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VIA E-MAIL

The Administrative Office of the United States Courts
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**Re: Public Comments of the Media Law Resource Center, Inc.
Concerning the Proposal to Restrict Public Internet Access
to Plea Agreements in Criminal Cases**

To whom it may concern:

The Media Law Resource Center, Inc. ("MLRC") submits these comments in response to the request for public comment by the Committee on Court Administration and Case Management of the Judicial Conference of the United States (hereinafter "Federal Judiciary") concerning a proposal by the Department of Justice to restrict public Internet access to all plea agreements in all criminal cases. MLRC respectfully urges the Federal Judiciary to reject this blanket proposal and instead continue the practice of providing the same access to plea agreements on the Internet as is available in the courthouse.

The Department of Justice's generalized concerns regarding cooperating defendants being identified and thereby subjected to threats to their personal security is grossly overbroad and, in any case, could be easily addressed through a more narrowly tailored means. The proposal as set forth is a significant restriction on the ability of the public to examine records of criminal cases for which there is a strong presumption of public access under the First Amendment and the common law.

The Department of Justice's concern revolves around the publicizing of information on the Federal Judiciary's Public Access to Court Electronic Records system ("PACER") reflecting the existence of a cooperation agreement between a defendant and the Government, exposing the cooperator to potential harm or retribution by criminal elements. Approximately 95 percent of all criminal cases end in a plea bargain. Only a miniscule subset of such cases include a plea bargain accompanied by a cooperation agreement. It is the cooperation agreement – and not the plea agreement – which attracts the attention of those who would seek to harm or harass cooperators. Moreover, even among the extreme minority of cases involving cooperation agreements is there any credible risk to the safety or security of the cooperating witness – such witnesses in white collar or political corruption cases, for example, face little or no threat of

recriminations. Finally, because plea agreements will still be available for inspection and copying at the clerk's window under the proposal, and public access is guaranteed under the Constitution to observe the sentencing process, including public discussion of the value of purported cooperation as it relates to the U.S. Sentencing Guidelines, the Government's generalized concern in ensuring witness safety and privacy will not be materially advanced.

It therefore makes no sense, and contradicts sound public policy as well as settled precedents concerning the right of public access to judicial records, to completely withdraw every criminal plea agreement from the PACER system.

Some federal districts, such as New Jersey, have adopted a uniform policy of separating cooperation agreements from plea agreements, which leaves the latter documents available for inspection at the courthouse and on PACER. In those districts, cooperation agreements are not filed, and neither is a judge's final description of sentencing credit for cooperators, but all plea agreements are readily available on PACER. Although this approach is more "narrowly tailored" to serve the governmental interest advanced by the current proposal, even this "less restrictive means" sweeps too broadly. Along with the many cases of cooperation by those who would engage in gang violence, drug trafficking or human trafficking and whose co-defendants or former cohorts may want them silenced, are defendants who are cooperators in political corruption cases, white collar crimes or other offenses where the potential for retribution (through threats, intimidation, or actual violence) is low and where there is a need and an established public interest in widespread availability for cooperation agreements.¹

The MLRC urges the Federal Judiciary to reject the proposed blanket removal from PACER of all plea agreements; instead, the MLRC asks the Federal Judiciary (or DOJ) to adopt a policy requiring U.S. Attorneys to file plea agreements and cooperation agreements and that the latter only be sealed by motion, for good cause shown, on a case-by-case basis. To the extent that public access to plea agreements in individual cases may raise legitimate and compelling security, investigatory, privacy or other concerns, the Government and/or the defendants in those cases can, and should, move to file the sensitive provisions of those agreements under seal in

¹ Consider just one high-profile example: Jack Abramoff, the well-known Washington D.C. lobbyist and political influence peddler, entered into a cooperation agreement with the Government, which is evidenced by numerous references in his PACER criminal file, including his filed sentencing memorandum. See https://ecf.flsd.uscourts.gov/cgi-bin/show_case_doc?78,20354,,,,,104,1 (last visited Oct. 23, 2007). While his plea agreement appears inaccessible on PACER it is available on the Internet through a simple search at <http://f1.findlaw.com/news.findlaw.com/usatoday/docs/abramoff/abr10406plea.pdf> (last visited Oct. 23, 2007). The scandal with which Abramoff was involved goes to the heart of democratic government, and it cannot seriously be contended that these types of crimes would result in a reasonable probability of violent retribution against cooperators.

accordance with the long-standing practice mandated by the Constitution and by the Department of Justice Guidelines applicable to U.S. Attorneys.

The proposed blanket policy of denying Internet access to all plea agreements, however, offends the public's First Amendment right to access judicial records and would effectively block the public from efficiently learning the bases on which more than 90% of all criminal cases are disposed in federal court. Further, it is belied by the Federal Judiciary's previous strong statements in support of public Internet access for criminal records, and its conclusion in 2003 "that the benefits of remote public electronic access to criminal case file documents outweighed the risks of harm such access potentially posed." This proposal, as set forth, is ill-conceived and to repeat a well-worn cliché, throws the baby out with the bath water. MLRC hereby requests the opportunity to speak at any public hearing held to consider this proposal.

I. The Media Law Resource Center, Inc.

MLRC is a non-profit information clearinghouse that monitors developments and promotes First Amendment rights in the libel, privacy and related legal fields. MLRC's membership is comprised of Media Members (which include media companies, insurers, and professional and public interest groups), Defense Counsel (which include law firms and individual attorneys with practices focused on defending the media), and Associate Members (which include overseas counsel with media practices). MLRC's major projects and programs include publishing reports on various matters bearing on First Amendment rights, hosting educational conferences, advocating for a vibrant and independent press, and conducting research on issues affecting the media. MLRC submits these comments in connection with its mission, the mission of its members, and in an effort to vindicate the American public's First Amendment right to know what transpires in its courts.

II. The Public's Constitutional Right to Inspect Plea Agreements

The United States Supreme Court has long recognized that "what transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). It is thus "beyond dispute" that the public has the right to access judicial proceedings and judicial records. *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984). Indeed, this right of access "antedates the Constitution." *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988). Consistent with the people's historic access to courts, the Supreme Court held in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), that the First Amendment conveys an affirmative, enforceable right of public access to criminal proceedings. The right exists both to enhance the likelihood that justice will be done and to "satisfy the appearance of justice." *Id.* at 594 (internal quotations and citations omitted). It operates to curb prosecutorial and judicial misconduct and furthers the public interest in understanding the criminal justice system. *See Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")*, 478 U.S. 1, 8-9 (1986).

Like criminal proceedings and judicial records generally, “plea agreements have traditionally been open to the public.” *Washington Post Co. v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991). Based on this tradition, federal courts consistently recognize the public’s constitutional right to inspect and copy plea agreements. *See id.*; *United States v. Haller*, 837 F.2d 84, 86-87 (2d Cir. 1988); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *United States v. Kooistra*, 796 F.2d 1390, 1391 n.1 (11th Cir. 1986); *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1051 (N.D. Cal. 2005); *United States v. Thompson*, 19 Med. L. Rep. 2158 (N.D. Tex. 1992). Aspects of a plea agreement therefore can be hidden from public view only when “closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *In re Washington Post Co.*, 807 F.2d at 390 (quoting *Press-Enterprise Co. v. Superior Court (“Press-Enterprise I”)*, 464 U.S. 501, 510 (1984).

The public’s right to access plea agreements is as fundamental as the public’s right to attend a criminal trial, for, as the U.S. Court of Appeals for the D.C. Circuit explained a decade ago, “[a]n agreement that is accepted by the court, and on which a guilty plea is entered, substitutes for the entire trial,” *United States v. El-Sayegh*, 131 F.3d 158, 160-61 (D.C. Cir. 1997); *accord Oregonian Publ’g Co. v. United States Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990) (“In many respects, the plea agreement takes the place of the criminal trial.”). When a defendant agrees to plead guilty, he foregoes his constitutional right to a public trial by a jury of his peers, and the public is deprived of the opportunity to assess the Government’s case against him. It is axiomatic that “the appearance of justice can best be provided by allowing people to observe it.” *Richmond Newspapers, Inc.*, 448 U.S. at 571-72. When a defendant’s fate is determined without the benefit of a public trial, it is critical for the public to understand the basis for the defendant’s decision to admit his guilt and what the Government has agreed to in exchange.

The fact that *all* people, regardless of their proximity to the courthouse, can obtain a copy of a convicted defendant’s plea agreement serves as a powerful check on prosecutors and courts alike and ensures that all defendants are treated fairly and justly. Open access through the Internet thus enhances “the basic fairness” of criminal proceedings in which defendants agree to plead guilty and instills “public confidence in the system.” *Robinson*, 935 F.2d at 288 (internal quotations and citations omitted). Placing plea agreements in open view is also “crucial” because it “satisf[ies] the appearance of justice.” *Crompton Corp.*, 399 F. Supp. 2d at 1051 (quoting *Richmond Newspapers, Inc.*, 448 U.S. at 571-72). Moreover, because the courts mete out justice on the public’s behalf, it is imperative that all members of the public have an opportunity to know why a person was convicted and why (s)he received the sentence imposed by the Court. In cases in which a defendant agrees to plead guilty, the plea agreement “reveals the basis on which society imposes punishment.” *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989).

Finally, providing easy public access to plea agreements is crucial to the public’s understanding of its criminal justice system, because the overwhelming majority of criminal

cases filed in federal court are resolved by means of a plea agreement. See EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2006, at 11-12 (2006) ("During Fiscal Year 2006, a total of 71,959, or 95 percent, of all convicted defendants pled guilty prior to or during trial" and, in total, 87 percent of "the 82,343 defendants terminated" that year pled guilty.); see also *Haller*, 837 F.2d at 87 ("the taking of a plea is the most common form of adjudication of criminal litigation"). Denying Internet-based access to plea agreements "would effectively block the public's [meaningful] access to a significant segment of our criminal justice system." *Oregonian Publ'g Co.*, 920 F.2d at 1465.

In sum, unfettered and ready access to those agreements is integral to the people's understanding of the courts' decisions and the punishments imposed on the public's behalf.

III. Providing Access to Plea Agreements Over the Internet Fulfills the Promise of the First Amendment Right to Access Plea Agreements

Although the public has historically been provided with broad access to plea agreements, not all members of the public could readily access those documents because the documents themselves were stored at the local courthouse and were only available to people who were able to travel there. While that situation accorded the public the right to access plea agreements, in the words of the United States Court of Appeals for the Third Circuit, "what exists of the right of access if it extends only to those who can squeeze through the door?" *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994). The Federal Judiciary answered that question in September 2003 when it decided to provide access to criminal records via the PACER system over the Internet. The principle adopted by the Federal Judiciary was simple, yet recognized the fundamental nature of the public's right to inspect and copy judicial records: "if a document can be accessed from a criminal case file by a member of the public at the courthouse, it should be available to that same member of the public through the court's electronic access system." GUIDANCE FOR IMPLEMENTATION OF THE JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE FILES, available at <http://www.privacy.uscourts.gov/crimimpl.htm> (last visited Oct. 23, 2007). Internet access to court dockets and records means the right – indeed, the promise – of public access can now be fully realized, and is not dependent upon physical proximity to the court, or the financial wherewithal to send a messenger to the courthouse. Through the PACER system, all people can now examine judicial records in their offices, homes, or public libraries as if they were standing in the courthouse.

Providing online access to judicial records has many important benefits for our country, benefits the Federal Judiciary highlighted when it unveiled its policy:

Such access provides citizens the opportunity to see and understand the workings of the court system, thereby fostering greater confidence in government. The benefit that electronic access “levels the geographic playing field” by allowing individuals not located in proximity to the courthouse easy access to what is already public information [P]roviding remote electronic access to this same public information available at the courthouse would discourage the creation of a “cottage industry” by individuals who could go to the courthouse, copy and scan information, download it to a private website and charge for access, thus profiting from the sale of public information and undermining restrictions intended to protect privacy.

Id. Notwithstanding the Federal Judiciary’s previous strong statements in support of public Internet access for criminal records, and its conclusion in 2003 “that the benefits of remote public electronic access to criminal case file documents outweighed the risks of harm such access potentially posed,” *id.*, the request for public comment strikes a dramatically different tone, stating that “[t]he Supreme Court has recognized . . . that access rights are not absolute, and that technology may affect the balance between access rights and privacy and security interests.” The two cases cited for this proposition, however – *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), and *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) – have no bearing on the issues raised by the proposal to take all plea agreements off line.

In *Nixon*, the Court considered a request to copy, broadcast, and sell copies of the Watergate tapes played at a criminal trial. In an opinion that predates the Court’s express holding that the public has a First Amendment right to access criminal proceedings, the Court noted that “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon*, 435 U.S. at 597. As the Court explained, however, “the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes – to which the public has never had *physical* access – must be made available for copying.” *Id.* at 609. The Court ruled that the tapes did not need to be made publicly available for copying, not because of any privacy or security interest as the request for comment suggests, however, but because the Presidential Recordings Act provided a procedure for making the tapes accessible to the public. *See id.* at 603-08. The *Nixon* case simply has nothing to do with whether a plea agreement should be publicly accessible through the Internet.

The Supreme Court’s decision in *Reporters Committee for Freedom of the Press* is even less relevant, as it does not involve judicial records at all. There, the Supreme Court considered a request made to the FBI for certain rap sheets under the federal Freedom of Information Act (“FOIA”). *See* 489 U.S. at 751. The issue the Supreme Court addressed was whether an executive agency’s compilation of a single person’s criminal history could be obtained via a

FOIA request. Although the Supreme Court acknowledged that most of the information in that compilation was “a matter of public record” available in courthouse records and police stations around the country, it invoked the practical obscurity concept to hold that the FBI was not required to provide the public with that agency’s own “computerized summary” of those records. *Id.* at 753, 764. Providing the public with electronic access to individual plea agreements which are identical to the agreements that are publicly accessible court files is not the same – nor even remotely analogous – to a compilation of records prepared by the Executive Branch that was at issue in *Reporters Committee*. And, applying the “practical obscurity” concept invoked by the Court would make no sense in the context of judicial records, which are not in the least bit obscure.

IV. The Proposed Policy Will Not Materially Advance the Government’s Purported Interests

The Federal Judiciary has explained that the proposed removal of criminal plea agreements is based upon concerns that access to unsealed plea agreements jeopardizes the safety of defendants who cooperate with the Government. There is no dispute that actual threats of retaliation against defendants and/or witness intimidation are significant concerns. However, the proposed removal of unsealed plea agreements from PACER will not materially advance the Government’s purported interest. First Amendment jurisprudence requires that statutes regulating speech be narrowly tailored to promote the underlying Government interest. As the Supreme Court of the United States has emphatically and continually stated: “It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (citing *Herndon v. Lowry*, 301 U.S. 242, 258 (1937); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972)). A statute may be invalidated on its face as overly-broad if its restrictions are “substantial.” *New York v. Ferber*, 458 U.S. 747, 769 (1982).

Therefore, before ordering the closure of a criminal court proceeding or sealing a judicial record to which a First Amendment right of access applies, there must be a judicial finding that “closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise I*, 464 U.S. at 510-11; *see also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (restrictions on access must be “necessitated by a compelling governmental interest”); *Press-Enterprise II*, 478 U.S. at 14 (holding that public access may be restricted only if “findings are made demonstrating that . . . reasonable alternatives” do not exist). Finally, decisions to close judicial proceedings or records must be made on a case-by-case basis; blanket sealing orders, applicable to broad categories of records, are not “narrowly tailored” and are therefore unconstitutional. *See Globe Newspaper Co.*, 457 U.S. at 606-07 (striking down a Massachusetts statute that imposed a *per se* exclusion of the public and press

from trials during the testimony of minor victims of sexual abuse; even though the interest of protecting minor sex crime victims from additional trauma is *generally* a compelling one, the statute did not allow for the constitutionally required case-by-case review and findings necessary to justify closure). These same fundamental principles have been applied consistently by federal courts when a party seeks to seal plea agreements. *See, e.g., Oregonian Publ'g Co.*, 920 F.2d at 1466-67; *Haller*, 837 F.2d at 87-89; *United States v. Korean Air Lines, Co.*, --- F. Supp. 2d ---, 2007 WL 2405518, at *3 n.3 (D.D.C. Aug. 22, 2007); *United States v. Northrop Corp.*, 746 F. Supp. 1002, 1004-06 (C.D. Cal. 1990).

The proposed PACER restrictions are not in keeping with fundamental First Amendment principles. The proposed policy sweeps much too broadly by removing records of *all* guilty pleas—the method by which the overwhelming majority of federal criminal cases are resolved—from PACER. Further, the proposed policy will not advance the Government interest of protecting cooperating defendants. Logic dictates that those most likely to be concerned about a defendant's cooperation with authorities are those connected to the underlying crime or to the defendant. Those peculiarly interested individuals typically are, more likely than not, within close geographical proximity of the courthouse where the defendant's case is being heard. Thus, even if the plea documents were removed from PACER under the proposed policy, they would still be available to those wishing to examine the documents for nefarious purposes.

In addition, a letter from the Executive Office for U.S. Attorneys has been quoted in the press as suggesting that all plea agreements should be removed from PACER because “for anyone with Internet access, a PACER account and a basic familiarity with the criminal docketing system, the notation of a sealed plea agreement or docket entry in connection with a particular defendant is *often* a red flag that the defendant is cooperating with the government.” Marcia Coyle, *Federal Prosecutors Want to Shutter Public Access to Plea Agreements*, THE NATIONAL LAW JOURNAL, Sept. 17, 2007, *available at* <http://www.law.com/jsp/article.jsp?id=1190019763392> (emphasis added) (last visited Oct. 23, 2007). The MLRC respectfully disputes this wildly broad assumption. Plea agreements may be sealed for any number of reasons—matters of National Security, for instance, are often sealed, as are sex offenses or pleas that raise concerns regarding ongoing investigations. The mere listing of a plea agreement as “sealed” on a docket does not by any means necessarily imply that the defendant is a government informant. Furthermore, even if the “sealed” notation does “often” raise a “red flag” as to cooperating defendants, it is a far leap from that notation to the receipt of any tangible information about the suspected cooperation.

Moreover, the Justice Department's proposal is premised on the assumption that every cooperator faces an identical risk to his or her physical safety, a factual foundation for the proposal that is self-evidently incorrect. Accordingly, the proposal is fatally overbroad. There is tremendous public interest in being able to access cooperation agreements in cases that involve political corruption, white collar crime and other types of offenses where there is little or no

danger of violence. If anything, the Courts should facilitate access to cooperation agreements in these types of cases involving public graft or corporate theft.

Indeed, even policies that at first blush appear to be less restrictive and more narrowly tailored sweep far too broadly. For instance, since the Federal Judiciary enacted electronic filing and access in criminal cases, in some districts, including the District of New Jersey, the United States Attorney's office in conjunction with the U.S. District Court has adopted a policy of separating cooperation agreements from plea agreements. Under this policy, when a defendant agrees to cooperate with the Government as part of a guilty plea, documentation of the existence and substance of the cooperation is memorialized in a separate "cooperation agreement" and is not included in the plea agreement. The "cooperation agreement" is not filed with the court and instead is kept confidential by the Government and defense counsel. Thus, while the plea agreement is publicly available, the cooperation agreement is not available on the docket, let alone on PACER.²

The New Jersey policy, like the Government's proposed policy, is far too overbroad, sealing off access to all cooperation agreements, whether or not the cooperating defendant or the investigation itself is actually and legitimately at risk. There simply is no justification for such a sweeping policy. There are many categories of cases (and plenty of individual cases) where there is little or no danger of violent recriminations because of the defendant's agreement to cooperate, including numerous political corruption cases. Additionally, because the cooperation agreements in these districts are never publicly docketed, and thus their existence is forever shielded from public view, neither the public nor the press will ever have an opportunity to move for cooperation agreements to be unsealed – even after the threat to the cooperating defendant or to the investigation has passed. This blanket and permanent sealing is wholly unjustified and a direct affront to the public's First Amendment right to access plea agreements.

Plea agreements in all cases should remain subject to public inspection on PACER because *those* documents, devoid of references to cooperation, pose no real risk of harm to defendants. It is incumbent on the parties – the Government and/or defense counsel – to articulate good cause for removal of a cooperation agreement from PACER. If the threat is credible, it should not be difficult for the Government to articulate it for a judge at the plea hearing or at sentencing. Once a judge makes the requisite findings and orders a plea or cooperation agreement sealed, court clerks and PACER have no problem removing such records from the public court file.

² In the District of New Jersey, the Judgment of Conviction explaining the sentence is available on PACER; however, if a cooperating defendant's sentence is reduced because of the cooperation, any description of the reduced sentence is written in a separate statement by the Court that is available to the parties, but is not filed on PACER.

**V. There Are Less Restrictive Means of Accomplishing the Government's Objectives
Without Restricting the Public's Ability Effectively to Monitor
the Operations of the Judicial Branch**

To underscore the restrictive effect this unnecessarily overbroad proposal creates, MLRC briefly mentions the importance of access to plea agreements for those members of the press who cover our courts, both federal and state, for the benefit of the public.

As noted above, in 2006 approximately 95 percent of convicted defendants pled guilty. See EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2006, at 11-12 (2006). News features about prosecutors' increasing use of plea bargaining (in state courts) and the effect that has on criminal sentencing, law enforcement, and the accused's rights have appeared in newspapers as recently as the first week in October. See Pat Gillespie, *Few criminal cases go to trial in Lee County; Attorneys: Plea deals benefit both sides*, THE NEWS-PRESS, Oct. 8, 2007, available at <http://www.news-press.com/apps/pbcs.dll/article?AID=/20071008/NEWS01/710080454/1075> (last visited Oct. 23, 2007); see also Sara Reed, *Plea bargains expedite justice: Most cases settled before trial*, THE COLORADOAN, Sept. 21, 2007, available at <http://www.coloradoan.com/apps/pbcs.dll/article?AID=/20070921/NEWS01/709210379/1002> (last visited Oct. 23, 2007).

Removing plea agreements from PACER will make them available only to those members of the press with the resources sufficient to physically visit the court. This is of concern not only to smaller news outlets but also to the entire media industry, which, even in the largest of news organizations, never have unlimited resources. Stories, such as the ones noted here, can take significant time and require serious analysis of a sizable number of documents. Visits to courthouses in far away jurisdictions during business hours, which by definition are limited, can be extremely burdensome, if not impossible. Thus the words of the First Circuit have become even more relevant today: "If the press is to fulfill its function of surrogate, it surely cannot be restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously." *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 504 (1st Cir. 1989).³

Particularly in light of the significant role that access to plea agreements plays in our self-governing democratic system, the ready availability of a less restrictive means of accomplishing the Government objective of protecting the safety of cooperating defendants requires the Federal Judiciary to reject the blanket closure policy proposed by the Department of Justice. Specifically, the MLRC urges the Federal Judiciary to follow its own published Privacy

³ Court clerks also have limited resources and might welcome the ability to direct journalists who make requests for significant numbers of documents to PACER.

Policy, which already adequately provides for the security concerns raised here. Under that policy, courts approach decisions to seal documents relating to criminal defendants on a “case-by-case” basis. See GUIDANCE FOR IMPLEMENTATION OF THE JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE FILES, *available at* <http://www.privacy.uscourts.gov/crimimpl.htm> (“Courts maintain the discretion to seal any document or case file sua sponte. . . . Courts should assess whether privacy or law enforcement concerns, or other good cause, justify filing the document under seal.”) (last visited Oct. 23, 2007). According to the Criminal Case File Policy Guidelines, documents that risk revelation of cooperation information—such as pretrial bail or presentence reports, sealed documents, and the statement of reasons in the judgment of conviction—shall not be posted on PACER. *Id.* While the MLRC strongly opposes the sealing of *any* judicial record without the appropriate showing of compelling need, on a case-by-case basis, such sealing orders (effective *both* at the courthouse and on PACER), in appropriate cases, provide adequate (and meaningful) protection for the Government’s purported interest in those individual cases. Thus, strict implementation of the Criminal Case File Policy Guidelines already adopted by the Federal Judiciary should be sufficient to protect defendants who become cooperating witnesses. In addition to a strict enforcement of the Federal Judiciary’s guidelines, another more narrowly tailored means of protecting the safety and security of cooperating witnesses is to require that plea agreements make no reference to cooperation and that cooperation agreements be filed separately (and subject to separate sealing orders, on a case-by-case basis), as discussed above.

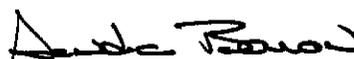
CONCLUSION

As an organization dedicated to helping the press fulfill its duty and right under the First Amendment to keep the public informed, the MLRC strenuously opposes the proposed policy of removing all unsealed Plea Agreements from PACER. The protection of cooperating defendants from retaliation and/or witness intimidation is undoubtedly important. It need not, however, come at the expense of the public’s right to know what transpires in the courts. Keeping documentation of these criminal resolutions off of the Internet would not only implicate the public’s constitutional right to access plea agreements, but would also effectively hamstring the press in serving as the public’s surrogate in monitoring federal criminal proceedings.

The MLRC urges the Federal Judiciary to consider the First Amendment implications here, and to reject the proposed limitations on PACER.

Respectfully submitted,

MEDIA LAW RESOURCE CENTER, INC.



By _____
Sandra Baron