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ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

1660 L Street, N.W., 12th Floor, Washington, DC 20036

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Clerk, U.S. District Court
333 West Broadway, Suite 420
San Diego, California 92101

Re: Proposed Amendment to Criminal Local Rule 32.1.8

Dear Clerk:

The National Association of Criminal Defense Lawyers is pleased to submit comments on the proposed amendment to Criminal Local Rule 32.1.8 set forth in General Order 648. We appreciate the Court extending the deadline to do so.

Introduction and Summary

Criminal Local Rule 32.1.8 creates special provisions governing the submission of motions for departure under U.S.S.G. § 5K1.1 and related written material. NACDL members often represent cooperating witnesses who may want the details of their "substantial assistance" kept out of the public eye, but our members also often represent the defendants against whom "cooperators" testify, and who therefore have an interest in disclosure of and readier access to such information. Since our members and their clients fall on both sides of this divide as a matter of self-interest, we would like to think, and we do believe, that our following comments are even-handed and fair-minded, not a case of special pleading.

The proposed amendment would make the following changes:

(1) A departure motion and related material could not be filed under seal unless an order was first obtained authorizing the sealed filing. The current

Rule, by contrast, does not require an order and instead provides that departure motions and related material are not to be publicly filed unless a court orders otherwise. Although not stated expressly, the effect of the proposed amendment would be to require that an application to seal be filed in any case where such materials were sought to be filed under seal.

(2) A showing of a "compelling interest justifying the restriction to public access" would be required for issuance of a sealing order. [1]

The proposed change from categorically exempting such motions from public filing to requiring that an application be made to file a departure motion under seal is consistent with the Federal Rules of Criminal Procedure and would help protect the public right of access to inspect and copy judicial records and documents. NACDL therefore supports the proposed change in principle.

The proposed standard requiring that a "compelling interest" be shown for issuance of an order sealing a departure motion, however, conflicts with Fed. R. Crim. P. 49.1. Rule 49.1 authorizes the under seal filing of such material on a showing of good cause, and the proposed amendment should be modified to correspond to that standard.

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[1] See General Order 648, p. 2, Proposed Amendments to Criminal Local Rule 32.1.8:

> "**Motions for Departure under 5K1.1.** Motions for departure under 5K1.1 and any written materials relating to those motions, including notice by summary sentencing chart, must be ~~delivered to the chambers of the sentencing judge and copies made available to~~ filed and served on opposing counsel seven (7) days before the sentence hearing date. ~~Service on pro per defendants will be accomplished on an ad hoc basis at the direction of the sentencing judge.~~ Counsel wishing to file ~~S~~such motions and supporting written materials under seal, must seek a court order in advance showing a compelling interest justifying restriction to public access of this material on the docket ~~will not be filed in the court clerk's file~~.

The version of Crim. Local Rule 32.1.8 reproduced in General Order 648, as set forth above, is not complete. Omitted is the final clause of the current Rule, which states "unless specifically ordered by the sentencing judge after the opportunity to be heard has been afforded to counsel for the government and for the defendant." This provision would of course no longer be part of the Rule under the proposed amendment, even though the proposed amendment does not include it as text to be stricken.

Discussion

Criminal Local Rule 32.1.8 addresses a subset of the broader issue of striking an appropriate balance between the common law right of access to inspect and copy judicial records and documents, and competing interests of confidentiality and witness security. See, *e.g.*, *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (recognizing the right of access is not absolute and identifying the different interests at stake); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (same).

The current Rule requires that departure motions and related written material "not be filed in the court clerk's file," unless the court so orders after affording counsel for the government and the defendant an opportunity to be heard. Crim. L.R. 32.1.8. The motion and related materials "must be delivered to the chambers of the sentencing judge and copies made available to opposing counsel..." *Id.* It appears that under the current Rule no public record is made of the submission, not even a notice of under seal filing, unless the court orders the motion to be filed with the clerk.

The categorical exemption approach reflected in the existing Rule was recommended by a report issued in 2004 by the Judicial Conference Committee on Court Administration and Case Management. See Advisory Comm. Note, Fed. R. Crim. P. 49.1 (referring to the "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" issued by the Judicial Conference in 2004). When Fed. R. Crim. P. 49.1 was adopted in 2009, however, it did not follow this categorical approach. Instead, the Advisory Committee noted that "the privacy and law enforcement concerns implicated by [such] documents [as 'substantial assistance' departure motions] in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e)."[2]

The amendment of Crim. Local Rule 32.1.8, to go from the categorical approach to one requiring that an application be filed and sealing order obtained in each case, would bring the Rule in line with Fed. R. Crim. P. 49.1. Requiring that an application be filed where the motion is sought to be filed under seal,

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[2] Fed. R. Crim. P. 49.1(d) provides that a court "may order a filing be made under seal without redaction," and subdivision (e) provides that a court may issue a protective order upon a showing of good cause requiring redaction of additional information or "limit or prohibit a nonparty's remote electronic access to a document filed with the court."

rather than having a categorical exemption, also recognizes that the need and justification for sealing departure motions will not be the same in all cases, and that there will be a number of cases where an under seal filing would not be justified. An additional benefit of requiring that an application be filed is that it insures there will be a public record of the submission, even if it is only a notice of an under seal filing. The record on the docket will at least provide notice of the submission to the press and public, who can seek to have the filing unsealed, subject to an appropriate showing.

The standard the proposed amendment would require to obtain a sealing order, however, would conflict with Fed. R. Crim. P. 49.1. As noted above, the amendment would require a "compelling interest justifying the restriction to public access of this material on the docket" be shown for issuance of a sealing order. A lesser standard is required by Fed. R. Crim. P. 49.1, which authorizes an under seal filing on a showing of no more than "good cause." See Advisory Comm. Note, Fed. R. Crim. P. 49.1 (noting that "[t]he provision governing protective orders was revised to employ the flexible 'cause shown' standard that governs protective orders under the Federal Rules of Civil Procedure"). To the extent Crim. Local Rule 32.1.8 would impose a higher standard, it would run afoul of Fed. R. Crim. P. 57(a)(1), governing the adoption of local rules. *Id.* (requiring that a "local rule must be consistent with ... federal statutes and rules adopted under 28 U.S.C. § 2072").

The general rule, consistent with First Amendment values, is that most judicial records may be sealed only if a court finds "compelling reasons." *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014) (internal quotations omitted). In authorizing the sealing of departure motions on a showing of good cause, Fed. R. Crim. P. 49.1 recognizes their special character, which is thought to justify an exception to the general rule.

Departure motions will typically contain sensitive law enforcement information that, if documented elsewhere at all, will be in reports that are created and produced under conditions of confidentiality. These considerations are sufficient to rebut the presumption of public access ordinarily applicable to documents filed with a court. See *Phillips v. Gen. Motors*, 307 F.3d 1206, 1213 (9th Cir. 2002) (recognizing an exception to the presumption of access for documents filed with a court in connection with non-dispositive motions that have been previously sealed under a valid protective order issued under the good cause standard of Fed. R. Civ. P. 26). In fact, departure motions are in some respects similar to documents "which have traditionally been kept secret for important policy reasons,'" and are almost entirely exempt from disclosure, *i.e.*,

grand jury proceedings and warrant and affidavits related to ongoing investigations. *Foltz*, 331 F.3d at 1134-35, quoting *Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989).

Of course, as with any sealing, it must be tailored to correspond to the underlying justification. Departure motions should not be used to present sentencing arguments not related to substantial assistance, and they would not be subject to sealing if they did.

The filing of departure motions under seal in no way affects the public right of access to sentencing proceedings. See *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012) (holding that "the First Amendment right of access applies to sentencing proceedings"). The arguments made by the parties at sentencing proceedings, and the reasons given by the court for imposing a particular sentence, including sentences predicated in part on substantial assistance, will be public, except in instances where the courtroom is closed and/or portions of the transcript sealed under the compelling interest standard.

Even where departure motions are filed under seal, a non-party may seek to have the motion unsealed, a procedure specifically recognized by Fed. R. Crim. P. 49.1(d) ("The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record."). It would be appropriate in that circumstance to apply the compelling interest test, as it gives explicit consideration to the strong presumption of public right of access. See *Kamakana*, 447 F.3d at 1180 (explaining the difference between the "good cause" standard and the "compelling interest" standard).

Even under the compelling interest standard, a concern that "disclosure ... could result in improper use of the material for scandalous or libelous purposes" –or as to 5K motions, appears likely to risk harassment or retaliation against a witness – is sufficient to justify continued sealing. *Hagestad v. Tragesser,* 49 F.3d 1430, 1434 (9th Cir. 1995) (internal quotations omitted); *Kamakana*, 447 F.3d at 1182. Where there is a concern that disclosure of a departure motion may potentially put the safety of the defendant or others at risk, the compelling interest standard will be easily satisfied, especially given that disclosure would result in remote electronic access. On the other hand, such concerns will not be sufficient to justify sealing if the information is outdated or has already been made public. See, *e.g.*, *Kamakana*, 447 F.3d at 1182 (upholding determination to unseal deposition testimony regarding "deposition testimony on confidential informants and criminal investigations" that was "years old" and "largely resulted in criminal indictments which were made public over three years ago").

One other aspect of the proposed amendment should be clarified or modified. The proposed amendment could be read to require that an order authorizing the sealing be obtained prior to the deadline for submission of the motion, seven days in advance of the sentencing hearing.

A party should be permitted to conditionally lodge the proposed under seal filing seven days in advance of the sentencing hearing, together with an application to have it filed under seal, subject to the court granting the application, or returning the material unfiled if the application is denied. Requiring a party to obtain an order authorizing the under seal filing of a departure motion in advance of the seven day period would impose an undue and unnecessary burden on the Court, Court staff and practitioners. To avoid potential confusion, it would be helpful if the proposed amendment made clear that conditionally lodging the proposed under seal filing is permitted as long as it is done seven days in advance of the sentencing hearing.

We appreciate the opportunity to comment on the proposed amendment and once again thank the Court for extending the time to do so.

Respectfully submitted,

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