, that the judiciary also has a role in finding solutions to these problems. Of particular concern for judges, apart from the need to protect the well-being of those we sentence, is the fact that our own court documents are being used to identify the cooperators who then become targets. In many instances these documents are publicly available online through PACER. Because criminal case dockets are being compared in order to identify cooperators, every criminal case is implicated.

Guidance

The CACM Committee believes a nationwide, uniform solution providing for greater control over access to cooperator information is required to address this systemic national problem. It has therefore asked the Committee on Rules of Practice and Procedure to consider the issues described in the FJC Report and determine whether changes to the criminal rules are warranted as a long-term remedy. In the interim, the CACM Committee is also asking courts to consider taking more immediate steps at the district level to address this problem. **The Committee has developed the attached guidance for protecting cooperator information found in criminal case documents and recommends that each district adopt it via local rule or standing order.** The guidance is based on practices for protecting cooperators already used in a number of courts.³

The guidance recommends that, in all criminal cases, courts restructure their practices so that documents or transcripts that typically contain cooperation information – if any – would include a sealed supplement. Any discussion of defendants’ cooperation – or lack thereof – would then be limited to these sealed supplements. For example, any plea agreement docketed in a criminal case would be accompanied by a separate, sealed supplement containing either discussion of cooperation or a simple statement that there was no cooperation. As a result, any member of the public who reviews the docket would be unable to determine, based on the plea agreement, whether a given defendant has cooperated. By adding standardized sealed material that will appear in every case, whether or not there is a cooperator, and placing all discussion of

³ Thirty-three district courts, or over one-third, have already adopted local rules or standing orders to make all criminal defendants appear identical in the record to obscure cooperation information. FJC Report at 26.

cooperation under seal, adoption of these practices would inhibit identification of cooperators through dockets and case documents. The public, however, would continue to have access to key criminal case files – albeit without sensitive information regarding cooperation.⁴

Importantly, the government’s disclosure obligations to opposing counsel would not be affected by implementation of this guidance, and the public would still have access to much of the plea and sentencing material that is now available.

Discussion

The CACM Committee would like to emphasize that, in recommending this guidance, its members understand and embrace our duty as judges to vigilantly safeguard the public’s right to access court documents and proceedings pursuant to the First Amendment and under common law. Nonetheless, the Committee finds that the harms to individuals and the administration of criminal justice in this instance are so significant and ubiquitous that immediate and effective action should be taken to halt the malevolent use of court documents in perpetuating these harms, consistent with each court’s duty to exercise “supervisory power over its own records and files.”⁵

The Committee is also mindful of the high burden that must be met before shielding particular case information from the public’s eye,⁶ but notes that this should not be seen as an absolute bar to exercising authority over court records and proceedings. Indeed, there are many well-established restrictions on access to criminal case information that address compelling government interests.⁷ The CACM Committee believes that the need in this instance is as great as, if not greater than, the needs that supported adoption of restrictions in the past.

⁴ The guidance contains other provisions, including procedures for prisoners to access sealed case materials in a secure environment, consistent with local BOP policy and court rules. The Committee is in communication with the Executive Office for U.S. Attorneys and the BOP regarding the provisions and local implementation.

⁵ *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (“[A]ccess has been denied where court files might have become a vehicle for improper purposes.”).

⁶ *See Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 509-13 (1984) (recognizing that, where right of public access applies, a court may close court proceedings or deny access to transcripts, but must articulate reasons for doing so in specific and reviewable findings demonstrating “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest”). Several circuits also have issued decisions that may impact court efforts to implement this guidance. *See, e.g., United States v. DeJournett*, 817 F.3d 479 (6th Cir. 2016) (vacating policy-based order that sealed the entirety of a plea agreement without case-specific findings); *In re Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008) (finding a public right of access to the cooperation addendum of a plea agreement, albeit with limited analysis of whether the right should apply); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) (acknowledging that potential threats to criminal investigations or individuals “may well be sufficient to justify sealing a plea agreement,” but vacating sealing of cooperator information as unwarranted where fact of cooperation was publicly known).

⁷ *See, e.g.*, 18 U.S.C. § 3153(c) (making pretrial services reports confidential); Fed. R. Crim. P. 32 & 18 U.S.C. § 3552(d) (limiting distribution of presentence investigation reports); Fed. R. Crim. P. 49.1 (requiring redaction of personally identifiable information and minors’ names); Fed. R. Crim. P. 49.1, 2007 Advisory Comm. Notes & Guide to Judiciary Policy, Vol. 10, Ch. 3, § 340 (categorizing as non-public a number of criminal case documents, including juvenile records); 18 U.S.C. § 5038 (making names and pictures of juveniles in delinquency proceedings non-public; safeguarding records from “unauthorized persons”); JCUS-MAR 01, p. 17 (dictating that statements of reasons are not to be disclosed to the public); 18 U.S.C. § 3662(c) (mandating that conviction records maintained by the Attorney General “not be public records”).

It is important to emphasize that, to the extent possible, broad adoption of the CACM guidance is key to its effectiveness at addressing the problems discussed above. If districts continue to take different approaches toward addressing this problem, there is a real risk that well-intentioned measures to protect cooperators in one court might result in criminal dockets that indicate cooperation, rightly or wrongly, when compared to those of another court. The inadequacy of a patchwork approach to sealing cooperator-related material is highlighted in Chief Judge Clark's opinion and referenced by a number of responses in the FJC Report. It is for this reason that the Committee has requested the Committee on Rules of Practice and Procedure to consider this issue for national application.

Finally, in drafting and recommending this guidance, the CACM Committee emphasizes that it has acted to the best of its ability to narrow the scope of the proposed measures. The Committee also thoroughly considered other potential options for addressing this issue in each district, such as those it recommended for potential adoption in 2008.⁸ These options, however, suffer from either failing to move the judiciary toward a uniform approach or by making a greater volume of case information unavailable to the public. For example, some courts presently seal the entirety of all plea agreements in an attempt to prevent identification of and harm to cooperators. By implementing the attached guidance and sealing only cooperator information, as the CACM Committee recommends, these courts may actually increase the amount of criminal case information available to the public.⁹

The CACM Committee believes that the misuse of court documents to identify, threaten, and harm cooperators is a systemic problem, and can only be addressed through a more uniform approach toward public access to cooperator information. To that end, the Committee believes uniform implementation of the attached guidance at the local level -- pending consideration of a national rule -- would be an important, measured step toward that goal, and one which is appropriately tailored to address the significant interests involved.

Thank you for the thoughtful consideration we know you and your colleagues will give to this issue.

⁸ See March 2008 Rep. of the CACM Committee to the Judicial Conf., pp. 8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350 (listing as potential measures (1) shifting cooperation information into non-case file documents, (2) sealing plea agreements, (3) restricting access to plea agreements, (4) redacting all cooperation information, (5) restructuring case records so that all criminal cases appear identical, and (6) delaying publication of plea agreements referencing cooperation).

⁹ The CACM Committee recognizes that there is no complete or perfect solution. If a cooperator testifies during a trial, for example, or is sentenced below a statutory mandatory minimum where the "safety valve" does not apply (18 U.S.C. § 3553(f)), his cooperation is apparent. This obviously does not mean, however, that solutions should not be adopted for those cases in which they are available and can be effectively applied.

If you have any questions or concerns, please feel free to contact either of us, Judge Terry Hodges (Chair, CACM Committee) or Judge Roger Titus (Chair, CACM Committee's Privacy Subcommittee). You can also contact Sean Marlaire, Administrative Office Policy Staff, Court Services Office, at 202-502-3522 or by email at Sean.Marlaire@ao.uscourts.gov.

Attachment

cc: Honorable Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure
Chief Probation Officers
Federal Public and Community Defenders
CJA Panel Attorney District Representatives

Guidance on Access to Plea Agreements and Other Documents That May Reveal Cooperation

- A. On the basis of the following findings of the Court Administration and Case Management Committee, arrived at in consultation with the Criminal Law Committee and Defender Services Committee (which takes no position on the proposed guidance), the Committee recommends prompt local adoption of the guidance set forth in subsection (b) by each district court via local rule or standing order.
1. As indicated by the Survey of Harm to Cooperators: Final Report prepared by the Federal Judicial Center in June 2015, and the findings contained in the memorandum order of Chief Judge Clark of the Eastern District of Texas dated April 13, 2015 (Case No. 14-CR-80), there is a pervasive, nationwide problem regarding the use of criminal case information to identify and harm cooperators and their families.
 2. The problem has been exacerbated by widespread use of PACER and other systems that provide ready public access to case information, including documents containing cooperation information and criminal dockets indicating whether cooperation did or did not occur in a case.
 3. The problem threatens public safety. It also interferes with the gathering of evidence, the presentation of witnesses, and the sentencing and incarceration of cooperating defendants, and therefore poses a substantial threat to the underpinnings of the criminal justice system as a whole. The Court Administration and Case Management Committee agreed that there is a compelling government interest in addressing these issues.
 4. Other possible less-restrictive alternatives have been considered before selecting this guidance and, to the greatest extent possible, the guidance has been narrowly tailored. To be effective, any action intended to address these issues must be implemented universally across all criminal cases; any rules, standing orders, or policies that provide for case-to-case variation in the treatment of criminal documents for cooperators and non-cooperators are ineffective and may compound the problem.
 5. Uniform nationwide measures regarding access to particular criminal court documents and transcripts are necessary in order to prevent the improper use of those documents to harm or threaten government cooperators in the long term. As a result, the Committee will continue to work with other committees of the Judicial Conference, and in particular the Committee on Rules of Practice and Procedure, along with the Department of Justice and the Bureau of Prisons, in

order to investigate and establish nationwide measures that are most effective at protecting cooperators while avoiding unnecessary restrictions on legitimate public access.

B. Recommended Document Standards to Protect Cooperation Information

1. In every case, all plea agreements shall have a public portion and a sealed supplement, and the sealed supplement shall either be a document containing any discussion of or references to the defendant's cooperation or a statement that there is no cooperation agreement. There shall be no public access to the sealed supplement unless ordered by the court.
2. In every case, sentencing memoranda shall have a public portion and a sealed supplement. Only the sealed supplement shall contain (a) any discussion of or references to the defendant's cooperation including any motion by the United States under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1; or (b) a statement that there has been no cooperation. There shall be no public access to the sealed supplement unless ordered by the court.
3. All transcripts of guilty pleas shall contain a sealed portion containing a conference at the bench that will either contain any discussion of or references to the defendant's cooperation, or simply state that there is no agreement for cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.
4. All sentencing transcripts shall include a sealed portion containing a conference at the bench, which reflects either (a) any discussion of or references to the defendant's cooperation, including the court's ruling on any sentencing motion relating to the defendant's cooperation; or (b) a statement that there has been no cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.
5. All motions under Rule 35 of the Federal Rules of Criminal Procedure based on the cooperation with the government shall be sealed and there shall be no public access to the motion unless ordered by the court.
6. Copies of presentence reports and any other sealed documents, if requested by an inmate, shall be forwarded by the Chief Probation Officer or the Clerk of the Court to the warden of the appropriate institution for review by the inmate in an area designated by the warden and may neither be retained by the inmate, nor reviewed in the presence of another inmate, consistent with the institutional policies of the Bureau of Prisons. Federal court officers or employees (including probation officers and federal public defender staff), community defender staff, retained counsel, appointed CJA panel attorneys, and any other

person in an attorney-client relationship with the inmate may, consistent with any applicable local rules or standing orders, review with him or her any sealed portion of the file in his or her case, but may not leave a copy of a document sealed pursuant to this guidance with an inmate.

7. Clerks of the United States district courts, when requested to provide a copy of docket entries in criminal matters to an inmate or any other requesting party, shall include in a letter transmitting the docket entries, a statement that, pursuant to this guidance, all plea agreements and sentencing memoranda contain a sealed supplement which is either a statement that there is cooperation, including the terms thereof, or a statement that there is no cooperation, and, as a result, it is not possible to determine from examination of docket entries whether a defendant did or did not cooperate with the government.
8. All documents, or portions thereof, sealed pursuant to this guidance shall remain under seal indefinitely until otherwise ordered by the court on a case-by-case basis.
9. Nothing contained herein shall be construed to relieve the government in any case of its disclosure obligations, such as those under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Jencks v. United States*, 353 U.S. 657 (1957) (as codified at 18 U.S.C. § 3500).
10. Judicial opinions involving defendants or witnesses that have agreed to cooperate with the government, where reasonably practicable, should avoid discussing or making any reference to the fact of a defendant's or witness's cooperation.