# ADVISORY COMMITTEE
# ON
# CRIMINAL RULES

**Washington, DC**
**April 18-19, 2016**

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## TABLE OF CONTENTS

# AGENDA
# CRIMINAL RULES COMMITTEE MEETING
## APRIL 18-19, 2016
## WASHINGTON, D.C.

**I. PRELIMINARY MATTERS**

**A. Chair's Remarks and Administrative Announcements**

**B. Review and Approval of Minutes of September meeting in Seattle, Washington**

**C. Status of Criminal Rules: Report of the Rules Committee Support Office**

**II. CRIMINAL RULES UNDER CONSIDERATION: Proposed Amendments Approved by the Judicial Conference and Transmitted to the Supreme Court**

**A. Rule 4. Arrest Warrant or Summons on a Complaint**

**B. Rule 41. Search and Seizure**

**C. Rule 45. Computing and Extending Time**

**III. RULE 49 SUBCOMMITTEE REPORT**

**A. Reporters' memo**

**B. Proposed amendment to Rule 49**

**C. Proposed conforming amendment to Rule 45**

**IV. RULE 12.4 SUBCOMMITTEE REPORT**

**A. Reporters' memo**

**B. Proposed amendment to Rule 12.4**

**V. RULE 15 SUBCOMMITTEE REPORT**

**Reporters' memo**

## VI. COOPERATOR SUBCOMMITTEE REPORT

**A. Reporters' memo March 2016**

**B. Reporters' memo February 2016**

**C. Excerpt from the March 2016 Report of the Committee on Court Administration and Case Management**

## VII. NEW CRIMINAL RULE SUGGESTIONS

**A. Rules changes for pro se and IFP litigants and for Expanding Redaction (15-CR-D)**
1. Reporters' memo
2. Communication from Sai

**B. Pro se electronic filing (15-CR-E)**
1. Reporters' memo
2. Communication from Robert M. Miller

**C. Rule 5 of the Rules Governing Section 2255 Proceedings (15-CR-F)**
1. Reporters' memo
2. Letter from Judge Richard C. Wesley

**D. Rule 12 (16-CR-A)**
1. Reporters' memo
2. Letter from James M. Burnham

**E. Rule 16 (16-CR-B)**
1. Reporters' memo
2. Letter from the New York Council of Defense Lawyers and the National Association of Criminal Defense Lawyers

**F. Rule 49.1 (Retroactive Redaction)**
1. Reporters' memo
2. Materials from Civil Rules Committee

## VIII. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER COMMITTEES

## IX. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Fall meeting, September 19-20, 2016, Missoula, Montana

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| Leslie R. Caldwell* | DOJ | Washington, DC | ---- | Open |
| James C. Dever III | D | North Carolina (Eastern) | 2014 | 2017 |
| Gary Scott Feinerman | D | Illinois (Northern) | 2014 | 2017 |
| Mark Filip | ESQ | Illinois | 2013 | 2018 |
| David E. Gilbertson | CJUST | South Dakota | 2010 | 2016 |
| Denise Paige Hood | D | Michigan (Eastern) | 2015 | 2018 |
| Lewis A. Kaplan | D | New York (Southern) | 2015 | 2018 |
| Terence Peter Kemp | M | Ohio (Southern) | 2015 | 2018 |
| Orin S. Kerr | ACAD | Washington, DC | 2013 | 2016 |
| Raymond M. Kethledge | C | Sixth Circuit | 2013 | 2016 |
| John S. Siffert | ESQ | New York | 2012 | 2018 |
| Sara Sun Beale<br>Reporter | ACAD | North Carolina | 2005 | Open |
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| **Liaison for the Advisory Committee on Bankruptcy Rules** | **Roy T. Englert, Jr., Esq.** | ***(Standing)*** |
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| **Liaison for the Advisory Committee on Civil Rules** | **Judge Neil M. Gorsuch** | ***(Standing)*** |
| **Liaison for the Advisory Committee on Criminal Rules** | **Judge Amy J. St. Eve** | ***(Standing)*** |
| **Liaison for the Advisory Committee on Evidence Rules** | **Judge James C. Dever III** | ***(Criminal)*** |
| **Liaison for the Advisory Committee on Evidence Rules** | **Judge Solomon Oliver, Jr.** | ***(Civil)*** |
| **Liaison for the Advisory Committee on Evidence Rules** | **Judge Richard C. Wesley** | ***(Standing)*** |

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**ADVISORY COMMITTEE ON CRIMINAL RULES**
**DRAFT MINUTES**
**September 28, 2015, Seattle, Washington**

## I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in the Federal Courthouse in Seattle, Washington, on September 28, 2015. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Morrison C. England, Jr.
Judge Gary Feinerman
James N. Hatten, Esq.
Chief Justice David E. Gilbertson
Judge Raymond M. Kethledge
Judge Terence Peter Kemp
Professor Orin S. Kerr (by telephone, for morning session)
Judge David M. Lawson
John S. Siffert, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge Jeffrey S. Sutton, Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison
Judge Reena Raggi, Outgoing Advisory Committee Chair
Judge Richard C. Tallman, Former Advisory Committee Chair

The following persons were present to support the Committee:
Rebecca Womeldorf, Esq.
Laural L. Hooper, Esq.
Julie Wilson, Esq. (by telephone)

## II. CHAIR'S REMARKS AND OPENING BUSINESS

### A. Chair's Remarks

Judge Molloy thanked Judge Richard Tallman for welcoming the Committee in Seattle and attending. He acknowledged the Committee's outgoing members: Judges David Lawson, Morrison England, and Timothy Rice for their years of dedicated service and noted they will be deeply missed. He expressed special gratitude to Judge Raggi, the Committee's outgoing Chair, for her remarkable leadership.

Judge Raggi expressed her respect and affection for the members of the Committee and praised the Committee for its collaborative, thoughtful, and determined work with some very difficult issues. She noted the importance of the Committee's decisions declining to change rules

as well as its work in crafting changes. Judge Lawson stated that his service with the Committee has been a privilege, and he was grateful for the opportunity to work with great minds so motivated to get to the right place. Judge England echoed these sentiments and spoke with special admiration for the work of the Committee, its Reporters, and Judge Raggi on the multi-year effort to amend Rule 12.

Judges Sutton and Tallman spoke of their high regard for the work of Judge Raggi and the Committee's talented members to reach common ground and creative solutions. Professor Beale followed with particular thanks to Judges Raggi, Lawson, England, and Rice for their energy, humor, and skill, and all of the effort they put in "behind the scenes" chairing the Committee or its Subcommittees.

### B. Review and Approval of Minutes of March 2015 Meeting

Professor Beale brought to the Committee's attention that the draft minutes of the March 2015 meeting include Item F, p. 38, which had been left out of the version of the draft minutes provided earlier to the Standing Committee. A motion to approve the minutes having been moved and seconded:

*The Committee unanimously approved the March 2015 meeting minutes by voice vote.*

### C. Status of Pending Amendments.

Ms. Womeldorf reported on the status of the Rules amendments. The amendments to Rules 4 and 41 went to the Judicial Conference on the consent calendar and were approved. Judge Sutton commented on the process, indicated that the proposed amendments would advance to the Supreme Court in time for review by December, and thanked the Committee for its work.

## III. Criminal Rules Actions

### A. Amendments to Rule 49

Judge Lawson, Chair of the Rule 49 Subcommittee, presented the Subcommittee's work on Rule 49. Rule 49 presently mandates that papers must be filed and served "in the manner provided for a civil action." As the Reporter's Memorandum explained, the Committee had decided at its March 2015 meeting to ask the Subcommittee to draft a "stand-alone" rule for filing and service in criminal cases, as an alternative to continuing to work with the Civil Rules Committee on a change to Civil Rule 5. The Subcommittee now seeks feedback on that effort.

Judge Lawson first explained the Subcommittee's decision to propose a "delinked" or "stand-alone" criminal rule. He noted that following the March meeting the Civil Rules Committee had agreed to modify Rule 5 to accommodate the Committee's strong concern that the access to paper filing by pro se defendants and filers under Section 2255 must not require a

showing of good cause or local rule. Nonetheless, the Subcommittee had decided to continue with the effort to draft a stand-alone rule. There are different interests and policies at stake in civil and criminal litigation, which involve heightened due process concerns, and the Subcommittee thought it would be desirable to do a comprehensive review and decide affirmatively what the Criminal Rules should include, rather than having to react to a series of future changes in the Civil Rules.

Professor Beale added that one advantage of having everything in the Criminal Rules is that criminal practitioners won't have to toggle back and forth between two rule books. Also, because parts of the civil rule may not apply in criminal cases, a stand-alone rule would allow the Committee to ensure that the criminal rule governing filing and service is tailored to fit criminal cases. On the other hand, there have been some suggestions that a short, targeted amendment to Rule 49 would be better than rewriting this whole rule, and the Subcommittee wanted to hear from Committee members on whether they agreed that the reasons for a more comprehensive stand-alone revision are sufficiently compelling.

Judge Lawson queried whether there would negative repercussions if the Committee pursued a stand-alone rule after those drafting the proposed civil revision had agreed to accommodate the Criminal Rules Committee's concern. Professor Beale stated her understanding that the Civil Rules Committee will not be offended if we go in this direction. To the contrary, the Reporters from the Civil Committee had expressed support for the Subcommittee's approach, which would free them from the necessity to compromise, and permit them to return to what they saw as the optimal Civil Rules proposal. Professor King added that the other rules committees are watching some of the changes we are considering and may find some aspects of those changes attractive for their own rules.

Several committee members commented favorably on the decision to pursue a stand-alone rule, including Mr.Wroblewski, who noted the Department's support of the approach, and two others who noted that they had been initially skeptical of delinking or tinkering with things that should be left alone, but had been persuaded by the reasons stated by Judge Lawson and in the Reporters' Memo. One member noted that although those working on the Civil Rules came around this time to our way of seeing things, there might be times in the future when they would not do so. Thus for efficiency's sake it is best to take our own path.

Judge Raggi noted the benefits of uniformity across the rules, but emphasized that service and filing in criminal cases have constitutional implications different than in civil cases. Weighing the potential that uniform rules well suited to civil cases would be inappropriate for criminal cases against the cost of drafting a comprehensive revision that would be a more complex undertaking, she said had been persuaded the latter option was worth pursuing.

Judge Sutton stated he was glad the Committee was exploring the pros and cons of a separate rule and looked forward to hearing about it at the January Standing Committee Meeting. He noted that the Standing Committee and the Judicial Conference will be looking closely at any

negative inferences that a new Rule 49 might produce. Adopting Rule 49 language that is different from another set of Rules may not be a problem for the Criminal Rules Committee, but the choice to add, delete, or change language may affect the meaning of the Civil Rules. There are also big picture policy issues affected by the choice to stay linked to the Civil Rules, to delink, or to preserve linking while adding exceptions. He noted that one advantage of retaining the present linkage to the Civil Rules is that the Rules Committees must speak to each other before proposals to amend these rules reach the Standing Committee.

Professor Beale noted that there are other devices for unifying the rules and addressing coordination, such as the cross-committee group studying electronic filing.

Judge Sutton agreed, noting again that there can never be complete delinkage because slight differences in language may carry implications. He said he was looking forward to seeing what the Committee recommends.

Judge Lawson then moved that the Committee vote on whether it supports the Subcommittee's recommendation to compose amendments to Rule 49 to add language that governs filing and service in criminal cases, eliminating the link to the Civil Rules.

One member asked if new rule would continue to refer to the Civil Rules at all so that future dialogue between committees would be compelled. Judge Lawson replied that the Subcommittee's discussion draft did not refer specifically to Civil Rule 5, but was intended to preserve as much uniformity as possible.

Judge Sutton reiterated that because the criminal rule now refers to the civil rule, the committees have to speak with each other about proposed changes. If there was an independent rule, then the committees would no longer be required to speak to each other unless the Conference or the Court or the Standing Committee required that. He said it would not be that big a deal if the new criminal rule just lifts the exact same language already in the civil rule, because it would be incorporating all of the interpretations of the Rule 5 language that have been made over the past years. The further you get away from that, using different words, leaving out words, the more that is changed, every single one of those changes is going to be a potential complication.

Professor Beale noted that the Criminal Rules contain many provisions that use language that is identical or nearly identical to language in other rules (e.g., the rules governing indicative rulings and time computation), and we already have to be vigilant about those concerns. The Committee Notes to these rules typically explain that there is no intent to change the meaning from prior language or language from another set of rules.

A member agreed that so long as there is a continuing cross pollination between the Committees, concerns about delinkage are not an obstacle.

Judge Raggi added that at every Standing Committee meeting the reporters from the various committees have a lunch to discuss matters of cross-committee interest. What the Subcommittee has to consider is whether the situation is so different in the criminal as opposed to civil sphere that a different rule is warranted and what differences with civil cases warrant differences in language.

Professor Beale emphasized that the Committee should be careful about changing any of the language from the civil rule provisions unless we have a good reason or it is causing some problem. She noted that the draft of any comprehensive revision of Rule 49 would go back to all of the other Committees. At that point there may be choices by other Committees that allow all of us to make the same changes.

A member stated that the one book approach makes sense and that hopefully the Committees will be encouraged to work out any concerns before they get to the Standing Committee.

Judge Lawson restated his motion for an expression of the sense of the Committee in support of drafting Rule 49 as stand-alone rule governing filing and service in criminal cases, rather than depending upon the Civil Rules governing filing and service. After being seconded,

***The Committee the unanimously approved the motion, expressing its sense that a stand-alone Rule 49 be pursued.***

Judge Lawson then proceeded to some of the issues raised by the Subcommittee's discussion draft.

First, he sought feedback from the Committee on the Subcommittee's recommendation that the Committee not change Rule 49(a)'s description of what must be served (lines 3-5 of the discussion draft) because the existing language had caused no confusion or difficulty.

Discussion focused initially on whether 49(a) addressed presentence reports/probation reports, which are filed electronically, and pretrial service or probation reports that prompt a revocation. Judge Lawson responded that the Subcommittee had not considered these reports, because it was focusing on documents that propel the lawsuit, not pretrial release reports handled at first appearance, or probation reports covered by Rule 32. In response, a member stated that because these filings trigger hearings, it is important to get the rules for service right.

Judge Lawson noted that Rule 49 covers the conduct of the parties, and these documents are different, generated by the Court, or an officer who works for the Court. Professor Beale pointed out that under existing Rule 49, there appears to be no problems associated with filing and serving these reports.

Another member noted that Rule 32.1 governs these reports, and that any internal recommendation of the probation officer is not within the rubric of Rule 49. A member observed that Rule 32.1 does not cover pretrial services.

Mr. Wroblewski added that in many district those types of documents prompting revocation or modification are not served on all on the parties, just provided to the judge. The government may or may not be involved.

A member noted that districts handle these very differently, and that the Committee would need to know more about what the different districts do before we come up with a top-down rule governing such reports.

Professors King and Beale suggested that the Committee could revisit this when discussing the Subcommittee's proposed approach to filings and service by non-parties.

Judge Lawson noted that Rule 49(a) speaks to service on parties and suggested caution about extending the rule to documents that have often not been served on the parties.

Judge Molloy asked for objections to the Subcommittee's decision to leave the language in (a)(1) unchanged, noting that continued voting on sense of the Committee will help direct the activities of the Subcommittee. ***Raising no objections to the suggested approach to (a)(1), the Committee indicated its approval of that approach.***

Judge Lawson then presented the Subcommittee's suggestion that the Committee preserve the existing language in Rule 49(a)(2), lines 7-9 of the discussion draft, regarding serving an attorney when the party is represented. A member asked why the language in Rule 49 differed from that in Civil Rule 5. Professor Beale suggested that it may have been changed during restyling, and clarified that the Subcommittee's discussion draft retains the existing language of criminal rule even though it is different than civil language. To change the criminal language would have its own set of negative implications.

***Hearing no objection to retaining the language in 49(a)(2),*** Judge Molloy asked Judge Lawson to continue.

Judge Lawson then turned to lines 11-13 of the discussion draft and the description of how service occurs through electronic filing. He noted that the proposed language saying that the party sends it through the court's electronic "transmission system" is misleading. The Court does not transmit the paper, instead the court system generates an electronic notification of filing, then the parties log on to access the paper. He wanted to know if the Committee had concerns about revising the language to read : "A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic case filing system . . ." That language best reflects what actually happens.

Professor Beale clarified that the language about 'transmission" comes from the proposed civil revision, and if the Civil Rules Committee ultimately agrees that this language is better, it may decide to change its proposal to conform to our suggested change.

After discussion clarifying that the term "registered user" includes pro hac vice and expressions of concern that the rules take into account the large proportion of filers who are not using ECF, Judge Lawson queried whether members thought the Rule should address the idea that some things filed need not be served, such as documents filed under seal. Professor Beale suggested that would not be necessary. The Rule does not say what must be served, it says how to serve. She noted that the Reporters would take new language back to the Reporters for the Civil Rules Committee so they can consider it as well.

***The vote on the sense of committee was unanimously in favor of the suggested language for lines 11 through 13.***

Judge Lawson next turned to the Subcommittee's suggestions for lines 14 through 16 of the discussion draft and the question of whether consent to other forms of electronic service must be in writing.

Professor Beale clarified that the question about whether consent to being served by email must be in writing was raised by the language proposed as part of the revision of the Civil Rule.

A member asked whether an email itself would constitute a writing. Professor King pointed out that the "in writing" language now appears in Civil Rule 5, and that one advantage of keeping it in is that whatever law there is about that language would carry over to Rule 49.

Professor Beale noted that another issue this provision raises is the bigger question whether it is a good idea to list other acceptable forms of electronic service, i.e., service by fax or email.

Mr. Wroblewski reported that he looked into whether the government ever consents to email service by pro se litigants. He explained that this never comes up. When a pro se person files a document, the clerk files it using ECF, and the government receives an electronic notice. So there is no need to consent to any other form of service.

Another member agreed, noting she could not remember ever being served by email by anybody. However, a third member noted that he is regularly served by email in criminal cases, with subpoenas, other motions, adjournments, and letters to the court. He stated these documents are often filed with the court, but there are things that the government serves but does not file, such as discovery. If there is a dispute whether something was delivered, there is a notice.

Two members agreed that it was a good idea to have consent in writing to fax or email, particularly if you are not a registered user, because otherwise there will be disagreements about whether the person ever consented.

When asked about the meaning of "person" Judge Lawson stated that it should be "person to be served."

Another member expressed support for keeping the writing requirement, but noted the difficulty of getting consent from people in prison, and skepticism that prisoners could be served by any means other than mail.

A different member liked the "in writing" requirement, too, but noted that as drafted, the consent requirement did not address pro se people. Didn't the Subcommittee want their consent "in writing" too?

Professor King responded that there is a later provision in the discussion draft for written consent to delivery by other means and that the Subcommittee's choice to limit other electronic means (email and fax) only to represented parties was deliberate choice. Even if a prisoner consents to such service one day, he may not be able to receive that email or fax if moved between institutions, or if the computer at the facility's library is down, or the mailbox is full, or other problems. Professor Beale added that the Subcommittee thought these access problems were so significant that permitting this kind of service would be a bad idea. She urged the Committee to consider that policy question.

A member asked why the Rule did not address service on other people other than parties. Professor Beale responded that Rule 49 presently just deals with service on parties, and that even proposed (d) in the discussion draft for filing and service by nonparties doesn't deal with service on nonparties, and that the person language seems to come from the Civil Rule draft, so that may have to be changed to "party."

Professor King noted that the word "person" is in Civil Rule 5, and Judge Raggi suggested that the word "person" must refer to the lawyer, so if "party" were substituted, it would have to include the lawyer.

***When asked to vote on whether its sense was that the Subcommittee should add person "to be served" and to retain the requirement that consent be "in writing," the Committee unanimously agreed that it was.***

Judge Lawson proceeded to line 15 of the discussion draft, indicating that service is not effective when the serving party did not reach the person to be served. A member raised a question about the meaning of this when service is by email (with consent). Professor King stated that this language was from the latest draft for revising the Civil Rule, which was lifted

from current Civil Rule 5, so that any uncertainty about the meaning is already raised by existing Rule 5.

Professor Beale noted that the policy question is whether to have this safeguard for the electronic filing/service system, in addition to the use of email, which could bounce back. If the Committee wants to keep this safeguard, then we can think about how to say it.

After members discussed when various sorts of service should be considered effective, discussion turned to whether email service by consent was an option that should be preserved. A member said he valued being served by email, because it provides notice to a sender if the email is rejected. That makes it better than ECF.

Mr. Hatten added that if there is a bounce back from ECF, there is a staff member in his office that would call the person and let them know. Other members agreed that if there is a bounce back on ECF, the Court knows that.

Judge Lawson commented that the other means are a good alternative and are not mandatory.

A member suggested the Subcommittee consider inserting language that indicates parties can email papers that don't have to be filed.

Judge Sutton urged the Committee to focus on the conceptual difference for the criminal process and leave the details for later.

Professor Beale offered that it is very helpful for the Subcommittee and the reporters to hear from the Committee members what procedures they follow and what their experiences are, and noted that this was actually the first time the Committee has had the chance to discuss these particular issues. That information is needed in order to hammer out the language in lines 11 through 18 of the discussion draft, which was drawn from the inter-committee proposal for amending the Civil Rule.

Judge Lawson summed up what he thought the sense of the Committee was on the conceptual ideas for 49(a)(3) so that the Subcommittee could work on the language: (1) that a represented party (or a pro se party with permission) may achieve service on a registered user by filing in ECF; (2) a represented party may achieve service on represented or unrepresented persons by other electronic means (e-mail) only with consent; and (3) if, using ECF or email, the filing or notice did not reach the intended recipient, then with that actual knowledge another attempt has to be made.

Judge Molloy asked for any disagreement with these ideas conceptually. Judge Lawson confirmed a member's understanding that ECF use by or service on unrepresented parties should require a court order. Judge Molloy noted that the Committee's input will help the Subcommittee

continue its work, and he stated his intention to add two more members to the Subcommittee to replace members whose terms of service had ended..

***After asking for and receiving no objections to Judge Lawson's summary of the sense of the Committee regarding (a)(3) of the discussion draft***, Judge Molloy suggested the Committee move on to the next section of the discussion draft, addressing whether there are conceptual issues other means of service.

Judge Lawson turned to lines 19 through 32 of the discussion draft, addressing traditional service techniques. He noted that the Subcommittee decided to flip the order of the civil rule, putting ECF before traditional means, because e-service is now the dominant means of service. The description of other means in the draft attempts to replicate language of the civil rule. He asked if the Committee agreed these methods should be retained. Judge Lawson stated the Subcommittee requested serious consideration of deleting (d), regarding leaving the paper at a person's office or home. Another option would be to look at whether (e) would provide a sufficient catch all.

Professor Beale stated that one reason for retention was to prevent negative inferences from changes or deletions. Professor King noted there are dozens of cases interpreting these provisions and that changing or dropping this language would mean dropping reliance on that case law as well.

Discussion also addressed the advantages of restricting (3) to ECF only, and moving the "other electronic means" language to (4), along with the restriction that it is not effective if the sender learns it did not reach the person to be served.

Judge Raggi questioned whether giving a document to a process server or putting in a FedEx box could ever be enough for service in a criminal case. Doesn't it have to reach the lawyer or the defendant? The Reporters responded that the Rule could specify an authorized means, but if in a particular case no notice is actually received, the defendant could raise a due process claim. Similarly, the proposed amendments to Rule 4 governing service on corporations outside the U.S. are supplemented by constitutional requirements. Judge Raggi said that may suffice.

She then asked about the purpose of specifying when the service is complete. Is this related to deadlines for service? She suggested that the Subcommittee ask the Civil Rules Committee what this requirement achieves and determine whether there is an analogy for criminal proceedings.

***Judge Molloy solicited the Committee members' agreement that their sense was that the Subcommittee should retain the civil rule language describing other means of service on lines 19 to 32 of the discussion draft.***

Judge Molloy then asked Judge Lawson to turn to section (b) addressing filing. The discussion turned to documents that are served but not filed. Mention was made of alibi notices under Rule 12.1, which some members noted are served but not filed, as well as documents such as coconspirator lists and discovery, which are provided to the other side but not filed. Some are not filed because it would be highly prejudicial if they were public.

Judge Lawson noted that in some districts alibi or insanity notices are docketed, but the Rule 12.1 does not require filing of such notices, yet Rule 49(b)(1) in combination with (a)(1) suggests they must be. Professor Beale commented that the existing language or Rule 49 already creates this tension, Rule 49(a) stating that notices need to be served on parties, but that there doesn't seem to be any problem with the current practice. Professor Beale suggested that one approach would be to add specific exceptions to filing to the Rule.

Judge Raggi warned that it is one thing to leave the language as is because even if parties are not always abiding by the present rule, it is not creating a problem. It is another thing to change the rule because certain districts are not abiding. That would require fuller discussion.

Members discussed why discovery was not filed. Rule 16 mandates disclosure, but does not require filing or service. Also, judges don't want it cluttering up the docket. Members questioned why alibi notices would not be filed.

Professor King asked if there were other documents, other than discovery and notices under Rules 12.1, 12.2, and 12.3 that that are served but not filed. Was there anything else the Subcommittee should think about exempting from Rule 49? Each member noted his or her experience, which varied among districts and from judge to judge. Most stated discovery was not filed unless it became the subject of a motion, nor were notices of alibi. Mr. Wroblewski stated that ex parte filings and filings under seal are already covered by Rule 49.

Both Judges Raggi and Tallman expressed their views that generally all documents in criminal cases should be filed, and noted the costs in transparency and for the appellate process when they are not filed or are sealed.

The Reporters indicated that the discussion would be very helpful for the Subcommittee.

Following the lunch break, Judge Lawson drew the Committee's attention to the material in (b)(2)(A) of the discussion draft, concerning the signature block (lines 41-47), as well as the phrase designating the attorney's user name and password as the attorney's signature. He explained that the information in the signature block is needed by readers of a paper in order to identify who signed it, because the user name and password does not appear on the filing. If a paper is filed outside ECF, he noted, you can look at the signature. In the electronic filing world, there may be no signature.

Professor Beale noted that the style consultant and the other reporters were opposed to the detailed listing of information.

Members asked why it is necessary now to spell out this level of detail if the civil rule didn't have it before, whether the absence of detail has created any problems, and whether there is a reason to require this information in criminal but not civil cases. Judge Lawson explained that Civil Rule 11 requires that (1) every paper must be signed by at least one attorney of record or by a party personally if the party is unrepresented, and (2) the paper must state the signer's address, e-mail address, and telephone number. The criminal rules do not have a counterpart to Civil Rule 11. Presently, by incorporating service and filing "in the manner" of the civil rules, current Rule 49 arguably incorporates Civil Rule 11. A new stand-alone rule with no cross reference to the Civil Rules would not. Also, he argued, it is a bad idea to allow people to file documents that have nothing on the last page to show who filed, and there should be certain features of identity that are mandatory for documents filed in our system.

Professor Beale noted that, as drafted, the proposed rule would not mandate this information be included on paper filings, only on papers filed electronically.

Members noted several reasons not to include these details in Rule 49. Some preferred that details of this nature be left to local rules. There was also a suggestion that these details do not belong in a rule about the manner of filing, and it would be more appropriate to adopt a new criminal rule about signing, something like Civil Rule 11.

Judge Raggi stated that the Civil Rules Committee also ought to be concerned about substituting electronic login and passwords for signatures since any registered user can file in any case.

Professor Beale noted that the past concern in the Bankruptcy Rules Committee about requiring wet signatures was different; they had focused on the need to establish the author of fraudulent filings.

When asked if members had experienced any difficulty with missing signatures or information in criminal cases in the past, the only member who recalled a problem said it had been in a civil case.

Judge Lawson noted that the Subcommittee could look at the language proposed for the civil rule, which has a lesser level of detail.

Judge Molloy asked for a voice vote on whether the Subcommittee should retain the material on lines 41-47, there were more nays then yays. ***The sense of the Committee was to remove the detailed language concerning what must be included in the signature block.***

Moving to non-electronic filing, lines 50-55 of the discussion draft, Judge Lawson explained that it would be useful if the Committee expressed its view on the desirability of retaining the option of filing by handing a paper to the judge. No objections were raised. ***The sense of the Committee was that allowing delivery to the judge should be retained***.

Professor Beale noted that there had been a suggestion at an earlier meeting that the provisions on nonelectronic filing might include a reference to the filing of an object, such as a disk or a bloody shirt. Discussion of whether something like "paper or item" should be used throughout the rule ended with a consensus. ***Objects would normally be filed along with or as exhibits to documents, and the Subcommittee should strike the word "item" in brackets.***

Judge Lawson presented the two alternative options for describing the presumption of ECF filing by represented parties. Option 1 was shorter. Option 2 was the language proposed by the latest consensus draft going forward in the Civil Rules Committee, and was preferred by the reporters and the style consultant. Professor Beale also noted that Option 1 does not emphasize the point that paper filings must be allowed for other reasons or local rule quite as strongly as Option 2. ***Judge Molloy noted that the discussion indicated that the Committee preferred Option 2.***

Judge Lawson explained that the language limiting use of ECF by unrepresented parties (lines 63-65 of the discussion draft) emphasized the strong sense from the spring Committee meeting that the Committee strongly opposes any rule that would *require* pro se defendants and 2255 filers to use electronic filing unless they can show good cause or the district has a local rule. Committee discussion of this section focused on concerns about the fragility and unreliability of the electronic system, and whether there is any guarantee that electronic files would be available and readable decades from now. Members noted outages in ECF and the burdens they had caused. Judge Raggi preferred there be at least one paper copy filed until there was greater assurance of permanent accessibility. Judge Sutton suggested that it might be useful to have Judge Thomas Hardiman, who chairs the Committee on Technology, come and talk to the Criminal Rules or the Standing Committee about these concerns.

On the section (lines 66-68 of the discussion draft) that prohibits a clerk from refusing a filing as lacking the proper form, Judge Lawson noted that this language was drawn from Civil Rule 5. The Civil Rule reflects a policy determination that a judge, rather than the clerk of court, should make the decision whether to reject a filing. Professor Beale added that the Subcommittee had considered whether this aspect of Rule 5 was part of "the manner" of filing provided by the Civil Rule—and thus currently incorporated by Criminal Rule 49(d)—and concluded that it probably was. Discussion of this provision noted that the language is needed because of Section 2255 cases. Mr. Hatten noted that, as a clerk, he appreciated not having this responsibility. ***The sense of the Committee was to include in Rule 49 the language forbidding the clerk from rejecting filings because of form.***

The discussion advanced to subsection (c) concerning notice of an order or judgment provided by the clerk of court. Professor Beale explained that what the clerk must do here wouldn't normally differ between civil and criminal cases. However, to complete the severance from the civil rules on filing and service, Rule 49 might incorporate the relevant provisions from Civil Rule 77. ***The sense of the Committee was that the Subcommittee should consider incorporating the language of Rule 77 in the proposed Rule 49.***

Judge Lawson explained that the tentative provision for nonparties who file and serve, on lines 82-83 of the discussion draft, was there to fill the absence of any guidance for nonparty filers. The Subcommittee's first take was that on those uncommon occasions when nonparties file in a criminal case they should follow the same rules as parties. If they are represented, they should file electronically; if not, they should file by delivering a paper to the clerk. Professor Beale explained that the Subcommittee wanted to make sure that any new language about nonparty filing wasn't granting any new rights to file, which is why it limited this to nonparties permitted or required by law to file. ***The Committee members had no objection to this approach to nonparty filing and serving.***

Professor Beale drew the Committee's attention to one last issue on lines 35-37 of the discussion draft: whether to include the "within a reasonable time after service" language. Civil Rule 5 says anything required to be served must be filed within a reasonable time after service. The Subcommittee thought the Criminal Rule could drop that phrase. Because late filing had not been a problem in criminal cases, this provision was not necessary. But the Reporters from the other committees were quite concerned about leaving this out, and Committee input would be useful.

Members noted points cutting both ways. Including the language would promote uniformity and avoid negative inferences. But no one could ever remember a filing too late after service, which seemed to be a problem that predated ECF. Now when a pro se defendant or prisoner files something on paper, notice is provided automatically through the ECF system when the clerk files it electronically. Service to unrepresented persons is accomplished by mail. ***The Committee agreed that the Subcommittee should keep the "reasonable time" language in brackets and continue to consider it.***

Professor King explained that there may be other specific omissions from the civil rule that may need review by the full Committee. The Subcommittee will go back through Civil Rule 5 and affirm that there is a good reason for each deletion and change.

Judge Molloy thanked Judge Lawson for his hard work on the Rule, and thanked Judge Feinerman for taking over Judge Lawson's duties as Chair of the Subcommittee.

**B. Rule 12.4(a)(2)**

Professor Beale introduced the proposal to amend Rule 12.4, explaining that the request came from the Justice Department. The rule of judicial conduct regarding disclosure of interest in organizational victims that was the basis for the Rule had changed, and literal compliance with the current rule was difficult for prosecutors in certain cases.

Mr. Wroblewski stated that the Department decided to ask the Committee to consider an amendment when the Appellate Rules Committee began looking into a rule about disclosure paralleling Rule 12.4(a)(2). Although existing Criminal Rule 12.4(a)(2) requires disclosure of *all* corporate victims, the Code of Judicial Conduct has been amended to require recusal only if there will be a substantial impact. The hope is that both committees could adopt the same standard.

Professor Beale stated that the Department has explained that there are cases in which there are scores or hundreds of corporate victims with minor damages, it is not feasible to provide notice about each of these entities, and it would be desirable to limit mandatory disclosure to cases in which there was a substantial impact.

Judge Sutton agreed that the Criminal and Appellate Rules need to be coordinated, but noted that not all judges take the position that recusal is needed only when it is required. Some may believe recusal to be appropriate even if not required. Mr. Wroblewski responded that the Department hopes the Committees will be able to find an acceptable middle ground between the extremes of disclosing every single entity that has been a victim when the damages are trivial and disclosing only when absolutely required. The language "may be substantial" is one example, and there may be other options.

***Judge Molloy appointed a new Rule 12.4 Subcommittee to consider the issue and come up with a recommendation for the Committee's April Meeting. Judge Kethledge will serve as Chair, with Mr. Wroblewski, Mr. Hatten, Mr. Siffert, Mr. Fillip, and Judge Hood serving as members.***

**B. Rule 15(d)**

Professor Beale introduced the second proposal by the Department, to address an inconsistency between text of Rule 15(d) and its Committee Note. This inconsistency was identified in 2004, but it could not be fixed because there is no procedure to change the Committee Note without changing the text. Now the language of the Committee Note is starting to cause some problems for the Department. That Note states that the Department must pay for certain deposition expenses, but the text of the rule does not. In addition, other statutory provisions about witness fees may bear on this, as well as Rule 17(b).

Mr. Wroblewski explained that in a handful cases a defendant wants to depose numerous witnesses overseas. If the government were required to pay all of those expenses it, the cost would threaten the prosecution. The question of who is going to pay can be debated, but the rule and text say different things. It doesn't come up very often, but when it does it is very difficult. In one case the defendant asked to depose 20 witnesses in Bosnia. The Criminal Division didn't have the funds, and the potential imposition of those costs threatened its ability to bring the prosecution. In some cases now there is negotiation about how much each side pays. The Department does not want to prevent defense depositions, but it wants clear guidance about who is responsible for what.

A member noted that the government is arguing that it shouldn't have to pay for depositions it did not request, and the member is not sure that should be the rule. Something should be done to fix Rule 15 and clarify the obligations. Also there is some uncertainty about is the interaction of Rule 15 with other statutes and rules, including the Criminal Justice Act, Rule 17 (the subpoena rule), and 18 U.S.C. § 4285 (the marshal's transportation rule).

Discussion noted the origin of the inconsistency seemed to be a mischaracterization of the Rule in the Note during restyling. Members discussed the pros and cons of amending a rule because of an inconsistency in the note. Professor Beale observed that once the Committee decides the correct substantive position about who pays, it can then decide how to say that and write a note that is consistent.

Judge Sutton suggested that if the Committee decides to take no action because it has no authority to amend the Committee Note without a rule text change, the minutes can reflect that conclusion. The Note is not the Rule, the Court does not approve the Committee Note, and there is no procedure for changing problematic Committee Notes.

One member voiced opposition to gearing up this process if the Rule is right and the Note is wrong, but Professor Beale pointed out that not everyone at the table agrees that the text of the Rule is right. Plus the Rule does not speak to what happens when the request is from a codefendant. A subcommittee may be useful to review these issues and determine whether the text of the rule is still correct or should be modified. It might also be something that could be addressed in the Benchbook.

Another member questioned whether it was part of this Committee's job to determine who bears the burden of deposition costs. Judge Sutton noted that although generally cost-shifting is governed by statute, this is not the only place in the rules where such issues arise. Judge Raggi questioned whether there might be some concern raised if the Committee were to say that the costs of a defendant's requested deposition must come out of the Department's budget instead of the CJA. Judge Tallman noted that he understood this Committee has no budgetary authority or right to recommend spending. Other Judicial Conference Committees have that responsibility.

Judge Molloy asked if a subcommittee could add anything to this discussion.

Mr. Wroblewski answered yes, noting that it would not be requiring the Committee to take up a new issue, the Rule addresses this now. The Subcommittee might recommend that no action be taken, but just a few conversations exploring it would not hurt. A member expressed doubt that any rule a subcommittee would come up with would be better for the defense than the existing text of the Rule. Judge Raggi stated that if the Subcommittee and the Committee decide that the text is right and the Note is wrong, that could go into the Committee's report to the Standing Committee, creating a public record that this has been considered.

***Judge Molloy appointed a new Rule 15 Subcommittee, with Judge Dever as chair, and Judge Kemp, Justice Gilbertson, Ms. Brook, and Mr. Wroblewski, as members.***

**C. Rule 6 (15-CR-B)**

Professor Beale introduced a proposal from a citizen who urged a series of reforms to increase the independence of the grand jury, including direct citizen submissions, new instructions to the grand jury, changes in grand jury secrecy, and the authority to issue presentments. The suggestion was not accompanied by any supporting materials. Professor Beale explained that although some states have adopted some of these proposals, each would be a change in practice in the federal courts. As to the charge to the grand jury, there is a model charge in the Benchbook, but this would be new territory for the Rules. Grand jury secrecy is carefully regulated by Rule 6. The matter of presentment is not regulated by the Rules, but it would be a change in practice to allow presentment without the signature of the prosecutor.

Judge Molloy asked if anyone had any questions or comments.

***A motion to take no further action on the proposal was seconded and passed unanimously***.

**D. Rule 23 (15-CR-C)**

Professor Beale explained that this proposal to amend Rule 23 to drop the requirement that a jury waiver be in writing was one of two proposals submitted by Judge Susan Graber of the Ninth Circuit. Rule 23(a) allows waiver of a jury if the waiver is in writing. Judge Graber asked the Committee to consider eliminating the writing requirement, noting that failure to make the waiver in writing is considered harmless error.

The Reporters' Memorandum on this proposal states that many Rules require something be done in writing. Allowing oral waivers of trial by jury would be more flexible, is a practice followed in many states, and would raise no constitutional concern. However, the writing makes a clear record in case there is a later dispute about the existence of or agreement to a waiver, and suggests the importance of the waiver to the defendant. Other far less important waivers require

writing. It is also not clear that the writing requirement is posing a problem for litigants or courts, as the harmless error rulings suggest.

Each member commented on the proposal. Without exception, each agreed that the reasons noted in the Reporters' Memo for leaving the writing requirement were compelling. One said that there are only three decisions clients make on their own: jury or bench trial, whether to plead guilty, and whether to testify. All are fundamental and should be in writing.

***A motion to take no further action on the proposal was made, seconded, and passed unanimously.***

**E. Rule 32.1**

Judge Molloy introduced this item, which was the second of two suggestions made by Judge Graber. Judge Graber suggested that Rule 32.1 be amended to require that the government be given the opportunity to address the court regarding the sentence to be imposed for a violation of the terms of supervised release. Her suggestion was prompted by a case in which the judge failed to ask the government to speak at a revocation proceeding, and the defendant successfully challenged his sentence on appeal. Professor Beale noted that Judge Graber's letter also raised a second related issue: whether the text of 32.1 ought to prohibit the disclosure of the sentencing recommendation to the defendant. More broadly, it raised the question how much Rule 32.1 should include--everything that Rule 32 includes?

A member focused on the nature of the revocation proceeding. The sentence has already been imposed, and this proceeding is about how the sentence is being executed. The attorney for the government does not ordinarily initiate revocation proceedings. The defendant is brought back for the court to address a problem that arose while the defendant was under the court's supervision. The government is making a courtesy appearance. It doesn't really have a dog in that fight, because the sentence has already been imposed. Requiring the court to allow the government to address it in supervised release revocation proceedings would change the character of the proceeding and recast the role of the government attorney.

Mr. Wroblewski stated that was precisely the litigating position the Department of Justice took in the Ninth Circuit. Around the country there is a lot of experimentation going on about reentry courts, and there are other very different practices concerning supervision. The Department is hoping to evaluate these experiments and identify the best practices. There may not be a full-fledged resentencing or sentencing type process for revocations. The probation officer may recommend a small modification, it is all done in chambers, and that may actually be a very good practice. The Department is not in a position to say that the practice should be much more formal with more process.

One member indicated that she was in complete agreement with the Department, and wanted that point to appear in the minutes.

Judge Molloy asked members whether they ask the government to offer its views when they do revocations. Members responded yes, although sometimes the government has nothing to say. One member found it unbelievable that a judge would not want to know what the government has to say if the government wants to speak on a supervised release matter.

Judge Raggi stated that there ought to be flexibility for the judge to approve a modification or a minor tweak without involving the government.

Another member suggested that the Ninth Circuit's recent case may be unique, and thus not a sufficient basis for a rules change. Judge Sutton suggested that it might be desirable to hold on to the issue for a year or two and see how the Ninth Circuit decision percolates in the other circuits.

After being made and seconded, a ***motion to retain Judge Graber's proposal on the Committee's study agenda, to be examined later to see if there are further developments that warrant going forward, passed unanimously.***

**IV. Status Report on Legislation**

Ms. Womeldorf reported on the document in the agenda book from the Department of Justice regarding access of the Inspector General to records over which the Department has control. A Departmental statement of policy that the Inspector General does not get access to grand jury records unless one of the exceptions in Rule 6 applies has led to a series of legislative proposals. There has been no action since the hearing discussed in the document in the Agenda Book.

Mr. Wroblewski explained that there is ongoing discussion about Inspector General access to grand jury records. The Department of Justice Office of Legal Counsel concluded that there are records to which the Inspector General is not entitled to have access, and Congress has held a number of hearings on proposed legislation. Because this might implicate the rules, it has been brought to the Committee's attention.

After brief discussion of why the Inspector General might want access to grand jury materials and the dangers of eroding grand jury secrecy, Ms. Womeldorf indicated she would keep the Committee apprised of developments.

**V. Information Items.**

Judge Molloy asked Judge St Eve to discuss developments in the Court Administration and Court Management (CACM) Committee. She reported that CACM has been working on a policy involving cooperators, in order to prevent violent attacks of prisoners based on suspicion

that the prisoner has cooperated with the government. These suspicions have been based in part on docket entries and documents available on PACER. Prisoners are also demanding that other prisoners produce sealed documents to prove they are not cooperating. It is an issue that has been around for many years. Judge Hodges, the Chair of CACM, agreed that it was a good idea to tell the Rules Committee that CACM had taken this up. Since he could not attend the Criminal Rules meeting, he asked Judge St. Eve to inform the Committee. CACM has not decided anything yet, is not sure what it will recommend, or the best way to coordinate going forward on this. Ms. Hooper stated that she understood that the research CACM is using is confidential. Judge St. Eve noted that CACM has traditionally looked at privacy policy and related issues.

A member noted that defenders have been fighting the increasing closure of criminal records, because it makes access to information and defending clients much more difficult. The situation is not as dire as it is suggested in this member's district, and people know who the cooperators are long before the presentence report.

Judge Raggi hoped that CACM had examined the published proceedings of a national conference held on this problem, that she co-chaired, at which everyone with a stake in this had a chance to express views on the problem – not just defense and prosecution, but also the press, researchers, the Bureau of Prisons, and more. The proceedings were published in the Fordham Law Review. The conference revealed many different local policies, all carefully thought out. One problem with these varying practices is that inmates are not aware of the variation. For example, although some districts seal certain documents in all cases, others do not, and inmates may incorrectly assume any inmate whose document was sealed must have been a cooperator. The Rules Committee should be at the table when changes are discussed. That people are being beaten and worse in prison is certainly a Bureau of Prisons problem. It may or may not be a rules problem, but the Criminal Rules Committee should be involved in the discussions.

Mr. Wroblewski stated that the BOP has taken several steps, but the problem goes beyond just the prisons. It also affects people outside of prison.

Judge Tallman said that he understood some courts are barring a defendant's access to his own presentence report so that he cannot be expected to produce his own presentence report in prison. He noted that the Ninth Circuit broadcasts arguments live on the internet, and it is receiving more and more requests to seal those proceedings. But this could be a problem if sealing an individual argument is taken as a signal that the person is a cooperator.

Judge St Eve suggested that CACM is looking to provide a recommendation to the Judicial Conference in March. When Professor Beale observed that the Criminal Rules Committee would have difficulty providing input before then, Judge Sutton inquired what a rules-related response might be. Professor King offered that the Committee might, for example, change access of the defendant to the presentence report in Rule 32 so that the defendant reviewed and returned a hard copy. Or it might amend Rule 11 concerning what is said on the record. There might be changes in the appellate rules concerning what must be filed. Judge

Sutton stated that the Standing Committee might decide to ask CACM to wait for this Committee's input, depending upon what CACM decides to do.

Judge Molloy noted that the Committee's next meeting was scheduled for April 18 and 19th in Washington D.C., and he urged members to make it a priority to attend. He hopes to find a week in October 2016 that will work for everyone, sufficiently in advance that there would be no reason for Committee members not to attend. With a final thank you to Judges Raggi, Lawson, England, and Rice, the meeting was adjourned.

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**MINUTES**
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**
Meeting of January 7, 2016 | Phoenix, AZ

**TABLE OF CONTENTS**



## ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its spring meeting in Phoenix, Arizona on January 7, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Associate Justice Brent E. Dickson
Roy T. Englert, Esq.
Gregory G. Garre, Esq.
Daniel C. Girard, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber
Professor William K. Kelley
Judge Patrick J. Schiltz
Judge Amy St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Steven M. Colloton, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter (by teleconference)
Professor Michelle M. Harner, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

Elizabeth J. Shapiro, Esq., Deputy Director for the Civil Division of the Justice Department, represented the Department of Justice on behalf of the Honorable Sally Quillian Yates, Deputy Attorney General.

Other meeting attendees included: Judge David G. Campbell; Judge Scott Matheson, Jr. (teleconference); Judge Robert M. Dow (teleconference); Judge Phillip R. Martinez and Sean Marlaire, representing the Court Administration and Case Management Committee ("CACM"); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; Professor Geoffrey C. Hazard, Jr., Consultant.

Providing support to the Committee:

| | |
|---|---|
| Professor Daniel R. Coquillette | Reporter, Standing Committee |
| Rebecca A. Womeldorf (by teleconference) | Secretary, Standing Committee |
| Julie Wilson (by teleconference) | Attorney Advisor, RCSO |
| Scott Myers | Attorney Advisor, RCSO |
| Bridget M. Healy (by teleconference) | Attorney Advisor, RCSO |
| Shelly Cox | Administrative Specialist |
| Tim Reagan | Senior Research Associate, FJC |
| Derek A. Webb | Law Clerk, Standing Committee |
| Amelia G. Yowell (by teleconference) | Supreme Court Fellow, AO |

## INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He introduced two new members of the Standing Committee, Daniel Girard and William Kelley, welcomed back Bryan Garner as a Style Consultant, welcomed Judge John Bates as the new chair of the Advisory Committee on Civil Rules and Judge Donald Molloy as the new chair of the Advisory Committee on Criminal Rules, and introduced Greg Maggs as the new reporter for the Advisory Committee on Appellate Rules and Michelle Harner as a new reporter for the Advisory Committee on Bankruptcy Rules. He thanked Judge Phillip Martinez and Sean Marlaire for representing CACM. And he reminded the attendees that Justice O'Connor would attend the dinner meeting.

Judge Sutton reported that the civil rules package, which included revisions of Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84, and Bankruptcy Rule 1007, went into effect on December 1, 2015. He observed that Chief Justice Roberts devoted his year-end report to that package.

Judge Sutton also reported that the Judicial Conference submitted various rule proposals to the Supreme Court on October 9, 2015 (Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45) and again on October 29, 2015 (Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033, known as the "*Stern* Amendments").

## APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the May 28, 2015 meeting.**

## INTER-COMMITTEE WORK

Judge Sutton reserved discussion of electronic filing, service, and notice requirements for the Advisory Committee on Criminal Rules' report on Criminal Rule 49.

Professor Capra discussed the 2015 study conducted by Joe S. Cecil of the Federal Judicial Center entitled *Unredacted Social Security Numbers in Federal Court PACER Documents*, which discussed unredacted social security numbers in documents filed in federal courts and thus available in PACER, notwithstanding the "privacy rules" adopted in 2007 that require redaction of such information. The Standing Committee concluded that this problem could not be resolved by another rule amendment, and offered to support those in CACM who would address implementation of the existing rule at their summer 2016 meeting.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy reported that the Advisory Committee on Criminal Rules had no action items and six information items.

*Information Items*

Rule 49 – Rule 49 provides that service and filing must be made "in the manner provided for a civil action." The Advisory Committee is considering ways to amend this rule in anticipation of a likely change in the civil rules that will require all parties to file and serve electronically. After study by the Rule 49 Subcommittee chaired by Judge David Lawson, the Advisory Committee concluded that such an electronic default rule could be problematic in the criminal context for two reasons. First, pro se defendants and pro se prisoners filing actions under § 2254 and § 2255 rarely have unfettered access to the CM/ECF system. Second, the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the Advisory Committee favors severing the link to the civil rules governing service and filing and is drafting a stand-alone Rule 49 that does not incorporate Civil Rule 5. They plan to submit a final draft rule to the Standing Committee in June 2016.

The Standing Committee then discussed the general topic of incorporation by reference across the various sets of rules. Consensus formed around the idea that whenever an advisory committee is considering changing a rule that is incorporated by reference, or is parallel with language in another set of rules, it should always first coordinate with the committee responsible for those other rules before sending proposed changes out for notice and comment.

Members also agreed that the presumption in favor of parallel language across the rules suggested that changes to Rule 49 should depart as little as possible from the language of Civil Rule 5.

Rule 12.4(a)(2) – After an amendment in 2009, the Code of Judicial Conduct no longer treats as "parties" all victims entitled to restitution. The Department of Justice consequently recommended a corresponding amendment to Rule 12.4(a)(2), which assists judges in

determining whether to recuse themselves based on the identity of any organizational or corporate victims. The Advisory Committee agreed with this recommendation and created a subcommittee to draft a proposed amendment. Because a parallel provision exists in the Appellate Rules, the Advisory Committee on Criminal Rules is working with the Advisory Committee on Appellate Rules to draft the amendment.

Rule 15(d) – The Advisory Committee appointed a subcommittee to study whether to amend this rule and its accompanying note, which governs payment of deposition expenses, in light of an inconsistency between the text of the rule and the committee note. Judge Molloy said the text of the rule accurately identifies who bears the costs, but the note slightly mischaracterizes the rule by suggesting that the Department of Justice would have to pay for certain depositions overseas even if it did not request them. The Advisory Committee is struggling with how to fix this problem given the presumption that it cannot amend a note absent a rule revision. The Subcommittee will make its recommendations about how to fix this potential problem at the April 2016 meeting of the Advisory Committee.

Rule 32.1 – At the suggestion of Judge Graber, the Advisory Committee has examined whether Rule 32.1 should track the language of Rule 32 and require the court to give the government an opportunity to allocute at a hearing for revocation or modification of probation or supervised release. In a couple of cases, the United States Court of Appeals for the Ninth Circuit has held that the court must grant the government this opportunity and imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. After discussing the matter at its September 2015 meeting, the Advisory Committee decided to let this issue percolate and watch for developments in other circuits before considering any rule amendments.

Rule 23 – The Advisory Committee considered a suggestion to revise Rule 23 to allow oral waivers of trial by jury. The current rule requires a written stipulation from the defendant if they want to waive a jury trial and from the parties if they want to have a jury composed of fewer than twelve persons. Several cases have held that an oral waiver is sufficient if it is made knowingly and intelligently and have held that the failure to make the waiver in writing was harmless error. After study, the Advisory Committee decided against pursuing an amendment to Rule 23 because so many other criminal rules require written waivers and because the doctrine of harmless error covers this issue.

Rule 6 – In response to a suggestion to consider several amendments to Rule 6, which governs grand jury procedures, after a thorough discussion, the Advisory Committee decided to retain the current rule.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported that the Advisory Committee on Appellate Rules had three action items in the form of three sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

*Action Items*

STAYS OF THE ISSUANCE OF THE MANDATE: RULE 41 – The Advisory Committee sought approval of several amendments to Rule 41 designed to respond to two Supreme Court cases that highlighted some ambiguity within the Rule and to remove some redundancy from the Rule.

The proposed amendment to Rule 41(b) clarifies that a circuit court can extend the time of a stay of its mandate "by order" and not simply by inaction. In response to a question from a member, the Standing Committee discussed the pros and cons of inserting "only" in front of "by order" but decided to leave the language as is, with the potential to revisit at the June 2016 Standing Committee meeting. The proposed amendment to Rule 41(d)(4) next clarifies that a circuit court can "in extraordinary circumstances" stay a mandate even after it receives a copy of a Supreme Court order denying certiorari, thereby adopting the same extraordinary circumstances standard that the Supreme Court has found is required to recall a mandate. Finally, the Advisory Committee proposed deleting Rule 41(d)(1), which replicates Rule 41(b) regarding the effect of a petition for rehearing on the mandate, and is therefore redundant.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 41 and their accompanying Committee Notes.**

AUTHORIZING LOCAL RULES ON THE FILING OF AMICUS BRIEFS: RULE 29(A) – The Advisory Committee sought approval of an amendment to Rule 29(a) that would authorize local rules that prohibit the filing of amicus briefs, even if the parties have consented to their filing, in situations where they would disqualify a judge. As it stands, Rule 29(a) appears to be inconsistent with such local rules because it implies that there is an absolute right to file an amicus brief if the parties consent: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing." The proposed amendment adds to that sentence "except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge."

The Standing Committee members raised and discussed several potential stylistic issues with the proposed amendment. Judge Colloton noted in advance that he plans to shorten "the disqualification of a judge" to "a judge's disqualification." Judge Sutton recommended omitting the phrase "by local rule," which received support from the members. Others raised stylistic concerns with the "except that" phrase as a whole, preferring to start a new sentence beginning with "But" or "A court of appeals may," or breaking up the sentence with a semicolon and beginning the second clause with "provided however that." Others pointed out that a third sentence might suggest that the exception would also apply to the first sentence of Rule 29(a), which governs amicus briefs submitted by the government. Finally, some members raised a concern with the meaning of the phrase "prohibit the filing," asking whether it referred to prohibiting the actual submission of the document, its delivery to the panel, or its continued appearance in the record.

Judge Colloton decided to "remand" the proposal back to the Advisory Committee for further consideration of these largely stylistic revisions before re-submission to the Standing Committee.

EXTENSION OF TIME FOR FILING REPLY BRIEFS: RULES 31(A)(1) AND 28.1(F)(4) – The Advisory Committee sought approval of an amendment to Rules 31(a)(1) and Rule 28.1(f)(4), which would lengthen the time to serve and file a reply brief from 14 days to 21 days after the service of the appellee's brief. This amendment comes in anticipation of the elimination of the "three day rule," which would effectively reduce the time to file a reply brief from 17 to 14 days. After appellate lawyers on the Advisory Committee expressed the concern that this reduced window of time would adversely effect the quality of reply briefs, and in the hope that the extra time might lead to shorter reply briefs, the Advisory Committee decided to increase the time allowed. The Advisory Committee elected to shift from 14 days to 21 days in keeping with the established convention to measure time periods in 7-day increments where feasible. Judge Colloton noted that the phrase "the committee concluded that" will be deleted from the draft Committee Notes for both amended rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) and their accompanying Committee Notes.**

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions reported that the Advisory Committee on Evidence Rules had no action items and four information items.

*Information Items*

SYMPOSIUM ON HEARSAY REFORM – Judge Sessions reported on the Symposium on Hearsay Reform in Chicago on October 9, 2015. Inspired by a recent decision by Judge Posner in which he had suggested the removal of all the specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to re-examine the continuing vitality of the hearsay rule and its exceptions. Participants considered reform of the hearsay rule in the context of the electronic information era and discussed the pros and cons of various potential amendments to the hearsay rule. Participants entertained a proposal to replace the rule-based system with a guidelines system akin to the Sentencing Guidelines. Another proposal favored replacing the system of exceptions with a Rule 403 balancing analysis. And yet another was to retain the current system while expanding use of the residual exception in Rule 807. Judge Sessions added that none of these changes was likely to happen soon, particularly in view of the nearly uniform position of the practicing attorneys that the specificity of the current rules works well. He and several members remarked upon how successful the symposium had been and thanked Judge St. Eve, Judge Schiltz and Professor Capra for their help with the event.

PROPOSED AMENDMENTS TO RULES 803(16) AND RULE 902 ISSUED FOR PUBLIC COMMENT – The Advisory Committee has two proposed amendments out for public comment. The first, Rule 803(16), eliminates the hearsay exception for ancient documents. The second, Rule 902, would ease the burden of authenticating certain electronic evidence. Judge Sessions reported that since November 2015 the Advisory Committee has received more than 100 letters on the first rule governing the ancient documents exception, principally from lawyers in asbestos and

environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old, a concern Judge Sessions believed misplaced because the proposed rule does not alter the rules for authenticity, but rather reliability. Judge Sutton asked whether a Committee Note might help clarify this issue, and Professor Capra concurred. With respect to Rule 902, the proposal elicited little public comment and seems to have been universally accepted. Professor Capra added that the magistrate judges support both proposed amendments.

PROPOSED AMENDMENTS TO THE NOTICE PROVISIONS IN THE FEDERAL RULES OF EVIDENCE – The Advisory Committee continues to consider ways to increase uniformity among the various notice provisions throughout the Federal Rules of Evidence. Uniformity cannot be achieved for all provisions. For example, the notice provisions of Rules 412–415 dealing with sex abuse offenses, are congressionally mandated and cannot therefore be amended through the rules process. The Advisory Committee continues to consider uniform language that would work for other notice provisions.

Turning to specific notice provisions, the Advisory Committee is considering removing the requirement in Rule 404(b) that a criminal defendant must request notice of the general nature of any evidence that the prosecutor intends to offer at trial. Judge Sessions added that the Advisory Committee believed the existing rule was a "trap for an incompetent lawyer" and unfair because it punishes defendants whose lawyers fail to request notice. The Advisory Committee is also considering inclusion of a good faith exception to the pretrial notice provision in Rule 807.

BEST PRACTICES MANUAL ON AUTHENTICATION OF ELECTRONIC EVIDENCE – In an effort to assist courts and litigants in authenticating electronic evidence such as e-mail, Facebook posts, tweets, YouTube videos, etc., and following a suggestion from Judge Sutton, the Advisory Committee is creating a best practices manual on the subject. Judge Sessions reported that Professor Capra has worked on this manual along with Greg Joseph and Judge Paul Grimm, and the final product should be completed for presentation to the Standing Committee by its June meeting.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta reported that the Advisory Committee had five action items and four information items to present to the Standing Committee. She also announced that the modernized bankruptcy forms became effective on December 1, 2015. She added that they have been well received and that the only "criticism" made against them is that they are so clear and easy to use that they might encourage more pro se filings.

### *Action Items*

Judge Ikuta explained that because the first three action items (a proposed change to Rule 1015(b), proposed changes to Official Forms 20A and 20B, and a proposed change to Official Form 410S2) involved just minor or conforming changes, the Advisory Committee recommended to the Standing Committee that they go through the regular approval process but without notice and public comment. She added that this would result in a December 1, 2017

effective date for the rule rather than the December 1, 2016 effective date stated in the agenda book. The forms, she said, would remain on track to go into effect on December 1, 2016.

RULE 1015(B) (CASES INVOLVING TWO OR MORE RELATED DEBTORS) – In light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Advisory Committee proposed that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 1015(b).**

OFFICIAL FORMS 20A (NOTICE OF MOTION OR OBJECTION) AND 20B (NOTICE OF OBJECTION TO CLAIM) – The Advisory Committee proposed that Official Forms 20A and 20B be renumbered to 420A and 420B, to conform with the new numbering convention of the Forms Modernization Project. It also proposed substituting the word "send" for "mail" in this rule to encompass other permissible methods of service and to maintain consistency with other new forms.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Forms 20A and 20B.**

OFFICIAL FORM 410S2 (NOTICE OF POSTPETITION FEES, EXPENSES, AND CHARGES) – The Advisory Committee proposed resolving an inconsistency between Rule 3002.1(c) and Official Form 410S2. The rule requires a home mortgage creditor to give notice to the debtor of all fees without excluding ones already ruled on by the bankruptcy court. The form that implements the rule, however, says that the creditor should not "include…any amounts previously…ruled on by the bankruptcy court." The Advisory Committee proposed deleting the form's inconsistent instruction and adding an instruction that tells the lender to flag the fees that have already been approved by the bankruptcy court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Form 410S2.**

RULE 3002.1(B) (NOTICE OF PAYMENT CHANGES) AND (E) (DETERMINATION OF FEES, EXPENSES, OR CHARGES) – The Advisory Committee sought approval from the Standing Committee of three proposed amendments to Rule 3002.1(b) for publication for public comment in August 2016. First, the Advisory Committee recommends creating a national procedure by which any party in interest can file a motion to determine whether a change in the mortgage payment made by the creditor is valid. Second, the Advisory Committee recommends giving the court the discretion to modify the 21-day notice requirement in the case of home equity lines of credit because the balance of such loans is constantly changing. And third, the Advisory Committee recommends amending Rule 3002.1(e) by allowing any party in interest, and not just a debtor or trustee as currently allowed under the rule, to object to the assessment of a fee, expense, or charge.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 3002.1(b) and 3002.1(e) for publication for public comment.**

REQUEST FOR A LIMITED DELEGATION OF AUTHORITY – The Advisory Committee requested a limited delegation of authority to allow it to make necessary non-substantive, technical, and conforming changes to the official bankruptcy forms that would be effective immediately but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. Judge Ikuta explained that there were three categories of such changes that would benefit from this procedure: 1) typos; 2) changes to the layout or wording of a form to ensure that CM/ECF can capture the data; and 3) conforming changes when statutes, rules, or Judicial Conference policies change in non-substantive ways. Discussion led to consensus around the idea that after the Advisory Committee identified the need for a minor change in a form, it would vote on the proposed change, and notify the chair of the Standing Committee during that approval process. Some members observed that because the process to amend forms concludes with approval by the Judicial Conference, and does not require the full Rules Enabling Act process, the delegation of authority to the Advisory Committee to make minor changes effective immediately, but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, posed no procedural problems.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously agreed to seek Judicial Conference delegation of authority to the Advisory Committee on Bankruptcy Rules to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference.**

*Information Items*

*STERN* AMENDMENTS RESUBMITTED TO THE SUPREME COURT – Professor Gibson gave a brief update on the *Stern* Amendments. After the Supreme Court's decision in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), which upheld the validity of party consent to bankruptcy courts entering final judgment on *Stern* claims, the Advisory Committee resubmitted to the Standing Committee its *Stern* Amendments. It had originally submitted these amendments in 2013, and secured the approval of the Standing Committee and the Judicial Conference, but the Judicial Conference withdrew them given the Supreme Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). The Standing Committee reapproved the amendments by e-mail vote in October 2015 and the Judicial Conference approved them shortly thereafter. The Judicial Conference submitted them to the Supreme Court as a supplemental transmittal on October 29, 2015. If approved by the Supreme Court in the spring of 2016, they will go into effect on December 1, 2016. Professor Gibson and Judge Ikuta expressed the Advisory Committee's appreciation of the Standing Committee's quick action on the *Stern* Amendments.

CHAPTER 13 PLAN FORM AND OPT-OUT PROPOSAL – Judge Ikuta gave a report on the history and current status of the Advisory Committee's plan to create a national Chapter 13 plan official form. The Advisory Committee commenced work on this at its spring 2011 meeting. It published its proposed plan form and related rules in August 2013. In response to comments received, the package was revised and republished in August 2014. The second publication prompted additional comments, most notably from numerous bankruptcy judges expressing their

preference to retain their local forms. In response, the Advisory Committee voted unanimously to consider a proposal to approve the plan form and most of the related rules with minor amendments, but to consider further rule revisions that would allow a district to use a single district-wide local plan form so long as it met certain criteria. At its April 2016 meeting, the Advisory Committee will decide whether to recommend that this "opt-out" proposal go forward without further notice and public comment. Judge Sutton and Professor Coquillette suggested that while republication might not be required because the Chapter 13 package has been published twice before, prudence might favor republication given the demonstrated public interest over the past two publication periods and the somewhat new concept of the opt-out proposal. Members generally supported the idea of further publication, but only to the rule changes needed to implement the proposed opt-out procedure, and, if acceptable to the Judicial Conference and the Supreme Court, on an accelerated basis that would allow for an effective date of December 2017, rather than December 2018. To accomplish this, the rule changes could be published for three months (August–November, 2016) and the entire Chapter 13 package could be considered by the Standing Committee in January 2017, the Judicial Conference in March 2017, and the Supreme Court by May 2017, with a target December 1, 2017 effective date assuming no contrary congressional action.

RULE 4003(C) (EXEMPTIONS – BURDEN OF PROOF) – Professor Harner reported the Advisory Committee's ongoing study regarding whether Rule 4003(c), which places the burden of proof in any litigation concerning a debtor's claimed exemptions on the objecting party, violates the Rules Enabling Act. In light of the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), which held that the burden of proof is a substantive component of a claim, Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, suggested to the Advisory Committee that by placing the burden of proof on the objector, as opposed to the debtor which many states do, Rule 4003(c) alters a substantive right and thereby violates the Rules Enabling Act. Professor Harner explained that the Advisory Committee is studying whether, à la *Hanna v. Plumer*, the rule announced in *Raleigh* is substantive or procedural.

RULE 9037 (PRIVACY PROTECTION FOR FILINGS WITH THE COURT) – REDACTION OF PREVIOUSLY FILED DOCUMENTS – Judge Ikuta reported that the Advisory Committee is studying CACM's recent suggestion that it amend Rule 9037. CACM suggested that the rule require notice be given to affected individuals when a request is made to redact a previously filed document that mistakenly included unredacted information. Because a redaction request may flag the existence of unredacted information, consideration is being given to procedures to prevent the public from accessing the unredacted information before the court can resolve the redaction request. Further consideration at the Advisory Committee's spring 2016 meeting may result in a proposal.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates reported that the Advisory Committee on Civil Rules had no action items but four information items to put before the Standing Committee.

*Information Items*

RULE 23 SUBCOMMITTEE – Judge Bates reported on the work of the Rule 23 Subcommittee, chaired by Judge Robert Dow, which has been in existence since 2011. After various conferences and multiple submissions, the Subcommittee has identified six topics for possible rule amendments:

1. "Frontloading" in Rule 23(e)(1), requiring upfront information relating to the decision whether to send notice to the class of a proposed settlement.
2. Amendment to Rule 23(f) to clarify that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f).
3. Amendment to Rule 23(c)(2)(B) to clarify that the Rule 23(e)(1) notice triggers the opt-out period under a Rule 23(b)(3) class action.
4. Another amendment to Rule 23(c)(2)(B) to clarify that the means by which the court gives notice may be "by United States mail, electronic means or other appropriate means."
5. Addressing issues raised by "bad faith" class action objectors. Finding a way to deter objectors from holding settlements "hostage" while pursuing an appeal until they receive a payoff and withdraw their appeal has received considerable attention. Members of the Subcommittee seem inclined to recommend a simple solution which would require district court approval of any payment in exchange for withdrawing an appeal. One potential issue with this solution is jurisdictional: Once the notice of appeal is filed, jurisdiction over a case typically transfers from the district court to the court of appeals. The Subcommittee is currently studying this issue. The Subcommittee is also considering a more complicated solution whereby it would amend both Rule 23 and Appellate Rule 42(c), on the model of an indicative ruling.
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2). The proposed amendment focuses and expands upon the "fair, reasonable, and adequate" standard incorporated into the rule in 2003 by offering a short list of core considerations in the settlement-approval setting.

The Standing Committee principally discussed the "bad faith" objector issue. Some members raised the question of whether sanctioning lawyers might help address the problem. Others asked whether securing district court approval for a payoff might actually worsen the problem by incentivizing bad faith objectors to do more work and run up a bill that they can justify to a court.

Judge Bates next reported on those issues that the Rule 23 Subcommittee has decided to place on hold.

1. Ascertainability. Because this issue is currently getting worked out by several circuit courts, is the subject of a few pending cert petitions to the Supreme Court, and may be affected by the class action cases already argued this term before the Court, the Subcommittee has decided not to propose a rule amendment at this time.
2. "Pick-off" offers of judgment. This issue has also recently been litigated in the circuit courts and, as of the time of the meeting, was pending before the Supreme Court in *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (2016).

3. Settlement class certification standards. Given the feeling of many in the bar that they and the courts can handle settlement class certification without the need for a rule amendment, the Subcommittee has decided to place this issue on hold.
4. Cy Pres. Given the many questions that have emerged in this controversial area, including the necessity of a rule and whether a rule might violate the Rules Enabling Act, the Subcommittee has decided to place this issue on hold.
5. Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.

RULE 62: STAYS OF EXECUTION – Judge Bates reported on the work of the joint Subcommittee of the Appellate and Civil Rules Advisory Committees chaired by Judge Scott Matheson. The Subcommittee has developed a draft amendment for Rule 62 that straightforwardly responds to three concerns raised by a district court judge and other members of the Appellate Rules Advisory Committee. First, the draft extends the automatic stay from 14 days to 30 days to eliminate a gap between the current 14-day expiration of the automatic stay and the 28-day time set for post-trial motions and the 30-day time allowed for appeals. Second, it allows security for a stay either by bond or some other security provided at any time after judgment is entered. And third, it allows security by a single act that will extend through the entirety of the post-judgment proceedings in the district court and through the completion of the appeal. Judge Bates concluded by noting that the Subcommittee had considered but withdrawn a proposal that spelled out several details of a court's inherent power to regulate several aspects of a stay. The Subcommittee withdrew it after discussion at the Advisory Committee meetings because a stay is a matter of right upon posting of a bond and because they concluded that such an amendment was not necessary to solve any problems. This preliminary draft has yet to be approved by either Advisory Committee. Judge Bates said that he planned to submit this to the Standing Committee in June 2016 for publication.

EDUCATIONAL PROGRAMS REGARDING THE CIVIL RULES PACKAGE – Judge Bates reported that the Advisory Committee has been collaborating with the Federal Judicial Center to create educational programs for judges and lawyers to help spread the word about the new discovery amendments that went into effect on December 1, 2015. Judge Campbell and others have starred in various educational videos highlighting the new rules. Judge Sutton and Judge Bates sent out letters to all chief judges of the circuit, district, and bankruptcy courts on December 1, 2015, explaining the changes. Various circuit courts are creating educational programs of their own for circuit conferences and other court gatherings. The American Bar Association and other bar groups have started to create programs as well. The Education Subcommittee, chaired by Judge Paul Grimm, is now working on additional steps in collaboration with the Federal Judicial Center. Judge Sutton underlined the ongoing responsibility of Standing Committee members to help support these local and national educational efforts.

PILOT PROJECTS – Judge Campbell reported on the ongoing work of the Pilot Project Subcommittee. The Subcommittee investigates ways to make civil litigation more efficient and collects empirical data on best practices to help inform rule making. The Subcommittee consists of members of the Advisory Committee on Civil Rules along with Judges Sutton, Gorsuch and St. Eve from the Standing Committee, Jeremy Fogel and others from the Federal Judicial Center, and in the near future one or more members of CACM. Over the past several months, members

of the Subcommittee have been researching pilot projects and various studies that have already been conducted, including 11 projects in 11 different states, efforts in 2 federal courts particularly noted for their efficiency, a pilot project conducted during the 1990s at the direction of Congress, the work of the Conference of State Court Chief Justices, and a multi-year FJC study conducted at CACM's request that examined the root causes of court congestion.

The Subcommittee has decided to focus on two possible pilot projects. First, it is looking into enhanced initial disclosures in civil litigation. Some research indicates that initial disclosure of helpful and hurtful information known by each party can improve the efficiency of litigation. But the experience with a mandatory disclosure regime in the 1990s under then Rule 26(a), which involved fierce opposition, a dissent by three Supreme Court Justices, multiple district court opt-outs, and eventual abandonment of the rule, provides something of a cautionary tale. The Subcommittee is exploring and conducting empirical and historical research on this topic at both the federal and state level. They have concluded that conducting pilot projects that test the benefits of more robust initial disclosures would be a sensible next step before proceeding to the drafting and publishing of any new possible rule amendments. Judge Campbell sought the perspective of members on several tough questions, including what the scope of the discovery requirement should be, how to handle objections to discovery obligations, how to handle electronically stored information, how to get around a categories-of-documents-based approach to discovery obligations, and how to measure the success of any pilot projects in this area (cost of litigation, time to disposition, number of discovery disputes, etc.).

The second category of possible pilot projects would focus upon expedited litigation. The Federal Judicial Center has shown that there exists a linear relationship between the length of a lawsuit and its cost. There are already a number of federal and state courts that have expedited schedules, including the Eastern District of Virginia, Southern District of Florida, Western District of Wisconsin, and the state courts of Utah and Colorado. Under the CJRA, researchers found in the 1990s that early judge intervention, efficient and firm discovery schedules, and firm trial dates are among the factors most helpful in moving cases along. Because Rule 16, in existence in its current form since 1983, already permits judges to do all of this, a change in a federal rule of procedure is less necessary than a change in local legal culture to help speed up case disposition times. The Subcommittee is considering running a pilot project that could address a court's legal culture by setting certain benchmarks for it, including requiring case management conferences within 60 days, setting firm discovery schedules and trial dates, and measuring how well the local court is meeting those benchmarks over a three-year period. At the same time, the Federal Judicial Center would provide training for the pilot judges in that court in accelerated case management.

Judge Campbell discussed another possible pilot project of having the Federal Judicial Center regularly publish a chart showing the average disposition time by a district court of different kinds of suits compared to the national average.

And finally, speaking on his own and not on behalf of the Pilot Project Subcommittee, Judge Campbell discussed with members the pros and cons of possibly shortening the time before cases and motions were placed on the CJRA list from 3 years to 2 years, and from 6 months to 3 months.

## REPORT OF THE ADMINISTRATIVE OFFICE

REPORT ON THE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT'S CONSIDERATION OF PROTECTION OF COOPERATOR INFORMATION – Judge Martinez, assisted by Sean Marlaire, reported on CACM's work on the issue of harm or threat of harm to government cooperators and their families in criminal cases. This problem, which goes back at least a decade, has proven a tricky one, and seems to pit the interest in protecting cooperators from retaliation against the interest of access to court records and proceedings. CACM met in early December in Washington, D.C., where it discussed the issue. Judge Martinez reported that Judge William Terrell Hodges, the chair of CACM, recommends that the Standing Committee refer this issue to the Advisory Committee on Criminal Rules. CACM has concluded that a national approach, whether in the form of rule change or suggested best practices, would be preferable to one based on diverse local rules. Members of the Standing Committee generally agreed that the problem was a serious one that required collaboration across multiple committees and consultation with the Department of Justice and the Bureau of Prisons. Judge Molloy, on behalf of the Advisory Committee on Criminal Rules, and in consultation with his Reporters, welcomed the reference of the issue to his Committee. He added that he looked forward to inviting interested parties to the discussion, and pledged to keep the Advisory Committee on Appellate Rules informed of the Committee's work.

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Judge Sutton observed that the Standing Committee had various ongoing initiatives that support the strategies and goals of the current *Strategic Plan for the Federal Judiciary*, which the Judicial Conference approved on September 17, 2015.

## CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all of the impressive work they had done on their memoranda for the meeting and the members of the Rules Committee Support Office for helping to coordinate the meeting. He then concluded the meeting. The Standing Committee will next meet in Washington, D.C., on June 6–7, 2016.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

# TAB 2

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## PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

### Rule 4. Arrest Warrant or Summons on a Complaint

**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by United States law.

* * * * *

**(c) Execution or Service, and Return.**

**(1)** ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

**(2)** ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.

**(3)** ***Manner.***

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate

original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by

mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a

managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one that is:

(a) stipulated by the parties;

(b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) permitted by an applicable international agreement.

* * * * *

**Committee Note**

**Subdivision (a).** The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the

issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

**Subdivision (c)(2).** The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

**Subdivision (c)(3)(C).** The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of

criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

**Subdivision (c)(3)(D).** This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

**Subdivision (c)(3)(D)(i).** Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

**Subdivision (c)(3)(D)(ii).** Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of

giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

**Rule 41. Search and Seizure**

* * * * *

**(b) Venue for a Warrant Application.** At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

**(6)** a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

* * * * *

**(f) Executing and Returning the Warrant.**

**(1)** ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to

use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

* * * * *

**Committee Note**

**Subdivision (b).** The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

**Subdivision (b)(6).** The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. § 1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the

Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

**Subdivision (f)(1)(C).** The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

**Rule 45. Computing and Extending Time**

* * * * *

**(c) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a specified time after being served and service is made under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

**Committee Note**

**Subdivision (c).** Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

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## PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

**Rule 4. Arrest Warrant or Summons on a Complaint**

**(a) Issuance.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If an organizational defendant fails to appear in response

* New material is underlined; matter to be omitted is lined through.

to a summons, a judge may take any action authorized by United States law.

* * * * *

**(c) Execution or Service, and Return.**

**(1)** ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

**(2)** ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.

**(3)** ***Manner*****.**

(A) A warrant is executed by arresting the

defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion

residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization~~organization's last known address within the district or to its principal place of business elsewhere in the United States~~.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one that is:

(a) stipulated by the parties;

(b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) permitted by an applicable international agreement.

* * * * *

**Committee Note**

**Subdivision (a).** The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

**Subdivision (c)(2).** The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

**Subdivision (c)(3)(C).** The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

**Subdivision (c)(3)(D).** This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

**Subdivision (c)(3)(D)(i).** Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a

managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

**Subdivision (c)(3)(D)(ii).** Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable

international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

**Rule 41. Search and Seizure**

* * * * *

**(b) ~~Authority to Issue a Warrant~~Venue for a Warrant Application.** At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

**(6)** a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

* * * * *

**(f) Executing and Returning the Warrant.**

**(1)** ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to

use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

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**Committee Note**

**Subdivision (b).** The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

**Subdivision (b)(6).** The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the

Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

**Subdivision (f)(1)(C).** The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

**Rule 45. Computing and Extending Time**

* * * * *

**(c) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a specified ~~period~~ time after ~~service~~ being served and service is made ~~in the manner provided~~ under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

**Committee Note**

**Subdivision (c).** Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

# TAB 3

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# TAB 3A

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**MEMO TO: Criminal Rules Committee**

**FROM: Professors Sara Beale and Nancy King**

**RE: Rule 49**

**DATE: March 26, 2016**

## I. Introduction

The proposed amendment grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. A subcommittee composed of representatives from each of the advisory committees concluded that the rules governing the procedure in civil, criminal, bankruptcy, and appellate cases should be amended to require electronic filing and service, with appropriate exceptions. The Standing Committee endorsed that recommendation and charged the advisory committees to work closely together and coordinate the parallel amendments on e-filing and service.

Because Rule 49(b) and (d) currently provide that service and filing be made in the "manner provided for a civil action," the threshold question facing the Criminal Rules Committee was whether to retain this linkage to the Civil Rules or to draft a comprehensive Criminal Rule on filing and service. At its September meeting, the Criminal Rules Committee unanimously approved a motion instructing the Rule 49 Subcommittee to prepare a stand-alone rule. Members emphasized the different interests and policies at stake in civil and criminal litigation: criminal cases involve heightened due process concerns that should be reflected in the criminal rules governing filing and service. Members also noted that prosecutors, defense lawyers, and pro se defendants would benefit from having the rules on filing and service included in the Federal Rules of Criminal Procedure, rather than having to consult two different sets of procedural rules.

This memorandum describes the Subcommittee's work following the September meeting and proposes a comprehensive amendment of Rule 49 and explanatory Committee Notes. Tab B.[1] The Subcommittee unanimously recommends that the proposed amendment be approved for transmission to the Standing Committee with the recommendation that it be published for public comment. Parallel amendments to the Civil, Bankruptcy, and Appellate rules will be presented to the relevant committees at their spring meetings, with the goal of presenting a full complement of rules to the Standing Committee and publishing them together in August of 2016.

[1] The Subcommittee concluded that a conforming amendment to Rule 45 would also be necessary; that recommendation is discussed in a memorandum at Tab C.

During its deliberations, the Subcommittee received helpful input from the Standing Committee emphasizing the importance of replicating the language of the Civil Rules to the degree possible in a new stand-alone rule. When Judge Molloy presented a summary of the Subcommittee's work at the January meeting of the Standing Committee, the members who provided feedback were generally supportive of the idea of a stand-alone rule. However, Judge Sutton and several members emphasized that the proposed language for Criminal Rule 49 should replicate the language in the Civil Rules whenever possible in order to avoid raising questions about the meaning or scope of the existing language in the Civil Rules. They noted that any change from the text of the Civil Rules will be closely scrutinized and must be justified by significant differences in civil and criminal proceedings.

The drafting of a comprehensive stand-alone rule has been a lengthy process involving many individuals and groups. In an effort to ensure that the new provisions on filing and service in Rule 49 would differ from the revised provisions in the Civil Rules only where necessary, the Subcommittee worked closely with representatives of the Civil Rules Committee throughout the process. The Reporters and the Subcommittee carefully reviewed Civil Rule 5, beginning with a presumption in favor of importing each of its provisions. The Subcommittee departed from the civil rule only when it concluded that presumption was rebutted by differences between civil and criminal cases. The Subcommittee identified a variety of provisions in the Criminal Rules that already limit the applicability of Rule 5. Generally, where there were detailed provisions in the current Criminal Rules addressing the matters also covered in Civil Rule 5, the Subcommittee concluded they rebutted any possible implication that the civil rule currently governs in criminal cases. Similarly, when the purpose of the civil provision was inapplicable in criminal cases, the Subcommittee concluded that weighed heavily against any implication that the provision was incorporated by Rule 49. The proposed amendment is long and complex, and the Subcommittee reviewed multiple drafts in a series of teleconference calls. Members of the Civil Rules Committee and Reporters from the Civil, Appellate, and Bankruptcy Committees participated in the Subcommittee's calls. Finally, the style consultants have had an ongoing impact on the wording as well as the structure of the proposal, recommending changes when each new draft emerged from the Subcommittee, and working to harmonize the phrasing and structure of the civil and criminal rules.

The coordination of this effort with the other advisory committees does present a timing challenge. The spring meetings of the other committees, at which each will take up proposed e-filing and service amendments, will take place between the date this memo is circulated and the date of Criminal Rules Committee meeting. The Reporters will provide updates of relevant action as needed. Since the goal is to present parallel amendments to the civil, criminal, bankruptcy, and appellate rules to the Standing Committee in June, it is possible that the coordination effort may require changes after the respective committees approve their drafts. Employing the same language in the Civil and Criminal Rules will be a special point of emphasis. As with earlier coordinated efforts, Judge Molloy, Judge Feinerman, and the Reporters will carefully review any proposed changes before submission to the Standing Committee. We hope that, as the Reporter of the Civil Rules Committee put it in a recent email,

"both Committees [will] show an open-minded flexibility when it comes time to produce drafts that are as nearly identical as can be, accounting for differences arising from the overall structure of present Civil Rule 5 and possible differences of circumstances between civil and criminal filings."

To facilitate review of the Subcommittee's proposal by the Committee, this memo addresses issues in the order that they appear in the text of the proposed rule.

## II. Service Rules – Part (a) of Rule 49

### A. Lines 3-6, 49 (a) (1) Service on a Party, When Required

*1. What must be served.*

The language regarding what must be served is retained from existing Rule 49(a): "any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper." This language already differs from the language of Civil Rule 5(a)(1), which refers to papers filed in civil but not criminal cases.[2] Because filing and service practices vary widely from district to district, the Subcommittee recommended and the Committee agreed at its September meeting that it would be unwise to attempt to craft new language excluding certain documents from service.[3] Parties and courts know what the existing language means, no difficulties have arisen from the current language of the rule, and tinkering with it without a compelling reason could do more harm than good.

Because of the need to avoid inadvertent substantive changes to the meaning of what must be served, the Subcommittee also rejected the stylists' proposed revisions: "~~any~~ a written motion (other than one to be heard ex parte), a written notice, a designation of the record on appeal, or any similar paper." The Subcommittee concluded that insertion of "any" before "similar paper" would be a substantive change that could expand what must be served beyond the bounds designated by the existing language.

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[2] *See, e.g.*, FRCP 5(a)(1)(B) ("a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants").

[3] Practices on filing and service of discovery vary from district to district. Rule 16 does not require filing or service of discovery in criminal cases, and requirements regarding filing and service in other discovery-related provisions are not consistent. *Compare* Rule 12.1(a)(2) (notice of alibi defense must be served on government, but only if government makes written request for such notice as provided in (a)(1); no mention of filing), *with* Rule 12.2(a) (requires written notice to government of insanity defense or psychiatric expert and filing with clerk), and Rule 12.3(a) (defendant must file notice of public authority defense with clerk; government must serve written response, as well as request for witnesses). The Committee Note to this section of the amendment could state that the amendments to the Rule are not intended to modify the scope of the retained language or to change existing practices concerning papers such as discovery materials that are disclosed but not necessarily filed.

*2. Who must serve.*

The Subcommittee's proposal amends Rule 49(a) to reverse an unintended change that occurred in the 2002 restyling, when the rule was inadvertently limited to service by parties. As discussed more fully in Part IV below, nonparties do occasionally file motions in criminal cases, so a new stand-alone rule on filing and service should include guidance for those occasions.

Prior to restyling in 2002, Rule 49 provided that guidance. It said simply that "Written motions other than those which are heard ex parte, written notices, designations of record on appeal and similar papers shall be served upon each of the parties" and that "papers required to be served shall be filed with the court . . . in the matter provided in civil actions." The 2002 restyling removed this language. By changing this passive construction to "A party must serve on every other party . . ." and "A party must file . . ." the restyling worked a substantive change, narrowing the Rule's scope, excluding nonparties who file and serve papers in criminal cases. Finding no reference to this change in any consideration of the 2002 amendments, or in case law, the Subcommittee concluded that it was unintended. The Subcommittee also concluded that the change was potentially problematic, particularly if nonparties could no longer refer to the civil rules, because the existing language in Rule 49 would provide no guidance to nonparties on filing and service. The Subcommittee thus recommends a return to the language used prior to 2002 so that once again Rule 49(a) will apply to both parties and nonparties, and nonparties as well as parties will be required to serve the items described in (a) on each party. The style consultants agreed to this change, with three stylistic changes,[4] all reflected in the Subcommittee's proposed draft of (a)(1). [5]

*3. Who must be served.*

This part of the Rule governs service "on a Party." Although nothing in the existing (or pre-2002) Rule 49 addresses service *on nonparties*, the Subcommittee concluded this was not a problem. Given the ranges of nonparties who file in criminal cases described in Part IV, below, it would be difficult to craft a rule that would designate which nonparties must be served with

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[4] The three changes were (1) the substitution of the singular "any motion . . . paper" for the plural "motions . . papers," (2) the substitution of "must" for "shall,"and (3) the relocation of the clause about service "must be served on every party," to the beginning rather than the end of the sentence.

[5] The style consultants later proposed to add the word "other" to line 4 ("every <u>other</u> party"), and new caption "Service by a Party on Other Parties," reasoning that with a new subsection (c) for nonparties (see part IV, below), subsection (a) could be limited to parties alone. The Subcommittee unanimously rejected these changes, so they do not appear in the draft submitted to the Committee. New subsection (c) does tell nonparties <u>how</u> to file and serve. But only subsection (a) lists <u>what</u> must be served. Whenever nonparties are permitted to file under (c), they, like parties, should look to (a) to determine what (if anything) they must serve, as was the case prior to restyling in 2002.

which papers for what period of time. A media movant seeking reversal of a closure order would ordinarily be served with the reply to and the order resolving its motion, but would it thereafter be entitled to service of every paper filed in that criminal case? Would a surety seeking payment? A material witness seeking a deposition? The Subcommittee thought it best to let the silence on this issue continue, absent any reason to believe it was causing problems.

### B. Rule 49(a)(2) Serving Attorney Instead of Party, Lines 8-10

The language from existing Rule 49(b) concerning service on the attorney of a represented party is retained here. The only change is the stylists' repositioning of the "unless" clause to the beginning rather than the end of the sentence. Because this language already differed slightly from that in Civil Rule 5,[6] the Subcommittee saw no need to revise it to conform to the civil rule.

### C. Rule 49(a)(3) Service by Electronic Means, Lines 12-22

*1. Ordering of provisions on means of service.*

The Subcommittee and the style consultants disagreed on an organizational issue: whether the rules for service by electronic means should come before or after service by traditional nonelectronic means.[7] The Subcommittee rejected the style consultant's recommendation and placed the rules for electronic service first. Electronic service is now the norm, and will become even more so in the future. The most commonly used means of service should come first in the rule, rather than requiring all readers to wade through a long list of infrequently used methods. More importantly, placing the subsection on electronic means of service first highlights the specific restriction on use of CM/ECF by unrepresented parties. For unrepresented persons using the rule, the placement of electronic before nonelectronic service makes it crystal clear that

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[6] Civil Rule 5 reads: "If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party."

[7] With great reluctance the Subcommittee accepted another organizational change recommended by the style consultants. The Subcommittee's initial drafts divided the instructions on means of service into one provision concerning the use of the court's electronic filing system, captioned "Using Court's Electronic Filing System," and another for all other types of service, captioned "Using Other Means." The section on using the court's electronic filing system included different subsections for represented and unrepresented parties that reflected the concern that use of the court's electronic filing system cannot be the presumptive method for pro se defendants. The stylists rejected this structure, and combined CM/ECF service and other electronic service (email, fax) under the heading of a subsection entitled "Service by Electronic Means." The stylists also moved the limitation on the use of CM/ECF by unrepresented parties to this subsection. The remaining means of service were left under a new caption "Service by Nonelectronic Means." Although the Subcommittee believed its original organization was easier to use and understand, the stylists' reorganization did not change the substantive meaning of the Subcommittee's draft, so the stylists' choice appears in the draft rule.

unrepresented parties must follow different rules when it comes to CM/ECF. The stylists suggested placing nonelectronic means first in order to follow the order of the provisions in Civil Rule 5 for service. The Subcommittee found this unpersuasive. The order of the provisions in the civil rule is a historical accident that has no relevance to Rule 49. Electronic service comes last in the Civil Rule only because it did not exist when Rule 5 was drafted, and the new section on electronic service was added at the end of the existing forms of service to avoid renumbering or relettering. Since these sections of Rule 49 are new, there is no reason for it to follow this order. Moreover, the concern that the *language* of the criminal rule be the same as that in the civil rule does not apply to the *order* of the provisions in each rule. The reporter for the Civil Rules Committee and the representatives of that committee who were consulted during the drafting process saw no difficulty in having a different order of the various forms of service in the Civil and Criminal Rules.

2. *Language choices.*

The draft rule uses the phrase "court's electronic filing system," (line 15) instead of the awkward and misleading phrase in the existing Civil Rule 5: "use the court's transmission facilities." The proposed changes under consideration by the Civil Rules Committee include the same revision. The terminology used to describe the CM/ECF system should be identical in both sets of rules.

Although prior discussions of Rule 49 included suggestions that "person to be served" would be clearer than the word "person," the Subcommittee decided that it would be prudent to adopt the existing language in the Civil Rule. Accordingly, the proposed Rule 49(a)(3) and (4) use the word "person" to describe the person being served whenever Rule 5 uses that term, and use "person to be served" whenever Rule 5 uses that term.

There is one departure from the Civil Rule on lines 17 and 22. The proposal to amend Civil Rule 5(b)(2)(E) retains the word "it" when describing when electronic service would not be effective: "Electronic service is complete upon transmission, but is not effective if the serving party learns that <u>it</u> did not reach the person to be served" Unlike Civil Rule 5(b)(2)(E), proposed new Criminal Rule 49 contains separate provisions for service through the court's electronic filing system and electronic service by other means with written consent. Given this bifurcated structure in Rule 49, the Subcommittee concluded that substituting "the notice of electronic filing" for the word "it" in 49(a)(3(A) and the word "paper" or the words "a copy of the paper"[8] for the word "it" in 49(a)(3)(B) would be more accurate. What does not reach the person is not "service." It is either the notice of electronic filing or the transmitted paper. This alternative phrasing will be considered by the Civil Rules Committee. If that Committee retains the word "it," referring back to "service," we believe that the bifurcated structure of Rule 49 provides a sufficient reason for the Criminal Rule to substitute more specific language.

[8] Brackets are included on line 22 because the Subcommittee did not settle on which was preferable: "paper" or "copy of the paper."

## III. Filing Rules

### A. Rule 49(b)(1) When Required; Certificate of Service, Lines 38-41

1. *Lines 38-41, restoring passive construction.*

Like Rule 49(a) on service, before restyling in 2002, Rule 49(d)g used the passive construction, and did not exclude filing by nonparties. The 2002 restyling changed "Papers required to be served shall be filed with the court" to "*A party* must file with the court any paper *the party* is required to serve." (emphasis added). The Subcommittee proposes that this section return to the passive construction and track the language of Civil Rule 5(d)(1), which now says "Any paper . . . that is required to be served–together with a certificate of service–must be filed within a reasonable time after service."

*2. Line 38, not adding the qualifier "under this rule" between "served" and "together."*

The proposed revised Civil Rule 5 describes the papers that must be filed as "any paper *after the complaint* that is required to be served." (emphasis added). Adding the phrase "under this rule" to line 38 would similarly signal that Rule 49 does not apply to summonses and warrants governed by the specific service rules in Rules 4, 9, and 41 (including the new rule for service on corporations outside the United States). The Subcommittee concluded that this phrase was not necessary. Where other rules—such as Rules 4, 9, 17, and 41—specify specific means of service, it seems clear that the more general provisions of Rule 49 are not intended to override them. Moreover, adding the phrase "under this Rule" could engender confusion. The phrase is not included in the current rule, and its addition might suggest, misleadingly, that Rule 49 does not apply to a variety of items that other rules require to be served.[9]

*3. Lines 39-41, certificate of service.*

The language of this second sentence of Rule 49(b)(1) is taken directly from the new provision proposed for Civil Rule 5(d)(1)(B). The only difference yet to be ironed out is which phrase both will use: (1) "served by using the court's electronic-filing system" or (2) "served using the court's electronic-filing system", or (3) "served by filing with the court." To indicate the potential that this phrase will be changed to create uniformity, brackets have been placed around the language on lines 40-41.

### B. 49(b)(2) Means of Filing, lines 42-50

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[9] These include service of a petition to disclose a grand jury matter under Rule 6(e)(3)(F), notices under Rule 12.1(a)(2) and Rule 12.3(a)(3) and (4), subpoenas under Rule 17, objections to presentence reports under Rule 32(f)(2), notices to sureties under Rule 46, notices to appear for defendants under Rule 58(d)(2), notices of appeal of a magistrate's order under Rule 58(g)(2), and objections to a magistrate's rulings and recommendations under Rule 59.

*1. Order of sections.*

The most recent Civil Rule proposal, like Rule 49(b)(2), divides the means of filing into two subsections, one for Nonelectronic Filing and one for Electronic Filing. However, the civil proposal places nonelectronic filing first. The Subcommittee's proposal places electronic *filing* first in (b) for the same reasons it placed electronic *service* first in Rule 49(a). Also, the Subcommittee reasoned, the subsection including the definition what it means to "file electronically" should precede the use of that term.

*2. Lines 43-44, definition of electronic filing.*

Both sets of Rules omit the existing language "A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States"

Rule 49(2)(A) says "A paper is filed electronically by using the court's electronic-filing system." The presumption that a represented party must file electronically appears in a separate section. The civil rule is different. It states, "All filings, except those made by a person proceeding without an attorney, must be made by [filing with/using] the court's electronic-filing system."

The structure of the criminal rule differs because the substantive rule differs. Under the criminal rule, an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. Under the civil rule, an unrepresented party may also be "required" to file electronically by a court order or local rule that allows reasonable exceptions.

*3. Lines 44-45, signature.*

The language concerning electronic signatures is identical to that in proposed Civil Rule (d)(3)(C). (The requirement of a signature in proposed Rule 49(b)(4) is discussed below.)

*4. Line 46, "written or in writing."*

Rule 49(e)'s phrasing ("A paper filed electronically in compliance with a local rule is written or in writing under these rules.") has always been slightly different than Civil Rule 5(d) ("A paper filed electronically is a written paper for purposes of these rules."). Although the Subcommittee considered omitting the words "or in writing," it ultimately retained the phrase because it is used in so many Rules of Criminal Procedure. For example, this phrasing is used in three important rules: Rule 47(b) on the form of motions, Rule 11(a)(2) on conditional pleas, and Rule 23(b) on jury size. The phrase also appears in many other rules that require the defendant to waive other important procedural rights "in writing."

*5. Lines 47-50, nonelectronic filing.*

The language here is identical to that in Civil Rule 5(d)(2). The Subcommittee considered, but rejected, adding the word "court" before clerk on line 48 because it might suggest a

difference in meaning from the civil rules or have implications for the interpretation of the civil rule.

### C. 49(b)(3) Means Used by Represented and Unrepresented Parties, Lines 51-57

*1. Lines 52-54, represented parties.*

The first part of this section, regarding represented parties, is very similar to the Civil Rule for represented parties, though it uses slightly different wording. Proposed Rule 49(b)(3)(A) provides:

> A party represented by an attorney must file electronically, but nonelectronic filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

Proposed Civil Rule 5(d)(3)(A) provides:

> All filings, except those made by a person proceeding without an attorney, must be made by [filing with][*alternative:* using] the court's electronic-filing system. But paper *[alternative: nonelectronic]* filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

The proposed criminal rule uses "file electronically," while the proposed civil rule uses "filing with/using the court's electronic-filing system." The proposed criminal rule uses "nonelectronic filing," while the proposed civil rule may retain "paper filing." It is possible that these inconsistencies will be reconciled as the rules move forward.

*2. Lines 55-57, unrepresented parties.*

The second part of this subsection, regarding unrepresented parties, contains the essential difference between the Civil and Criminal Rules on filing and service. From the beginning, the Criminal Rules Committee has opposed any requirement that unrepresented defendants and 2255 prisoners file electronically, or that they make a showing or secure a local rule before being permitted to file nonelectronically. Accordingly, proposed Criminal Rule 49(b)(3)(B) says: "An unrepresented party must file nonelectronically, unless *allowed* to file electronically by court order or local rule." (emphasis added.) It does not permit a court order or local rule to *require* unrepresented parties to file electronically. In contrast, proposed Civil Rule 5(d)(3)(B) does authorize local rules or orders requiring unrepresented parties to file electronically. It states that an unrepresented party "may be required to file electronically only by court order or by a local rule that allows reasonable exception."[10]

[10] The Civil Rules Agenda Book contains two alternatives for this provision. Both include this language but they are structured differently. The reporters intend to distribute at our meeting the version adopted by the Civil Rules Committee.

The proposed civil rule may be applicable to one group of cases of special concern to the Criminal Rules Committee. Rule 49, and not Civil Rule 5, would govern filing by pro se defendants and 2255 filers. But Civil Rule 5 may apply to 2254 habeas petitioners. Rule 12 of the 2254 Rules provides that the Federal Rules of Civil Procedure may be applied in 2254 proceedings "to the extent they are not inconsistent with any statutory provision or these rules." Rules 3 and 4 of the 2254 Rules contain various provisions regarding filing and service that might not be inconsistent with Civil Rule 5.

The civil rules drafters explained to the Rule 49 Subcommittee that they added the option of requiring e-filing by unrepresented parties to allow programs like one currently in place in Indiana. In two Indiana districts, local rules or standing orders facilitate and require e-filing from the prison libraries of specific institutions. The inmates' filings are converted to PDFs in the prison library and then submitted electronically. The Civil Rules Committee's clerk of court liaison is from one of the districts employing this procedure. She advocated the inclusion of language allowing local rules to require nonparties to e-file, explaining that the inmate filing procedure in her district works very well and is valuable. But members of the Rule 49 Subcommittee expressed concerns that the proposed civil rule on its face was not limited to such carefully tailored programs. It would allow a district to require all 2254 petitioners to file electronically, even in the absence of such a program. In response, the civil rule drafters agreed to add the phrase "that allows reasonable exceptions" at the end of this proposed section. This phrase is intended to restore to the proposed civil rule the protection currently in Civil Rule 5, which provides, "A local rule may require electronic filing *only if reasonable exceptions are allowed*." (emphasis added).

Although the Criminal Rules Committee has no formal role to play in the approval of the Civil Rule, it would be useful for this Committee to provide its views on the proposed language and its application to 2254 cases. Additionally, if the Civil Rules Committee approves the language allowing local rules to require e-filing by unrepresented persons for publication and public comment, additional research may be needed on the relationship between this proposal and the Rules Governing 2254 cases, which are traditionally the province of the Criminal Rules Committee.

### D. 49(b)(4) Signature, Lines 58-64

*1. The need for a signature provision.*

There is another provision in the Civil Rules, apart from Rule 5, the Subcommittee concluded must be replicated in Rule 49 as part of the "manner" of filing -- the signature provision in Civil Rule 11(a).[11] Although the signature requirement appears to address the

[11] Civil Rule 11(a) provides:

> **Signature.** Every written motion and other paper must be signed by at least one attorney of record in the attorney's name–or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone

content not the manner of filing, a few courts have assumed Civil Rule 11(a) may be applicable in criminal cases.[12]

The Subcommittee found it unnecessary to determine whether Rule 49 currently incorporates the signature provision in Rule 11(a). Either Rule 11(a) is presently incorporated, so that severing the link to the Civil Rules without adding the signature provision to Rule 49 would *create* a gap in the Criminal Rules, or Rule 11(a) is not presently incorporated, so there is *already* a gap in the current rules. Regardless of which interpretation is correct, the Subcommittee concluded that it was desirable, as a policy matter, for the Criminal Rules to include such a provision requiring filers to provide the relevant contact information. Nothing else in the Criminal Rules requires the contact information specified in Civil Rule 11(a). If it is useful to have this information in a civil case, it seems equally useful in a criminal case.

*2. Lines 58-61, the text of the signature provision.*

The language on lines 58-64 replicates the civil rule language with two changes. The Civil Rule refers only to signatures by unrepresented parties or by parties' attorneys of record.

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number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

A similar requirement appears in Civil Rule 26(g)(1). Note also that Civil Rule 10 provides "Every pleading must have a caption with the court's name, a title, a file number and a Rule 7(a) designation."

[12] In United States v. Wright, 419 Fed. Appx. 251 (3d Cir. 2011), the defendant argued that an information charging a prior offense was not properly filed because, inter alia, it did not include the prosecutor's address and telephone number as well as /s/ before her name on the signature line. The government's brief contended that document met, inter alia, the requirements of Rule 49 and Rule 11(a), as well as the local court rules. The appellate court found that the omission of the prosecutor's "address and so on" were "minor errors" that did not affect the defendant's substantial rights. *Id*. at 255. It was not clear whether the court thought these "errors" were the failure to meet the requirements of Rule 11(a) or the local rules of court. Additionally, there are also a few 2254 and 2255 cases that reference Civil Rule 11(a). The 2254 and 2255 Rules themselves address the prisoner's signature on the petition or motion (requiring a signature under penalty of perjury by the petitioner/movant or by a person authorized to sign it for the petitioner/movant under 28 U.S.C. 2242), but they say nothing about papers filed by the government. But even when dealing with a § 2255 petition—for which there is a specific rule regarding signatures—some courts have still referred to Rule (a) for the requirement that the petition be signed. Hagen v. United States, 198 F.3d 245 (6th Cir. 1999); United States v. Veatch, 3 Fed.Appx. 764 (10th Cir. 2001) (noting that the district court ordered petitioner's § 2255 motion stricken from the record because it lacked an original signature required by FRCP 11(a)).

This leaves a potential gap for nonparties. The Subcommittee confirmed with its clerk representatives that the term "attorney of record" would cover attorneys for nonparties. It also concluded that unrepresented nonparties should sign papers they file just like unrepresented parties. To accomplish this, the Subcommittee substituted the words "a person filing the paper" for "a party" (line 59) and substituted "person" for "party" on lines 60 and 64.

*3. Lines 61-62, the verification clause.*

The Subcommittee's draft incorporates the following phrase from Civil Rule 11(a): "Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit." This provision was included in the original Rules of Civil Procedure to make it clear that any statute that required a pleading to be verified or accompanied by an affidavit was expressly not superseded by the new Civil Rules. The original Advisory Committee notes identified important statutes that required either an affidavit or verification to accompany a suit against the United States or an application for a preliminary injunction, as well as Rules of Civil Procedure that imposed similar requirements. The Subcommittee noted that 28 U.S.C § 2242 and Rules 2 and 3 for proceedings under §§ 2254 and 2255 require verification. The petition and in forma pauperis forms include a verification section. Also, a variety of other Rules of Criminal Procedure and statutes refer to affidavits, though very few require them. Although it seems doubtful that the proposed new stand-alone Rule 49 on filing and service would be read to supersede the more specific provisions in the 2255 Rules and the Rules of Criminal Procedure, the Subcommittee concluded that the important role of verification in 2255 proceedings tips the balance in favor of including the language drawn from Civil Rule 11. Since this language is now included in Civil Rule 11, its omission might lead to confusion or give rise to arguments in habeas or criminal cases that a different result should obtain. Moreover, it is particularly important that the rules provide clear guidance for prisoners proceeding pro se.

### E. Rule 49(b)(5), Acceptance by the Clerk, Lines 65-67

This language forbidding the clerk from rejecting filings because of form is identical to the existing language in Civil Rule 5(d)(4).

### F. Rule 49(c), Service and Filing by Nonparties, Lines 68-71

Nonparties do occasionally file in criminal cases, and some guidance to those who do should be provided in Rule 49 if it will substitute for the guidance presently provided by Civil Rule 5. After reviewing the practice regarding various types of nonparty filing, the Subcommittee drafted a new subsection, Rule 49(c) to provide that guidance.

*Media representatives* occasionally seek to file in criminal cases, and the clerk representatives from the Civil and Criminal Rules Committees noted that there has been no consistent treatment of these requests under the existing Rule. Some districts require paper filing, but others appear to allow represented media to file with CM/ECF. Often a representative of the media will provide its submissions to the clerk of court, who scans them and enters them into the CM/ECF system, so that notice is provided to the parties. The media filer does not become a party.

*Victim* submissions are made with some frequency. Rule 60(b)(1) provides for motions asserting a victim's rights, and (b)(2) states that these rights may be asserted by the victim, the victim's representative, or the government. Most often, a submission from a victim is provided to the clerk of court, who converts it to a PDF and files it using the CM/ECF system. The CM/ECF system generates a notice to the parties, who may wish to file a response. If the Department responds, it sends its response to the victim outside the CM/ECF system. Submissions by victims are handled differently from place to place. Occasionally a represented victim has been permitted to file and serve using the CM/ECF system, and in some instances a victim's paper may be handed to the judge in open court. When a paper is handed to the judge, it is usually filed, but may not be if it contains information raising special privacy concerns.

*Nonparty motions for the return of property* under Rule 41 are also possible. Rule 41 motions are most often brought by a party: the defendant. A nonparty owner may seek return of property, but is most likely to do so immediately after the property is seized, before there is a criminal case in which to file, in the form of a separate civil equitable action.[13] There are instances, however, in which a nonparty seeks the return of property after a criminal case has been filed. This occurs, for example, in the case of white collar charges against an individual where property belonging to the individual's employer (such as a server) has been seized. These cases may be worked out informally, but if not the owner seeks the property's return under Rule 41(g).[14]

*Material witnesses* who are detained under 18 U.S.C. § 3144 may request a deposition by filing a motion and giving notice to parties under Rule 15(a)(2). But the clerk representatives participating in the Subcommittee's deliberations could not recall a single instance of a material witness filing, and the reporters found no cases.

*Civil litigants and defendants in other criminal cases who seek disclosure of grand jury material* under Rule 6 may file a motion, although most requests occur before or after the filing

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[13] *See, e.g.*, United States v. A Bldg. Housing a Business Known as Mach. Products Co., Inc. 139 F.R.D. 111 (W.D. Wisc. 1990) ("Ordinarily, a motion for return of property is brought as a civil action with the allegedly aggrieved entity or individual characterized as plaintiff or petitioner.").

[14] In 1980, the D.C. Circuit encountered its first case of a nondefendant filing under Rule 41 seeking to prevent public disclosure of property (documents) as well as its return. United States v. Hubbard, 650 F.2d 293 (D.C.Cir.1980). The court concluded that such claims should be asserted "by simple motion, served on the parties in the criminal case, under the caption of that case," under the district court's "ancillary jurisdiction." *See also* AmeriSource Corp. v. United States, 75 Fed.Cl. 743 (2001) (prior to filing claim against government, plaintiff had filed motion under Rule 41 seeking return of property after its property had been seized for evidence in a criminal case). Such a motion, if denied, may be the subject of an interlocutory appeal. In re Sealed Case, 237 F.3d 657 (D.C. Cir. 2001).

of criminal charges and take the form of a separate proceeding on the miscellaneous docket.[15] Some cases predictably generate third-party requests for grand jury materials during the pendency of the federal prosecution. For example, in a civil rights prosecution for police misconduct, both state prosecutors and individual victims contemplating a civil action may seek access to matters occurring before the federal grand jury.

Other types of infrequent nonparty filings include a custodians of records moving to quash a subpoena, amici (other than the media) filing at the district court level, and sureties for bail filing motions.

The Subcommittee considered the benefits and costs of including a rule regarding nonparty filing and service. Weighing against the addition was the absence of an immediate problem with nonparty filing – courts seemed to be muddling through, as well as the risk of generating controversy unrelated to the goal of updating the rules to recognize the primacy of electronic filing and service. Weighing in favor of the addition, however, was the importance of reducing uncertainty and inconsistent treatment, and the opportunity to specify appropriate filing rules for represented and unrepresented nonparties.

The Subcommittee concluded that good reasons support requiring all nonparties, represented or not, to file and serve nonelectronically in the absence of a court order or local rule to the contrary. In general, nonparties have a distinctive interest in a certain aspect of a criminal case, and it may not be desirable for them to be served with pleadings that are unrelated to that aspect of the case. Some nonparties may prefer a default rule of nonelectronic filing. Some, particularly victims, provide information to the court that they may not wish to have shared with the parties. A default of nonelectronic filing helps protect those interests. If a district decides that it would prefer all represented media, victim, or other filers to use its electronic filing system, that would remain an option by local rule.

To implement this policy, the Subcommittee considered various drafting options, deciding the best option was to add a new subdivision to provide guidance for nonparty filers. To avoid any suggestion that the provision is itself authorizing new forms of nonparty filing, the subdivision states that nonparty filing is permitted "only if doing so is required or permitted by law." The rule also emphasizes that a nonparty who serves a paper must do so on every party, consistent with Rule 49(a)(1).

In order to place this provision with the other provisions guiding those who file and serve, it was designated as proposed subdivision (c), and the provision regarding notice by clerks relettered as Rule 49(d). Although renumbering and relettering is ordinarily to be avoided because it makes research more difficult, it seemed unlikely to be much of a problem in this context, particularly given the comprehensive nature of the revision of Rule 49.

### G. Rule 49(d) Notice by Clerk, Lines 72-78

[15] Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). *See also* United States v. Alston, 491 F.Supp. 215 (D.D.C. 1980).

Presently Rule 49(c) provides that the clerk must serve notice of orders "in a manner provided for in a civil action." To eliminate this reference, the Subcommittee replaced it with the language from Civil Rule 77(d)(1), governing the clerk's duty to serve notice of orders, omitting only the phase "who is not in default for failing to appear," which does not apply in criminal cases, and substituting "Rule 49(a)" for Rule 77's reference to "Rule 5(b)."

The Subcommittee considered omitting the sentence in Civil Rule 77 that allows one party to provide notice of a court order to other parties, which in the Civil Rules allows the prevailing party to prevent opposing parties from extending the time for filing a notice of appeal under FRAP 4(a)(6)(A). The Subcommittee decided to retain this language, even though FRAP 4(b), which governs appeals in criminal cases, has no counterpart to the reopening procedure under (a)(6). FRAP 4(b)(4) does permit the court to extend the time to file a notice of appeal based on a "finding of excusable neglect or good cause." If a party, such as a pro se defendant, did not receive notice of an order, that might establish good cause or excusable neglect. Also, FRAP 4(b)(6) states that a judgment or order is entered when "when it is entered on the criminal docket," but incarcerated parties will not ordinarily be able to check that docket or receive electronic notice of filing, and may have to rely on postal service. The potential that notice may not reach an incarcerated party, combined with the possible extension of time, supplies a reason to include this sentence in the Criminal Rule.

The Subcommittee also considered substituting relevant language from FRAP 4(b) instead of retaining the cross reference to that Rule, but decided against it.

## IV. Conclusion

The Subcommittee unanimously recommends that the proposed amendment and accompanying committee note be approved for transmission to the Standing Committee for publication, with such changes as may be necessary to coordinate with the parallel rules approved by the other advisory committees.

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**Rule 49. Serving and Filing Papers**

**(a) Service on a Party**

(1) ***When Required.*** ~~A party must serve on every other party~~ Each of the following must be served on every party: any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

~~**(b) How Made.** Service must be made in the manner provided for a civil action.~~

(2) ***Serving a Party's Attorney***. Unless the court orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party~~, unless the court orders otherwise~~.

(3) ***Service by Electronic Means***.

(A) *Using the Court's Electronic Filing System*. A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. An unrepresented party may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that the notice of electronic filing did not reach the person to be served.

(B) *Using Other Electronic Means*. A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that [the paper/a copy of the paper] did not reach the person to be served.

(4) ***Service by Nonelectronic Means***. A paper may be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; or

(E) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service [delivers it to the agency designated to make delivery].

**(b) Filing**

(1) ***When Required; Certificate of Service.*** Any paper that is required to be served—together with a certificate of service—must be filed within a reasonable time after service. A notice of electronic filing constitutes a certificate of service on [any person/a party] served [by using the court's electronic-filing system] ~~through the court's transmission facilities~~.

(2) ***Means of Filing.***

(A) *Electronically.* A paper is filed electronically by using the court's electronic-filing system. The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically is written [or in writing] under these rules.

(B) *Nonelectronically.* A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Means Used by Represented and Unrepresented Parties.***

(A) *Represented Party.* A party represented by an attorney must file electronically, but nonelectronic filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Unrepresented Party.* An unrepresented party must file nonelectronically, unless allowed to file electronically by court order or local rule.

(4) **Signature.** Every written motion and other paper must be signed by at least one attorney of record in the attorney's name – or by a person filing a paper if the person is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. [Unless a rule or statute specifically states otherwise, a

pleading need not be verified or accompanied by an affidavit.] The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(5) ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

**(c) Service and Filing by Nonparties.** A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party using means authorized by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

**(d) Notice of a Court Order.** When the court issues an order on any post-arraignment motion, the clerk must ~~provide notice in a manner provided for in a civil action~~ serve notice of the entry, by the means in Rule 49(a), on each party. [A party also may serve notice of the entry, by the same means.] Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.

~~**(d) Filing.** A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.~~

~~**(e) Electronic Service and Filing.** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.~~

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## Committee Note

Rule 49 previously required service and filing "in a manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendment eliminates the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

**Rule 49(a)(1).** The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, "Each of the following must be served on every party" restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

**Rule 49(a)(2).** The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the "unless" clause moved to the beginning for reasons of style only.

**Rule 49(a)(3) and (4).** Subsections (a)(3) and (4) list the permissible means of service. These provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, at the present time many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by "other electronic means" such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic filing system, and the language was adjusted slightly to more accurately reflect the operation of the electronic filing system. Because a party served through the court's electronic filing system receives a notice of electronic filing, but not the paper that was filed, (A) provides that electronic service is not effective if the serving party learns that "the notice of electronic filing" did not reach the person to be served, and (B) provides that other electronic service is not effective if the serving party learns

that "the paper" did not reach the person to be served In contrast, Civil Rule 5 refers to the serving party's knowledge that "it" (that is, "service") did not reach the person to be served. The change in wording from the Civil to the Criminal Rule is not intended to change the scope of this requirement, only to add clarity to accommodate the discussion of these two types of service in two different subsections.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

**Rule 49(b)(1).** Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b). The language requiring filing of papers that must be served is retained in subsection (1) of subdivision (b), but is revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties. The language in former subdivision (d) that required filing "in a manner provided for in a civil action" has been replaced here by language drawn from Civil Rule 5(d)(1). That provision used to state "Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service." That requirement now appears in Rule 49(b)(1). Civil Rule 5(d)(1) has been revised to subdivide this phrase into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it is intended to have the same meaning as the Civil Rules provision from which it was drawn.

The last sentence, which states that a notice of electronic filing constitutes a certificate of service on a party served by using the court's electronic-filing system, mirrors a similar contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court's electronic filing system, a certificate of service must be filed.

**Rule 49(b)(2).** Subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of former Rule 49(d), providing that e-filed papers are "written or in writing," now appears at the end of Subsection (b)(2)(A), with the words "in compliance with a local rule" deleted as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

**Rule 49(b)(3).** Subsection (b)(3)(A) requires represented parties to use the court's electronic filing system, but nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the Civil Rule

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language is also identical to that adopted in the Civil Rule.[1]

**Rule 49(b)(4).** This language requiring a signature and additional information was drawn from Civil Rule 11.

**Rule 49(b)(5).** The language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

**Rule 49(c).** This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires

[1] Note that this language will require revision if the Civil Rule allows local rules to require unrepresented parties to file using the court's electronic filing system.

nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic filing system only when permitted to do so by court order or local rule.

**Rule 49(d).** This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided "in a manner provided for in a civil action" has been replaced by a requirement that notice be served by the means in Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in in Civil Rule 5(d).

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# TAB 3C

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: Conforming amendment to Rule 45(c)**

**DATE: March 22, 2016**

Rule 45, which governs time computation, closely parallels the Civil, Bankruptcy, and Appellate Rules. Rule 45(c) provides for additional time to take action after service by certain means authorized by Civil Rule 5. In tandem with parallel changes in the other rules, Rule 45(c) was recently amended to eliminate extra time after service by electronic means. The amendment also incorporated cross references to the individual sections in Civil Rule 5 that authorize certain forms of service.

The adoption of a standalone Criminal Rule governing service will make these cross references to Civil Rule 5 obsolete. If a proposed standalone amendment is published, it would be desirable to publish a conforming amendment. Accordingly, the Rule 49 Subcommittee proposes the following amendment to conform the cross references:

> **(c) Additional Time After Certain Kinds of Service**. Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of ~~Civil~~ Criminal Procedure 49(a)(3)(B), and 49(a)(4)(C), (D), and (E) ~~5(b)(2)(C), (D), (E), or (F)~~, 3 days are added after the period would otherwise expire under subdivision (a).

**Committee Note**

Rule 49 previously required service and filing "in a manner provided" in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain forms of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49. This amendment revises the cross references in Rule 45(c) to reflect this change.

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# TAB 3D

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**Rule 45. Computing and Extending Time.**

* * * * *

**(c) Additional Time After Certain Kinds of Service**. Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of ~~Civil~~ Criminal Procedure 49(a)(3)(B), and 49(a)(4)(C), (D), and (E) ~~5(b)(2)(C), (D), (E), or (F)~~, 3 days are added after the period would otherwise expire under subdivision (a).

**Committee Note**

Rule 49 previously required service and filing "in a manner provided" in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain forms of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49. This amendment revises the cross references in Rule 45(c) to reflect this change.

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: Rule 12.4**

**DATE: March 23, 2016**

## A. Background

In a memorandum dated June 8, 2015, Jonathan Wroblewski wrote on behalf of the Justice Department asking the Advisory Committee to consider "whether some amendment to Rule 12.4 might be warranted in light of the 2009 change to the Code of Conduct and to address the cases where compliance with the current rule may be problematic and unnecessary." Additionally, he noted that other advisory committees may be considering changes to their disclosure requirements, and he expressed hope that the Criminal Rules Committee could coordinate with them.

Rule 12.4 governs the parties' disclosure statements. It provides:

**(a) Who Must File.**

**(1) Nongovernmental Corporate Party.** Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

**(2) Organizational Victim**. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

Rule 12.4 was a new rule added in 2002. The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

The Department of Justice memorandum presented two reasons for reconsideration of the notice requirement regarding organizational victims. First, the Code of Judicial Conduct was significantly amended in 2009, and it no longer treats all victims entitled to restitution as parties. Since the purpose of the rules was to require the disclosure of information necessary to assist judges in making rescusal decisions, a change in the recusal requirements may warrant a parallel change in Rule 12.4.

Second, the Department indicated that there are some cases in which it is difficult or impossible to provide the notification required by the current rule. For example, in some antitrust cases there may be hundreds or thousands of corporate victims. Providing the notification required for each of them, even if possible, would be extremely burdensome.

After initial discussion at the September meeting, Judge Molloy appointed a subcommittee to consider the DOJ proposal. The Subcommittee members are Judge Kethledge (chair), Judge Hood, Mr. Filip, Mr. Hatten, Mr. Siffert, and a representative of the Department of Justice. Because the Appellate Rules Committee had some interest in a provision that might parallel Rule 12.4, the reporter for the Appellate Rules Committee participated in the Subcommittee's deliberations.[1]

**B. The Subcommittee's recommendations**

The Subcommittee agreed that it would be beneficial to bring the scope of the required disclosures in line with the 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code, which requires recusal if a judge has "an interest that could be substantially affected by the outcome of the proceeding."

During the course of its deliberations, the Subcommittee received helpful input from the Standing Committee that influenced some of its drafting choices. When Judge Molloy reported on the Rule 12.4 proposal as an information item at the Standing Committee, some members expressed concerns with a draft then under consideration by the Subcommittee. Some thought it might make the government the sole judge of whether an organization's interests were sufficiently affected to warrant filing a statement identifying organizational victims. Members also noted that some judges may wish to recuse themselves even when not absolutely required to do so by Canon 3(C)(1)(c) of the Judicial Code, and the language the Subcommittee was considering might prevent a judge from taking (or considering taking) a broader approach to recusal.

Taking the concerns expressed at the Standing Committee into account, the Subcommittee

[1]The reporter for the Appellate Rules Committee was supportive of the Subcommittee's proposed amendment, which was included in the Appellate Rules Committee agenda book as an information item for their meeting April 5-6. If we receive any useful input from the Appellate Rules Committee, we will provide that information at our meeting.

revised its proposal, and it unanimously recommends the following change in Rule 12.4(a)(2):

> (***2) Organizational Victim***. Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. ~~If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim~~. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

As noted below, there were a few points–which the Subcommittee viewed as matters of substance rather than style–on which it did not accept the suggestions of the style consultants.

The requirement that the government show "good cause" is a flexible standard that allows the court to determine on a case-by-case basis whether to relieve the government of the obligation to make disclosures under Rule 12.4. The style consultants expressed concern that the phrase "good cause" was "vague," but the Subcommittee concluded that the phrase–which is used throughout the Criminal Rules where exceptions to general requirements are permitted–is well understood by judges and litigants. Moreover, using the phrase "good cause" has several advantages, and in the Subcommittee's view the choice of this standard is a matter of substance, not mere style. First, "good cause" allows a holistic approach to the question whether to relieve the government of its disclosure responsibility, which is very significantly affected by the number of organizational victims. As noted in the government's correspondence, there are cases in which there are hundreds or even thousands of organizational victims that each suffer a small loss. In such cases, the government has a strong interest in avoiding burdensome disclosures, and the good cause standard allows a court to balance the burden of disclosure against the costs/risks of non-disclosure. Second, the more general term "good cause" avoids the drafting problem of trying to encapsulate the standard of a judicial "interest that could be substantially affected by the outcome of the proceeding" into a short phrase describing the showing that the government must make.[2] Finally, "good cause" allows the court to take broad view of the scope of recusal and the information required in particular cases. For example, some judges might wish to recuse themselves if they might be seen to be closely identified with certain kinds of organizational victims, even if those victims are alleged to have suffered only relatively minor harms.

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[2] The Subcommittee also considered–but was not persuaded by–the style consultants' suggestion that the amendment should require the government to make a showing that corporate victims will suffer only "minor harm" to be relieved of its disclosure obligations. That language focuses solely on the impact on the organizational defendant, without considering the burden on the government or the need for the information to inform the judge's recusal decision. Moreover, the Subcommittee was not sure that "minor harm" is the same as "no substantial [e]ffect" (the language of Canon (C)(1)(c)). The Subcommittee viewed this as a matter of substance, not style.

Although the style consultants suggested that the new language be placed in the second sentence, the Subcommittee's draft places locates it in the first sentence of (a)(2). This has two effects. It makes the exception applicable to all organizational victims, and it allows the court to relieve the government of the burden of even listing the organizational victims. There may be situations in which (1) it would be unnecessarily burdensome even to list all corporate victims, and (2) listing other organizational victims would also be unnecessarily burdensome. The government stated that Rule 12.4(a) notices have been problematic in antitrust cases. For example, nearly every organization in the U.S. could be affected by price fixing concerning a widely-used product, such as a computer program. But each victim would suffer only a very minor harm from a price increase that might be only pennies for each product purchased. In such cases, it seems unnecessarily burdensome (even if possible) for the government even to name every corporation, partnership, union, or other organizational victim. The Subcommittee's proposal addresses those cases, allowing the government to make a showing of good cause to be relieved of this burden.

The Subcommittee concluded that it would also be desirable to amend subsection (b) in two respects: (1) to provide a specific time for the filing of statements under Rule 12.4, and (2) to make clear the parties' obligation to supplement their Rule 12.4 disclosures if they learn of additional information. It recommends the following language:

**(b) Time for Filing; Supplemental Filing**. A party must:

(1) file the Rule 12.4(a) statement within 30 days after ~~upon~~ the defendant's initial appearance; and

(2) promptly file a supplemental statement if the party learns of additional information or any required information changes ~~upon any change in the information that the statement requires~~.

The Subcommittee's proposed amendment and the accompanying committee note are provided as Tab B.

# TAB 4B

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**Rule 12.4 Disclosure Statement**

**(a) Who Must File.**

**(1)** ***Nongovernmental Corporate Party.*** Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(***2) Organizational Victim***. Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. ~~If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim~~. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

**(b) Time for Filing; Supplemental Filing**. A party must:

(1) file the Rule 12.4(a) statement within 30 days after ~~upon~~ the defendant's initial appearance; and

(2) promptly file a supplemental statement if the party learns of additional information or any required

information changes ~~upon any change in the information that the statement requires~~.

## Committee Note

**Subdivision (a)** Rule 12.4 requires the government to identify organizational victims in relevant cases to assist judges in complying with their obligations under the Judicial Code of Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has "an interest that could be substantially affected by the outcome of the proceeding." In some cases, the government alleges that there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government show good cause to be relieved of making the disclosure statements because the organizations's interests could not be "substantially affected by the outcome of the proceedings."

**Subdivision (b)** The amendment specifies that the time for making the disclosures is within 30 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

# TAB 5

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: Rule 15(d)**

**DATE: March 5, 2016**

The Department of Justice brought to the Committee's attention an inconsistency between the text of Rule 15(d) and the Committee Note concerning the scope of the government's obligation to pay defense deposition expenses. After initial discussion at the September meeting, Judge Molloy appointed a Subcommittee, chaired by Judge Dever, to consider the issue.

The Department has now withdrawn its suggestion. In an email to the Subcommittee, Ms. Morales explained:

> We had an opportunity to review the materials related to previous incarnations of Rule 15(d) as well as other materials in relation to the payment of deposition expenses, such as the Criminal Justice Act guidelines. The Department still believes that the rule is problematic, and that the CJA should pay for the costs of the deposition expenses when requested by the defense. However, in light of all the materials we researched, we came to recognize that reconciling the inconsistency between the rule and the note in our favor would require a larger showing of an undue burden to the government than we can currently show.

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: Cooperator Subcommittee**

**DATE: March 23, 2016**

## I. Background

After lengthy consideration, including a study by the Federal Judicial Center, the Committee on Court Administration and Case Management made a series of finding leading to recommendation that would require significant changes in the Rules of Criminal Procedure. CACM unanimously concluded:

- There is "a pervasive nationwide problem regarding the use of criminal case information to identify and harm cooperators and their families."

- The problem has been "exacerbated by widespread use of PACER and other systems that provide ready access to case information, including documents containing cooperator information and criminal dockets indicating whether cooperation did or did not occur in a case.

- Uniform nationwide measures regarding access to particular court documents and transcripts are necessary in order to prevent the improper use of those documents to hear or threaten government cooperators in the long term.

CACM's central recommendation is that all plea agreements as well as the transcript of every guilty plea must contain a sealed portion that would include the defendant's cooperation or a statement that there was no cooperation. Thus every case would appear identical, and no inspection of the transcript or the documents would reveal whether any individual had cooperated. CACM's report and recommendations are included as Tab C.

## II. The Subcommittee

The Standing Committee referred CACM's report and recommendations to the Criminal Rules Committee, and Judge Molloy appointed a subcommittee to consider them. Because of the nature of the issues to be considered, the Subcommittee includes representatives from CACM

and the Sentencing Commission, as well as members of the Criminal Rules Committee and representatives of the Standing Committee. The members of the Subcommittee are:

Judge Lewis Kaplan (chair)
Judge James Dever
Judge Terry Kemp
Ms. Carol Brook
Mr. John Siffert
Ms. Michelle Morales (Department of Justice)
Judge Charles Breyer (U.S. Sentencing Commission)
Judge Philip Martinez (CACM)
Judge Amy St. Eve (Ex Officio, Standing Committee representative to CACM)

Ms. Morales will draw upon and include representatives from various units within the Justice Department, such as the Bureau of Prisons and the U.S. Marshals. Judge Molloy and Judge Sutton will participate in the Subcommittee's deliberations when possible.

The Subcommittee held one call, on February 25. In preparation for the call, the reporters prepared an introductory memorandum, which is included as Tab B. The memo (1) provides a more detailed description of CACM's report and recommendations, (2) identifies the Rules of Criminal Procedure that may be affected by CACM's recommendations, and (3) provides a brief overview of the issues raised by CACM's proposals.

At the outset of the February 25 call, Judge Kaplan asked members to give their preliminary views on the justifications for the CACM proposals, focusing on the scope and nature of the problem of harm and threats to cooperators, the linkage to court documents, the degree to which the proposals would be successful in addressing the problem, the justification for a nationwide rule, and potential constitutional issues.

Members raised questions and expressed some serious reservations.

Part of the discussion focused on how widespread the problems were whether they warranted across-the-board changes in the Rules of Criminal Procedure. Members noted that roughly 10,000 individuals get sentence reductions for cooperation each year, but the FJC study upon which CACM relied found only a few hundred incidents of threats or harm. Members requested more information about the prevalence of threats and harm, as well as their distribution. For example, did the incidents reported to the FCJ occur primarily in certain districts or geographic areas? Were they limited to certain offenses?

Members expressed multiple concerns about the impact of the proposed changes on the defense. First, the defense presently researches other sentences and agreements in order to advocate for their clients at sentencing. This would be impossible if CACM's proposals were adopted. Second, to achieve CACM's objectives, even more sealing might be required, since good advocacy weaves cooperation in throughout the motion and sentencing presentation. Indeed, it might lead to sealing of many more documents and procedures, since people learn of

cooperation from other judicial documents and in open court at other procedural stages. And finally, although CACM's recommendations state that the government must continue to honor its *Brady* obligations, CACM's recommendations would greatly hamper the defense in making its own complementary investigations.

A related concern was whether the impact of the proposed changes in the Rules of Procedure would be sufficient to warrant the proposed changes. Members noted the many other sources of information about cooperation that would not be affected by the proposed changes.

Members also raised the question whether changes in the Rules of Criminal Procedure were the right remedy for the problem. Several members expressed the view that the executive branch, not the judiciary, should take the lead in solving the problems identified by CACM. The Department of Justice, not the court, has the best opportunity to identify cases in which problems are likely to arise. Others suggested that this might be an issue Congress should address.

Finally, members expressed concern that CACM's proposals were inconsistent with the foundational assumption of open judicial proceedings, and raised significant First Amendment issues.

Judge Sutton suggested that the Subcommittee view its task as determining the best response to the problems, which might or might not include changes in the Rules of Criminal Procedure. He encouraged the Subcommittee to consider solutions that might include changes in local rules, the Rules of Criminal Procedure, legislation, or other options.

The call concluded with the request that the reporters gather information and do additional research in preparation for the next call.

- The Subcommittee identified the following additional information or data that would be helpful:
    - How large is the problem compared to the universe of cooperators?
    - What kinds of cases give rise to problems?
    - Is this truly a nationwide problem or are there significant geographic variations?
    - How does the experience in districts which currently seal plea agreements differ, if at all, from the experience in other districts?
- The Subcommittee also requested that the reporters prepare a memorandum on the First Amendment issues raised by CACM's proposals.

- Finally, the Subcommittee requested that the Department of Justice provide the Subcommittee with (1) information regarding its practices and experience in the 10 largest districts as well as any other relevant districts and (2) its recommendations.

## III. Next steps

This report is an information item. The Subcommittee would benefit from hearing the initial views from members of the Committee. Its next call is scheduled for July 19, 2016.

# TAB 6B

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**MEMO TO: Cooperator Subcommittee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: Background information**

**DATE: February 17, 2016**

In preparation for the Subcommittee's first call, Judge Kaplan requested a memo providing background information regarding the Subcommittee's assignment and identifying (1) specific Rules of Criminal Procedure that might be affected and (2) other issues for consideration.

## I. Introduction

In order to study the problem of threats and harm to cooperators and their friends and families, the Committee on Court Administration and Case Management (CACM) asked the Federal Judicial Center (FJC) to design and conduct a comprehensive survey to determine the nature and frequency of threats and harms suffered by those who cooperate with the government. The FJC surveyed five groups: (1) federal prosecutors, (2) federal defenders and CJA Attorneys, (3) chief probation and pretrial services officers, (4) district judges, and (5) chief district judges. Respondents were asked to focus on five instances of harm in the past three years. The FJC study is provided as an attachment to this memo.

This memo is addressed to CACM's report to the Judicial Conference, and we do not attempt to evaluate the FJC's study. We note the study provides the most comprehensive data about threats and harm to cooperators that has been developed to date, though the data has some limitations. Because of various features of the study design, it does not represent a full catalogue of all incidents of harm and threats. Many may not have been made known to the respondents who answered the survey. Moreover, since the survey limited each respondent to providing information about a maximum of five incidents, the study omits any other incidents in excess of those five. Additionally, the survey did not include respondents from the Bureau of Prisons.[1]

[1]We have no information about why BOP was not included. We understand that although BOP tracks assaults on prisoners, it does not separately identify those connected with the inmate's cooperation. On the other hand, a witness from BOP testified in a case upon which CACM relied. See the discussion of Judge Clark's order, infra.

CACM's report to the Judicial Conference provides a brief summary, p. 11, of what it viewed as the critical findings from the FJC survey, separating the responses of judges and prosecutors. CACM's report is provided as an attachment to this memo. CACM noted that judges reported at least 571 instances of harm or threats against 381 cooperating defendants. Prosecutors reported a minimum of 197 defendants and 174 witnesses who withdrew from cooperation because of threats of harm, and at least 527 defendants and 467 witnesses who refused to cooperate because of such threats.

CACM also relied, p. 11, on an unpublished order issued by Chief Judge Ron Clark of the Eastern District of Texas, who denied a motion to unseal a plea agreement containing cooperation information after conducting a hearing on the manner in which cooperation information is collected and used against cooperating witnesses. Judge Clark's decision is provided as an attachment to this memo.

CACM was unanimous in concluding, pp. 12-13, that the FJC study and Judge Clark's order demonstrate a pattern of harm and threats against cooperators and "a linkage between threats and harm to cooperators, on the one hand, and the use of court documents to identify those cooperators on the other." Further, "the injuries and even acts of murder being suffered by cooperators present a compelling need for greater controls on access to criminal case information that can be used for this purpose."

CACM emphasized several main points.

- The high likelihood of threats and harm creates the potential for a direct and significant infringement on a cooperating defendant's ability to receive, and on a judge's ability to impose, a fair sentence.

- Court documents often serve as the means for identifying cooperators for illicit and illegal threats or harm, and this problem is exacerbated by ready access, through systems such as PACER, to criminal case documents containing cooperation information and criminal dockets.

- The pervasive problem of cooperator intimidation poses a substantial threat to the underpinnings of the criminal justice system as a whole, making it difficult to find witnesses who are willing to cooperate.

- Efforts in individual districts to protect cooperators are ineffective because persons seeking to identify and threaten or injure cooperators are unaware of differences in procedure from district to district, and frequently draw erroneous assumptions about whether an individual prosecuted in another district has cooperated.

Accordingly, CACM concluded that a nationwide solution providing for greater controls over access to cooperator information is required. It therefore requested that the Rules Committee address this issue.

In addition, because the CACM concluded immediate action to address the problem is required, it adopted Recommended Document Standards to Protect Cooperation Information (set out in an attachment to its report) that it proposes all districts should adopt by local rule or standing order while CACM's recommendations are under consideration by the Rules Committee. CACM anticipates that adoption of its recommendations by local rules or standing orders will begin to resolve district to district inconsistencies, and that the experience gained under these procedures will assist the Rules Committee. This memo addresses CACM's recommendations for local rules, which embody the approach CACM recommends implementing in the Rules of Criminal Procedure.

CACM's report and recommendations also included information about problems in the access to information within the prison system, where inmates are pressured to request and then share their own records to demonstrate they have not cooperated. Because those recommendations are addressed to the executive branch, not the courts, we do not address them here.

CACM's report does not discuss a prior effort by the Rules Committees to study the problem of threats and harm to cooperators. In 2010 the Standing Committee's Privacy Subcommittee, chaired by Judge Reena Raggi, held a day-long conference on new threats to privacy arising from disclosure of private information in court files, including threats to cooperating witnesses. The conference focused on the vastly increased accessibility of electronic court records. As discussed in part III infra, the conference included diverse users of court records (e.g., the press, public interest advocates, and scholars), and two panels focusing on the issue of cooperators and plea agreements. The Fordham Law Review published a transcript of the conference, which is included with this report. Pages 63-95 (cooperators) are particularly pertinent to this issue.

## II. Rules that may be affected

We have attempted to identify all of the rules that might be affected by CACM's recommendations, and by the general concerns that animate them. CACM's recommendations would most clearly affect Rules 11 and 35. But to provide a complete basis for discussion, we note as well other provisions that might be more peripherally affected.

### A. Rule 11

The proposed procedures have clear implications for Rule 11, which governs plea agreements and the plea process. CACM recommendation (b)(3) provides:

> 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.

This recommendation would require modification of **Rule 11(c)(2)**, which provides for disclosure of plea agreements in open court, absent a showing of good cause for in camera disclosure in an individual case:

> **(2)** ***Disclosing a Plea Agreement.*** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

In effect, the CACM proposal would reverse the general rule and permitted exception in Rule 11 as it applies to cooperation agreements. The CACM recommendation would preclude presentation of this portion of the plea agreement in open court, require a case-by-case showing of good cause to disclose ("provide public access") the agreement, and allow that disclosure only after the fact, not at the time the plea is entered.

CACM recommendation (b)(3) might also require an amendment to **Rule 11(g)**, which provides:

> **(g) Recording the Proceedings.** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

An amendment could modify (g) to provide that the required bench conference would be recorded, the transcript of that portion of the hearing sealed, and no public access provided unless ordered by the court.

Although Rule 11 does not presently include requirements for the format of plea agreements, it might also be amended to incorporate CACM recommendation 1, which states:

> 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.

The requirement that all plea agreements contain a public and nonpublic portion could be added to Rule 11(c)(2) (with a revised caption), but it might be preferable to add it as a new subdivision.

### B. Rule 35

CACM recommendation 5 addresses Rule 35 motions for sentence reductions based on cooperation. It provides:

> 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.

Rule 35(b) provides for sentence reductions for substantial assistance upon the government's motion. The rule does not address whether the government's motion seeking a reduction on the basis of cooperation should be sealed. Rule 35(b) states only that "[u]pon the government's motion" the court may reduce the sentence of a defendant who provided substantial assistance.

It would be possible to reframe Rule 35 to accommodate the CACM recommendation for a sealed motion, though at present the rule focuses only on the court's authority to order a reduction, rather than the format of the government's motion. Alternatively, it might be possible for the government to address this in guidance to prosecutors, e.g., in the United States Attorneys' Manual.

The Subcommittee may also wish to consider whether other rules and procedures are implicated by the Subcommittee's recommendation concerning the resentencing of cooperators under Rule 35. Unless the rules address these issues, we are not certain that limiting access to the government's Rule 35 motion fully addresses CACM's concerns about cooperator resentencing under Rule 35.

CACM's recommendation does not address, for example, the availability of a key piece of information: the defendant's reduced sentence. If the court finds that the defendant's cooperation warrants a sentence reduction under Rule 35(b), it will order the defendant's initial sentence to be reduced, and it may order a sentence below any mandatory minimum prescribed by statute. CACM's recommendations do not limit access to the fact that the defendant's sentence has been reduced or to the resulting lower sentence. These would presumably be reflected on the docket sheet. Indeed, release dates are available on the BOP's website using the inmate locator.

And CACM's recommendation does not address the availability of other sources of information about the defendant's resentencing under Rule 35. CACM recommends that the resentencing motion and relevant portion of the resentencing transcript be sealed. It does not, however, recommend that the courtroom be closed during such proceedings, and it does not recommend that the defendant be prohibited from attending. Thus even if the discussion of cooperation occurs at a sidebar (recommendation 4), observers may hear the case called, see the defendant appear, and hear the reduced sentence being imposed. Any courtroom observers would thus be aware, in general terms, of the defendant's cooperation.

A defendant's fellow inmates may also be able to learn of his cooperation because of his attendance at the Rule 35 resentencing proceedings. The FJC study found that inmates are very attentive to the absences of others to attend court proceedings, from which they draw inferences about cooperation. Rule 43(b)(4) provides that a defendant "need not be present" at sentence reduction proceedings under Rule 35. This allows a case-by-case determination balancing the need for or value of the defendant's attendance against the costs, including the possibility that it would reveal the defendant's cooperation to others who might seek to retaliate. If the goal is to eliminate the possibility of a defendant's attendance at a Rule 35 motion along with any inferences that attendance may raise, an amendment to that effect may be required.

### C. Rule 49/docket entries

Rule 49(c) provides that the court is required to provide notice of a court order. The order is also noted on the docket sheet. These procedures apply to the court's ruling on all motions, including motions under Rule 35.

CACM recommendation 7, concerning the provisions of docket entries, states:

> Clerks of the United States district courts, when requested to provide a copy of docket entries 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.

Although this recommendation addresses the concern that the docket entries may signal that cooperation led to a plea agreement, it does not seem to address docket entries concerning resentencing under Rule 35 on the basis of cooperation. Although the Rule 35 motion itself would be sealed, it is difficult to envision that any sentence reduction would not be noted on the docket sheet.

The Subcommittee may wish to consider whether the implementation of the recommendation that Rule 35 cooperation motions be sealed would be undercut by the clerk's notice of the court's order and the entry of the order reducing the sentence on the docket sheet. We are not sure how the courts currently handle the docket when other sealed motions are made, and whether procedures already exist that would address this concern.

### D. Rule 16(a)(2)

The CACM recommendations may affect several of the pretrial discovery rules. Rule 16(a)(2) carves out from the government's disclosure requirements certain internal government memoranda. It states:

> (2) *Information Not Subject to Disclosure.* Except as permitted by Rule 16(a)(1)(A)–(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective witnesses except as provided in 18 U.S.C. § 3500.

If documents related to cooperation might otherwise be subject to disclosure under other provisions of Rule 16, this section makes explicit the point that internal government documents prepared in connection with the investigation and prosecution of the case at hand are not discoverable. It also limits disclosure of witness statements except as provided by the Jencks Act.

This provision might be read to preclude disclosure of documents related to an individual's cooperation (either as a statement by a prospective witness, or an internal document prepared in connection with the case). However, if the other CACM recommendations are adopted, the Subcommittee may wish to consider whether this provision should explicitly refer to documents reflecting cooperation.

### E. Rule 12.1(b)(1) & (c)

Rule 12.1 governs alibi defenses, creating reciprocal duties that may be affected by the goal of protecting cooperators. Rule 12.1(a) states that upon the government's request for notification of any alibi defense, the defendant must provide his location at the time of the offense and the witnesses upon whom he intends to reply. Rule 12.1(b) requires the government, in turn, to provide the names and contact information for the witnesses it expects to use to establish the defendant's presence at the scene of the offense and to rebut his alibi. Subdivision (c) imposes a continuing duty to disclose, and Subdivision (d) allows the court to grant exceptions to the disclosure requirements for good cause.

Although this rule is not directly in conflict with CACM's recommendations, under some circumstances it might require the government to disclose the names and contact information of cooperating witnesses. The Subcommittee may wish to consider whether the provision allowing exceptions for good cause is sufficient to respond to any concerns.

### F. Rule 12.3(a)(4)(C) & (b)

Rule 12.3 governs public-authority defenses, creating a reciprocal discovery scheme that parallels Rule 12.1 and raises similar issues. If the defendant provides notice that he intends to rely on a public-authority defense, Rule 12.3(a)(4)(C) requires the government to disclose the name and contact information of the witnesses upon whom it expects to rely to oppose this defense. Subdivision (b) imposes a continuing duty to disclose. Subdivision (d) states:

> This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.

Although this rule is not directly in conflict with CACM's recommendations, under some circumstances it might require the government to disclose the names and contact information of cooperating witnesses. The Subcommittee may wish to consider whether the existing provision regarding protective orders and filing under seal is sufficient to respond to any concerns.

### G. Rule 17(c)

Rule 17(c)(1) provides:

> (1) ***In General.*** A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

Although this rule does not conflict directly with the CACM recommendations, there may be situations in which the material to be produced would reveal cooperators. Rule 17(c)(2) allows the court to quash or modify a subpoena if compliance would be unreasonable or oppressive.

The Subcommittee may wish to consider whether any further modification would be appropriate in light of CACM's recommendations for the protection of cooperators.

### H. Rule 49.1

This rule, which implemented the E-Government Act of 2002, requires redaction of certain information to protect individual privacy and security. With certain exceptions required

to adapt its provisions to criminal proceedings, Rule 49.1 parallels provisions in the Civil, Bankruptcy, and Appellate Rules.

Although nothing in Rule 49.1 is inconsistent with CACM's recommendations, we note this rule because it provides a model that affirmatively states certain information should be excluded from filings. The Committee might wish to consider whether the Criminal Rules should include a similar affirmative provision addressing cooperators. Similarly, Rule 26.2 offers explicit protection for the prior recorded statements of witnesses, prohibiting disclosure before the witness testifies.

## III. Overview of issues for Subcommittee consideration

We suggest that the Subcommittee focus first on two foundational issues: (1) evaluating the justifications for the CACM recommendations, and (2) considering countervailing general concerns. With those considerations in mind, it can then turn to the issues raised by particular rules.

### A. The justifications for CACM's proposal

The CACM Report concludes that there is (a) a compelling interest in restricting access to information that can be used to identify cooperating witnesses, and (b) a nationwide solution will more be more effective than case-by-case or court-by-court solutions.

There is no reason to doubt that threats to cooperators (and their friends and families) are a serious problem in the federal system. The FJC Study and the CACM report document instances of such harm and threats known to prosecutors, judges, and probation officers. Indeed, we note that the Criminal Rules Committee and the Standing Committee were aware of this problem, and a special committee chaired by Judge Reena Raggi held a conference in 2010 to study threats to privacy, including cooperators from disclosure of court files. See pp. 63-95 of the conference transcript in the Fordham Law Review for a discussion of plea agreements and cooperators. However, neither the 2010 conference nor the FJC study quantifies or provides comprehensive data,[2] though both provide a clear indication that the problem is significant.

There is, however, a stark difference between the conclusions drawn by CACM and those drawn at the conclusion of Privacy Subcommittee's Fordham conference. CACM now takes the

[2]The FJC study was not designed to provide comprehensive data on the number of individuals affected. Because respondents were limited in the responses, they could not provide full information about the number of instances of harm and threats. We have no information about why the Bureau of Prisons was not included in the survey.

strong position that a national rule is needed, and it recommends immediate adoption of its recommendations by local rule or standing order. At the conclusion of the Fordham conference, in contrast, the Criminal Rules Committee and the Standing Committee concluded that there was no consensus on the best way to protect cooperators, particularly in light of countervailing considerations. Individual districts had studied the issue, adopted different procedures, and were not persuaded by other approaches. Participants were aware, moreover, of a point CACM stresses: in the absence of a national rule, individuals who seek to identify and retaliate against cooperators may draw incorrect inferences because they do not understand the differences in the approaches of the various districts. In other words, in 2010 participants were aware that a national rule would have a different effect than their preferred local approaches.

The materials we have received from CACM do not reference the Privacy Subcommittee's Fordham conference and the conclusions drawn from it, and we are unable to determine whether CACM gave any weight to the recent study and consideration of the same issues. We are not certain whether CACM found the problem had increased since 2010 or it simply drew a different conclusion regarding the proper response to the problem after further study.

We note also that the FJC study found that multiple sources were used to identify and target cooperators. CACM notes, p. 13, that court documents "often serve as the means for identifying cooperators for illicit and illegal threats or harm." The FJC, which identified 571 instances of harm or threat, found that court documents had been used in 363 of these cases (about 70 %). If CACM's recommendations are adopted, we do not know how easy it would be for individuals determined to identify cooperators to substitute other methods.

The Privacy Subcommittee's Fordham conference also included many stakeholders not involved in CACM's discussions. We turn in the next section to a brief description of the countervailing considerations they and others might raise.

## B. Countervailing interests

The most significant difference between CACM's report and the Privacy Subcommittee conference is one of focus: the Privacy Subcommittee's conference included a broader range of interests, including scholars, reporters, and public interest advocates who seek access to information about cooperating witnesses and the concessions made to obtain cooperation. It also included defense attorneys who opposed blanket restrictions on the availability of cooperation agreements.

### 1. Scholars, reporters, public interest advocates

The scholars, reporters, and public interest advocates at the Fordham conference generally expressed strong opposition to restrictions on access to court records.[3]

The interests of this diverse group vary: historians may be less troubled by short-term limitations on access, though they would strongly oppose the recommendation for permanent sealing (CACM recommendation 8). Reporters, public interest advocates, and criminal justice scholars, in contrast, generally focus on the current functioning of the federal criminal justice system. They would be significantly hampered by the CACM recommendations. Reporters would have special concerns about access to information about specific high profile cases, but would also need more general information to put those cases into context and to identify and report on general developments. Public interest groups and scholars seek information about not only the percentage of cases in which defendants receive charge or sentencing concessions in return for cooperation, Rule 35 reductions, or § 5K1.1 departures (which are tracked by the Sentencing Commission), but also more fine grained information about such cases, including the types of cases in which defendants provide cooperation, the degree of sentence reductions awarded, and differences in these statistics over time as well as from district to district.

We note that several participants expressed the view that blanket sealing provisions would not survive First Amendment challenges.[4]

2. Victims

Under Rule 60(a)(2) and (3), victims have a right to be present during public court proceedings and a right to be heard at public proceedings on pleas or sentencing involving the crime.[5] Although nothing in CACM's recommendations is inconsistent with the right to be

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[3]See Judicial Conference Privacy Subcommittee: Conference on Privacy and Internet Access to Court Files, 79 FORD. L. REV. 1, 12-16 (2010) (comments of Lucy Dalgleish, Reporters Committee for Freedom of the Press); *id.* at 19-22 (comments of Maeva Marcus, historian); *id.* at 25-27 (comments of David McCraw, New York Times); *id.* at 63-66 (comments of Caryn Morrison, criminal justice scholar).

[4]*Id.* at 73-75 (comments of Alan Vinegrad, cautioning against "categorical approach" to all cooperators and emphasizing the public's right to know); *id.* at 66-68 (comments of Gerald Shargel, stating sealing is not appropriate in the case of cooperators and that a "blanket rule where courts were permitted to make generalized findings that all records are sealed in the case of cooperating witnesses . . . . would never pass constitutional muster").

[5]Rule 60 provides:

**(2)** ***Attending the Proceeding.*** The court must not exclude a victim from a public court

present or to be heard, as a practical matter the process being recommended would make it more difficult for victims to follow and understand why the defendant is being given a lower sentence than he might otherwise receive. Sealing the relevant portions of the transcript would also reduce the victim's access to this information.

3. Defense interests

Although Federal Defenders and CJA panel attorneys were surveyed by the FJC and CACM consulted the Judicial Conference Defender Services Committee, that may not provide a comprehensive response from the defense perspective. We anticipate that some defense lawyers would strongly oppose the CACM proposals, or at least urge that they should be tailored much more narrowly. At the Privacy Subcommittee conference, two defense attorneys opposed the idea of blanket rules sealing the records of cooperators.[6]

4. More narrowly tailored rules

Some speakers at the Privacy Subcommittee's conference supported different–and in some cases more narrowly tailored–solutions to the problem of protecting cooperators.

PACER and internet access appear to be exacerbating the problem of threats and harm to cooperators, and there was some support at the Privacy Subcommittee conference for restricting

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> proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.
>
> **(3)** ***Right to Be Heard on Release, a Plea, or Sentencing.*** The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.

[6]Judic. Conf. Privacy Subcommittee, *supra* note 3, at 73-75 (comments of Alan Vinegrad, cautioning against "categorical approach" to all cooperators and emphasizing the public's right to know); *id.* at 66-68 (comments of Gerald Shargel, stating sealing is not appropriate in the case of cooperators and that a "blanket rule where courts were permitted to make generalized findings that all records are sealed in the case of cooperating witnesses . . . . would never pass constitutional muster").

PACER access, rather than sealing documents.[7] This would return the system of court records in criminal cases to the practical obscurity that existed before there was widespread internet access, though it might conflict with the general Congressional policy of making government records more accessible. This restriction could be complemented by providing electronic public access to a new database of all cooperation agreements, with individual identifiers redacted, outside the confines of individual case files.[8]

Many speakers at the Privacy Subcommittee Conference emphasized that not all cooperators face threats or harm. It might, accordingly, be possible to narrow rules automatically restricting access to information about cooperators to a subset of cases. It seems probable that not all cooperators face the same risk of physical threats or harm to themselves or others. For example, white collar defendants may not face the same threats of death or serious bodily harm as defendants testifying in prosecutions involving organized crime or other offenses more closely tied to the threat of violent retribution. But developing rules to prioritize which cases present credible risks of threats or harm would be challenging. It may not be possible to correlate harm and threats to the offenses of the cooperator's conviction, for example. An organized crime case involving violent acts might also include fraud or official bribery, and the offense to which a cooperator pleads or for which a cooperator's sentence has been imposed might be unrelated to the activities of the person or entity expected to retaliate.

It might also be possible to restrict the period of time that access is prohibited, by, for example, a presumption that sealing would be lifted at some designated time.[9]

### III. Constitutional concerns

We have identified several constitutional concerns raised by various elements of the CACM proposal. We briefly note them here for purposes of this initial discussion. If the Subcommittee decides to pursue certain rules, further research and consideration of these constitutional issues would be necessary.

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[7] *Id.* at 63-66 (comments of Caryn Morrison, advocating limiting access to docket sheets and case documents in PACER to the parties and the court). But see *id.* at 74 (comments of Alan Vinegrad, that in a majority of cases those who are intent on harming cooperators will get the information at the courthouse if it is not available on PACER).

[8] *Id.* (advocating a system of online access to all cooperation agreements outside of case files with individual identifiers redacted).

[9] *Id.* at 82, 83-84 (comments of Judge Raymond Dearie, urging that First Amendment requires reconsideration whether documents should be sealed forever without a compelling justification).

## A. Press and public access; the First Amendment

The CACM report acknowledges, p. 16, "the public's constitutional right to access court documents pursuant to the First Amendment and common law," and the "high burden that must be met before shielding particular case information from the public's eye." It also notes, p. 15, that "the case law generally demands that courts undergo a fact-intensive, case-specific analysis in order to justify limitations on public access to court records." CACM concluded, *id*., that "the nature of the harm in these situations simply cannot be addressed in isolation as a case-by-case issue." To illustrate the need for a general rule, CACM noted that (1) in many cases the government would be unable to anticipate and demonstrate a threat before disclosure, and (2) disclosure in one case may have implications in other cases as well. It concluded that "the harms to individuals and criminal justice are so significant and ubiquitous as to threaten the highest values of the judiciary and demand immediate and effective action to halt the use of court documents in perpetuating these harms."

Several aspects of the CACM proposal might give rise to First Amendment challenges. Broadly speaking, CACM focuses on two points in the process (initial sentencing under Rule 11 and resentencing under Rule 35), and it recommends the use of two techniques (sidebar conferences and sealing of motions and transcripts). Anticipating a challenge to sealing, CACM notes that there are precedents for precluding public access to certain categories of criminal case information (pp. 16-17, citing pretrial services reports, juvenile records, personally identifiable information, and minors' names).

There is considerable authority in the courts of appeals and district courts recognizing that the press and the public have a First Amendment right to attend proceedings in which a defendant pleads guilty or is sentenced. *See, e.g.*, Hearst Newspapers LLC v. Cardenas–Guillen, 641 F.3d 168, (5th Cir. 2011) (joining the Second, Fourth, and Seventh Circuits in recognizing First Amendment access to sentencing). Courts recognizing this right to access have concluded that the presumption that the proceedings should remain open must be overcome by specific, substantive findings that closure is necessary to protect higher values and is narrowly tailored to serve such goals. Any reasonable alternatives to closure must be considered.

The application of these cases to the CACM proposals might require a two-stage enquiry. The first stage might focus on the broad question whether the government can establish a sufficient showing of a compelling need to protect cooperators by broad categorical restrictions on information regarding cooperation. But a second stage of the enquiry would likely focus on challenges to particular types of restrictions, which would include new factors, such as whether there has traditionally been a public right to access. For example, for First Amendment purposes, a distinction might be drawn between the public's right to attend certain proceedings and its right to access to certain court documents. Some cases have a drawn a distinction between the right of access to judicial proceeding and access to particular documents.

Presentence reports, although relied upon in a sentencing proceeding that is open, have a history of confidentiality and are not publicly accessible. A detailed analysis would be necessary to determine how courts are likely to analyze cooperation agreements that are incorporated into guilty pleas, or other documents such as motions for resentencing under Rule 35.

Sealing of a significant portion of the transcript in every Rule 11 and Rule 35 proceeding involving a defendant's cooperation would raise distinctive, though related, issues. Challengers might argue it should be analogized to closing the courtroom, rather than denying access to certain judicial documents. And we note in passing that courts might distinguish between initial Rule 11 plea proceedings and Rule 35 resentencing. For other constitutional purposes, such as the defendant's right to counsel and right to be present at trial, Rule 35 proceedings are not equated with guilty plea proceedings under Rule 11. This might arguably support a different treatment for purposes of the First Amendment.

We also note the possibility that a uniform procedure for discussing cooperation in a sidebar conference not audible to the public might be challenged as the equivalent of closure of the courtroom. To be sure, sidebar conferences are common in other contexts. But they are not ordinarily coupled with the sealing of the relevant portion of the transcript in a comprehensive strategy to prevent public access to information about judicial proceedings.

Finally, we note that the First Amendment requires not only consideration of the interests that justify precluding press and public access to plea and sentencing proceedings, but also whether the restrictions in question are as narrowly tailored as possible, and whether other alternatives have been considered. Although the CACM report explains why it concluded that district-by-district solutions are not fully satisfactory, it neither considers ways to tailor or narrow the proposed restrictions, nor evaluates other means of protecting cooperators.

## B. Impact on Constitutional Rights of Criminal Defendants

### 1. Interfering with the government's due process obligations to provide exculpatory information

The CACM recommendations recognize that the government has an obligation under the Due Process Clause to provide the defense with exculpatory information. Recommendation 9 provides:

> 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).

CACM's Report to the Judicial Conference also states, p. 17, that its recommendations would "explicitly ensure that defendants' discovery rights are in no way abrogated."

We agree that CACM's policy cannot interfere with the government's obligation to disclose the incentives that it has provided to cooperating witnesses. We do not, however, have a clear understanding how this would play out in practice. Would the government's fulfillment of its obligation to disclose impeaching and exculpatory information effectively undermine much of the value of otherwise restricting access to information about cooperation? Would the new policy, even unintentionally, encourage prosecutors to withhold or delay providing information that might otherwise have been disclosed?

2. Upsetting the balance of reciprocal discovery

As noted in our discussion of Rules 12.1 and 12.3, the Criminal Rules create a system of reciprocal discovery. The Supreme Court has upheld the requirement that defendants provide the government with pretrial discovery when this is part of a system of reciprocal discovery that merely accelerates disclosure the parties would make at trial. To the extent that withholding information about cooperating witnesses might prevent the government from making disclosures to the defense under these rules, continuing to require disclosure by the defense to the government could be challenged by the defense as violating due process.

# TAB 6C

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**Agenda E-6**
**Court Admin./Case Mgmt.**
**March 2016**

# REPORT OF THE JUDICIAL CONFERENCE

## COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Court Administration and Case Management met on December 2-3, 2015. All Committee members were present. Bill McCool, Clerk of the District Court for the Western District of Washington, participated as well. The Committee meeting was staffed by Mark Miskovsky, Chief; David Levine and Sean Marlaire, Senior Attorneys; and Jenny Soroko, Policy Analyst, of the Administrative Office's Court Services Policy Staff. Also participating from the Administrative Office were Laura C. Minor, Associate Director for the Department of Program Services; Mary Louise Mitterhoff, Chief, Court Services Office; and Kate Flynn, Attorney Advisor, Office of Legislative Affairs. The Federal Judicial Center (FJC) was represented by Donna Stienstra, Senior Research Associate. Members of the Committee on Rules of Practices and Procedure (Rules Committee), including Judge Jeffrey S. Sutton, chair of the Rules Committee; Judge Amy J. St. Eve, the Rules Committee's liaison to this Committee; and Judge John D. Bates, the chair of the Advisory Committee on Civil Rules, as well as James Haines, Glen Palman, and Michael Dobbins, members of the Committee's cost containment Expert Panel, participated in portions of the meeting.

## PROTECTION OF COOPERATION INFORMATION

For many years, this Committee has worked to balance the legitimate privacy concerns of individuals with the need to provide public access to court records. As part of this responsibility, the Committee has a longstanding interest in ensuring appropriate controls and procedures for electronic access to judiciary case files. This is especially true with respect to accessing criminal case documents, where indications of an individual's cooperation with the government can create the serious potential for retribution, threats, and significant harm or death.

Eight years ago, this Committee, in collaboration with the Criminal Law Committee, issued guidance offering measures courts could take to protect cooperation information. *See Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350. Over the past decade, the Committee has continued to track district court practices regarding public access to criminal case files, and has noted that concerns regarding the illicit use of cooperation information to threaten or harm cooperators—particularly incarcerated cooperators—have continued to grow. For this reason, the Committee has worked to address these serious concerns.

In 2014, the Committee, along with the Criminal Law and Defender Services Committees, considered proposed comprehensive guidance aimed at protecting cooperation information in criminal cases. The three committees strongly supported the concepts behind the

guidance, but raised additional questions for consideration. The Committee agreed, therefore, to gather more data and to formulate a potential solution with the involvement of additional stakeholders, including the U.S. Department of Justice (DOJ), federal defenders, and others, before developing any formal recommendations. Most importantly, the Committee asked the FJC to design and conduct a comprehensive survey to determine the frequency and nature of threats and harms suffered by those who cooperate with the government. The FJC worked with the Committee, the Administrative Office, and various advisory groups, to develop five separate surveys, each targeting a different group of individuals: (1) federal prosecutors; (2) federal defenders and Criminal Justice Act district panel attorney representatives; (3) chief probation and pretrial services officers; (4) district judges (active and senior status); and (5) chief district judges. Survey respondents were asked to focus their responses on up to five instances of harm from among their cases in the preceding three years (i.e., 2012-2015). The result was a major, multi-year FJC study, which ended in spring 2015. The preliminary conclusions of the study were presented in a report ("FJC Cooperation Report," included as Appendix B) provided to the Committee at its June 2015 meeting.[6]

The FJC Cooperation Report provided a methodologically sound basis for the Committee's concern that cooperation information was being used to harm or threaten cooperators. Prosecutors were in the best position to report instances of harm to cooperating witnesses—97 percent of U.S. attorneys' offices who responded reported instances of harm or threats of harm, compared to 50 percent of district judges who did so—though all five respondent groups reported that harm or threats directed against cooperators is a problem. Based on the responses received from judges:

[6]While the three interested committees received a preliminary version of the FJC Cooperation Report at their summer 2015 meetings, CACM Committee members agreed to postpone formal consideration of the report and the guidance designed to address the identified issues until December 2015, to allow time for additional consideration by the Criminal Law Committee and the Defender Services Committee.

- There were at least 571 instances of harm or threats against 381 cooperating defendants over the past three years.
- The types of harm aimed at cooperating defendants ranged from threats of physical harm (339) to actual physical harm (102) and even murder (31).
- Threats to friends and family members of defendants were common (222), though actual harm was also perpetrated against those individuals (19).
- The location of the defendant at the time of harm or threats was most often in pretrial detention (207), though threats and harm often took place during incarceration (125) or other post-sentencing periods (39).
- Court documents were often the source for identifying cooperating defendants (363).

U.S. attorneys' office respondents reported a minimum of 197 defendants and 174 witnesses who withdrew from cooperation because of the threats of harm, and a minimum of 527 defendants and 467 witnesses who refused to participate in any cooperative endeavor due to such threats. Although 70 percent of all districts take some steps to protect cooperation information, wide variation in districts' approaches to protecting cooperators has exacerbated the problem, according to some respondents.

In addition to the FJC Cooperation Report, the Committee has taken notice of a recent decision of Chief Judge Ron Clark of the United States District Court for the Eastern District of Texas in *United States of America v. Devin Wayne McCraney*. Mem. Order Requiring Unsealing of Documents, Case Nos. 1:14-cr-1, 1:14-cr-80, and 1:14-cr-93 (E.D. Tex. 2015) ("Clark Order," attached as Appendix C). Before Chief Judge Clark was a motion, in part, to unseal plea agreements containing cooperation information. The proceedings on the motion included extensive testimony from knowledgeable individuals[7] concerning the manner in which information regarding cooperators is typically collected and used against them. Based on this

[7]This testimony was provided by the supervisory intelligence officer for the Bureau of Prisons, a special investigator at the Federal Correctional Complex in Beaumont, Texas and an Assistant United States Attorney in the Eastern District of Texas.

testimony, Chief Judge Clark concluded that "allowing the disclosure of information in plea agreements that identifies defendants who have assisted the government by cooperating against others, or who agree to do so in the future, puts those defendants at risk of extortion, injury, and death." *Id.* at 12.[8]

The privacy subcommittee of the CACM Committee, including liaison members from the Criminal Law and Defender Services Committees, met in September 2015 to consider the findings of the FJC Cooperation Report and the Clark Order. Based on the extensive evidence presented in these documents, the privacy subcommittee found that there is a compelling government interest in restricting access to criminal case information that can be used to identify cooperating witnesses. The subcommittee also concluded that a nationwide solution would protect cooperators more effectively than a case-by-case or court-by-court solution, and therefore expressed a desire that any Committee action be followed by consideration of appropriate changes to the Federal Rules of Criminal Procedure.

After a thorough review and discussion of the privacy subcommittee's recommendation in December 2015, and based on an examination of the FJC Cooperation Report and the Clark Order, it was the unanimous view of this Committee that a substantial number of cooperators have experienced actual harm and that their families and friends have received a significant number of threats. Because the Report demonstrates a linkage between threats and harm to cooperators, on the one hand, and the use of court documents to identify those cooperators on the other, the Committee agreed with the privacy subcommittee that the injuries and even acts of

[8]Local Criminal Rule 49 for the Eastern District of Texas now provides that all plea agreements "will include a sealed addendum that will either state that no additional information is included or will set out the agreement concerning consideration for a downward departure." As noted in the order, this measure is consistent with those that have been adopted in several other districts in order to protect the identities, and thus the safety, of cooperators. Clark Order n. 9 (citing orders and policies of the Northern District of Texas, the District of Maryland, and the District of Vermont); *see also* FJC Cooperation Report, p. 25 & Appendix H (discussing courts' efforts to protect cooperators).

murder being suffered by cooperators present a compelling need for greater controls on access to criminal case information that can be used for this purpose.

In reaching this conclusion, the Committee coalesced around several key points. As a fundamental point, the Committee recognized that the high likelihood of threats and harm creates the potential for a direct and significant infringement on a cooperating defendant's ability to receive, and on a judge's ability to impose, a fair sentence. For example, multiple respondents to the FJC survey noted that cooperators' fear of harm is so great that some choose to forgo the sentencing benefits provided under Section 5K1.1 of the U.S. Sentencing Guidelines in order to avoid being identified as a cooperator.[9] FJC Cooperation Report, pp. 94, 120. Out of fear of reprisal, these cooperators feel that they have no other choice but to refuse benefits to which they may be legally entitled. In addition, imprisoned cooperators often will be placed in a Segregated Housing Unit (SHU)—either on the Bureau of Prison's (BOP's) initiative or at their request—in an attempt to protect them from the retribution of other inmates. This desperate measure to avoid harm to the cooperators can greatly increase the severity of the imposed sentence.[10] The Committee believes that these types of interference with the sentencing of cooperating defendants could inhibit fundamental rights, including those of due process and freedom from cruel and unusual punishment, and certainly impedes the courts' ability to impose fair sentences.

Second, the Committee emphasized the troubling fact that court documents often serve as the means for identifying cooperators for illicit and illegal threats or harm. As consistently documented by the FJC survey of respondents of all types and in all regions, it is now routine for

[9]United States Sentencing Guidelines Manual § 5K1.1 states, in relevant part: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

[10]As one respondent to the FJC survey stated: "A sentence served in the SHU is a very different sentence than one served in general population. There is no programming. Any inmate serving a lengthy sentence in the SHU stands little if any chance at rehabilitation." FJC Cooperation Report at 132, App. I. *See also* Clark Order at 9 n.7 ("An inmate is normally confined to the [SHU] as a punishment. The inmate has no access to classes or general outdoor recreation and is not eligible to receive the 'good time credit' that can be earned by inmates on the yard. Thus, any 'protection' that the SHU provides comes with severe drawbacks.").

those who report to prison to be asked by other inmates to produce their case documents or dockets in order to prove that they did not cooperate. *See* FJC Cooperation Report, Appendix I: Open-Ended Comments. *See also* Clark Order at 6-7. This problem is exacerbated by ready access, through systems such as PACER, to criminal case documents containing cooperation information and criminal dockets (or gaps in the docket) indicating (rightly or wrongly) that cooperation occurred.[11] The increased availability and capability of the consumer products and software used to access, process, and share case information also have facilitated the misuse of case information. The Committee believes there can be little doubt that these problems will worsen if left unchecked.

Finally, the Committee emphasized that the pervasive problem of cooperator intimidation poses a substantial threat to the underpinnings of the criminal justice system as a whole. Due to the widespread awareness of the harm that cooperating witnesses might face, it is becoming increasingly difficult to find witnesses who are willing to cooperate. Concrete examples of this can be found in both the FJC Cooperation Report and the Clark Order. For example, one survey respondent stated that "[l]aw enforcement agents commonly hit a wall of silence in a community, stemming largely from the fear that powerful groups will kill witnesses who are seen as providing information to the government." FJC Cooperation Report at 117; *see also id.* at 23-25 (summarizing survey results regarding the number of defendants and witnesses who refused to cooperate due to potential harm).

To address the pervasive, nationwide problem regarding the use of cooperation information to harm cooperators, the Committee agreed with the privacy subcommittee that a nationwide solution providing for greater controls over access to cooperator information is

[11] *See, e.g.*, FJC Cooperation Report, Appendix I: Open-Ended Comments (containing several references to the use of PACER to access identifying documents); Clark Order at 7 (discussing the use of software such as LexisNexis, Google, Wikipedia, in conjunction with PACER and a BOP website).

required. While the case law generally demands that courts undergo a fact-intensive, case-specific analysis in order to justify limitations on public access to court records,[12] the Committee believes that the nature of the harm in these situations simply cannot be addressed in isolation as a case-by-case issue. The harm flowing from unsealed court documents necessarily comes after public filing of the documents, and in most cases the facts that would justify sealing are not then known and therefore cannot be stated in a sealing order. Furthermore, restricting access to a cooperator's information in one case, while allowing unrestricted access in another, means that neither cooperator is protected.[13] The Committee has, therefore, asked the Standing Committee on Rules of Practice and Procedure (Rules Committee) to consider this matter.[14] This will allow the Rules Committee to begin the deliberative process and consider whether one or more changes to the Federal Rule of Criminal Procedure are warranted.

In the interim, the Committee recommends that courts take immediate action to address this serious problem. It therefore has endorsed the privacy subcommittee's guidance (set out in Appendix D[15]) for district courts to adopt via local rule or standing order. This guidance provides for the uniform inclusion of sealed material in case documents and transcripts that typically contain cooperation information, so as to avoid providing a means of distinguishing and identifying cooperators. The guidance, furthermore, provides specific procedures for

[12]*See, e.g., Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 510 (1984).

[13]As Chief Judge Clark stated, "[u]nsealing only those plea agreements that do not contain cooperating language would paint a bulls-eye on every defendant whose plea agreement was not unsealed. Likewise, the blank spaces left by redaction of cooperation clauses from plea agreements would simply identify those whom the prison gangs needed to 'discipline' or kill." Clark Order at 14.

[14]Members of the Rules Committee attended the December 2015 meeting of the Court Administration and Case Management Committee and were able to hear and discuss the significant concerns related to the misuse of cooperator information. The Rules Committee members in attendance agreed that this appeared to be an appropriate issue for their consideration. As a result, the issue was discussed at the Rules Committee's January 2016 meeting and referred to the Advisory Committee on Criminal Rules for review and investigation.

[15]The proposed guidance uses as a template the existing local rules and standing orders of courts that have already adopted practices to protect cooperators. *See supra* note 8.

incarcerated individuals to access these sealed materials in a secure environment, consistent with local BOP policy and court rules. The guidance expressly refrains from impacting the government's disclosure obligations. The Committee emphasized that, in order to be effective, the guidance should ideally be implemented universally, in all criminal cases. The Committee unanimously agreed that the proposed guidance would provide a significant step forward in preventing criminal case information from being used to threaten or harm those who choose to cooperate with the government.

In endorsing this guidance, the Committee emphasized that it embraces the sworn duty of district judges to vigilantly safeguard the public's constitutional right to access court documents pursuant to the First Amendment and under common law. The Committee is also well aware of the high burden that must be met before shielding particular case information from the public's eye. Nonetheless, the Committee finds that the harms to individuals and criminal justice are so significant and ubiquitous as to threaten the highest values of the judiciary and demand immediate and effective action to halt the use of court documents in perpetuating these harms.

The guidance—intended to immediately reduce the use of court documents to threaten and harm cooperators within individual districts—should be seen only as an interim solution until the Rules Committee has an opportunity to address the issue.[16]

The Committee also discussed a number of relevant examples where Congress and/or the Judicial Conference and/or other government bodies have similarly decided to treat the disclosure of an entire category of criminal case information as inherently harmful and therefore inappropriate for public access. *See, e.g.*, 18 U.S.C. § 3153(c) (making pretrial services reports confidential); Fed. R. Crim. P. 49.1 (requiring the redaction of personally identifiable

[16]In light of the fact that a large percentage of courts already take steps to protect cooperators, *see* supra p. 3, transitioning to a nationwide or more widespread approach for resolving this problem should not be overly burdensome for the judiciary. Adoption of the guidance contained in Appendix D will begin to resolve the district-to-district inconsistencies that limit the effectiveness of the well-intentioned measures now in existence.

information and minors' names); *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 340 (removing from public access a number of documents, including juvenile records). In these instances the problems being addressed were so clear and pervasive as to demand a universal response rather than an analysis of the specific harms that might result from disclosure in any single case. The Committee believes that the instant misuse of cooperator information presents an even greater need for a universal response.[17]

In developing these interim measures, the Committee also addressed considerations regarding the potential impact on defendants. First, the Committee emphasized that the new guidance would explicitly ensure that defendants' discovery rights are in no way abrogated by the adoption of the guidance. Cooperation information would continue to be available to defendants who need it for effective cross-examination of witnesses, and any attorneys who visit their clients in prison would continue to be able to access and discuss such information during their visits. Second, the Committee strongly believes that, rather than improperly favoring one population of defendants over another, the proposed guidance attempts to strike a better balance, on an interim basis, within a system that has become weighted against cooperating witnesses and their well-founded safety concerns.

Whether the approach represented by this guidance ultimately strikes the correct balance over the long term can and should be determined through the deliberations of the rulemaking process. The Committee hopes and expects that the information gained in developing the recommended guidance, and the experience of courts that implement it, will assist the Rules Committee in establishing a nationwide, long-term solution.

[17]It should be noted that, though the inclusion of a presumptively sealed document or transcript section under the proposed guidance would be universal in districts in which it is implemented, courts will retain discretion to unseal in any single case if the public has a legitimate interest in reviewing the cooperation agreement or sentencing of a cooperator.

The Committee also agreed with the view of some members that the executive branch, specifically the DOJ and the BOP, bear much of the responsibility to protect the safety of their witnesses and prisoners. Accordingly, the Committee has engaged with these agencies in developing the proposed guidance and expects to work closely with them as it is implemented in the courts. Nonetheless, the Committee strongly believes that the fact that these agencies have distinct responsibilities concerning the safety of cooperating parties does not release the judiciary from its own obligation to maintain control over its records and take reasonable steps to see that they are not misused.[18] Attacks on cooperators and their family members are so extreme and pervasive that they impact the administration of criminal justice within the courts, and because the attacks are often facilitated through the use of case documents, the judiciary itself has a significant interest in addressing the problem, separate from the interest of the executive branch.

In light of these positions, the Committee has agreed to take the following actions. First, it plans to provide the findings and guidance language of Appendix D to the district courts and encourage them to adopt it through local rule or standing order. Second, as discussed above, it has asked the Rules Committee to consider a potential nationwide, long-term approach to resolving the problems identified by this Committee. Third, the Committee will continue to monitor this important issue.

Finally, as noted above, in light of the broad interests to be considered in developing this guidance, this Committee has worked closely with the Criminal Law and Defender Services Committees. Principally, this collaboration has been achieved by developing the guidance through the privacy subcommittee that includes members from all three Committees. This Committee also asked the two other Committees to review the FJC Cooperator Report, as well as

[18] *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978) ("Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.").

the recommended findings and guidance, at their December 2015 meetings. The Criminal Law Committee supports the proposal, including the decision to ask the Rules Committee to consider the matter. The members of the Defender Services Committee agreed to take no position on the guidance.

**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) To the greatest extent possible, this 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 a secure space designated by the warden and may not be retained by the inmate, nor reviewed in the presence of any other incarcerated individual, 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 incarcerated person.

(7) Clerks of the United States district courts, when requested to provide a copy of docket entries 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.

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# TAB 7A.1

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: Proposed rule changes for pro se and IFP litigants (15-CR-D)**

**DATE: March 23, 2016**

15-CR-D presents several suggestions from Sai[1] that address issues common to the Civil Rules, and, in some cases, the Bankruptcy and Appellate Rules. As noted in the subject line, all are seen as enhancing fairness for pro se and IFP litigants.

These suggestions are on the agenda for discussion of the question whether a Subcommittee should be appointed to consider one or more of them.

**1. Redaction of the last four numbers of Social Security numbers**

Sai's first suggestion is for full redaction of social security numbers in filings made with the court. This would affect Rule 49.1(a)(1), which requires redaction of all but the last four digits of social security numbers.

Rule 49.1 was adopted in 2007 to implement the E-Government Act. The Committee on Court Administration and Management took the lead in developing the judiciary's policies, which were incorporated into the rules after a lengthy collaborative process that included all of the Rules Committees and produced parallel rules.

We join the reporters for the Appellate, Bankruptcy, and Civil Rules Committees in recommending that each of the Rules Committees (1) take no present action to amend the respective rules and (2) advise CACM that the question has been reopened by a suggestion submitted to the advisory committees.

**2. Sealing of affidavits in support of application for appointed counsel**

Sai's second suggestion is that the Civil and Criminal Rules be amended to protect the privacy of persons filing affidavits in support of applications for the provision of counsel in

[1]The proponent's full name is Sai.

criminal cases under 18 U.S.C. § 3006A and in forma pauperis status in civil cases. Sai proposes that these affidavits be filed under seal and reviewed ex parte, with a provision for disclosure upon a showing of good cause. There was a short preliminary discussion of the proposal for sealed filing of in forma pauperis affidavits at the Civil Rules fall meeting. Their draft minutes state:

> Brief discussion suggested that filing under seal is not a general practice now. One judge says that he does not order sealing because it imposes costly burdens on the court. Another participant suggested that i.f.p. disclosures generally invade privacy only to the extent of disclosing a lack of financial resources, a state that could be inferred from a grant of in forma pauperis permission in any event. This discussion too will be carried forward for consultation with other advisory committees.

This proposal is on the agenda for further discussion at the April meeting of the Civil Rules Committee, which precedes the Criminal Rules meeting.

**3. Authorities to be provided to pro se litigants**

Sai's third suggestion it to amend the Civil and Criminal Rules to add a new rule modeled on a local rule in the Southern and Eastern Districts of New York:

> Authorities to Be Provided to Pro Se Litigants
>
> In cases involving a pro se litigant, counsel shall, when serving a memorandum of law (or other submissions to the Court), provide the pro se litigant (but not other counsel or the Court) with copies of cases and other authorities cited therein that are unpublished or reported exclusively on computerized databases. Upon request, counsel shall provide the pro se litigant with copies of such unpublished cases and other authorities as are cited in a decision of the Court and were not previously cited by any party.

The reporter for the Civil Rules Committee observed that one question is whether this is an appropriate topic for national rules at this time.

**4. Electronic filing by pro se litigants**

Sai's final suggestion is for amendments to the Civil and Criminal Rules allowing pro se litigants to have the same access to CM/ECF as represented parties, but also allowing pro se litigants to make paper filings.

Because the proposed revision of Rule 49 contains a detailed treatment of filing and service by pro se defendants, the reporters recommend that Sai's arguments be considered in connection with the discussion of Rule 49.

# TAB 7A.2

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15-AP-E
15-BK-I
15-CV-EE
15-CR-D

**Re: Proposed rule changes for fairness to pro se and IFP litigants**

Sai to: Rules_Support 09/07/2015 10:36 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

I further request parallel changes to the non-civil rules, and defer to the Committee on how to mirror them appropriately, as I am only familiar with the civil rules.

In particular, I note an error in my draft below for proposal #2: 18 U.S.C. 3006A (the Criminal Justice Act) would of course come under the FRCrP, not the FRCvP, so the FRCvP rule should refer only to 28 U.S.C. 1915 (the IFP statute).

Sincerely,
Sai

On Mon, Sep 7, 2015 at 10:02 AM, Sai <dccc@s.ai> wrote:
> Dear Committee on Rules of Practice and Procedure -
>
> I hereby propose the following four changes to the Federal Rules of
> Civil Procedure.
>
>
> 1. FRCP 5.2: amend (a)(1) to read as follows:
> (1) any part of the social-security number and taxpayer-identification
number
>
> The last four digits of an SSN, prior to a recent change by the SSA,
> is the only part that is random. The first digits can be strongly
> derived from knowing the person's place and date of birth.
>
> Disclosure of the last four digits of an SSN effectively gives away
> all of the private information, serves no public purpose in
> understanding the litigation, and should therefore be sealed by
> default (absent a court order to the contrary, as already provided for
> by FRCP 5.2).
>
> See, e.g.:
> Alessandro Acquisti and Ralph Gross, Predicting Social Security
> numbers from public data, DOI 10.1073/pnas.0904891106, PNAS July 7,
> 2009 vol. 106 no. 27 10975-10980 and supplement
> https://www.pnas.org/content/106/27/10975.full.pdf
> http://www.heinz.cmu.edu/~acquisti/ssnstudy/
>
> EPIC: Social Security Numbers (Nov. 13, 2014)
> https://epic.org/privacy/ssn/
>
> Latanya Sweeney, SSNwatch, Harvard Data Privacy Lab; see also demo
> http://latanyasweeney.org/work/ssnwatch.html
> http://dataprivacylab.org/dataprivacy/projects/ssnwatch/index.html
>
>
> 2. FRCP 5.2: add a new paragraph, to read as follows:
>
> (i) Any affidavit made in support of a motion under 28 U.S.C. 1915 or

> 18 U.S.C. 3006A shall be filed under seal and reviewed ex parte. Upon
> a motion showing good cause, notice to the affiant and all others
> whose information is to be disclosed, and opportunity for the same to
> contest the motion, the court may order that such affidavits be
> (1) disclosed to other parties under an appropriate protective order; or
> (2) unsealed in appropriately redacted form.
>
> For extensive argument, please see the petition and amicus briefs in
> my petition for certiorari regarding this issue: http://s.ai/ifp
>
>
> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
>
> Rule 7.2. Authorities to Be Provided to Pro Se Litigants
> In cases involving a pro se litigant, counsel shall, when serving a
> memorandum of law (or other submissions to the Court), provide the pro
> se litigant (but not other counsel or the Court) with copies of cases
> and other authorities cited therein that are unpublished or reported
> exclusively on computerized databases. Upon request, counsel shall
> provide the pro se litigant with copies of such unpublished cases and
> other authorities as are cited in a decision of the Court and were not
> previously cited by any party.
>
> See:
> Local Civil Rule of the Southern and Eastern Districts of New York 7.2
> Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009)
>
>
> 4. Add new subparagraph to rule 5(d)(3):
> (1) A court may not require a pro se litigant to file any paper by
> non-electronic means solely because of the litigant's pro se status.
>
> Pro se litigants should still be permitted (not required) to file by
> paper, to ensure that those without access to CM/ECF or familiarity
> with adequate technology have access to the courts.
>
> Pro se litigants may of course be required to register with CM/ECF in
> the same manner as an attorney, including signing appropriate
> declarations or passing the same CM/ECF training or testing required
> of attorneys.
>
> However, courts should not prohibit pro se litigants from having
> CM/ECF access where represented parties would have it. Doing so
> imposes a disparate burden of time, expense, effort, processing
> delays, reduction in the visual quality of papers due to printing and
> scanning, removal of hyperlinks in papers, and reduction in ADA /
> Rehab Act accessibility.
>
>
>
> I request to be notified by email of any progress related to the four
> changes I have proposed above.
>
> Respectfully submitted,
> /s/ Sai

# TAB 7B.1

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: Access to CM/ECF by pro se litigants (15-CR-E)**

**DATE: March 23, 2016**

Robert M. Miller has written to suggest that pro se litigants be permitted to use the CM/ECF system on the same terms as litigants represented by attorneys. Mr. Miller states that denying pro se litigants (such as himself) the right to e-file unjustly burdens them relative to their legal adversaries. These burdens are especially unfair, he argues, because pro se litigants already suffer from a lack of experience and resources.

Mr. Miller does not limit his suggestion to civil cases, and he refers to his experience in both the district and appellate courts. Accordingly his suggestion has been referred to the Appellate, Civil, and Criminal Rules Committees.

Because the proposed revision of Rule 49 contains a detailed treatment of filing and service by pro se defendants, the reporters recommend that Mr. Miller's arguments be considered in connection with the discussion of Rule 49.

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# TAB 7B.2

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Suggested Rule Change - ECF for Pro Se Litigants
Rob Miller
to:
Rules_Support
10/26/2015 02:26 PM
Hide Details
From: "Rob Miller" <robmiller44@hotmail.com>
To: <Rules_Support@ao.uscourts.gov>

15-AP-H
15-CV-JJ
15-CR-E

To whom it may concern:

I have been a pro se litigant in one district court and two US Courts of Appeals. In the U.S. District Court for Northern California and the U.S. Court of Appeals for the Ninth Circuit, I was permitted to use Electronic Case Filing for my lawsuit and appeal.

In a recent appeal to the U.S. Court of Appeals for the Federal Circuit, I discovered that pro se litigants are not permitted to e-file. Since I discovered this rule the day before my Notice of Appeal was due in Washington, DC, I forfeited my right to appeal.

I discovered today that I am not entitled to file using ECF in an appeal to the U.S. District Court for the Eastern District of Virginia. The rule was not prominent in the local rules or the pro se handbook, and I only learned about it by calling the Clerk's office. Later, I found one line in the rules regarding this restriction that was difficult to see. Oddly, this court allows pro se litigants to receive service of documents through PACER.

Whether or not the courts have reasons from experience to believe pro se litigants have difficulty with electronic filing, litigants such as myself have been unjustly burdened relative to our legal adversaries based not on our own failures, but with failures by other pro se litigants. The US Courts could look to the Ninth Circuit's experiment in permitting all litigants to e-file to see what the results are. In any case, clerks in the Ninth Circuit have informed me that even experienced attorneys and paralegals make errors in ECF. Pro se litigants should not be held to a higher standard than professional litigants, but have their errors excused or unexcused consistent with the courts' approach to professional litigants.

These rules have an adverse impact on pro se litigants relative to their adversaries. While the defendants, government officials, can use ECF from the convenience of their home or office right up until a midnight deadline, I must submit documents through the mail at great expense or drop the documents at the court house in person, taking time off work and dealing with heavy traffic and scarce parking.

The rules of the courts must ensure that no party is disadvantaged relative to another. Pro se litigants already suffer from a lack of experience and resources. These rules only further compound the disadvantage.

Sincerely,

Robert M. Miller, Ph.D.
4094 Majestic Lane
#278
Fairfax, VA 22033

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# TAB 7C.1

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: 2255 Rule 5(d) (15-CR-F)**

**DATE: March 21, 2016**

In October of 2015, Judge Richard Wesley of the Second Circuit wrote to the Chair of the Civil Rules Committee expressing concern about a division among district courts in interpreting Rule 5(d) of the Rules Governing § 2255 Proceedings. The letter (Tab 7C.2) was forwarded to the Criminal Rules Committee, which has traditionally handled amendments to the 2254 and 2255 Rules.

Judge Wesley's letter states his view that the text of Rule 5(d), along with its accompanying Committee Note, was intended to give federal prisoners the right to file a reply if the government files a response to their applications under § 2255. He notes, however, that some district courts have held otherwise. The question before the Committee is whether a subcommittee should be appointed to consider this issue.

## I. The history of Rule 5(d) and the current dispute

Rule 5 of the 2255 Rules presently reads:

**Rule 5. The Answer and the Reply**

**(a) When Required.** The respondent is not required to answer the motion unless a judge so orders.

**(b) Contents.** The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.

**(c) Records of Prior Proceedings.** If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings.

**(d) Reply.** The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

Section (d) of Rule 5 of the 2255 Rules was added in 2004, along with an identical provision in Rule 5 of the 2254 Rules (there lettered Rule 5(e)). The Committee Notes to both of these 2004 Amendments are also identical, and read, in relevant part:

> Finally, revised Rule 5(d) adopts the practice in some jurisdictions giving the movant an opportunity to file a reply to the respondent's answer.

> Rather than using terms such as "traverse," *see* 28 U.S.C. § 2248, to identify the movant's response to the answer, the rule uses the more general term "reply." The Rule prescribes that the court set the time for such responses, and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

These provisions were first proposed as amendments to the 2254 and 2255 Rules (hereinafter "habeas rules") in 2002, by a Subcommittee of the Criminal Rules Committee chaired by Judge Trager. According to the minutes of the April 2002 meeting, the additional language was intended to provide the prisoner with the opportunity to respond to defenses such as the statute of limitations raised by the government in its answer, return, or response. The new language was adopted unanimously by the Committee, by a vote of 12 to 0. According to the Standing Committee minutes, Judge Trager attended and explained that "Rule 5 of both sets of rules would be amended to give the petitioner or moving party *a right* to reply to the government's answer or other pleading," which he said most judges allow already (emphasis added). The Standing Committee unanimously approved these provisions (along with all of the other changes to the habeas rules proposed at the same time). After publication for public comment, the proposed changes to the habeas rules were approved by the Advisory Committee, the Standing Committee, and the Supreme Court; they took effect on December 1, 2004.

As Judge Wesley's letter explains, the lower courts are divided on their interpretation of Rule 5(d). Although some courts read the new language as creating a right to file a reply when the government files a response (as was apparently intended by the various Committees), other courts have concluded that the rule permits a court to exercise its discretion to prohibit an applicant from filing a reply to the government's response. At least one of these cases appears to rely on circuit authority interpreting the pre-2004 version of the rule.

## II. How the text might be clarified

Since the current language has generated a conflict among the lower courts, we took the liberty of asking the style consultants how the text could be clarified if the Committee agrees with Judge Wesley that the moving party in a 2255 action should have a right to file a response. The consultants' first response stated:

> The word "may" means that the party is permitted to do it. That's what "may" means. Lower courts that require the court's permission are acting contrary to what the rule says. What's more, changing this "may" has implications for other uses of "may." Now do we have to worry that all those other uses of "may" without some kind of intensifier don't really grant permission?

We agree with the consultants that the word "may" is used to create a right in other Criminal Rules.[1] But as Judge Wesley's letter explains, in this particular context some lower courts have

[1] For example, Rule 30(a) states: "Any party may request in writing that the court instruct the jury on the law as specified in the request," and Rule 32(f) states: "Within 14 days after being served with a

concluded that the prisoner does *not* have such a right. Accordingly, we pressed the consultants to suggest language that would clarify the Rule.

Although the stylists continued to express a strong preference for making no change in the text of Rule 5(d), if one is to be made they suggested this language:

> **(d) Reply.** The moving party may submit a reply to the respondent's answer or other pleading ~~within a time fixed by the judge~~. Although the judge's permission is not required, the judge may fix a time for the reply.

The style consultants also expressed concern that the Rule did not contain a time period for the filing of a reply.

## III. Recommendation

We recommend the appointment of a Subcommittee to consider the issue raised by Judge Wesley. There is a division in the courts over the meaning of a 2004 amendment to this rule, and a number of potential responses to that division, some of which might include an amendment to the text of the rule.

A Subcommittee could consider also whether any decision to change or clarify the 2255 rule would also warrant a similar change or clarification to the 2254 rule.[2]

---

copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations."

[2] In in connection with the 2254 version of this rule, Professors Hertz and Leibman note in their treatise that in some cases:

> the state's answer may raise what on their face appear to be legally sufficient affirmative defenses to the petition or to individual claims or it may be accompanied by a brief, or a motion to dismiss . . . that under the circumstances, seems likely to induce the court to dismiss the petition or claim without further proceedings. In these circumstances, the petitioner may find it necessary to file a timely "Reply" in order to explain why the state's defense are not meritorious.

Randy Hertz & James S. Leibman, FEDERAL HABEAS CORPUS, §17.2 at notes 10-13 (7th ed.)

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# TAB 7C.2

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

15-CR-F

RICHARD C. WESLEY
UNITED STATES CIRCUIT JUDGE

585-243-7910
FAX 585-243-7915

October 26, 2015

Honorable John D. Bates
Chair, Advisory Committee on Civil Rules
United States District Court
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I recently had a case that called into question the interpretation of Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts. Under this rule, it is unclear whether a 2255 petitioner has an absolute right to file a reply to a respondent's answer.

The full text of Rule 5 reads as follows (emphasis added):

> RULE 5. THE ANSWER AND THE REPLY
>
> (a) When Required. The respondent is not required to answer the motion unless a judge so orders.
>
> (b) Contents. The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.
>
> (c) Records of Prior Proceedings. If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings.
>
> **(d) Reply. The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.**

One plausible reading of subsection (d) is that a petitioner may submit a reply, provided that he or she wishes to do so. Another plausible reading is that a petitioner may submit a

LIVINGSTON COUNTY GOVERNMENT CENTER
6 COURT STREET
GENESEO, NEW YORK 14454-1030

reply, provided that the judge allows the petitioner to do so. The ambiguity appears rooted in differing interpretations of the word "may." "May" could mean that a petitioner is permitted—but not required—to file a reply. Alternatively, "may" could mean that a petitioner is allowed—if granted permission by the court—to file a reply.

The federal district courts that have encountered this ambiguity are presently divided on its resolution. Several courts have concluded that Rule 5(d) affords a 2255 petitioner the absolute right to file a reply. *See, e.g.*, *United States v. Hosseini*, 2013 U.S. Dist. LEXIS 89148, at *2 (N.D. Ill. June 25, 2013) ("In accordance with Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts, [the petitioner] is entitled to file a reply to the government's detailed response if he desires to do so."); *United States v. Andrews*, 2012 U.S. Dist. LEXIS 179244, at *6 (N.D. Ill. Dec. 19, 2012) ("It is reasonable to read [Rule 5(d)] as requiring the district court to provide the petitioner with the opportunity to reply. If that is the correct reading, we may have erred in ruling on the § 2255 motion without considering a reply").

Other courts have concluded that a reply is not required under Rule 5(d). *See, e.g.*, *Simmons v. United States*, No. 12 Civ. 04693 (ILG), 2014 WL 4628700, at *1 (E.D.N.Y. Sept. 15, 2014) ("[Rule 5(d)]'s plain language does not mandate a reply."); *Terrell v. United States*, No. 3:12-cv-233-FDW, No. 3:09-cr-172-FDW-1, 2014 WL 1203286, at *1 (E.D.N.C. Mar. 24, 2014) ("There is . . . no absolute right for a Petitioner to file a Reply to the Government's Response in an action brought under § 2255."). At least some of these courts hold that whether a 2255 petitioner may file a reply depends on the circumstances or is a matter of discretion for the judge. *See, e.g.*, *United States v. Crittenton*, Crim. Act. No. 03-349-2, Civ. Act. No. 07-3770, 2008 WL 343106, at *2 (E.D. Pa. Feb. 7, 2008) ("No court has held that Rule 5(d) entitles a petitioner to submit a reply under all circumstances."); *United States v. Martinez*, Crim. No. 11-131(2) (SRN/AJB), 2013 WL 3995385, at *2 (D. Minn. Aug. 5, 2013) ("[W]hether to allow the moving party to file a reply brief is within the Court's discretion.").

It is my view that Rule 5(d) entitles a petitioner to submit a reply regardless of a court's express permission. The confusion appears to be fueled at least in part by the portion of Rule 5(d) providing that the court will set a time limit for submission of the reply. The Advisory Committee Notes to the 2004 Amendment, however, help clarify that the court's discretion to set time limits does not grant the court discretion to deny entirely a 2255 petitioner's right to reply:

> [R]evised Rule 5(d) adopts the practice in some jurisdictions *giving the movant an opportunity to file a reply* to the respondent's answer. Rather than using terms such as "traverse," *see* 28 U.S.C. Sec. 2248, to identify the movant's response to the answer, the rule uses the more general term "reply." The Rule prescribes that the court set the time for such responses, and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

These Notes support a reading of Rule 5(d) that permits (but does not require) a petitioner to reply. Furthermore, the language of Rule 5(d) is strikingly similar to that of Federal Rule of Appellate Procedure 28(c), which provides that "[t]he appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed." Fed. R. App. P. 28(c). The language "appellant may file a brief in reply," which certainly entitles an appellant to reply, is parallel to "[t]he moving party may submit a reply" in Rule 5(d).

The broader jurisprudential question underlying this issue is whether parties to a 2255 proceeding are entitled to a full round of briefing. By denying a 2255 petitioner the right to reply, a court essentially assumes that nothing the petitioner might raise in reply could possibly change the outcome of the 2255 proceeding. This does not strike me as the Committee's intended result.

I raise this matter with you for the Committee's consideration.

Sincerely,

Richard C. Wesley
United States Circuit Judge

Cc: Honorable Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
Professor Edward H. Cooper, Reporter, Advisory Committee on Civil Rules
Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules

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# TAB 7D.1

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: 12(b)(3)(B)(v) (16-CR-A)**

**DATE: March 7, 2016**

James M. Burnham proposes that Rule 12(b)(3)(B)(v) be amended to make it clear that the standard for dismissal of a criminal indictment for failure to state an offense is the same as the standard for dismissal of a civil complaint under Federal Rule of Civil Procedure 12(b)(6).

Mr. Burnham argues that judges who routinely dismiss civil complaints for failure to state a claim seldom dismiss indictments for failure to state an offense, and he argues that this application of Rule 12 contributes to serious problems in the criminal justice system:

> The judiciary's collective failure to apply the dismissal standard in criminal proceedings that is a staple of civil practice plays a central role in the ever-expanding, vague nature of federal criminal law because it largely eliminates the possibility of purely legal judicial opinions construing criminal statutes in the context of a discrete set of assumed facts, and because it leaves appellate courts to articulate the boundaries of criminal law in post-trial appeals where rejecting the government's legal theory means overturning a jury verdict and erasing weeks or months of judicial effort.

Burnham's suggestion is to revise Rule 12(b)(3)(B)(v)–which was recently amended as part of the comprehensive revision of Rule 12–to refer to "failure to state an offense upon which a conviction could be obtained." He has provided a law review article that more fully develops the basis for his proposal.

This issue is on the agenda for initial discussion of the question whether to appoint a subcommittee to study the proposal.

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# TAB 7D.2

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James M. Burnham
622 South Saint Asaph St.
Alexandria, Virginia 22314

Direct Number: (602) 501-5469
jamesmburnham@gmail.com

February 1, 2016

VIA FIRST CLASS MAIL

The Honorable Donald W. Molloy
Chair, Advisory Committee on Criminal Rules
United States District Court
Russell E. Smith Federal Building
201 East Broadway Street, Room 360
Missoula, MT 59802

Re: Proposed Amendment to Federal Criminal Rule 12(b)(3)(B)(v)

Dear Judge Molloy:

I am an attorney in private practice in Washington, D.C., and am writing solely on my own behalf to propose an alteration to Federal Rule of Criminal Procedure 12(b)(3)(B)(v)—governing dismissal of an indictment for failure to state an offense—to clarify that the standard for dismissal of a criminal indictment is meant to be consistent with the standard for dismissal of a civil complaint under Federal Rule of Civil Procedure 12(b)(6). In support of this suggestion, I have enclosed a short law review article that provides a detailed analysis of the criminal and civil rules for dismissal, as well as the seemingly mistaken differential in how the two rules are construed. For your convenience, I have included five bound reprints, as well as one copy on letter paper.

The current Criminal Rule 12(b)(3)(B)(v) is phrased in language almost identical to the language in Civil Rule 12(b)(6). The former provides for dismissal of an indictment for "failure to state an offense," while the latter provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." But despite the textual similarity of these rules, courts have adopted wildly different constructions of them. In the criminal context, courts virtually never dismiss indictments—no matter how legally unsound or adventurous the Government's legal theory—while courts routinely dismiss complaints that stretch the law beyond its limits. As the Department of Justice's Criminal Resource Manual explains, under current law "indictments that, when read in their entirety, inform the defendant of all elements of the offense

are generally sufficient, even if lacking the factual circumstances of the crime charged."[1] The standard in the civil context is much higher, with courts requiring dismissal of any complaint that "does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory."[2]

As my enclosed article explains, this unexplained distinction has broad consequences for the soundness and fairness of the criminal justice system. In the civil context, complex legal issues are generally resolved through motions to dismiss and appellate opinions reviewing district court orders granting the same. In the criminal arena, by contrast, virtually all litigation over the legal soundness of prosecutorial theories occurs after a lengthy, expensive trial that has consumed immense judicial resources—a point at which, as Judge Kozinski has explained, "the judicial instinct" is "to preserve the jury's verdict."[3] That puts pressure on courts to endorse creative theories of criminality that would likely meet greater skepticism if considered in the context of pleadings-based dismissals before such a tremendous investment of time and energy. And that, in turn, contributes to the increasingly serious problem of "overcriminalization and excessive punishment in the U.S. Code."[4]

I therefore strongly encourage the Committee to consider altering Criminal Rule 12(b)(3)(B)(v) to make clear that it holds criminal indictments to the same legal standard for dismissal to which Civil Rule 12(b)(6) currently holds civil complaints. This change could be accomplished through a textual alteration to Criminal Rule 12(b)(3)(B)(v) to make it mirror its civil counterpart even more closely—such as by expanding the phrase "failure to state an offense" to say "failure to state an offense upon which a conviction can be obtained." Or it could be done by simply publishing a Committee Note to the current Criminal Rule which explains that the Criminal Rule's text intentionally mirrors its Civil Rule analogue, thus clarifying that the Criminal Rule imposes the same pleading requirements on indictments that the Civil Rule imposes on complaints. For the reasons I give in the attached article, I believe such an amendment would result in a more fair, just, and lawful criminal justice system.

Please let me know if you would like to discuss my proposal further, or if there is any other information I can provide to be useful to the Committee. I sincerely appreciate your consideration of this suggestion.

---

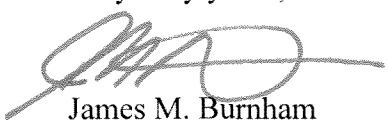
[1] Criminal Resource Manual § 221, available at http://goo.gl/4KBxey.

[2] *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013).

[3] Panel on Evidence Disclosure in Criminal Cases, National Association of Criminal Defense Lawyers (Nov. 17, 2014) (written transcript at 42:54), available at http://goo.gl/xorkO0.

[4] *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J. dissenting).

Very truly yours,



James M. Burnham

cc: Professor Sara Sun Beale
Reporter, Advisory Committee on Criminal Rules
Charles L. B. Lowndes Professor
Duke Law School
210 Science Drive
Durham, NC 27708-0360

Professor Nancy J. King
Associate Reporter, Advisory Committee on Criminal Rules
Vanderbilt University Law School
131 21st Avenue South, Room 248
Nashville, TN 37203-1181

# WHY DON'T COURTS DISMISS INDICTMENTS?

## A SIMPLE SUGGESTION FOR MAKING FEDERAL CRIMINAL LAW A LITTLE LESS LAWLESS

*James M. Burnham*

MANY LAWYERS ARE FAMILIAR with the problem of overbroad, vague federal criminal laws that ensnare unwary defendants and perplex the lawyers who defend them. It is a recurring theme in academic literature and it featured prominently in Justice Kagan's recent dissent in *Yates v. United States*, where she described "the real issue" in the case as being "overcriminalization and excessive punishment in the U.S. Code."[1] Practitioners of all ideological stripes recognize the problem, with the National Association of Criminal Defense Lawyers and the Heritage Foundation decrying it with equal urgency.[2] Scholars have

*James M. Burnham is an associate in the Washington, DC office of Jones Day. He speaks here on behalf of nobody but himself.*

[1] *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J. dissenting); *see also, e.g.*, Paul Larkin, *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 Hofstra L. Rev. 745 (2014); Glenn Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, 113 Colum. L. Rev. Sidebar 102 (July 8, 2013).

[2] *See* Criminal Defense Issues, *Overcriminalization*, National Association of Criminal

proposed numerous solutions, mostly variations on Professor William Stuntz's observation that the "last, and probably best, solution is to increase judicial power over criminal law."[3] Professor Stuntz and many who agree with him often jump directly to the Constitution as the solution to this problem, specifically the Due Process Clause and an emphasis on fair notice as a way to narrow vaguely worded statutes.

That is a good idea, but it overlooks a tool for combating overcriminalization that is, perhaps, simpler and more readily available than the heavy artillery of constitutional law – making it easier for criminal defendants to secure a legal ruling before trial on whether their alleged conduct actually constitutes a federal crime. Implementing this basic reform would require nothing more than applying the Federal Rules of Criminal Procedure, which already contain provisions for dismissing indictments that are materially identical to the familiar 12(b)(6) standard and the rules for dismissing civil complaints. Yet the same federal judges who routinely dismiss complaints for failure to state a claim virtually never dismiss indictments for failure to state an offense. The judiciary's collective failure to apply the dismissal standard in criminal proceedings that is a staple of civil practice plays a central role in the ever-expanding, vague nature of federal criminal law because it largely eliminates the possibility of purely legal judicial opinions construing criminal statutes in the context of a discrete set of assumed facts, and because it leaves appellate courts to articulate the boundaries of criminal law in post-trial appeals where rejecting the government's legal theory means overturning a jury verdict and erasing weeks or months of judicial effort.

Courts should eliminate this anomalous difference between criminal and civil procedure. There is no good reason why federal prosecutors cannot abide by the same pleading standards as civil

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Defense Lawyers (criticizing overcriminalization and gathering anti-overcriminalization scholarship), available at www.nacdl.org/overcrim/ (last checked June 29, 2015); *Overcriminalization*, The Heritage Foundation (same), available at www.heritage.org/issues/legal/overcriminalization (last checked June 29, 2015).

[3] William J. Stunz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 508 (2001).

plaintiffs. That is what the rules already provide. And holding prosecutors to that reasonable standard would go a long way toward making federal criminal law a little less lawless.

## I.

Unlike civil cases, which generally involve substantial motions to dismiss – and, should those fail, motions for summary judgment – the typical criminal prosecution does not prompt legal rulings on the scope of the underlying criminal law until the trial is basically over. Most federal criminal cases begin with a grand jury returning an indictment at the behest of a federal prosecutor. Grand juries operate without the participation of defense counsel and without any meaningful judicial supervision. Their job is to assess facts, not law. And because prosecutors instruct grand juries on the law, returning an indictment has nothing to do with the legal soundness of any given prosecutorial theory. There is thus no independent oversight of the government's legal theory at the first stage in the case.

The criminal rules permit a defendant to move to dismiss an indictment for "failure to state an offense,"[4] but as I'll explain shortly, the courts have gutted this rule and district courts deny these motions as a matter of course. Nor does the criminal law contain any mechanism akin to summary judgment. A defendant thus cannot meaningfully challenge the government's legal theory until the close of the government's case at trial – when the defendant can move to dismiss the charges for insufficient evidence by arguing that the government has proven conduct which is not actually criminal. But the Double Jeopardy Clause bars the government from appealing a mid-trial dismissal for insufficient evidence,[5] and district courts are un-

[4] Fed. R. Crim. P. 12(b)(3)(B)(v).

[5] *See United States v. Scott*, 437 U.S. 82, 97 (1978) ("Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will be barred [ ] when 'it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.'" (quotation omitted)).

derstandably reluctant to render non-appealable legal rulings. So this, too, practically never happens. (Although even when it does, the defendant has already undergone months of motions practice and the bulk of an extraordinarily stressful criminal trial that has consumed immense governmental resources and, for defendants of means, likely depleted the defendant's bank account.)

At that point, the defendant presents his or her affirmative case, the government presents its rebuttal case, and it is time for the district court to instruct the jury. This is typically the first time the district court meaningfully engages with the government's legal theory and any limitations the law might impose. But here, even if the district court is skeptical of the government's legal theory, all the court does is craft instructions that attempt to accurately explain the law. The court then gives those instructions to the jury and hopes that the twelve jurors can figure it all out.

Should the jury convict, the defendant can once again request dismissal of the charges for insufficient evidence. Dismissals in this posture – while still exceedingly rare – are somewhat more common because the government can ask the Court of Appeals to reinstate the jury's verdict. But the standard for such a dismissal is high. The district court must conclude on the basis of an extensive trial transcript that no reasonable juror could have convicted the defendant beyond a reasonable doubt under a proper understanding of federal law.[6] Complex trial records do not, of course, present legal issues with the same clarity and concision as criminal charging documents (or civil complaints).

Only after all this has happened, along with the criminal sentencing required for a final judgment, do appellate courts typically get a look at the underlying criminal statute and the government's theory about what that statute means. This is an extremely cumbersome posture in which to review pure legal questions. Rather than read a

[6] *United States v. Gagliardi*, 506 F.3d 140, 149 (2d Cir. 2007) ("A defendant challenging the sufficiency of trial evidence bears a heavy burden, and the reviewing court must view the evidence presented in the light most favorable to the government and draw all reasonable inferences in the government's favor." (quotations omitted)).

single document collecting the allegations and then reach a legal ruling, the appellate court must consider the trial record as a whole and must find itself unable to cobble together enough evidence for any reasonable juror to find criminality.

## II.

The lack of any effective mechanism to decide legal questions early in criminal prosecutions is a serious problem that plays a central role in the seemingly never-ending expansion of federal criminal law. It is, for one thing, one of the reasons criminal laws are so vague and ill-defined. When courts review motions to dismiss or motions for summary judgment, they are able to issue legal rulings on the basis of a discrete set of assumed or undisputed facts. By limiting the universe of facts, such motions make it relatively easy for appellate judges to feel confident that they understand the factual predicate for the legal rule they are adopting. They can thus focus entirely on articulating a clear and dispositive legal rule.

When appellate courts are reviewing a lengthy trial record, by contrast, it requires clearing away substantially more underbrush to divine the clear principle separating legality from criminality. The court must referee fights about what the evidence showed, who said what, and what inferences the evidence supports. Resolving these disputes about multi-thousand-page records is a daunting task. It is also a heavily factual task – rather than a legal one – which takes place against a standard of review in which the defendant "bears a heavy burden."[7] The combination of scouring a lengthy record to determine whether anything would permit a rational juror to find a crime and surmounting the demanding legal standard facing convicted defendants likely creates a general attitude in the judiciary that sufficiency challenges are far-fetched claims that a small amount of evidence and a plausible legal theory will invariably defeat. In other words, as Judge Kozinski has noted in a different context, "all of the momentum of the process is to uphold the conviction."[8]

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[7] *United States v. Gagliardi*, 506 F.3d 140, 149 (2d Cir. 2007).

[8] Panel on Evidence Disclosure in Criminal Cases, National Association of Criminal

When appellate judges review a motion to dismiss, by contrast, their energy is focused on the contested legal rule, with a de novo standard of review that is neutral between the parties. That posture likely leads appellate judges to view motion-to-dismiss appeals as more plausible challenges where either side could easily prevail.

This dynamic also puts pressure on appellate courts to endorse creative legal theories advanced by zealous prosecutors. Because district courts essentially never dismiss criminal cases on the pleadings, appellate courts are stuck reviewing dispositive legal questions after a lengthy, expensive judicial process culminating in a resource-intensive trial and sentencing. Unlike appeals from a dismissed complaint or a grant of summary judgment, reversing in a criminal case usually means overturning a jury verdict and nullifying a trial. Needless to say, judges in that position are strongly predisposed to affirm.[9] And that gives appellate courts another reason to endorse whatever expansion of law the government successfully pressed in the court below, or to at least avoid vacating the conviction using an avoidance doctrine (like "harmless error") that would not be available in the motion to dismiss context.

It also tempts appellate courts to hide behind an especially troubling form of what Judge Posner calls "deference to lower-level decision makers."[10] Because practically every criminal appeal follows a conviction, the government invariably urges the appellate court to

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Defense Lawyers (Nov. 17, 2014) (written transcript at 42:54), available at www.c-span.org/video/?322781-1/discussion-fair-disclosure-criminal-trials.

[9] To again quote Judge Kozinski:

> You have then had an expensive trial, you spent judicial time, you have taken 12 or 14 people from the community depending on how large the jury panel is and kept them there for days and sometimes weeks on end, and they have come up with a judgment that this person is guilty. And all of the incentives we have in our system, all of the rules that we have before conviction that presumes innocence, gives rise to the defense, all those things are reversed. The inertia is the judicial instinct to preserve the jury's verdict . . . .

*Id.*

[10] Richard A. Posner, *Reflections on Judging*, at p. 86 (Harvard College Press 2013).

respect the jury's unanimous verdict. Appellate courts sometimes accept the invitation, even when the defendant's objections are purely legal and plainly substantial.[11] That is disturbing for numerous reasons, including the fact that district courts are emphatic in telling jurors that they are not permitted to question the legal soundness of the judge's instructions or deviate from the law as the judge explains it.[12] Appellate courts that adopt this approach are thus effectively deferring to laypeople on legal judgments that those laypeople are not even permitted, let alone qualified, to make. In a very real sense, this dynamic permits the jury to pass the buck to the courts to decide the law (we didn't want to convict him but the law required it!), while the courts pass the buck back to the jury to decide guilt (we wouldn't have convicted him but the jury's verdict deserves respect!). The end result is an illegal and unjust outcome for which nobody claims responsibility.

Related to that temptation is the difficulty some appellate judges may have in blessing conduct that they find distasteful as being non-criminal. It is one thing to say that certain conduct is non-criminal when considering the question *ex ante* in the abstract context of assumed allegations. It is entirely different to make that judgment in the messy context of proven facts and a unanimous verdict. When reviewing a lengthy record documenting a criminal defendant's alleged misdeeds, it is surely more psychologically difficult to say that the proven, repugnant conduct is not criminal, however flawed the underlying legal theory.

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[11] For example, in rejecting legal challenges to the government's conviction in the case of former Alabama Governor Don Siegelman, the Eleventh Circuit began by discussing "the 'sword and buckler' of a jury verdict" and by extolling "the virtue of our jury system" as being "that it most often gets it right," *United States v. Siegelman*, 640 F.3d 1159, 1164 (11th Cir. 2011) – a point that elides the legal question of precisely *what* the system is getting "right." It is no defense of the current regime to say that it excels at accurately convicting defendants of conduct that is not illegal.

[12] *United States v. Wunder*, 919 F.2d 34, 36 (6th Cir. 1990) ("The province of the court in a jury trial is to decide issues of law, instruct the jury on the law, and let the jury decide the facts.").

Finally, by leaving challenges to prosecutorial legal theories for the end of the case, the current system gives basically unreviewable power to federal prosecutors to subject targeted individuals to full-blown criminal trials. The Supreme Court has recognized the "potential expense" to civil defendants when legally flawed complaints are sustained,[13] but the costs are astronomically higher in the criminal context. Individuals who are indicted on incorrect legal theories are innocent people. Dragging those innocent people through a lengthy and traumatic criminal trial imposes significant legal expenses, incalculable emotional hardship, and severe reputational injury, in addition to making substantial demands on the judiciary. In cases where the government has overreached on the law, these expenditures are unwarranted and wasteful. Courts ought to have a realistic mechanism for saying so at the outset.

## III.

Given this system's evident unfairness, it is perhaps unsurprising that it is not what the Federal Rules of Criminal Procedure actually provide. To the contrary, all signs indicate that the criminal rules for dismissing indictments were intended to be interpreted compatibly with the civil rules for dismissing complaints. The criminal rule governing indictments requires that indictments contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged."[14] That language is very similar to the civil rule on complaints: "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."[15] The rules providing for dismissal of indictments and complaints are similarly synched, with the criminal rule providing that indictments can be dismissed for "failure to state an offense,"[16] while the civil rule provides that complaints can be dismissed for "failure to state a claim upon which relief can

[13] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

[14] Fed. R. Crim. P. 7(c)(1).

[15] Fed. R. Civ. P. 8(a)(2).

[16] Fed. R. Crim. P. 12(b)(3)(B)(v).

be granted."[17] Nothing in the advisory notes suggests that these criminal rules are supposed to be less potent than their civil counterparts.

Despite the textual and structural similarity between the two sets of rules, the courts have given them very different constructions. In the civil context, the Supreme Court has insisted on meaningful pleading standards that keep legally unsound civil litigation from wasting everyone's time. This is true on two fronts – testing whether a plaintiff's legal theory is sound and testing whether a plaintiff's factual allegations are plausible. As courts have explained, "[d]ismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory."[18] Courts thus routinely dismiss complaints when the facts alleged – however troubling or sinister they sound – do not "contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory."[19] In other words, the allegations must add up to a cognizable cause of action. If they don't, the court dismisses the complaint.

And on the factual plausibility front, the Supreme Court has held that complaints must be dismissed if their factual allegations do not tell a plausible story of liability under recognized legal standards. Civil Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[20] A "pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do," nor "does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement."[21] Civil complaints must "contain sufficient factual matter" to plausibly permit "the reasonable inference that the defendant is liable for the misconduct alleged."[22] This standard requires district courts to read and digest the

[17] Fed. R. Civ. P. 12(b)(6).

[18] *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir. 2013).

[19] *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007).

[20] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[21] *Id.* (quotations omitted).

[22] *Id.*

allegations in a complaint, unpack the complainant's assertions, and determine whether the plaintiff's story is plausible: "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief."[23]

Criminal practice is very different. The lower courts have adopted an extremely low standard for sustaining an indictment, holding that "[a]n indictment is sufficient if it states each of the essential elements of the offense."[24] Indictments "need only provide some means of pinning down the specific conduct at issue," and "in determining whether an indictment provides sufficient information to enable the preparation of a defense, the presence or absence of any particular fact need not be dispositive of the issue."[25] The circuit and district courts have thus "consistently upheld indictments that do little more than [] track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime."[26] Or as the Department of Justice's Criminal Resource Manual puts it, "indictments that, when read in their entirety, inform the defendant of all elements of the offense are generally sufficient, even if lacking the factual circumstances of the crime charged."[27]

It is difficult to imagine a lower standard than merely tracking the language of the statute, noting the venue, and providing an approximate time period for the alleged offense. That standard means courts do not review or consider the legal adequacy of the factual allegations, *i.e.*, whether factual allegations of A, B, and C actually amount to a federal crime. It also means that courts do not consider the completeness or plausibility of the government's allegations, *i.e.*, whether factual allegations A, B, and C tell a plausible account that constitutes the charged crime. On both fronts, the bar is much

[23] *Id.* at 679.

[24] *United States v. Lockhart*, 382 F.3d 447 (4th Cir. 2004).

[25] *United States v. Fassnacht*, 332 F.3d 440, 445 (7th Cir. 2003).

[26] *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999).

[27] Criminal Resource Manual § 221, available at www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00221.htm.

lower than in the civil arena. And consistent with these divergent standards, the lower courts virtually never dismiss criminal indictments for failure to state an offense, while they routinely dismiss civil complaints for failure to state a claim.

## IV.

Fortunately, fixing this problem is not much harder than identifying it: Courts should simply begin interpreting the federal criminal rules in accordance with their text, and in harmony with their civil counterparts. Realigning the criminal rules in this direction accords with the few Supreme Court cases to address the issue. The leading Supreme Court decision on challenging indictments makes clear that indictments must include enough detail to factually state a criminal act. The Court explained that indictments must "fairly inform[ ] a defendant of the charge against which he must defend" and "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged."[28] Nothing in that decision precludes applying the 12(b)(6) standards to criminal indictments, either in testing the soundness of the government's legal theory or in assessing the plausibility of its factual allegations.

### *A.*

For the government's legal theory, the Supreme Court's leading decision requires the government to allege "a statement of the facts and circumstances." The lower courts could and should construe that passage as imposing the familiar requirement that civil plaintiffs must meet. That is, the courts should require prosecutors to make "allegations respecting all the material elements to sustain recovery under some viable legal theory."[29]

There is no good reason for protecting civil defendants (for whom money is at stake) from defending against legally flawed claims, while leaving criminal defendants (for whom life and liberty is at

[28] *Hamling v. United States*, 418 U.S. 87, 117-18 (1974).

[29] *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007).

stake) to fight it out before a jury despite a legally unsound prosecutorial theory. Most indictments will not involve novel applications of vague criminal statutes, such that this shift would not affect the bulk of indictments; there is not much gray about what constitutes bank robbery or drug possession. But for many areas of federal criminal law, the government has a long track record of pursuing aggressive, questionable legal theories that would present large targets for motions to dismiss.[30] Yet because such motions are essentially unavailable, criminal defendants are dragged through jury trials only to see their convictions eventually overturned for lack of a sound legal basis.

The government's recent misadventures with the limits of insider trading law provide an illustrative example. For instance, in one insider-trading prosecution, the district court denied the defendant's motion to dismiss the indictment, citing the low standard the government must meet.[31] Yet in the very next breath, the court held that "the sufficiency of the Indictment is an issue separate and apart from whether the Court will charge" the disputed element of

[30] Examples abound, including: (1) the government's claim that an individual transmitted online threats by posting violent raps on his Facebook page regardless of whether he was trying to threaten anyone, *see Elonis v. United States*, Case No. 13-983, Slip op. at 7 (June 1, 2015); (2) the government's accusation that a commercial fisherman violated the "anti-shredding" provision of Sarbanes-Oxley by throwing allegedly undersized grouper overboard to evade a civil fishing infraction, *Yates v. United States*, 135 S. Ct. 1074, 1079-81 (2015); and (3) the government's insistence that a Philadelphia woman violated the Chemical Weapons Convention Implementation Act – which implemented the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction – by putting chemicals on her neighbor's doorknob as part of an acrimonious love triangle involving the woman's husband, *see Bond v. United States*, 134 S. Ct. 2077, 2085 (2014). Each of these facially dubious legal theories not only reached a jury, but survived post-verdict review in the federal appellate courts.

[31] *See* Order, *United States v. Rajarengan Rajaratnam*, Case No. 13-cr-211, Dkt. 49, at p. 7 (S.D.N.Y. April 18, 2014) ("The Indictment tracks the language of the relevant statutes . . ., provides sufficient particulars to apprise defendant of the charges against him and avoid double jeopardy problems, and adequately alleges the essential elements of tippee liability . . . .").

the crimes to the jury.[32] The court eventually dismissed the charges against the defendant mid-trial for failure to satisfy that disputed element.[33] Had the court dismissed the indictment on this basis – rather than sustain it based on conclusory assertions that would never fly in the civil context – the court could have saved the parties and the judiciary the time, effort, and expense of a criminal trial.[34] And there is no telling how many criminal defendants have lost close legal disputes with the government that appellate courts would have decided differently if they were reviewing dismissed indictments rather than post-trial criminal convictions.

The refusal of district courts to meaningfully test prosecutors' pleadings also enables the government to take a case to trial on the theory that X establishes a crime, while freeing the appellate court to affirm despite concluding that the government actually needs to prove X+1 to establish a crime. The appellate court can avoid overturning the trial and jury verdict by simply finding enough evidence in the record for a rational juror to find X+1, while brushing aside any discrepancies in the jury instructions as harmless error. Were the appeal focused on the pleadings, by contrast, the appellate court would have to squarely decide whether the government's allegation of X established a criminal offense.[35]

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[32] *Id.*

[33] *See, e.g.*, Nate Raymond, *Two Counts Tossed in Rajaratnam Brother's Insider Trading Trial*, Reuters (July 2, 2014), available at goo.gl/EMVA2a.

[34] Other examples abound, such as the much-maligned prosecution of former presidential candidate John Edwards for supposed campaign-finance crimes. There, the district court acknowledged "some concerns with the prosecution's definition of 'for the purposes of influencing an election," but nonetheless refused to dismiss the indictment. James Hill, *Judge Denies John Edwards' Dismissal Motions*, ABC News (Oct. 27, 2011), available at goo.gl/39qL4w. The parties thus had to undergo a lengthy, costly trial built atop a seriously questionable legal theory about whether the charged conduct actually constituted a federal crime.

[35] For that same reason, courts could and should grant Motions for a Bill of Particulars under Federal Rule of Criminal Procedure 7(f) in order to flesh out the government's legal theory pretrial. Such orders require the government to detail its allegations with greater specificity, rather than permitting the government to rest on vague allegations and invocations of the statutory elements. By requiring more

*B.*

On the second strain of pleadings-based challenges – factual plausibility – the Supreme Court's dismissing-the-indictment decisions do not preclude courts from importing *Twombly* and *Iqbal* into the criminal sphere. To be sure, the Supreme Court's leading dismissing-the-indictment decision noted that the Court's "prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."[36] But there was plenty of similar precedent in the civil arena before *Twombly*. Before *Twombly*, the Supreme Court had consistently held that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[37] The *Twombly* Court had no trouble re-conceptualizing those earlier statements as requiring "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action."[38] From the perspective of precedent, the federal criminal rules are equally ripe for refinement.

And if anything, heightened factual pleading standards make more sense in the criminal arena than they do in civil cases. The civil litigation model is that plaintiffs file lawsuits based partly on knowledge about what happened and based partly on supposition about what happened. Civil defendants typically possess the relevant evidence, which will not be exposed until the plaintiff engages in civil discovery, only after which can the plaintiffs (they hope) prove that their allegations are true. On day one, civil plaintiffs thus have a relatively limited ability to make detailed allegations.

In criminal cases, by contrast, the government is supposed to have enough evidence to convict the defendant on the day it files

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detailed allegations, courts can more easily determine whether the government's factual theory actually amounts to a federal crime.

[36] *Hamling*, 418 U.S. at 117.

[37] *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

[38] 550 U.S. 544, 555 (2007).

charges.[39] The government conducts discovery through pre-indictment tools like search warrants and grand jury subpoenas – not through post-complaint interrogatories, requests for production, or depositions. The government is thus making its allegations after its discovery process is over, which means it is far more capable than a civil plaintiff of proffering detailed allegations that satisfy the civil 12(b)(6) standard. And for that same reason, the government would be able to survive civil-style motions to dismiss in the vast majority of criminal cases.

Moreover, when the government proceeds on the basis of a scant indictment, it preserves factual flexibility it can use to unfairly trap the defendant in different ways throughout the trial. Because criminal pleading requirements are so minimal, short indictments enable prosecutors to continually revise their factual theory to respond to new developments, perceived juror reactions, unexpected testimony, etc.[40] That forces criminal defendants to rebut ever-shifting accusations, making criminal cases much more difficult to defend than their civil counterparts, where plaintiffs must commit to a relatively specific set of factual allegations at the outset and then attempt to prove it.

### *C.*

Finally, the constitutional rules governing criminal proceedings support interpreting the criminal rules on indictments even more strictly against the government than the courts interpret the civil rules on complaints against plaintiffs. Federal Criminal Rule 7(c)'s

[39] This expectation is implicit in the Speedy Trial Act, which gives charged defendants the right to demand trial within seventy days of being "charged in an information or indictment with the commission of an offense." 18 U.S.C. § 3161(c)(1). That tight potential timeframe gives the government little room for additional evidence gathering.

[40] As one prominent criminal practitioner, Abbe David Lowell, put it in an appellate brief: "It was as if the indictment was the government's accordion, contracting at trial to allow the government to obtain a conviction, and then expanding at sentencing to inflict the greatest punishment on Mr. Minor." Ellen Podgor, *Paul Minor's Appellate Brief*, White Collar Crime Prof Blog (July 6, 2008), available at lawprofessors.typepad.com/whitecollarcrime_blog/2008/07/paul-minors-app.html (last checked June 29, 2015).

requirement that the indictment contain a "plain, concise and definite written statement of the essential facts constituting the offense charged" reflects three different constitutional protections: (1) it helps protect the Sixth Amendment right "to be informed of the nature and cause of the accusation;" (2) it is a mechanism for preventing someone from being subject to double jeopardy under the Fifth Amendment; and (3) it reflects the Fifth Amendment protection against prosecution for crimes based on evidence not presented to the grand jury. If anything, the criminal rules should thus be more strict than the civil rules, not more lenient.

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The problem of overcriminalization is serious and pathological. Solving it will take much more than rethinking motions to dismiss indictments. But the Federal Rules of Criminal Procedure already provide one meaningful mechanism to begin correcting the problem. The courts simply need to start using it.

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# TAB 7E.1

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: Rule 16; government discovery in complex cases (16-CR-B)**

**DATE: March 22, 2016**

Writing on behalf of the New York Council of Defense Lawyers (NYCDL) and the National Association of Criminal Defense Lawyers (NACDL), Roland Riopelle, Peter Goldberger, and William Genego propose an amendment to Rule 16 that would impose additional disclosure obligations on the government in complex cases. Their letter is included at Tab 7E.1.

NYCDL and NACDL describe (p. 2) "a growing problem in the defense of complex federal criminal cases nationwide." They state that defense counsel routinely receive "enormous amounts of information at the outset of the discovery process," often supplemented with "millions of pages of documentation and thousands of emails." Occasionally, they report, "more gigabytes of information will be dropped in defense counsel's laps on the eve of trial."

The letter from NYCDL and NACDL includes a draft amendment to address these issues, which is based on orders entered in complex cases in the Southern and Eastern District of New York. These procedures, they report, can facilitate the work of both the prosecution and the defense, and make it easier for the parties to identify and the court to resolve evidentiary issues before trial. These procedures can also encourage the early disposition of complex cases by helping defense counsel identify the critical issues and counsel their clients.

The question before the Committee is whether a subcommittee should be appointed to study the proposal.

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# TAB 7E.2

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**Peter Goldberger, Esq.**
**William Genego, Esq.**
**Federal Rules Committee Chairs**

**Roland G. Riopelle**
**President**

March 1, 2016

Hon. Donald W. Molloy
United States District Judge
Russell E. Smith Federal Building
201 East Broadway Street
Missoula, MT 59802

**Re: Enclosed Proposed Amendments to Rule 16**

Dear Judge Molloy:

This letter is submitted to you on behalf of the New York Council of Defense Lawyers (the "NYCDL") and the National Association of Criminal Defense Lawyers ("NACDL"). We write to you in your capacity as Chair of the Advisory Committee on the Federal Rules of Criminal Procedure. We respectfully request that the Advisory Committee consider proposing to the Judicial Conference amendments to Federal Rule of Criminal Procedure 16. The NYCDL and NACDL support the proposed amendments for the reasons stated below.

The NYCDL is an organization comprised of more than 250 experienced attorneys whose principal area of practice is the defense of complex criminal cases in federal court and before New York courts and regulatory tribunals. Our membership includes numerous former state and federal prosecutors, and we regularly submit amicus curiae briefs on major questions of criminal law and advocate for reforms of penal statutes and procedural rules, both federal and state. Our members are among the most active trial lawyers in New York's federal courts, and in virtually any complex criminal case in New York City, a member of the NYCDL will appear for one or more of the defendants. Many of our cases are document-intensive "white collar" cases of the sort that require extensive and detailed preparation, such as insider trading, securities fraud and mail and wire fraud. Indeed, I believe it is fair to say that, given the location of the financial markets here, the Southern and Eastern Districts of New York are two of the principal venues where a large number of complex federal criminal cases are brought and tried.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,200 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system. Our members represent persons and entities in federal criminal cases throughout the country, and they frequently confront the difficulties of complex criminal cases with enormous amounts of discovery. NACDL is a longstanding participant in the Judicial Conference's rules promulgation process, sending a representative to attend meetings and regularly submitting comments on proposed changes of interest to the criminal defense bar.

The amendments we propose are enclosed with this letter. These amendments are meant to address a growing problem in the defense of complex federal criminal cases nationwide. It is now routine in many jurisdictions for defense counsel to receive enormous amounts of information at the outset of the discovery process, with relatively little guidance as to what might be relevant to the prosecution or defense of the charges contained in the indictment. In the 21st Century, defense counsel are often handed a computer hard drive at the first appearance in court, and told that it contains the government's first production of discovery, consisting of millions of pages of documentation and thousands of emails culled from the server of a client's employer. Thousands more pages of documentation and emails typically follow that first production, and, occasionally, more gigabytes of documentation will be dropped into defense counsel's laps on the eve of trial.

In such cases, the indictment itself is often a fairly "bare bones" document, not revealing much about the government's theory of the case or the evidence the government intends to rely on Because the decisional law permits indictments to be pleaded sparsely, with relatively little factual description (indeed, many conspiracy statutes do not even require the pleading of "overt acts" committed in furtherance of the conspiracy), and because the decisional and statutory law also does not typically require the government to provide bills of particulars, defense counsel is left with little guidance as to the specific facts the government intends to prove or the documents the government intends to rely on at trial. Absent indices of the government's production, a listing of the exhibits the government intends to use at trial, or other guidance to defense counsel, it is virtually impossible for defense counsel to wade through the mountains of material produced by the government and identify the critical documents important to the defense of the case.

The experience of the federal courts in New York under district judges' pretrial orders shows that a rule-based solution for this nationwide problem is feasible. The enclosed proposals are based on the real experiences of our membership in complex cases. District Judges in the Southern and Eastern Districts of New York typically enter orders requiring procedures like those set forth in the enclosed proposals, because they recognize that without these procedures, the trial of a complex case cannot proceed smoothly and will not be fair to the defendants. If rules like those in our proposal are followed, the jobs of both the prosecution and the defense are made easier, because the defense gets an early glimpse at the government's proof, and knows where to focus in order to assess the strength of the government's case and mount a defense. These procedures also provide a significant benefit to the prosecution, because the defense's

identification of the evidence it will use gleaned from the government's own proof gives the government advance notice of the facts that will be disputed at trial, signals to the prosecution where the weaknesses in its proof may be and what the factual defenses are likely to be, and better enables the government to prepare its response. And with this pre-trial exchange of information, evidentiary issues and potential in limine motions are identified, and made easier for the Court to address before trial. We also observe that the procedures recommended in the enclosed proposals often encourage the early disposition of complex criminal cases, because it is easier for defense counsel to identify the relevant evidence, and defense counsel are therefore better able to counsel their clients on the strength of the government's case and the clients' defenses.

Finally, the Advisory Committee should know that even though procedures like those described in our proposed amendments are commonly adopted in the New York federal courts, we are unaware of any case in which these procedures have resulted in witness tampering or threats from the defendants. We have yet to see a case in which early disclosure of the sort advocated in the enclosed proposals resulted in obstruction of justice or other improper conduct. And if there were a complex case in which such issues were a valid concern, the Court would always be free to modify the procedures described in the enclosed proposals by way of protective order.

We appreciate the opportunity to submit the NYCDL's and NACDL's proposal to you, and are available to provide any additional information the Committee may require.

Very truly yours,

Roland G. Riopelle
President, NYCDL

Peter Goldberger, Esq.
Chair, NACDL Federal Rules Committee

William Genego, Esq.
Chair, NACDL Federal Rules Committee

Cc: John Siffert, Esq.
Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice & Procedure
Prof. Sara Sun Beale, Reporter, Advisory Committee on Criminal Rules

## PROPOSED MODIFICATIONS TO RULE 16

**RULE 16. Discovery and Inspection**

**(b) Government's Additional Disclosure in a Complex Case.**

(1) Applicability. This subsection of the rule shall apply in any case in which the court finds that the case is complex for the purposes of discovery production and review. The time periods for production and scheduling set forth in this subsection are subject to the requirements of the Speedy Trial Act, 18 U.S.C. § 3161 et seq., and scheduling orders pursuant to a finding of complexity under this rule must also include the requisite findings under that statute.

(2) Application for Finding of Complexity. The government or the defendant may make an application to the court for a finding that a case is complex for the purposes of discovery production and review, within 30 days of arraignment or at such other time as the court may require. The court may also make such a finding *sua sponte.*

(3) Complexity

A. Considerations.

i. In determining whether a case is appropriate for treatment as a complex case under this Rule, the trial court shall consider the degree of difficulty of the case and the time needed for the government and defense to prepare adequately for trial and to ensure a fair trial for the defendant. Among other factors, the court should take into account the complexity of the subject matter, the technical difficulty to understand and analyze the evidence, the existence of scientific, economic or similarly technical evidence, the number of documents, the number of defendants, the number of witnesses and such other factors as may make it necessary to provide additional time for the parties to be prepared adequately for trial.

B. Presumption of Complexity. There shall be a presumption that a case is complex for the purposes of discovery, production and review:

i. if the government's obligation to disclose materials pursuant to this rule would require it to disclose or permit inspection of:

(1) more than 50,000 physical pages of material consisting of books, papers, documents, photographs or copies of those items;

(2) more than one gigabyte of data;

(3) more than 100 audio and visual recordings; or

ii. if more than 10 defendants are joined in a single indictment.

(4) Extended Period for Discovery. If the court finds that a case is complex for the purposes of discovery production and review:

A. the government shall be permitted to produce the materials required to be produced pursuant to section (a) of this rule over a period of up to six months following the arraignment of the defendant; and

B. the court shall not set any trial date until the certification described in sub-paragraph (5) below has been made.

(5) Certification of Substantial Disclosure. In a complex case, the government shall certify that it has produced substantially all the materials or data it is required to produce pursuant to section (a) of this rule, no later than six months after the arraignment of the defendant. The government may continue to produce additional materials or data to the defendant after this date, upon a showing that the materials were only discovered or accessible to the government after the date of its certification that it has produced substantially all the materials or data it is required to produce pursuant to this rule.

(6) Trial Date. The court may not set a trial date that is earlier than 12 months from the date of the government's certification required by sub-paragraph (5) above, unless the defendant consents to such earlier date.

(7) Index. Simultaneously with the certification required by subparagraph (5), the government shall provide the defendant with an index of materials produced pursuant to section (a) of this rule. Such index shall include a

description of the following: (A) any books, papers, documents, photographs or copies of those items produced by the government; (B) the source from which the materials were obtained; (C) the location at which the items were acquired during the execution of a search warrant; (D) the date and time of any recordings; and (E) the names of the persons whose voices and/or images the government contends were recorded.

(8) Tentative Exhibit List, and Copies of Exhibits. At least six months before the trial date set pursuant to sub-paragraph (6) above, the government shall produce all exhibits the government intends to offer in evidence, together with a tentative exhibit list that cross-references the exhibits to the index described in sub-paragraph (7) above.

(9) Corrective Measures. In the event that the tentative exhibit list produced pursuant to sub-paragraph (8) above is materially incomplete, or misleading, or fails to provide sufficient notice as to which materials produced pursuant to section (a) of this rule the government intends to offer at trial, the court may take such corrective action as it deems just, including an adjournment of the previously scheduled trial date; preclusion of exhibits not included on the tentative exhibit list; a directive to provide adequate notice of the evidence the government will offer at trial; or such other remedy as may be required.

(10) The Government's Right to Amend the Tentative Exhibit List and Index. The government shall have the right to amend the index and tentative exhibit list described in sub-paragraphs (7) and (8) above for any reason at any time until 90 days before the trial date set by the court pursuant to sub-paragraph (6) above. Thereafter, the government shall have the right to further amend the index and tentative exhibit list, upon a showing that the amendment to the index and tentative exhibit list relates to materials that were only discovered or accessible to the government after the date on which the index and tentative exhibit list were produced, or for other good cause shown. In the event the government amends the index and tentative exhibit list within 90 days of the previously set trial date, the court shall entertain an application by the defendant for an adjournment of the trial date. Such an adjournment shall be sufficient to allow the defendant to prepare for the newly identified items, but shall in no event be less than 30 days, unless the defendant so consents.

(11) Reciprocal Disclosure. In a complex case, the defendant shall produce to the government copies of those items from the government's index

produced pursuant to sub-paragraph (7) that the defendant intends to offer in evidence at trial, either through government or defense witnesses. The defendant shall also produce a tentative exhibit list of such materials. The defendant's production under this sub-paragraph shall be made the sooner of: (A) 30 days before the defendant's case in chief begins, or (B) the date the parties make their opening statements. The production of the defendant's tentative exhibit list and the copies of the defendant's exhibits does not require the defendant to call any witness or offer any exhibit during the trial, and the defendant is not required to produce any document or other material which the defendant only intends to use to impeach a government witness, and which the defendant does not intend to offer in evidence. The defendant's tentative exhibit list may be amended at any time upon a showing that newly designated materials were only discovered or accessible to the defendant after the date on which the defendant's tentative exhibit list was produced, or for other good cause shown. In the event that the tentative exhibit list produced by the defendant fails to provide sufficient notice as to what materials from the government's index the defendant intends to offer in evidence, the court may grant a continuance of the trial sufficient to allow the government to prepare for the newly identified items. The defendant shall not be required to include in its tentative exhibit list any item that is not contained in the government's production under Section (a) of this rule.

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# TAB 7F.1

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**MEMO TO: Members, Criminal Rules Advisory Committee**

**FROM: Professors Sara Sun Beale and Nancy King, Reporters**

**RE: Rule 49.1; Redaction of previously filed documents**

**DATE: March 26, 2016**

The Bankruptcy Rules Committee is considering an addition to Bankruptcy Rule 9037(h), the Bankruptcy Rules equivalent of Criminal Rule 49.1. The draft would create an explicit procedure for deleting information protected by Rule 9037(a) but mistakenly included in a filed document. The Bankruptcy Committee took up this subject in response to concerns raised by the Committee on Court Administration and Case Management. Bankruptcy courts are receiving creditors' requests to redact previously filed documents, sometimes involving thousands of documents in numerous courts. CACM believes it is important to establish a uniform procedure for dealing with such requests.

Each of the other advisory committees has been asked to consider a parallel amendment if the Bankruptcy Committee moves forward with its proposal. As noted in the materials prepared for the Civil Rules Committee, Tab B, Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 were adopted in a coordinated process that sought to achieve as much uniformity as possible. Criminal Rule 49.1 largely parallels Civil Rule 5.2, though it limits home addresses to identifying the city and state and expands the list of exemptions to include several matters peculiar to criminal proceedings.[1] Bankruptcy Rule 9037 hews close to Civil Rule 5.2, with an additional exception and without Rule 5.2(c)(limitations on remote access). Appellate Rule 25(a)(5), adopts the other rules for appeals in cases that they governed in the district court, invokes Criminal Rule 49.1 when an extraordinary writ is sought in a criminal case, and adopts Civil Rule 5.2 for all other proceedings.

The common origin of these provisions adds substantial weight to the tradition that parallel rules addressing the same problems should be as nearly identical as possible. Indeed, since adding parallel provisions to each set of rules seems unlikely to do any harm, it may be

[1]The exemptions include financial account numbers and real property addresses necessary to identify property for forfeiture, arrest and search warrants, and charging documents and affidavits filed in support of charging documents. *See* Rule 49.1(b)(1), (8), and (9).

desirable to add parallel provisions authorizing redaction even if those provisions will be seldom be needed outside the context of bankruptcy proceedings.

This item is included for discussion of the Committee views on a parallel amendment to the Criminal Rules if the Bankruptcy Committee moves forward with its redaction proposal. Although it may be too late in the cycle for all of the advisory committees to take final action on amendments that could be published in August of 2016, it would be helpful the Criminal Rules Committee, and its counterparts, to discuss the desirability of moving forward with a redaction rule as well as what adjustments, if any, would be needed to incorporate the provision into each set of rules.

Professor Cooper has drafted the following language for the Civil Rule, which would serve as the model for an amendment to Rule 49.1. The version in Tab B includes a series of footnotes that highlight the changes he made to adjust for the distinctive terminology of the Bankruptcy Rules.

**Rule 5.2. Privacy Protection for Filings Made with the Court**

* * * * *

(I) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

(1) *Content of the Motion.* Unless the court orders otherwise, a person that seeks to redact from a previously filed document information that is protected under Rule 5.2(a) must file a motion under seal. The motion must:

(A) include a copy of the original document showing the proposed redactions;
(B) include the docket number of the original document; and
(C) be served on all parties and any person whose identifying information is to be redacted.

(2) *Restricting Public Access to an Unredacted Document.* The court must [promptly] restrict [deny] public access to the motion and the unredacted document:

(A) pending its ruling on the motion, and
(B) if the motion is granted, until the court amends or vacates the order.

# TAB 7F.2

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## II New and Carry-Over Proposals for Study

### A. Rule 5.2: Redact Filed Documents

The Bankruptcy Rules Committee is considering an addition to Bankruptcy Rule 9037(h), the Bankruptcy Rules equivalent of Civil Rule 5.2. The draft would create an explicit procedure for deleting information protected by Rule 9037(a) but mistakenly included in a filed document. The Bankruptcy Rules Committee took up this subject in response to concerns raised by the Committee on Court Administration and Case Management.

Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 were adopted in a coordinated process that sought to achieve as much uniformity as possible. Appellate Rule 25(a)(5), adopts the other rules for appeals in cases that they governed in the district court, invokes Criminal Rule 49.1 when an extraordinary writ is sought in a criminal case, and adopts Civil Rule 5.2 for all other proceedings. Criminal Rule 49.1 largely parallels Civil Rule 5.2, but also limits home addresses to identifying the city and state; it expands the list of exemptions to include several matters peculiar to criminal proceedings. Bankruptcy Rule 9037 hews close to Civil Rule 5.2, with an additional exception and without Rule 5.2(c)(limitations on remote access).

This common origin add extra weight to the growing tradition that parallel rules addressing the same problems should be as nearly identical as possible. Differences can be warranted by the different circumstances that confront different sets of rules. But care should be taken in assessing the need for differences.

There is good reason for this Committee to take seriously the prospect that Civil Rule 5.2 should be amended by adding a new subdivision (i) that essentially tracks Bankruptcy Rule 9037(h) if the Bankruptcy Rules Committee goes forward with the proposed amendment.

It is possible that the circumstances of civil practice differ from those that confront bankruptcy practice. The Committee on Court Administration and Case Management referred the question to the Bankruptcy Rules Committee, reacting to reports that bankruptcy courts are receiving creditors' requests to redact previously filed documents, sometimes involving thousands of documents in numerous courts. Bankruptcy courts are, of necessity, dealing with these requests now. CACM believes it is important to establish a uniform procedure. And it may be concerned that the pressures of bankruptcy practice make it more difficult to rely on parties and courts to act to accomplish required redactions in ways that restore protection as promptly as possible.

The problem may arise more frequently in bankruptcy practice, but surely it arises in civil and criminal practice as

well. The need for uniform practice across different courts also may be more pressing in bankruptcy if an improper filing can involve thousands of documents in numerous courts. That circumstance is less likely to arise in civil and criminal practice. And it is nice to believe that courts and parties should be able to manage to act effectively without need for explicit prompting in Rule 5.2.

The prospect that there is little need to add a new Rule 5.2(i), on the other hand, is offset by the prospect that little harm will be done, apart from adding to the Civil Rules word-count. The Bankruptcy Rules Committee has led the way with a carefully considered draft. And although there may be little risk that adoption of a new Bankruptcy Rule 9037(h) would mislead courts if Rule 5.2(i) is not added in parallel, uniformity is reassuring. That is particularly so if the Criminal Rules Committee believes it useful to add a parallel provision to Criminal Rule 49.1.

A draft Rule 5.2(i) is set out below. Some style differences from the Bankruptcy Rule are unavoidable. Others are a matter to be worked out when all commitees have reached their own conclusions. This question has come up late enough in the winter cycle that it may not be feasible to ask all four of the advisory committees responsible for these rules to decide on recommendations in time to publish Bankruptcy Rule 9037(h) this summer. But it will be useful to have discussion now, even on the style issues identified in the footnotes.

**Rule 5.2. Privacy Protection for Filings Made with the Court**

* * * * *

(i) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

(1) *Content of the Motion.* Unless the court orders otherwise, a person[1] that seeks to redact from a previously filed document information that is protected under Rule 5.2(a)[2] must file a motion under seal. The motion must:
(A) include[3] a copy[4] of the original document

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[1] Draft Bankruptcy Rule 9037(h) uses "entity" because the Bankruptcy Code definition of "person" does not include a governmental unit. "Entity" does. But "entity" is a poor fit for a natural person. "Person" as used in the Civil Rules regularly includes all sorts of entities.

[2] The Bankruptcy draft is: "information that is subject to privacy protection under" seems longer than necessary.

[3] The Bankruptcy Draft reads: "attach a copy." That works in their draft. This version consolidates the various

showing the proposed redactions;
(B) include the docket number of the original document; and
(C) be served on all parties[5] and any person whose identifying information[6] is to be redacted.

(2) *Restricting Public Access to an Unredacted Document.* The court must [promptly][7] restrict

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requirements for the motion in a series of subparagraphs. It is clearer that way: "The motion must * * *." "Include" works with that formula. It may be argued that "attach" treats the copy of the paper as an exhibit, while "include" makes it part of the motion. It is a copy either way. Although it applies only to pleadings, Civil Rule 10(c) suggests the mood: "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

[4] The Bankruptcy Rule requires an "identical" copy. That seems redundant. The rule is addressed to a "previously filed document." The copy is useful only for a party who does not have a copy of the original. But earlier Bankruptcy drafts required a certification that no changes had been made to the original other than the proposed redactions. This became softened to "identical" copy. It is only one word. It can be added if there is ground to fear this rule might be used as an excuse to amend an earlier filing without notice.

[5] The Bankruptcy Rule includes a long list of bankruptcy characters does not fit the Civil Rules context.

[6] The Bankruptcy Rule is: "any individual whose personal identifying information is to be redacted." For the Civil Rule, "person" seems to fit better with a financial-account number that should have been redacted, at least assuming that an entity other than an individual can have a protected financial-account number.

[7] The Bankruptcy Rule begins: "Upon receipt of the motion, the court shall promptly restrict public access." The direction to act promptly reflects a concern that the motion itself may point out the existence and public availability of the unredacted document in the court file.

Rendered in Civil Rules language, this approach would substitute "must" for "shall," and "receiving" for "receipt of." But "filed" may be better than "receiving": "When the motion is filed, the court must promptly restrict public access * * *."

But during the Style Project the Civil Rules Committee was continually reminded that directions that a court must act promptly, or immediately, or whatever, begin to seem like the often conflicting docket priority directions of earlier and unlamented days. Perhaps it is enough to rely on the movant to

[deny][8] public access to the motion and the unredacted document:
(A) pending its ruling on the motion, and
(B) if the motion is granted, until the court amends or vacates the order.[9]

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request prompt action to deny access, omitting the bracketed "[promptly]."

[8] "Deny" likely is better than restrict. No public access.

[9] The Bankruptcy Rule includes a final sentence: "If the motion is denied, the restrictions shall be lifted, unless the court orders otherwise." It may not be necessary to add the provision for denial of the motion. Under (A), the document is protected pending the ruling, and that's all. The restriction dissolves unless the ruling grants the motion. But there may be some risk that the restriction will carry forward by sheer inertia — that seems to be the fate of a fair share of sealed documents.

If a sentence on denial is to be added, it likely will work better to avoid the break into subparagraphs:

> The court must deny public access to the motion and the unredacted document pending its ruling on the motion, and if the motion is granted until the court amends or vacates the order. The court must restore public access if the motion is denied.