ADVISORY COMMITTEE
ON
CRIMINAL RULES

Chicago, IL
April 15-16, 2010

AGENDA
CRIMINAL RULES COMMITTEE MEETING
APRIL 15-16, 2010
CHICAGO, ILLINOIS

I. PRELIMINARY MATTERS

A. Chair's Remarks, Introductions, and Administrative Announcements

B. Review and Approval of Minutes of October 2009 meeting in Seattle, Washington

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

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court (No Memo)

1. Rule 12.3. Notice of Public Authority Defense. Proposed amendment implementing the Crime Victims' Rights Act.

2. Rule 15. Depositions. Proposed amendment authorizing a deposition outside the presence of the defendant in limited circumstances and after court makes case-specific findings.

3. Rule 21. Transfer for Trial. Proposed amendment implementing the Crime Victims' Rights Act.

4. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment clarifies standard and burden of proof regarding the release or detention of a person on probation or supervised release.

B. Proposed Technology Amendments Published for Public Comment (Memo)

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable

electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

6. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment authorizing defendant to participate by video teleconferencing.

7. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

8. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1, and return of warrant and inventory by reliable electronic means.

9. Rule 43. Defendant's Presence. Proposed amendment cross referencing to Rule 32.1 provision for participation in revocation proceedings by video teleconference and authorizing defendant to participate in misdemeanor proceedings by video teleconference.

9. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Memo)

B. Rule 12(b) Challenges for Failure to State an Offense; Rule 34 (Memo)

C. Rule 37 Indicative Rulings (Memo)

D. Procedures Concerning Crime Victims (Memo)

IV. NEW PROPOSALS

A. Rules 5 and 58. Initial Appearance (Memo)

B. Rule 32 (technical and conforming amendment) (Memo)

C. Proposal to Recommend Amendment of 18 U.S.C. § 3060(b)(2)(Memo)

D. Proposal to Amend Multiple Provisions of the Rules Governing Section 2254 Cases (Memo)

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER ADVISORY COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure (No Memo)

B. Update on Work of Sealing Committee (No Memo)

C. Update on Work of Privacy Subcommittee (No Memo)

D. Rule 45(c) and additional time for certain forms of service of process (Memo)

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Fall Meeting

B. Other

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:	**Reporter:**
Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals 902 William Kenzo Nakamura United States Courthouse 1010 Fifth Avenue Seattle, WA 98104-1195	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360 --- Professor Nancy J. King Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181
Members:	
Rachel Brill, Esquire Mercantil Plaza Building Suite 1113 2 Ponce de Leon Avenue San Juan, PR 00918	Leo P. Cunningham, Esquire Wilson Sonsini Goodrich & Rosati, P.C. 650 Page Mill Road Palo Alto, CA 94304-1050
Honorable Robert H. Edmunds, Jr. Supreme Court of North Carolina Justice Building – Room 212 2 East Morgan Street Raleigh, NC 27601	Honorable Morrison C. England, Jr. United States District Court 501 I Street – Suite 14-230 Sacramento, CA 95814-7300
Honorable John F. Keenan United States District Court 1930 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312	Honorable David M. Lawson United States District Court Theodore Levin United States Courthouse 231 West Lafayette Boulevard, Room 802 Detroit, MI 48226
Professor Andrew D. Leipold Edwin M. Adams Professor of Law University of Illinois College of Law 504 E. Pennsylvania Avenue Champaign, IL 61820	Thomas P. McNamara Federal Public Defender United States District Court First Union Cap Center, Suite 450 150 Fayetteville Street Mall Raleigh, NC 27601

ADVISORY COMMITTEE ON CRIMINAL RULES (CONT'D.)

Honorable Donald W. Molloy United States District Court Russell E. Smith Federal Building 201 East Broadway Street Missoula, MT 59802	Honorable Timothy R. Rice United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 3041 Philadelphia, PA 19106
Bruce Rifkin United States District Court United States Courthouse, Lobby Level 700 Stewart Street Seattle, WA 98101-1271 Honorable James B. Zagel United States District Court 2588 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Honorable Lanny A. Breuer Assistant Attorney General Criminal Division (ex officio) U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Rm 2107 Washington, DC 20530-0001 Jonathan Wroblewski Director, Office of Policy & Legislation Criminal Division U. S. Department of Justice 950 Pennsylvania Ave., N.W. Rm 7728 Washington, DC 20530-0001 Kathleen Felton Deputy Chief, Appellate Section Criminal Division U. S. Department of Justice 950 Pennsylvania Ave., N.W. Rm 1264 Washington, DC 20530-0001
Liaison Member: Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818	**Secretary:** Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej

Chief

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

James N. Ishida

Senior Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Jeffrey N. Barr

Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Henry Wigglesworth

Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

James H. Wannamaker III

Senior Attorney

Bankruptcy Judges Division

Administrative Office of the U.S. Courts

Washington, DC 20544

Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Denise London Administrative Officer Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Amaya Bassett Staff Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Rachel Kessinger Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

ADVISORY COMMITTEE ON CRIMINAL RULES

Members	Position	District/Circuit	Start Date	End Date
Richard C. Tallman Chair	C	Ninth Circuit	Member: 2004 Chair: 2007	---- 2010
Lanny A. Breuer*	DOJ	Washington, DC	----	Open
Rachel Brill	ESQ	Puerto Rico	2006	2012
Leo P. Cunningham	ESQ	California	2006	2012
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2010
Morrison C. England, Jr.	D	California (Eastern)	2008	2011
John F. Keenan	D	New York (Southern)	2007	2010
David M. Lawson	D	Michigan (Eastern)	2009	2012
Andrew Leipold	ACAD	Illinois	2007	2010
Thomas P. McNamara	FPD	North Carolina	2005	2011
Donald W. Molloy	D	Montana	2007	2010
Timothy R. Rice	M	Pennsylvania (Eastern)	2009	2012
James B. Zagel	D	Illinois (Northern)	2007	2010
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Principal Staff:				
Peter G. McCabe		(202) 502-1800		
John K. Rabiej		(202) 502-1820		

TAB IA-B

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 13, 2009
Seattle, Washington

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Seattle, Washington, on October 13, 2009. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morris C. England, Jr.
Judge John F. Keenan
Judge David M. Lawson
Judge Donald W. Molloy
Judge James B. Zagel
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Lanny A. Breuer, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

Two members were unable to attend: newly-appointed member Timothy R. Rice, U.S. Magistrate Judge of the Eastern District of Pennsylvania, and Thomas P. McNamara, Federal Public Defender of the Eastern District of North Carolina (excused due to illness).

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi. Supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Henry Wigglesworth, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department of Justice's Criminal Division - Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton,

Deputy Chief of the Appellate Section. Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, attended as a representative of the Clerks of Court and Thomas Hillier, Federal Public Defender of the Western District of Washington also attended as a representative of the Federal Public Defenders.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone to the newly-renovated William K. Nakamura Courthouse in Seattle. Judge Tallman particularly welcomed newly-appointed Committee members Judge David Lawson and Assistant Attorney General Lanny Breuer.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the April 2009 meeting.

The Committee unanimously approved the minutes.

II. CRIMINAL RULES UNDER CONSIDERATION

Mr. Rabiej reported that the following proposed rule amendments simplifying the computation of time had been approved by the Supreme Court and transmitted to Congress. Unless Congress enacts legislation to reject, modify, or defer them, they will take effect on December 1, 2009.

1. Rule 45. Computing and Extending Time. Proposed amendment simplifying time-computation methods.

2. Related amendments regarding the time periods in Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58 and 59; Rule 8 of the Rules Governing § 2254 Cases; and Rule 8 of the Rules Governing § 2255 Proceedings.

In addition, the following proposed amendments had also been approved by the Supreme Court and submitted to Congress, to take effect December 1, 2009:

1. Rule 7. The Indictment and Information. Proposed amendment removing reference to forfeiture.

2. Rule 32. Sentencing and Judgment. Proposed amendment requiring government to state whether it is seeking forfeiture in presentence report.

3. Rule 32.2. Criminal Forfeiture. Proposed amendment clarifying applicable procedures.

4. Rule 41. Search and Seizure. Proposed amendments specifying procedure for warrants to search for or seize electronically stored information.

5. Rule 11 of the Rules Governing § 2254 Cases. Proposed amendments clarifying requirements for certificates of appealability.

6. Rule 12 of the Rules Governing § 2254 Cases. Proposed amendment renumbering provision regarding applicability of Civil Rules.

7. Rule 11 of the Rules Governing § 2255 Proceedings. Proposed amendments clarifying requirements for certificates of appealability.

Mr. Rabiej further reported that the following proposed amendments had been approved by the Judicial Conference at its September 2009 session for transmittal to the Supreme Court:

1. Rule 12.3. Notice of Public Authority Defense. Proposed amendment implementing the Crime Victims' Rights Act.

2. Rule 15. Depositions. Proposed amendment authorizing a deposition outside the presence of the defendant in limited circumstances outside the United States after the court makes case-specific findings.

3. Rule 21. Transfer for Trial. Proposed amendment implementing the Crime Victims' Rights Act.

4. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment clarifies standard and burden of proof regarding the release or detention of a person on probation or supervised release.

Finally, Mr. Rabiej reported that the following proposed amendments had been approved by the Standing Committee for publication, and had been posted on the internet in August 2009 for review and comment:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable

electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

6. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment authorizing defendant to participate by video teleconferencing.

7. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

8. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1, and return of warrant and inventory by reliable electronic means.

9. Rule 43. Defendant's Presence. Proposed amendment cross-referencing to Rule 32.1 provision for participation in revocation proceedings by video teleconference and authorizing defendant to participate in misdemeanor proceedings by video teleconference.

10. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

Professor Beale asked whether any comments had yet been received. Mr. Rabiej replied that none had been received but that the deadline was February 16, 2010, and comments typically do not come in until the end of the period.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Judge Tallman introduced the discussion of again considering amendments to Rule 16 by briefly summarizing the Committee's prior attempts to amend the rule to codify and expand the requirements to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). First, Judge Tallman pointed out that the Committee has wrestled with this issue

almost since *Brady* was decided forty years ago. He informed members that the Rules Committee Support Office had compiled documents of the Committee's prior consideration of amendments to Rule 16. They are available, along with a table of contents, on the rulemaking website.

Second, Judge Tallman recounted that in 2007, the Committee had approved an amendment to Rule 16, over the objection of the Department of Justice (the "Department"), and had sent the amendment to the Standing Committee to approve for publication for notice and comment. Before the Standing Committee, the Department argued, among other things, that the amendment unnecessarily upset the careful balance of interests in the criminal justice process. As an alternative, the Department had agreed to change the U.S. Attorneys' Manual ("the Manual") to explicitly set forth a prosecutor's disclosure obligations under *Brady* and undertook a commitment to additional training of all litigating prosecutors. The Standing Committee declined to approve the amendment for publication and remanded the matter to the Committee for further consideration as it deemed appropriate at some future date after sufficient time had passed to assess the impact of the Department's changes.

In April 2009, Judge Emmet Sullivan, who had presided over the trial of Senator Ted Stevens in the United States District Court for the District of Columbia, wrote a letter to Judge Tallman urging the Committee to reconsider amending Rule 16 to require disclosure of all exculpatory evidence to the defense. Judge Tallman appointed a subcommittee consisting of himself, Judge England, Professor Leipold, Rachel Brill, and Assistant Attorney General Lanny Breuer. On September 10, 2009, the subcommittee held a teleconference, with Jonathan Wroblewski filling in for General Breuer who was out of the country. Mr. Wroblewski told the subcommittee that a working group had been formed at the Department to review issues related to Rule 16 and said that by the Committee's October meeting, he anticipated that the Department would be able to articulate its position on how to best resolve these issues.

After Judge Tallman's summary, Lanny Breuer addressed the Committee. General Breuer pledged that he and the Attorney General are committed to making federal prosecutors the most professional and ethical lawyers in the nation. He described steps that the Department had taken in the aftermath of the Stevens trial, including forming a working group to study discovery in criminal proceedings and to suggest improvements. He said that while the Department took its obligations seriously, an Office of Professional Responsibility report of alleged *Brady* violations over the past nine years did not reveal evidence of a widespread problem. Indeed, according to OPR, only 15 instances of sustained misconduct during that period had been substantiated.

Nonetheless, General Breuer said that the Department recognized that further steps are necessary to address what he characterized as two different types of problems: prosecutorial misconduct and prosecutorial error. Because prosecutorial misconduct is by definition "knowing and intentional," General Breuer suggested that changing the rule to make disclosure obligations more stringent would not be an effective deterrent. Rather, prosecutorial misconduct can only be

rectified by robust enforcement and sanctions, which General Breuer maintained the Department was ready to implement once the Deputy Attorney General had reviewed the report of the working group.

To address prosecutorial error, General Breuer said the Department was adopting a multi-faceted approach, emphasizing training, guidance, strong leadership, and more uniformity. All federal prosecutors will be required to undergo training on discovery issues. Each U.S. Attorney's Office will be required to designate an expert on discovery to advise prosecutors on individual cases. At the Department's headquarters in Washington, D.C., a new position will be created to oversee these efforts. In addition, the Department will create an on=line repository of material on *Brady* issues and is considering developing a manual that deals exclusively with disclosure obligations.

Although the Department is committed to a comprehensive approach to the issue, General Breuer reiterated that the Department remained opposed to amending Rule 16 to expand disclosure requirements beyond the dictates of *Brady*. He said that such an approach would be inconsistent with Supreme Court precedent, would upset the careful congressionally-mandated balance inherent in criminal discovery under the Jencks Act, and would disregard critical interests such as the rights and safety of witnesses and special concerns relating to cases implicating national security. He outlined several hypothetical scenarios involving criminal cases to illustrate the problems that the Department feared would be created by amending the rule.

General Breuer concluded by stating that the Department would not object to amending Rule 16 simply to codify the disclosure requirements of *Brady*, but would object to any proposed amendment that went beyond *Brady* and unnecessarily impinged on these concerns. If the Committee decided to amend Rule 16 to require more disclosure than *Brady* currently requires, General Breuer said that the proper course of action would be for the Committee to write a report to Congress seeking statutory authorization for such a change, necessitating amendment of the Jencks Act.

Following General Breuer's presentation, Judge Tallman recounted his efforts in meeting with the Director of the Federal Judicial Center to devise a research project that could measure the effectiveness of the Department's 2007 changes to the Manual. (The FJC had issued reports in 2004 and 2007 on local rules that incorporated *Brady*.) Judge Tallman's discussion with the FJC revealed that any research project on this issue poses numerous methodological problems. He concluded from those discussions that measuring the efficacy of the Manual change does not easily lend itself to research using the FJC.

A member cautioned against giving undue weight to any research that might be done if that research is fundamentally unsound. Another member said that after-the-fact review of cases

to determine if there were any *Brady* violations would be very difficult and that perhaps a better approach is to develop best practices at the outset of cases.

Professor Beale suggested that it might be feasible to emulate a model used by hospitals to improve the delivery of health care, whereby the hospital reviews the treatment of patients in cases selected at random. Such a random review could be performed by the Department in various U.S. Attorneys' offices to see if any undetected discovery problems had occurred. General Breuer expressed interest in considering the idea and said he would look into it.

A participant voiced a concern over *Brady* violations that are relatively minor, and therefore do not become the subject of litigation, but still have a significant effect on the case. He suggested that the training of federal prosecutors should include presentations by members of the defense bar who could offer their perspective on discovery issues. He also suggested that the determination of whether information is "material" and therefore should be divulged is better made by a judge than by a prosecutor. Judicial members expressed concern that it is very difficult to determine such a question *in camera* without greater familiarity of the underlying facts and theories of a particular case.

A member pointed out that regardless of the amount of empirical data demonstrating *Brady* violations, it only takes one case to skew perception of the problem. In addition, he expressed concern that there is so much variation nationwide among the 94 U.S. Attorney's Offices and the litigating divisions within Main Justice itself in handling discovery in criminal cases. General Breuer responded that the Deputy Attorney General was aware of the variation and is considering whether and how best to achieve greater uniformity.

Another member said she agreed that prosecutors should not be in charge of determining what information is material and therefore must be disclosed. She also said that in some districts, a change in culture was necessary before improvements could be made.

Judge Tallman pointed out that if Rule 16 were amended to require the government to disclose a witness's information before trial, such an amendment could conflict with the Jencks Act, codified at 28 U.S.C. § 3500. In the event of such a conflict, there remains a legal issue under the "supersession clause" whether the Rules Enabling Act, 28 U.S.C. § 2072(b), would give the rule precedence over the statute. However, both Judge Tallman and Judge Rosenthal cautioned that as a general matter, the rules committees prefer not to rely on the supersession clause and that committees should strive to avoid conflicts with statutes wherever possible.

Discussion then ensued over whether the so-called "open-file" policy that has been adopted by some U.S. Attorney's Offices produced fewer *Brady* problems. One member thought that the policy had been successfully used in the Northern District of California. However, Judge Tallman noted that as an appellate judge, he sees *Brady* issues arising in many cases from California, including that district.

Judge Tallman proposed that the FJC conduct a limited survey of judges and defense lawyers to find out whether the districts that employ an open-file policy had fewer discovery issues. Mr. Wroblewski said that the Department could seek similar information from the U.S. Attorney's Offices in those districts. Judge Rosenthal pointed out that the FJC could accept data from the Department but must retain its own independence when analyzing that data.

As another way to gain information, Judge Tallman proposed that the Rule 16 subcommittee host a "consultative session" on the topic, to which experts from the bench, bar, and academia would be invited to share their views. A member suggested that it might be valuable to ask participants in the session to reverse roles so that prosecutors and defense lawyers would see things from the other's perspective.

Judge Rosenthal said that it might be helpful for participants in the session to work with actual drafts of the rule in order to focus on the various issues presented by any amendment. Mr. Wroblewski offered to provide Judge Tallman with examples of drafts that were debated by the Committee when it last considered amending Rule 16 in 2007.

A member said that she felt it was important to hold the Department accountable for assessing and reporting the effects of the 2007 changes to the Manual, since the changes had essentially functioned as an alternative to amending the rule.

Judge Tallman finished the discussion of Rule 16 by noting that due to the time required to perform research and hold the consultative session, the Committee was unlikely to see a draft amendment for consideration at its next meeting in the spring of 2010. He further commented that ultimately, the Committee might decide that any rule change would be better accomplished by Congress than through the rulemaking process. Judge Tallman concluded by recommitting consideration of whether to amend the rule to the Rule 16 subcommittee.

B. Rule 12 (Pleadings and Pretrial Motions)

In April 2009, the Committee voted to send to the Standing Committee an amendment to Rule 12 that attempted to conform the rule to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The amendment required defendants to raise a claim that an indictment fails to state an offense before trial, but provided relief in certain narrow circumstances when defendants failed to do so. In particular, the amendment provided for relief if the failure to raise the claim was for good cause or prejudiced a substantial right of the defendant.

The Standing Committee declined to publish the proposed amendment and remanded it to the Committee for further study. Specifically, as Judge Raggi pointed out, members of the Standing Committee generally approved of the concept of the proposed amendment to Rule 12 but wanted the Advisory Committee to consider the implications of using the term "forfeiture"

instead of "waiver" in the relief provision. In *Cotton*, the Supreme Court had used the term "forfeiture" and the two terms trigger different standards of review on appeal. In drafting its proposed amendment, the Committee had used "waiver" because it was part of the existing language of Rule 12.

Judge Tallman observed that the Committee had not previously considered the option of using "forfeiture" and the impact of such a choice was unclear. Judge Rosenthal pointed out that the use of either term should be consistent with the use of those terms in other rules.

Judge Tallman recommitted the issue of whether to use "waiver" or "forfeiture" to the Rule 12 subcommittee, with the goal of presenting a revised draft to the full Committee at the spring meeting in 2010.

C. Rule 32 (Sentence and Judgment)

In April 2009, the Committee deferred consideration of two amendments to Rule 32: (1) an amendment to Rule 32(h) that would require a judge to give notice to parties when the judge was considering imposing a sentence that was a "variance" from the sentencing guidelines; and (2) an amendment to Rule 32(c) that would ensure that parties receive the same information as the probation officer who prepares the presentence report ("PSR"). Both amendments were deferred because the law regarding federal sentencing is in flux, with both the Department and the U.S. Sentencing Commission currently undertaking comprehensive reviews.

Mr. Wroblewski reported on the status of the Department's sentencing review. He said that many reforms were under consideration and that he anticipated that a final report would be ready for the Attorney General's review within a few months. Judge Tallman asked whether it would make sense for the Committee to await further developments before proceeding with its own amendments. Mr. Wroblewski responded in the affirmative.

Members commented that the current version of Rule 32 puts defendants and prosecutors at a disadvantage because it does not require probation officers to provide them with information gathered in preparing a PSR. If a defendant or prosecutor does not discover errors in the information used to prepare the PSR until the actual time of sentencing, the members contended that raising a challenge at that late date then causes delay which prejudices the defendant or the government.

Judge Tallman noted, however, that even if a rule change were to address this problem, such a change would not take effect for three years, given the multiple steps inherent in the rulemaking process. During that time, federal sentencing law might change in ways that could affect the rule. Accordingly, further action on the amendments was deferred to await further developments in federal sentencing law.

D. Rule 5 (Initial Appearance)

In April 2009, the Committee had decided against forwarding to the Standing Committee an amendment to Rule 5 that would have required a judge, when deciding whether to detain or release the defendant, to consider the right of any victim to be reasonably protected from the defendant. The Committee based its decision on its belief that the current version of Rule 5 already provides adequate protection for victims because the rule requires a judge to apply all relevant statutes – including the Bail Reform Act, which requires a judge to consider danger to the community – in making the decision to release or detain.

In June 2009, the Standing Committee considered the Committee's decision not to amend Rule 5 and recommitted the matter to the Committee for further study as part of its ongoing monitoring of the implementation of the Crime Victims' Rights Act ("CVRA"). Judge Tallman commented that the Committee must continue to review all the rules to determine whether the Crime Victims' Rights Act is being fully implemented. Professor Beale added that the area of victims' rights needs constant monitoring to ensure that victims and witnesses are being protected.

Mr. Wroblewski reported that there had been no mention of any rules amendments at a recent CVRA oversight hearing on Capitol Hill. He also said that he would be willing to serve as a liaison between the Committee and advocates for victims' rights. Judge Tallman asked him to report any dissatisfaction on the part of victims with how Rule 5 was being applied. Professor Beale reiterated the importance of remaining vigilant regarding the needs of victims in order to determine whether any adjustments to the rules are warranted.

E. Indicative Rulings

Appellate Rule 12.1 and Civil Rule 62.1 are scheduled to go into effect on December 1, 2009. These rules are designed to facilitate remands to the district court to enable the court to consider motions after appeals have been docketed and the district court no longer has jurisdiction. In light of the adoption of these new rules, the question before the Committee is whether to propose a parallel provision in the Criminal Rules permitting "indicative rulings."

Professor Beale noted that courts are already issuing indicative rulings in criminal cases, and adopting a new rule would merely formalize the existing procedure. Judge Tallman said that as an appellate judge, he appreciated the efficiencies of indicative rulings which obviate appeals by permitting the district court to grant relief if given the opportunity before the appellate court takes action. Judge Rosenthal said that since new rules permitting indicative rulings had been adopted in the appellate and civil context, the question is whether the criminal context is different and somehow incompatible with adoption of such a rule.

Mr. Wroblewski noted that the Department had earlier voiced a concern about language in the Committee Note to Appellate Rule 12.1, which interprets the rule as permitting indicative rulings in the criminal context. The Department's concern had been that the rule might be viewed as an invitation by jailhouse lawyers to file frivolous motions. A member replied that this fear is overstated because in his experience as a trial judge, jailhouse lawyers do not need an invitation to file such motions. In addition, Judge Rosenthal pointed out that the Standing Committee had considered and rejected a proposal to limit the appellate rule's applicability in the criminal arena.

As an initial matter, Judge Tallman suggested that the proposed rule allowing indicative rulings, "Rule X.X" (page 319 of agenda book) be renamed either Rule 37 or Rule 39. After the meeting, it was decided by email that the new Rule be called "Rule 37."

After discussion of whether the new Rule would apply to motions under 28 U.S.C. § 2255, it was concluded that the rule did not so apply, because § 2255 motions, while disfavored, are not precluded during the pendency of a direct appeal. Because the new Rule would apply solely to motions that a district court is unable to consider during an appeal, the rule does not cover § 2255 motions.

The Committee voted unanimously to approve the new Rule and send it to the Standing Committee for publication.

Turning to the Note following the new Rule, the Committee considered whether to amend the Note by inserting the following paragraph immediately before the last paragraph (page 320 of agenda book):

> The procedure formalized by Appellate Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). This rule applies to motions that the court lacks authority to grant, and therefore does not include motions under 28 U.S.C. § 2255.

The Committee voted unanimously to amend the Note following the new Rule by inserting the above paragraph before the last paragraph.

IV. NEW PROPOSALS

A. Rule 11. Advice on Immigration Consequences of Conviction

The Committee had been asked by Judge Rosenthal to consider the desirability and feasibility of amending Rule 11 to require a district court to warn an alien defendant who is pleading guilty of the possible collateral consequences that might flow from a conviction, *i.e.*, deportation. Professor Beale introduced the topic by remarking that by coincidence, the Supreme Court was hearing argument that day in *Padilla v. Kentucky*, No. 08-651, a case presenting the related question of whether the Sixth Amendment requires that counsel advise an alien defendant who pleads guilty of the immigration consequences of the conviction. Professor Beale noted that the Committee has twice previously declined to add immigration consequences to the list of warnings required to be issued by a judge conducting a plea colloquy under Rule 11.

Judge Tallman expressed concern about pursuing such an amendment because of the complexity of immigration law and the added burden that such a requirement would place on the district courts. A member suggested that the Committee table the proposal until the Supreme Court issues its decision in *Padilla* and the obligations of defense counsel become clearer. Mr. Wroblewski added that the Department had recently awarded a grant to a project conducted by the American Bar Association to create a computer database compiling the collateral consequences of various offenses.

In light of these concerns, the Committee decided to defer consideration of amending Rule 11.

B. Rule 12. Advice on Right to Appeal

Mr. Enoc Alcantara Mendez wrote the Committee a letter requesting that it consider amending Rule 12.2 to require a district court to advise a defendant of his right to appeal from an order to submit to a competency examination or from an order of commitment.

Judge Tallman noted that in general, notice of the right to appeal is not given in specific hearings. He asked whether any special circumstances warranted giving such notice in competency hearings, when it is not given, for example, in bail hearings. No special circumstances were identified and, accordingly, the Committee decided not to pursue Mr. Mendez's suggestion of amending Rule 12.2.

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, STANDING COMMITTEE, OR OTHER ADVISORY COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Mr. Rabiej reported that there is no legislation currently pending in Congress that would affect the Criminal Rules.

B. Update on Work of Sealing Subcommittee

Judge Zagel reported that the Sealing Subcommittee had divided its work into two sub-subcommittees. These panels are making progress in analyzing the following issues: Should there be a standard to guide district courts in deciding when to seal cases? What constitutes a "case" for the purposes of calculating how many cases are sealed? Is there an effective way to prompt judges to unseal cases once the need for sealing no longer exists? In addition, the subcommittee was awaiting a further report by Timothy Reagan of the FJC, collecting and analyzing data on sealed cases. Judge Zagel concluded by saying that he anticipated the Sealing Subcommittee would finish its work by the end of the year or shortly thereafter.

C. Update on Work of Privacy Subcommittee

Judge Raggi reported that the Privacy Subcommittee was addressing concerns about the privacy of court records raised by Congress and also issues raised by the judiciary. Of particular interest in the criminal context, Judge Raggi cited the need to protect the privacy of cooperating defendants whose names might be mentioned in plea agreements or other court documents. Judge Raggi reported that the courts have developed various techniques to deal with this issue, ranging from sealing such documents to not filing them at all. The subcommittee's first task has been to gather information on these various techniques and evaluate their effectiveness.

Judge Raggi also cited the need to protect the privacy of jurors as an important issue that the subcommittee is reviewing. To illustrate this point, Judge Raggi recounted a recent incident involving a juror who had served in a murder trial in Chicago and whose address and phone number were subsequently posted, along with derogatory comments, on a website. Such a threat to the privacy of jurors undermines the judiciary's ability to find people willing to serve as jurors, Judge Raggi observed, which in turn undermines the system as a whole.

The subcommittee will collect further information about privacy concerns by sending out a survey in a few weeks to federal judges, prosecutors, and members of the defense bar. In addition, the reporter for the subcommittee, Professor Dan Capra, is arranging an all-day conference focusing on privacy issues, to be held at Fordham Law School in New York City in April 2010.

In response to a question regarding minute entries by docket clerks that contain private information, Judge Raggi expressed hope that some privacy issues could be resolved by additional training and education of court staff. In addition, Judge Raggi noted that court CM/ECF websites have been revised to contain a "banner" that requires lawyers filing

documents electronically to certify that they have read and are complying with the court's privacy rules.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman proposed several dates in April 2010 for the next meeting of the Committee. After the meeting was adjourned, the Committee decided by email that the meeting would take place on April 15-16, 2010, in Chicago, Illinois.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7-8, 2010
Phoenix, Arizona
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 7 and 8, 2010. All the members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Deputy Attorney General David W. Ogden
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

In addition, the Department of Justice was represented by Karen Temple Clagget and S. Elizabeth Shapiro.

Also participating in the meeting were Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee; committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.; and committee guests Professor Robert G. Bone, Dean Paul Schiff Berman, Dean Georgene M. Vairo, and Professor Todd D. Rakoff.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed the committee members and guests.

Judge Scirica reported that all the rule changes recommended by the committee had been approved without discussion by the Judicial Conference at its September 2009 session. The fact that rule amendments are so well received, he said, is a sign of the great esteem that the Conference has for the thorough and thoughtful work of the rules committees.

Judge Rosenthal added that the rules approved by the Conference in September 2009 included: (1) important changes to FED. R. CIV. P. 26 (disclosure and discovery) that make draft reports of expert witnesses and conversations between lawyers and their experts generally not discoverable; (2) a major rewriting of FED. R. CIV. P. 56 (summary judgment); and (3) amendments to FED. R. CRIM. P. 15 (depositions) that would allow, under carefully limited conditions, a deposition to be taken of a witness outside the United States and outside the physical presence of the defendant. She explained that the advisory committees had reached out specially to the bar for additional input on these amendments and had crafted them very carefully.

Judge Rosenthal reported that the Judicial Conference also approved proposed guidelines giving advice to the courts on what matters are appropriate for inclusion in standing orders vis a vis local rules of court. Professor Capra, she noted, deserved a great deal of thanks for his work on the guidelines.

She noted that several new rules had taken effect by operation of law on December 1, 2009, most of them part of the comprehensive package of time-computation amendments. She thanked Judges Kravitz and Huff and Professor Struve for their extensive work in this area.

Judge Rosenthal pointed out that the agendas for the January meetings of the Standing Committee are customarily lighter than those for the June meetings because most amendments are presented for publication or final approval in June, given the cycle prescribed by the Rules Enabling Act. The January meetings, therefore, give the committee an opportunity: (1) to discuss upcoming amendments that the advisory committees believe merit additional discussion before being formally presented for publication or approval; and (2) to consider a range of other matters and issues that may impact the federal rules or the rule-making process.

Judge Rosenthal also noted that Mr. McCabe had just reached the milestone of 40 years of service with the Administrative Office, including 27 years as assistant director and 18 as secretary to the rules committees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 1-2, 2009.

LEGISLATIVE REPORT

Adjustment of Legislative Responsibilities

Judge Rosenthal reported that the Director of the Administrative Office had assigned Mr. Rabiej to take a more visible and extensive role in coordinating legislative matters that affect the federal rules. She explained that Congress appears to be taking greater interest in, and giving greater scrutiny to, the federal rules. She noted that most of the bills in Congress that would affect the rules involve difficult and technical issues. For that reason, it is essential that the Administrative Office coordinate its communications with Congressional staff through a lawyer who has a deep, substantive knowledge of the rules themselves, of the rule-making process, and of the agendas of the rules committees.

She noted that communications between the rules committees and Congress are different in several respects from those of other Judicial Conference committees. The rules committees, she noted, do not approach Congress to seek funding or to advance the needs of the judiciary, but to explain rule amendments that benefit the legal system as a whole. As a structural matter, she said, it is better to separate the staff who present bread and butter matters to Congress from those who explain rules matters. She pointed out that the new arrangements are working very well.

Proposed Sunshine in Litigation Act

Judge Rosenthal reported that the proposed Sunshine in Litigation Act would prohibit sealed settlements in civil cases and impose substantial restrictions on a court issuing protective orders under FED. R. CIV. P. 26(c). Under the legislation, a judge could issue a protective order only if the judge first finds that the information to be protected by the order would not affect public health or safety. That provision, she said, has been introduced in every Congress since 1991, and Judge Kravitz testified against the legislation at hearings in 2008 and 2009. But, she added, there had been little activity on the legislation for the last several months.

Judge Rosenthal explained that the Judicial Conference opposed the legislation because it would amend Rule 26 without following the Rules Enabling Act process. Moreover, the legislation: (1) lacks empirical support; (2) would be very disruptive to the

civil litigation process; and (3) is unworkable because it would require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

Judge Kravitz added that Congressional staff now appear to understand the serious problems that the bill would create. But, he noted, it is the members of Congress who vote, not the staff, and it is difficult for members to oppose any bill that carries the label "sunshine." He noted that he had presented Congress with a superb, comprehensive memorandum prepared by Ms. Kuperman detailing the case law on protective orders in each federal circuit and demonstrating that trial judges act appropriately whenever there is a question of public health or safety.

Congressional Activity on the Rules that Took Effect on December 1, 2009

Judge Rosenthal pointed out that there has been increased Congressional scrutiny of the rule-making process. The rules committees, she said, have taken pains to make sure that Congress knows what actions the committees are contemplating early in the rules process, especially on proposals that may have political overtones or affect special interest groups.

She noted that Congressional staff in late 2009 had voiced two separate sets of concerns over the rule amendments scheduled to take effect on December 1, 2009, and they had suggested that implementation of the rules be delayed until their concerns were resolved. Staff asserted, for example, that some of the bankruptcy rules in the package of time-computation amendments might create a trap for unwary bankruptcy debtors and lawyers by reducing certain deadlines from 15 days to 14 days.

Judge Swain explained that it is common for debtors to file only a skeleton petition at the commencement of a bankruptcy case. The rules currently give debtors 15 additional days to file the required financial schedules and statements. The amended rules, though, would reduce that period to 14 days. Some bankruptcy lawyers may not be aware of the shortened deadline and may fail to file their clients' documents on time.

She said that the Advisory Committee on Bankruptcy Rules had persuaded the legislative staff to allow the rules to take effect as planned on December 1, 2009, by taking two visible steps to assist attorneys who may not be aware that they will have one day less to meet certain deadlines. First, the committee wrote to all bankruptcy courts to inform them of the committee's position that, during the first six months under the revised rules, missing any of the shortened time deadlines should be considered as "excusable neglect" that justifies relief. Second, the committee recommended adding a notice to CM/ECF and asking the courts to add language to their respective web sites

warning the bar of the revised deadlines in the rules. Letters were sent to Congress documenting these steps.

Judge Rosenthal reported that the second set of concerns voiced by Congressional staff focused on proposed new Rule 11 of the Rules Governing Section 2254 Cases and a companion new Rule 11 of the Rules Governing Section 2255 Proceedings. The new rules require a district court to issue or deny a certificate of appealability at the same time that it files the final order disposing of the petition or motion on the merits. The concern expressed through staff related to two sentences of the new rules, stating that: (1) denial of a certificate of appealability by a district court is not separately appealable; and (2) motions for reconsideration of the denial of a certificate of appealability do not extend the time for the petitioner to file an appeal from the underlying judgment of conviction.

The new rules, Judge Tallman said, were relatively minor in scope and designed to avoid a trap for the unwary in habeas corpus cases brought by pro se plaintiffs. Perfecting a challenge to a conviction is a byzantine process, and petitioners will lose appeals if they do not understand the complicated provisions.

By statute, a petitioner may not appeal to a court of appeals from a final order of the district court denying habeas corpus relief without first filing a certificate of appealability. Even if the district court denies the certificate of appealability, the court of appeals may grant it. Separately, the petitioner must also file a notice of appeal from the final order denying habeas corpus relief within the deadlines set in FED. R. APP. P. 4(a). So, in order for an appellate court to have jurisdiction over an appeal, the petitioner must have both: (1) filed a timely notice of appeal; and (2) received a certificate of appealability from either the district court or the court of appeals.

The trap for the petitioner occurs because once a district judge denies the habeas corpus petition itself, the clock begins to run on the time to file a notice of appeal, regardless of any action on the certificate of appealability. The accompanying committee note explains to petitioners that the grant of a certificate of appealability does not eliminate their need to file a notice of appeal.

Judge Tallman pointed out that the concerns brought to Congressional staff were misplaced. He explained in a memorandum for them that the new rules do not in any way alter the current legal landscape regarding the tolling effect of motions for reconsideration or the deadlines for filing a notice of appeal challenging the underlying judgment. All that they do, he noted, is codify and explain the existing law for the benefit of petitioners in response to reports received by the advisory committee that many forfeit their right to appeal, especially pro se filers, because they unwittingly file their appeals too late.

Judge Rosenthal emphasized the importance of the advisory committees: (1) reaching out to affected groups to give them a full opportunity to provide input on proposed rules; and (2) fully documenting on the record how their concerns have been addressed. Some committee members suggested that the recent communications from Congressional staff on the 2009 rules may portend new challenges in the rules process. Last-minute communications with Hill staff, they said, may become a new strategy for parties whose views are not adopted on the merits through the rule-making process. A participant added that it is particularly difficult to predict problems of this sort in advance because staff may be hearing from their friends or from individuals in an organization, rather than the organization itself.

Civil Pleading Standards

Judge Rosenthal reported that legislation had been introduced in each house of Congress to restore pleading standards in civil cases to those in effect before the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. ___, 129 S. Ct. 1937 (2009). The Senate and House bills are phrased differently, but both attempt to legislatively supersede the two decisions and return the law on pleading to that in effect on May 20, 2007. But, she said, the drafting problems to accomplish that objective are truly daunting, and both bills have serious flaws. Both would impose an interim pleading standard that would remain in place until superseded by another statute or by a federal rule promulgated under the Rules Enabling Act process.

The short-term challenge, she suggested, was to identify the proper approach for the rules committees in light of the pending legislation, recognizing that much of the discussion in Congress is intensely political. She reported that she and Judge Kravitz had written a carefully drafted letter to Congress that avoids dragging the committees into the political fray, but accepting the committees' obligation to consider appropriate amendments to the rules. She added that the letter had provided a link to Ms. Kuperman's excellent memorandum documenting the extensive case law developed in the wake of *Twombly* and *Iqbal.* The memorandum, she said, is continually being updated, and it shows that the courts have responded very responsibly in applying the two decisions.

The letter also provided a link to Administrative Office statistical data on the number of motions to dismiss filed before and after *Twombly* and *Iqbal*, the disposition of those dismissal motions, and the breakdown of the statistics by category of civil suit. But no data were available to detail whether the motions to dismiss had been granted with prejudice or with leave to amend and whether superseding complaints were filed. That information will be gathered by staff of the Federal Judicial Center, who will read the docket sheets and case papers and prepare a report for the May 2010 civil rules conference at Duke Law School.

Judge Rosenthal noted that the Advisory Committee on Civil Rules was closely monitoring the intensive political fight taking place in Congress, the substantive debate unfolding among academics and within the courts, and the actions of practicing lawyers in response to *Twombly* and *Iqbal.* She predicted that there will be a substantial effort in Congress to get the legislation enacted in the current Congress, and a number of organizations have made it a top priority. The rules committees, she said, have two goals: (1) to protect institutional interests under the Rules Enabling Act rule-making process; and (2) to fulfill their ongoing obligation under the Act to monitor the operation and effect of the rules and recommend changes in the rules, as appropriate. She suggested that Congress is likely to leave the eventual solution to the pleading controversy up to the rules process. Therefore, the Advisory Committee on Civil Rules will have to decide whether the current pleading standard in the rules is fair and should be continued or changed.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2009 (Agenda Item 6). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

FED. R. APP. P. 4(a)(1) and 40(a)

Judge Sutton reported that the advisory committee had been considering proposed amendments requested by the Department of Justice to FED. R. APP. P. 4(a)(1) (time to file an appeal in a civil case) and FED. R. APP. P. 40(a) (time to file a petition for panel rehearing). Both rules provide extra time in cases where the United States or its officer or agency is a party. The proposed amendments would make it clear that additional time is also provided when a federal officer or employee is sued in his or her individual capacity for an act or omission occurring in connection with official duties.

The advisory committee, he said, had presented proposed amendments to the Standing Committee. But the Standing Committee returned them for further consideration in light of the Supreme Court's recent decision in *United States ex rel. Eisenstein v. City of New York,* 129 S. Ct. 988 (2009). The problem is that the time limits in FED. R. APP. P. 4(a)(1) are fixed by statute, 28 U.S.C. § 2107, and therefore may be jurisdictional for the court of appeals under *Bowles v. Russell,* 551 U.S. 205 (2007).

The Department of Justice recommended proceeding with the proposed amendment to Rule 40, but deferring action on Rule 4 because of the *Bowles* problem. The advisory committee, however, was reluctant to seek a change in one rule without a corresponding change in the other, since both use the exact same language. Therefore, it is considering a coordinated package of amendments to the two rules and a companion proposal for a statutory amendment to 28 U.S.C. § 2107. A decision on pursuing that approach has been deferred to the committee's April 2010 meeting in order to give the Department of Justice time to decide whether seeking legislation is advisable. Judge Rosenthal pointed out that the recent time-computation package of coordinated rule amendments and statutory changes provides relevant precedent for the suggested approach.

INTERLOCUTORY APPEALS FROM THE TAX COURT

Judge Sutton reported that the advisory committee was considering a proposal to amend the rules to address interlocutory appeals from decisions of the Tax Court. A 1986 statute, he explained, had authorized interlocutory appeals, but the Federal Rules of Appellate Procedure have never been amended to take account of such appeals. Permissive interlocutory appeals from the Tax Court appear to be very few in number. The advisory committee, he said, will informally solicit the views of the judges of the Tax Court, the tax bar, and others regarding proposed amendments.

OTHER ITEMS

Judge Sutton reported that the advisory committee had deferred action on suggestions to eliminate the three-day rule in FED. R. APP. P. 26(c) (computing and extending time) that gives a party an additional three days to act after a paper is served on it by means other than in-hand service.

The committee had received suggestions to require that briefs be printed on both sides. But, Judge Sutton said, there are strong differences of opinion on the subject, and courts are divided on whether to allow double-sided printing of briefs. As the courts continue to move away from paper filings, he said, time may overtake the suggestions.

Judge Sutton reported that the advisory committee was responding to a suggestion that Indian tribes be added to the definition of a "state" in some of the rules, particularly Appellate Rule 29 (amicus briefs), and the committee is researching how the state courts are handling amicus filings by Indian tribes.

Finally, Judge Sutton reported that the advisory committee was collaborating with the Advisory Committee on Bankruptcy Rules on the bankruptcy appellate rules project and with the Advisory Committee on Civil Rules on overlapping issues that affect both the appellate and civil rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachment of December 7, 2009 (Agenda Item 9). Judge Swain reported that the advisory committee had no action items to present.

Informational Items

HEARING ON PUBLISHED RULES

Professor Gibson reported that three of the rules published for comment in August 2009 had attracted substantial public interest and several requests had been received to testify at the hearing scheduled in New York in February 2010.

The proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) and new FED. R. BANKR. P. 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would, among other things: (1) prescribe in greater detail the supporting documentation that must accompany certain proofs of claim; and (2) require a holder of a home mortgage claim in a chapter 13 case to provide additional notice of post-petition fees, expenses, and charges assessed against a debtor.

The proposed amendments to FED. R. BANKR. P. 2019 (disclosure) would require committees and other representatives of creditors and equity security holders to disclose additional information about their economic interests in chapter 9 and chapter 11 cases.

She added that many of the persons requesting to testify represent organizations that purchase consumer debt in bulk and are opposed to the additional disclosures.

BANKRUPTCY APPELLATE RULES

Professor Gibson said that the advisory committee had conducted two very successful conferences with members of the bench, bar, and academia to discuss whether Part VIII of the bankruptcy rules needs comprehensive revision. (Part VIII governs appeals from a bankruptcy judge to the district court or a bankruptcy appellate panel.)

She reported that the committee had decided to move forward on the project with two principal goals in mind: (1) to make the Part VIII rules conform more closely to the Federal Rules of Appellate Procedure; and (2) to recognize more explicitly that records in bankruptcy cases are now generally filed and maintained electronically. She said that the

committee would work closely on the project with the Advisory Committee on Appellate Rules and would like to work with the other advisory committees in considering the impact of the new electronic environment on the rules.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported that the advisory committee's other large project is to modernize the bankruptcy forms. It had created a joint working group of members and others: (1) to examine all the bankruptcy forms for their substance and effectiveness; and (2) to consider how the forms might be adapted to the highly technological environment of the bankruptcy system. She explained that, unlike the illustrative civil forms appended to the civil rules, the bankruptcy official forms are mandatory and must be used in bankruptcy cases under FED. R. BANKR. P. 9009 (forms).

She noted that the working group had started reviewing the forms in January 2008 and had retained a nationally recognized forms-design expert as a special consultant. The focus of the group's initial efforts has been on improving the petition, schedules, and statements filed by an individual debtor at the outset of a case. The consultant, she said, has substantial experience in designing forms used by the general public and has really opened up the eyes of the judges and lawyers on ways that the bankruptcy forms could be simplified, rephrased, and reordered to elicit more accurate information from the public.

Judge Swain reported that the forms working group was also examining trends in technology and how they affect the way that lawyers, debtors, creditors, trustees, judges, clerks, and others use the bankruptcy forms and the pieces of information contained in them. To that end, she said, the Federal Judicial Center had drafted a survey for the committee to send to lawyers and the courts. In addition, the working group was working closely with both the Court Administration and Case Management Committee of the Judicial Conference and the functional-requirement groups designing the "Next Generation" replacement project for CM/ECF (the courts' electronic files and case management system).

Judge Swain noted that the advisory committee had recommended that the Next Generation CM/ECF system be capable of accepting bankruptcy forms, not just as PDF images, but as a stream of data elements that can be manipulated and distributed. The new electronic system must be capable of providing different levels of access to different users in order to guard privacy and security concerns. She noted that the working group would meet again in Washington in January 2010.

FORM 240A

Professor Gibson reported that, in addition to drafting the official, mandatory bankruptcy forms, the advisory committee assists the Administrative Office in preparing optional "Director's Forms." One of the most important of these optional forms, she said, is Form 240A – which includes the reaffirmation agreement and related documents. Among other things, it sets forth the disclosures explicitly required by the Bankruptcy Code. During the course of the forms modernization project, a number of judges commented on the need to revise Form 240A, which is organized in a manner that makes it difficult for a court to find the most important information it needs to review a reaffirmation agreement.

Therefore, the advisory committee worked with the Administrative Office to revise Form 240A and make it more user-friendly. In December 2009, a revised form was posted on the Internet. Professor Gibson said that some lawyers have suggested that the revised form is deficient because it rewords some of the disclosures required by the statute. She said, however, that the advisory committee had recommended the revisions to improve clarity, and she noted that the statute itself permits rewording and re-ordering of most of the required disclosures as long as the meaning is not changed. She added that the advisory committee was taking the suggestions seriously, though, and it would recommend further changes if it determines that the revised form is unclear or inaccurate.

After the meeting, the advisory committee recommended some modest changes to the December 2009 version of Form 240A. It also recommended that the January 2007 version of the form be retained as an alternative version to provide statutory disclosures for those parties that elect to use their own reaffirmation agreement – a practice that the statute allows. The advisory committee concluded that an alternate version of the form was necessary because the December 2009 version was designed as an integrated set of documents that could not be used as a "wrap around" to provide all the necessary disclosures if the parties decide to use their own reaffirmation agreement.

AUTHORITATIVE VERSION OF THE BANKRUPTCY RULES

Judge Swain reported that there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Administrative Office, however, had just succeeded in creating an authoritative version of the rules after months of intensive effort by interns under the leadership of Mr. Ishida. They compared the different commercial versions on the market and researched the original source documents, including rules committee minutes and reports, Supreme Court orders, and legislation to verify the accuracy of each rule. The new, authoritative rules, she said, would be posted shortly on the federal courts' Internet web site.

MASTERS

Professor Gibson noted that FED. R. BANKR. P. 9031 (masters not authorized) makes FED. R. CIV. P. 53 (masters) inapplicable in bankruptcy cases. She reported that the advisory committee had recently received suggestions to abrogate Rule 9031 and allow the appointment of masters in appropriate bankruptcy cases. The committee, she said, had reviewed and rejected the same suggestion on several occasions in the past. After careful deliberation, it decided again that the case had not been made to change its policy on the matter. Among other things, the committee was concerned about adding another level of review to the bankruptcy system, which already has several levels of review.

A member asked whether bankruptcy judges use other bankruptcy judges to assist them in huge cases. Judge Swain responded that judges usually have excellent lawyers and thorough support in large cases, and other judges frequently volunteer to help in various settlement matters. Professor Gibson added that the Bankruptcy Code authorizes the appointment of examiners in appropriate cases. Unlike masters, though, examiners are not authorized to make judicial recommendations.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachment of December 8, 2009 (Agenda Item 5). Judge Kravitz reported that the advisory committee had no action items to present.

Informational Items

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz reported that after completing work on the proposed amendments to FED. R. CIV. P. 26 (disclosure and discovery) and FED. R. CIV. P. 56 (summary judgment), the advisory committee decided to step back and take a hard look at civil litigation in the federal courts generally and to ask the bench and bar how well it is working and how it might be improved. About the same time, the Supreme Court rendered its decisions in *Twombly* and *Iqbal* regarding notice pleading, and bills were introduced in Congress to overturn those decisions.

The advisory committee agreed that the most productive way to have a dialogue with the bar and other users of the system would be to conduct a major conference and invite a broad, representative range of lawyers, litigants, law professors, and judges.

Judge Kravitz noted that Judge John G. Koeltl, a member of the advisory committee, had taken charge of arranging the conference, scheduled for Duke Law School in May 2010, and he was doing a remarkable job.

Judge Kravitz reported that the conference will rely heavily on empirical data to provide an accurate picture of what is happening in the federal litigation system. In addition, the committee wants to elicit the practical insights of the bar. To that end, it had asked the Federal Judicial Center to send detailed surveys to lawyers for both plaintiffs and defendants in all federal civil cases closed in the last quarter of 2008. The response level to the survey, he said, has been high, and the information produced is very revealing. In addition, Center staff has been conducting follow-up interviews with lawyers who responded to the surveys.

Additional data will be produced for the conference by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System. RAND, Fortune 200 companies, and some bar groups, such as the National Employment Lawyers Association, may also submit data. Among other things, the data may provide insight on whether new computer applications and techniques might be able to drive down the cost of discovery.

Judge Kravitz noted that the majority opinion in *Twombly* had cited a 1989 law review article by Judge Frank H. Easterbrook, based on anecdotal evidence, arguing that discovery costs are out of line and that district judges are not attempting to rein them in. The preliminary survey results from the Federal Judicial Center, however, show that little discovery occurs in the great majority of federal civil cases, and the discovery in those cases does not appear to be excessively costly, with the exception of 5% to 10% of the cases. That result, he said, is surprising to lawyers, but not to judges. Nevertheless, the extensive discovery in a minority of federal civil cases has caused serious discovery problems. The biggest frustration for lawyers, he said, occurs when they are unable to get the attention of a judge to resolve discovery issues quickly.

Judge Kravitz noted that Judge Koeltl had gathered an impressive array of topics and panelists for the conference, and several of the panelists have already written papers for the event. He said that the conference will hear from bar associations and from groups and corporations that litigate in the federal system. It will also examine the different approaches that states such as Arizona and Oregon take in civil litigation, as well as recent reform efforts in other countries, including Australia and the United Kingdom. The conference's proceedings will be recorded and streamed live, and the Duke Law Journal will publish the papers.

He added that enormous interest had been expressed by bench and bar in participating in the conference, and more than 300 people have asked to attend. Space,

though, is limited, and the formal invitation list is still a work in progress. A web site has been created for the conference, but is not yet available to the general public because several papers are still in draft form.

Judge Kravitz predicted that the conference will elicit a number of proposals for change that will be a part of the agenda for the Advisory Committee on Civil Rules for years to come. One cross-cutting issue, for example, is whether the civil rules should continue to adhere to the fundamental principle of trans-substantivity. He noted that several participants have suggested that different rules, or variations of the rules, should apply in different categories of civil cases. In addition, he said, the advisory committee may resurrect its work on a set of simplified procedures that could be used in appropriate civil cases.

PLEADING STANDARDS FOLLOWING *TWOMBLY* AND *IQBAL*

Judge Kravitz noted that pleading standards have been on the advisory committee's study agenda for many years. The committee, however, started looking at notice pleading much more closely after *Twombly* and *Iqbal*. At its October 2009 meeting, moreover, it considered a suggestion to expedite the normal rules process and prepare appropriate rule amendments in light of pending legislative efforts. Nevertheless, the committee decided that it was essential to take the time necessary to see how the two Supreme Court decisions play out in practice before considering any rule amendments. Therefore, it has been monitoring the case law closely, reaching out to affected parties for their views, and working with the Federal Judicial Center, the Administrative Office, and others to develop needed empirical data.

He reported that the statistics gathered by the Administrative Office show that there has been no substantial increase since *Twombly* and *Iqbal* in the number of motions to dismiss filed in the district courts or in the percentage of dismissal motions granted by the courts. He added that the motions data, though relevant, are not determinative, and the Federal Judicial Center will examine the cases individually.

In addition, Judge Kravitz noted that every circuit had now weighed in with in-depth analysis on what the Supreme Court cases mean. A review of court opinions shows that the case law is nuanced. Few decisions state explicitly that a particular case would have survived a motion to dismiss under *Conley v. Gibson*, but not under *Iqbal*. What is clearly important, he said, are the context and substance of each case.

There is the possibility, he suggested, that through the normal development of the common law, the courts will retain those elements of *Twombly* that work well in practice and modify those that do not. Accordingly, decisional law, including future Supreme Court decisions, may produce a pleading system that works very well in practice. By way

of example, he noted that *Conley* by itself was not really the pleading standard before *Twombly*. It had to be read in conjunction with 50 years of later case law development.

For the short term, he said, the committee cannot presently determine, and the Federal Judicial Center's research will not be able to show, whether people who would have filed a civil case in a federal court before *Twombly* are not doing so now. For example, it would be helpful to know from the plaintiffs' bar whether they are leaving the federal courts for the state courts or adapting their federal practices to survive motions to dismiss.

Judge Kravitz said that members of Congress and others involved in the pending legislation had expressed universally favorable comments about the rules process. Moreover, several members of the academy have argued pointedly that the Supreme Court did not respect the rule-making process in *Twombly* and *Iqbal*. Nonetheless, despite their support for the rules process, they are concerned that the process is too slow and that some people will be hurt by the heightened pleading standards in the next few years while appropriate rule amendments are being considered.

A member added that even though the great body of case law demonstrates that the courts are adapting very reasonably to *Twombly* and *Iqbal* and are protecting access to the courts, it will always be possible to find language in individual decisions that can be extracted to argue that immediate change is necessary. Even one bad case, he said, in an area such as civil rights, could be used to justify immediate action.

Judge Kravitz explained that the pleading problems tend to arise in cases where there is disparity of knowledge between the parties. The plaintiff simply does not have the facts, and the defendant does not make them available before discovery. As a result, he said, he and other judges in appropriate cases permit limited discovery and allow plaintiffs to amend their complaints.

Judge Kravitz stated that drafting appropriate legislation in this area is very difficult. Legislation, moreover, is likely to inject additional uncertainty and actually do more harm than good. All the bills proposed to date, he said, have enormous flaws and are likely to create additional litigation as to what the new standard means.

Judge Scirica expressed his thanks on behalf of the Executive Committee to Judges Rosenthal and Kravitz for handling a very difficult and delicate problem for the rules process. He said that what they have been doing is institutionally important to the judiciary, and they have acted with great intelligence, tact, and foresight.

PROFESSOR BONE'S COMMENTARY ON *TWOMBLY* AND *IQBAL*

Professor Bone was invited to provide his insights on the meaning of *Twombly* and *Iqbal* and his recommendations on what the rules committees should do regarding pleading standards. His presentation consisted of three parts: (1) a review of the two cases; (2) a discussion of the broader, complex normative issues raised in the cases; and (3) a discussion of whether, when, and how the rules process should be employed.

He explained that both *Twombly* and *Iqbal* adopted a plausibility standard. Both require merits screening of cases, and both question the efficacy of case management to control discovery costs. But, he said, there are significant differences between the two cases. *Twombly's* version of plausibility, he said, is workable on a trans-substantive basis, but *Iqbal's* is not.

Twombly, he suggested, had made only a minor change in the law of pleading, requiring only a slight increase in the plaintiff's burden. The allegations in the complaint in *Twombly* had merely described normal behavior. Under the rules, however, the plaintiff must tell a story showing that the defendant deviated in some way from the accepted baseline of normal behavior.

Twombly applied a "thin" screening model that does not require a high standard of pleading and calls for a limited inquiry by the court. Essentially, the purpose of the court's review is to screen out frivolous cases by asking the judge to interpret the complaint as a whole to see whether it is plausible and may have merit. *Twombly* did not adopt a two-pronged approach to the screening process, even though the opinion in *Iqbal* states that it did. In screening under *Twombly,* judges do not have to discard legal allegations in the complaint. Rather, the conclusory nature of any allegations is taken as part of the court's larger, gestalt review of the total contents of the complaint.

Iqbal, on the other hand, adopted a more substantial, "thick" pleading standard. The allegations in the *Iqbal* complaint did in fact tell a story of behavior that deviated from the accepted baseline conduct. The context of the complaint, taken as a whole, supported that conclusion. Yet *Iqbal* turned the plausibility standard into a broader test – not just to identify objectively those suits that lack merit, but also to screen out potentially meritorious suits that are weak.

Professor Bone asserted that *Iqbal's* two-pronged approach – of excluding legal conclusions from the complaint and then looking at the plausibility of the rest of the complaint – does not make sense. The real inquiry for the court has to be whether the allegations in the complaint, taken as a whole, support a plausible inference of wrongdoing.

He added that much of the academic analysis of the cases has been shallow and polarized. Many critics, for example, have framed the normative issues as a mere test between efficiency on the one hand and fairness and access rights on the other – weighing the potential costs of litigation against the need to maintain access to the courts. This analysis, however, is too simplistic. It does not work because economists, in fact, care deeply about fairness, and rights-based or fairness advocates care about litigation costs and fairness to defendants. It is really a balance between the two in either event.

As a matter of process, plaintiffs have a right of access to the courts that is not dependent on outcome. The "thin" *Twombly* screening process can be justified on moral grounds, as it requires the court to apply a moral balance between protecting court access for plaintiffs and considering fairness to defendants in having to defend against the allegations. The approach of *Iqbal,* on the other hand, is based on outcome and whether a case is strong or weak.

Professor Bone said that a normative analysis should be grounded in explaining why plaintiffs file non-meritorious suits. In reality, he said, this occurs in large measure because of the asymmetric availability of information between the parties. That asymmetry causes the problem that the stricter *Iqbal* standard of review is trying to address.

Professor Bone suggested that the central substantive question for the rules committees will be to specify how much screening a court must apply in order to dismiss non-meritorious suits at the pleading stage. Procedurally, he said, the committees need to address three key questions: (1) whether to get involved; (2) when to do so; and (3) how to do so.

The first question, he said, had already been decided, for the rules committees are already deeply involved in the pleading dispute. Indeed, he said, they should be involved forcefully – with or without Congressional action. And they should be prepared to confront political interest groups on the merits, if necessary. On the other hand, they also have to be pragmatic in protecting the integrity of the rules process itself, and they need to take the time necessary to achieve the right results.

Professor Bone emphasized that it was important to gather as much empirical information as possible. But considerable care and insight must be given to interpretation of the data. Even if the statistics reveal no significant change in dismissal rates since *Twombly* and *Iqbal,* the numbers are not definitive if they do not show whether plaintiffs are discouraged from filing cases in the first place. The ultimate metric for judging whether a pleading standard is working well is whether case outcomes are fair and appropriate, not whether the judges and lawyers are pleased.

He added that the Advisory Committee on Civil Rules should seriously consider deviating from the traditional trans-substantive approach of the rules in drafting a revised pleading standard. A revised rule, for example, might exclude certain kinds of cases, such as civil rights cases, from any kind of "thick" screening standard. It might also focus specifically on complex cases, or enumerate facts that courts should consider, such as informational asymmetry and the stakes and costs of litigation. In addition, the committee should use the committee notes more aggressively and cite examples to explain how and why the rule is being amended. It should not, however, try to develop pleading forms.

COMMITTEE DISCUSSION OF *TWOMBLY* AND *IQBAL*

Judge Kravitz pointed out that trans-substantivity has been a basic foundation of the Federal Rules of Civil Procedure for more than 70 years. Deviating from it would upset current expectations and entail serious political complications. Interest groups that use the federal courts, he said, have polar opposite views on certain issues. Some plaintiffs believe that the rules currently favor defendants, while some defendants believe that they are forced to settle meritless suits that should be dismissed on the pleadings. He added that the whole discussion is influenced in large part by discovery costs, and he noted that some corporations have designed their computer systems to accommodate potential discovery needs, rather than to address core business needs.

A participant agreed that it would be extremely difficult to deviate from trans-substantivity and to specify different rules for different categories of cases. For one thing, it is not always clear cut what category a case falls into. A more fruitful approach, he suggested, would be for a rule to focus on the parties' relative access to information, rather than on the subject nature of a case. Fundamental differences exist, he said, between those cases where the litigants have equal access to information and those where the plaintiff does not have access to the facts necessary to plead adequately. He suggested that this asymmetry prevails in many civil rights and employment discrimination cases. It also occurs in antitrust cases where the plaintiff alleges, but does not know for sure, that the defendant has engaged in a conspiracy or agreement. The plaintiff knows only that the defendants' behavior suggests it.

In addition, he said, it is difficult to isolate pleading from other aspects of a civil case – such as discovery, summary judgment, and judicial case management. The civil rules are linked as a whole, and if the pleading rules are changed, it may affect the application of several other rules. Another approach that the committee could consider in addressing information asymmetry would be to link pleading with preliminary discovery. Thus, in appropriate cases, the court could permit the plaintiff to frame a proper pleading by allowing some sort of preliminary inquiry into information that only the defendant possesses.

A lawyer member said that one of the great strengths of the rules process is that the advisory committees rely strongly on empirical evidence. He reported that he had not detected any changes or problems in practice as a result of *Twombly* and *Iqbal,* even though many interesting intellectual issues have been raised in the ensuing debates. A reasonable judge, he said, can almost always detect a frivolous case. Therefore, before proceeding with potential rule adjustments, the committee should obtain sound empirical data to ascertain whether any real problems have in fact been created by *Twombly* and *Iqbal.* Judge Kravitz added that the advisory committee needs to hear from lawyers directly, especially plaintiffs' lawyers, about any changes in their practice. For example, it would be relevant to know whether they have declined any cases that they would have taken before *Twombly* and *Iqbal* and whether they now must devote more pre-pleading work to cases.

A judge member concurred that, despite perceptions, there did not appear to have been much change since *Twombly* and *Iqbal,* except that the civil process may well turn out to be more candid. The trans-substantive nature of the civil rules, he said, is beneficial and allows for appropriate variation from case to case. The context of each case is the key. Thus, a plaintiff may have to plead more in an antitrust case than in a prisoner case. Instead of mandating different types of pleadings for different cases, the trans-substantive rules – which now incorporate an overarching plausibility standard – can be applied effectively by the courts in different types of cases. The bottom line, he suggested, is that even though plaintiffs may be concerned about *Twombly* and *Iqbal*, they are really not going to suffer.

Another member suggested, though, that the two Supreme Court opinions had in fact changed the outcome of some civil cases and may well affect the outcome of future cases. Use of the term "plausibility," moreover, is troubling because it borders on "believability" – which lies within the province of the jury. It may be that FED. R. CIV. P. 8 will become more like FED. R. CIV. P. 56, where practice in the courts has developed so far that it bears little resemblance to the actual language of the national rule. Procedural rules, she said, are sometimes made by Congress or the Supreme Court. But the rules committees are the appropriate forum to draft rules because the committees demand a solid empirical basis for amendments, seek public comments from all sides, and give all proposals careful and objective deliberation. Therefore, the Advisory Committee on Civil Rules should proceed to gather the empirical information necessary to support any change in the pleading rules.

Mr. Ogden reported that the Department of Justice had not taken a position on the debate, but it is very interested in the matter and has unique perspectives to offer since it acts as both plaintiff and defendant. In addition, he said, important government policies may be at stake.

A judge member suggested that a number of federal civil cases, especially *pro se* cases, are clearly without merit and do not state a federal claim. But where there is a genuine imbalance of information, dismissal of the case should be addressed at the summary judgment phase. The problem is that a dismissal motion normally occurs before any discovery takes place. Accordingly, a revised rule might borrow a procedure from summary judgment practice to specify that plaintiffs who oppose a motion to dismiss be allowed to explain why they cannot supply the missing allegations in the complaint and to seek some discovery to respond to the motion.

Other participants concurred in the suggestion. One recommended that a procedure be adapted from FED. R. CIV. P. 11(b)(3), which specifies that an attorney may certify to the best of his or her knowledge that the allegations in a pleading "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." That standard might be borrowed for use in dealing with motions to dismiss. A participant added, however, that the same suggestion had been made by the court of appeals in *Iqbal* and was rejected by the Supreme Court.

A lawyer member explained that, in current practice, plaintiffs confronting a motion to dismiss use the summary judgment mechanism and submit an affidavit to the court specifying what evidence they have and what they need. For many defendants, winning the motion to dismiss is really the entire ball game – not because of the merits of the case, but because the potential costs of discovery often exceed the value of the case to them. Therefore, if a dismissal motion is denied, a quick settlement of the case usually follows. This practical reality, he said, will not appear in the statistics. He concluded that the two Supreme Court decisions have not made a change in the law. Nor, he said, will allowing plaintiffs additional discovery make a difference.

Another lawyer member concurred that the two decisions had not affected his practice. The principal danger, he warned, is that Congress has already injected itself into the dispute and will likely try to resolve the matter politically at the behest of special interest groups. He asked what the committees' strategy should be if Congress were to enact a statute in the next month or so.

Judge Rosenthal explained that the committees have been concentrating on providing factual information to Congress, including statistical information on dismissal motions. She noted that the committees and staff have been working hard in examining the case law and statistics to ascertain whether there has been an impact since *Twombly* and *Iqbal.* The research to date, she said, shows that there has been little measurable change, even in civil rights cases. In addition, the committees have been commenting informally on proposed legislation and exploring less risky legislative alternatives, without getting involved in the politics. The central message to Congress, she said, has been to seek appropriate solutions through the rules process.

Judge Kravitz added that the rules committees cannot suggest appropriate legislation, even though they have been asked to do so, because they simply do not know what problems Congress is trying to solve. Interestingly, lawyers and other proponents of legislation have professed great confidence in the rules process and are urging action in part because they assert that the Supreme Court was not sufficiently deferential to the process. At the same time, though, they do not want to wait three years or more for the rules process to play out. They want to turn the clock back immediately while the rules process unfolds in a deliberate manner. He added that the committees have been reaching out to bar groups and others for several years, and the outreach efforts have been very beneficial for the rules process.

A participant reported that when the Private Securities Litigation Reform Act was being developed a few years ago, the rules committees decided that the most important interest was to protect the Rules Enabling Act process. Therefore, they chose not to participate, at least in a public way, with any statement or position on the proposed legislation. Instead, they concluded that it was an area of substantive law that Congress was determined to address, and anything the committees would say would not be given much weight. Moreover, any statement or position taken by the judiciary would likely be used by one side or the other in the political debate to their advantage, and to the ultimate detriment of the judiciary. In fact, he said, Congress did change the pleading standard in securities cases by legislation. In retrospect, the sky did not fall. Securities cases are still being filed and won, but now the pleadings contain more information.

Mr. Cecil reported that the research being conducted by the Federal Judicial Center will provide the committees with needed empirical structure, rather than anecdotal advice, in a very complex area. He said that Center staff are examining motions to dismiss filed from September to December during each of the last five years, *i.e.,* before and after *Twombly* and *Iqbal.* They are examining the text of the docket sheets and the text of the case documents themselves. They will look at whether dismissal motions were granted with leave to amend, whether the plaintiffs in fact amended the complaints, and whether the cases were terminated soon afterwards. Unfortunately, though, it may be impossible to ascertain some types of relevant information, such as whether there was differential access to information in a particular case, whether cases have shifted to the state courts, or whether the heightened pleading standards have discouraged filings.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering several suggestions from the bar to revise FED. R. CIV. P. 45 (subpoenas). He noted that a subcommittee had been appointed to address the suggestions, chaired by Judge David G. Campbell and with Professor Richard L. Marcus as reporter.

Judge Kravitz said that the subcommittee had considered many different topics, but is focusing on four potential approaches. First, the subcommittee is considering completely reconfiguring Rule 45 to make it simpler and easier to use. It is a dense rule that is not well understood. Second, the subcommittee is examining a series of notice issues because the current notice requirements in the rule are often ignored. Third, it is exploring important issues concerning the proper allocation of jurisdiction between the court that has issued a subpoena and the court where a case is pending. Fourth, it is considering whether courts can use Rule 45 to compel parties or employees of parties to attend a trial, even though they are more than 100 miles from the courthouse.

On the other hand, there are two other issues that the committee probably will not address: (1) the cost of producing documents and sharing of production costs; and (2) whether service of the subpoena should continue to be limited to personal service or be broadened to be more like the service arrangements permitted under FED. R. CIV. P. 4 (service).

Judge Kravitz explained that if the committee decides to reconfigure the whole rule, it will not have a draft ready to be presented to the Standing Committee at the June 2010 meeting. But if it decides to address only a limited number of discrete issues, it might have a proposal ready by that time for publication.

Professor Cooper added that Rule 45 is too long and difficult to read. Moreover, it specifies that the full text of Rule 45(c) and (d) be reproduced on the face of the subpoena form. The advisory committee, he said, should at least attempt to simplify the language of the rule, and in doing so it will focus on three key issues: (1) which court should issue the subpoena – the district where it is to be executed or the court having jurisdiction over the case; (2) which court should handle issues of compliance with the subpoena; and (3) where the subpoena should be enforced when there is a dispute. He suggested that the rule might also contain a better transfer mechanism, such as one that would consider the convenience of parties.

A member stated that the rule needs a good deal of attention because substantial satellite litigation arises over these issues, especially in complex cases. In addition, the advisory committee should focus on notice issues. Under the current rule, he explained, subpoenas must be noticed to the other party. In practice, though, they are generally issued without notice to the other party, and there is no notice that the documents have been produced. He concluded that the advisory committee should take all the time it needs to revise this important rule carefully and deliberately.

OTHER ITEMS

Judge Kravitz reported that the advisory committee had formed an ad hoc joint subcommittee with the Advisory Committee on Appellate Rules, chaired by Judge Steven M. Colloton, to deal with common issues affecting the two committees.

He noted that the advisory committee was looking to see whether FED. R. CIV. P. 26(c) (protective orders) needs changes. He noted that the courts appear to be handling protective orders very well. Nevertheless, the text of the rule itself might need to be amended to catch up with actual practice, as with FED. R. CIV. P. 56 (summary judgment).

He reported that the advisory committee was considering whether to eliminate the provision in FED. R. CIV. P. 6(d) that gives a party an extra three days to act after receipt of service by mail and certain other means. The committee has decided, though, to let the new time-computation rules be digested before hitting the bar with another rule change that affects timing.

Finally, he said, the advisory committee was re-examining its role in drafting illustrative forms under authority of FED. R. CIV. P. 84 (forms), especially since the illustrative forms are generally not used by the bar. It might decide to reduce the number of illustrative forms, or it might turn over the forms to the Administrative Office to issue under its own authority. He cautioned, though, that any change in the pleading forms at this juncture might send a wrong signal in light of the *Twombly-Iqbal* controversy.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachment of December 11, 2009 (Agenda Item 8). Judge Tallman reported that the advisory committee had no action items to present.

Informational Items

FED. R. CRIM. P. 16 – BRADY MATERIALS

Judge Tallman reported that the advisory committee had wrestled for more than 40 years with a variety of proposals to expand discovery in criminal cases. Most recently, in 2007, it had recommended, on a split vote, an amendment to FED. R. CRIM. P. 16 (discovery and inspection). The proposal, based on a suggestion from the American College of Trial Lawyers, would have codified the prosecution's obligations to disclose to the defendant all exculpatory and impeaching information in its possession.

He explained that the Department of Justice does not appear to have serious difficulty with a rule that would merely codify its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) – but only if the proposed rule were limited to exculpatory information and if it contained a materiality standard. On the other hand, the Department objects strongly to codifying disclosure of impeachment materials under *Giglio v. United States,* 405 U.S. 150 (1972). He added that a counter-proposal had been made within the advisory committee to limit disclosure under the proposed amendment to "material" information, but it failed to carry.

Judge Tallman reported that in 2007 the Standing Committee had received a lengthy letter from then-Deputy Attorney General Paul J. McNulty objecting to the rule proposed by the advisory committee. The Standing Committee, he said, recommitted the proposed amendment to the advisory committee on the explicit assurance from the Department of Justice that it would strengthen the advice it gives to prosecutors in the U.S. Attorneys' Manual regarding their *Brady-Giglio* obligations and undertake additional training of prosecutors. The Standing Committee believed that the Department would need time to assess the effectiveness of these measures, so it remanded the amendment to the advisory committee with a broad directive to continue monitoring the situation.

Not long afterwards, the celebrated case against Senator Theodore F. Stevens unfolded. It was alleged that a key prosecution witness in the case had changed his story. But the defense had not been notified of that fact, and it moved for a new trial. In early 2009, the new Attorney General, Eric H. Holder, Jr., authorized the prosecutor to move to dismiss the case because of the failure to disclose. He also directed that a working group be established within the Department of Justice to review fully what had happened in the Stevens case and whether the Department had faithfully carried out the promises made to the Standing Committee in 2007. In addition, Judge Emmet G. Sullivan, the trial judge in the Stevens case, wrote to the advisory committee and urged it to resubmit the proposed amendment to FED. R. CRIM. P. 16 that had been deferred by the Standing Committee.

Judge Tallman reported that the written results of the Department's review had just been made available. They include a comprehensive program of training and operational initiatives designed to enhance awareness and enforcement of *Brady-Giglio* obligations. He commended the Department and Deputy Attorney General Ogden for their enormous efforts on the project and the breadth of the proposed remedial measures. He emphasized that the proposed amendments to FED. R. CRIM. P. 16 would make a major change in criminal discovery, and he pointed out that criminal discovery poses very different concerns from civil discovery. Among other things, criminal discovery implicates serious issues involving on-going investigations, victims' rights, security of witnesses, and national security.

Deputy Attorney General Ogden thanked the committee for its careful and measured approach and explained that the Department continues to oppose any rule that goes beyond *Brady* and the requirements of the Constitution. He assured the committee that the Department and its leadership are very serious about disclosure and have made it a matter of high priority. He pointed out that after the Stevens violations had been uncovered, the Department moved to dismiss the case, even though that was not an easy decision for it to make. It also convened a high-level working group of senior prosecutors and members of the Attorney General's team to study the Department's practices and make recommendations to minimize *Brady* violations going forward.

The group, he said, had met frequently and surveyed the U.S. attorneys on a regular basis. It endeavored to pinpoint the scope of the problem and measure the state of compliance. In so doing, it asked the Office of Professional Responsibility to examine not only those cases brought to its attention, but also to search for potential issues of non-compliance. The results of the Department-wide study, he said, reveal that there are no rampant violations or serious problems with compliance. The Office, for example, reported that there had been findings of violations in only 15 instances out of 680,000 criminal cases filed by the Department over nine years – an average of only one or two a year out of the thousands of cases prosecuted. The numbers, he said, put the scope of the problem in proper perspective.

Mr. Ogden said that the Department believes that the violations reflect a handful of aberrational occurrences that could not be averted by a new federal rule. Instead, a more comprehensive approach should be taken, including strict compliance with the existing rules, enhanced training of prosecutors and staff, and a number of other efforts. In addition, the Department will strive for greater uniformity in disclosure practices among the districts.

Training, he said, is extraordinarily important. Until recently, he noted, the U.S. Attorneys' Manual had not included instructions on *Brady* and *Giglio*, nor had *Brady* and *Giglio* obligations been included specifically in the Department's training. In 2006, however, the Department substantially revised the manual to address disclosure of both exculpatory and impeaching materials. In addition, a comprehensive new training program is now in place that requires all prosecutors to attend a seminar on *Brady* and *Giglio*. To date, 5,300 prosecutors have been trained in the new curriculum, and every prosecutor will be required to attend a refresher program every year.

Mr. Ogden reported that the Department had just sent detailed guidance to all prosecutors on disclosure obligations and procedures. It is also developing a central repository of information for all U.S. attorneys and a new disclosure manual that will incorporate lessons learned and inform prosecutors on what kinds of information they must disclose, what they must not disclose, and what they should bring to the attention of

the court. A single official will be appointed permanently to administer the disclosure program on a national basis. At the local level, the Department has mandated that each U.S. attorney focus personally on the importance of the issue, designate a criminal disclosure expert to answer questions and serve as a point of contact with Department headquarters, and develop a district-wide plan to implement the Department's national plan and adapt it to local circumstances. Other plans include training of paralegals and law enforcement officers and developing a case management process that incorporates disclosure. The Department is also speaking with the American Bar Association about ways to promote additional transparency.

A member suggested that the Department might also want to consider pulling some U.S. attorney files randomly for review, following the standard practice that many hospitals have in place. That step, he said, would provide a positive motivation for U.S. attorneys' offices to comply with their disclosure obligations.

Another member asked whether the Department's plan specifies the nature of the discipline that will be applied to prosecutors who violate *Brady* and *Giglio* obligations. Thus, if assistant U.S. attorneys know clearly that they could be terminated for violations, it could have a real impact on deterring inappropriate behavior.

Mr. Ogden said that in considering impeachment information under *Giglio*, it is essential to balance the value of disclosing the particular information in a case to the defense against the impact that disclosure may have on the privacy and security needs of witnesses. In many situations, he said, the information is dangerous or very embarrassing to a potential witness, and it is not central to the outcome of the case. It should not be disclosed because turning it over would chill witnesses from giving information in the future. The prosecutor, he said, is the appropriate officer to make the disclosure decision.

Judge Tallman reported that the advisory committee had met most recently in October 2009. At the meeting, Assistant Attorney General Lanny A. Breuer presented a preview of the Department's comprehensive program. The committee decided that it should also reach out and solicit the views and experiences of interested parties. To that end, it will convene an informal discussion session in Houston in February 2010 with a small group of U.S. attorneys and other Department of Justice officials, a representative of crime victims' rights groups, the president of the National Association of Criminal Defense Lawyers, a federal public defender, and other lawyers having substantial practical experience with *Brady* issues.

Judge Tallman said that one of the key questions for the participants at the session will be whether a change in the federal rules is needed, or indeed would be effective in preventing abuses. He noted that any rule change would have to be carefully drafted to be

consistent with the Jencks Act, the Crime Victims' Rights Act, and statutes protecting juvenile records and police misconduct records.

Another important issue to be discussed at the session will be whether discovery should be required at an earlier stage of the process. In addition, he reported, the advisory committee will continue to conduct empirical research by surveying practitioners and examining the procedures in those districts that have expanded disclosure practice on a local basis.

FED. R. CRIM. P. 5 - VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to make sure that the rights of victims are addressed on a regular, ongoing basis. He noted that he had reported to the Standing Committee in June 2009 that there was no need to recommend amending FED. R. CRIM. P. 5 (initial appearance) to specify that a magistrate judge take into account a victim's safety at a bail hearing because that requirement is already set forth in the governing statute and followed faithfully by judges. Nevertheless, he said, the advisory committee continues to be sensitive to the interests of the victims and will continue to reach out to them. Among other things, it has invited a victims' representative to participate in its upcoming Houston session on disclosure.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachment of December 14, 2009 (Agenda Item 7). Judge Hinkle reported that the advisory committee had no action items to present.

Informational Items

RESTYLED EVIDENCE RULES

Judge Hinkle reported that the advisory committee's major initiative was to complete work on restyling the Federal Rules of Evidence. The revised rules, he said, had been published, and the deadline for comments is in February 2010. Written comments had been received, including very helpful suggestions from the American College of Trial Lawyers. But only one witness had asked to appear at the scheduled public hearing. Therefore, the hearing will likely be cancelled and the witness heard by teleconference. He added that the Style Subcommittee has been doing an excellent job, and it has been working closely with the advisory committee on the revised rules.

The advisory committee, he explained, plans to complete the full package of style amendments at its April 2010 meeting and bring the package forward for approval at the June 2010 Standing Committee meeting. Judge Rosenthal added that the restyled evidence rules will be circulated to the Standing Committee in advance of the rest of the agenda book to give the members additional time to review the full package. Judge Hinkle recommended that if any member of the committee identifies an issue or a problem with any rule, the member should let the advisory committee know right away so the issue may be addressed and resolved before the Standing Committee meeting.

CRAWFORD V. WASHINGTON

Judge Hinkle added that the advisory committee was continuing to monitor developments in the wake of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), dealing with the admissibility of out-of-court "testimonial" statements under the Confrontation Clause of the Constitution. The case law, he said, is continuing to develop.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the subcommittee, explained that the Federal Judicial Center had just filed its final report on sealed cases in the federal courts, written by Mr. Reagan. The report, he said, was excellent, and he recommended that all participants read it. At the subcommittee's request, the Center had examined all cases filed in the federal courts in 2006, and it identified and analyzed all cases that had been fully sealed by a court. The subcommittee members, he said, had reviewed the report carefully, and they take comfort in the fact that it reveals that there are very few instances in which a court appears to have made a questionable decision to seal a case. Nevertheless, he said, any error at all in improperly sealing a case is a concern to the judiciary.

He reported that the subcommittee was now moving quickly to have a report ready to present to the Standing Committee in June 2010. It will focus on several issues. First, he said, it will discuss whether there are cases in which sealing was improper. He noted that there appear to have been fewer than a dozen such cases nationally among hundreds of thousands of cases filed in 2006. Second, it will address whether sealing an entire case was overkill in a particular case, even though there may have been a need to seal certain documents in the case, such as a cooperation agreement with a criminal defendant. He noted, too, that in some districts juvenile cases are not sealed, but the juvenile is simply listed by initials. Third, the report will discuss cases in which sealing a case was entirely proper at an early stage of the proceedings, such as in a qui tam action or a criminal case with an outstanding warrant, but the court did not get around to unsealing the case later.

The subcommittee, he said, will not likely recommend changes in the rules, but it may use Professor Capra's recent report and guidelines on standing orders as a model to propose that the Judicial Conference provide guidance to the courts on sealing cases. For example, guidelines might specify that sealing an entire case should be a last resort. Courts should first consider lesser courses of action. Guidelines might also recommend developing technical assistance for the courts, such as prompts from the courts' electronic case management system to provide judges and courts with periodic notices of sealed cases pending on their dockets. Guidelines might also recommend a procedure for unsealing executed warrants.

In addition, he said, there should be some type of court oversight over the sealing process. For example, no case should be sealed without an order from a judge. In addition, procedures might be established for notifying the chief judge, or all the judges, of a court of all sealed cases.

Judge Rosenthal added that the sealing subcommittee and the privacy subcommittee have been working very well together. Both, she said, are deeply concerned about protecting public access to court records, while also guarding appropriate security and privacy interests. She expressed thanks, on behalf of all the rules committees, to the Federal Judicial Center for excellent research efforts across the board that have provided solid empirical support for proposed rule amendments.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the privacy subcommittee, reported that the subcommittee had been asked a year ago to review whether the 2007 privacy rules are working well, whether they are protecting the privacy concerns that they identify, and whether additional privacy concerns are being addressed by the courts on a local basis. In conducting that inquiry, she said, the subcommittee's first task had been to gather as much information as possible from the experiences of the 94 federal district courts. Therefore, it had asked the Federal Judicial Center to survey judges and clerks, and the Department of Justice to survey U.S. attorneys' offices.

She reported that the subcommittee had received superb staff assistance from Mr. Cecil and Meghan Dunn of the Federal Judicial Center in preparing and executing the surveys, Heather Williams of the Administrative Office in collecting all the local rules of the courts and comparing them to the national rules, and Mr. Rabiej of the Administrative Office in coordinating these efforts. In addition, she thanked Professor Capra for serving very effectively as the subcommittee's reporter.

Judge Raggi reported that the preliminary results obtained from the survey reveal that there have been no serious compliance problems with the new privacy rules, although there may be a need to undertake additional education efforts and to tweak some local rules and practices. But the subcommittee sees little need for major changes in the national rules.

Nevertheless, she said, two concerns have emerged. First, there are serious issues involving cooperating witnesses in criminal cases, and the courts have widely different views and practices on how to treat them. Some courts, for example, do not file cooperation agreements, which do not appear on the public records. Others make them all public, at least in redacted form. Since the courts feel so strongly about the matter, she said, it seems unlikely that the subcommittee will recommend a specific course of action. But the subcommittee may at least identify the issues and provide the courts information about what other courts are doing.

Second, there are concerns about juror privacy. For example, the current national rule requires redaction of jurors' addresses from documents filed with the courts, but not redaction of jurors' names. Therefore, their names are available widely on the Internet. She noted that the courts themselves are responsible for protecting jurors, while the Department of Justice is responsible for the safety and privacy of cooperating witnesses.

Judge Raggi pointed out that the privacy subcommittee includes three members from the Judicial Conference's Court Administration and Case Management Committee, and the joint effort has proved to be very constructive. Some of the matters being examined by the subcommittee, she said, may be directed to the rules committees, while others may be handled by the court administration committee. The subcommittee, she said, plans to write a single report and is not concerned at this point about specific committee responsibilities.

She added that the subcommittee wants to hear directly from people who have given serious thought to the privacy rules and related issues. Public hearings, she said, are not necessary, but the subcommittee will conduct a conference at Fordham Law School in April 2010 with a representative group of knowledgeable law professors, practicing lawyers, and other court users. After hearing from the participants, she said, the subcommittee will be better able to report on the issues that need to be pursued.

PANEL DISCUSSION ON LEGAL EDUCATION

Dean Levi of Duke Law School moderated a panel discussion on trends in legal education and the legal economy, how they may affect the judiciary, and how academia and the judiciary may help one another. The panel included Professor Coquillette of Boston College, Dean Berman of Arizona State, Professor Vairo of Loyola Los Angeles, and Professor Rakoff of Harvard.

Professor Coquillette stated that it is not possible to have a first-class justice system without good legal education. He pointed out that many changes have occurred in law schools over the last several years. He noted that Max Weber, the great prophet of legal education who died in 1920, had made three predictions that have come to pass. First, he proclaimed that the world of law, driven by simple economic necessity, would shift over time from a system of local law to a system of state law, then to a national system of law, and then to an even broader system of international law.

Second, he suggested that legal systems would become less formal, as people will resort more to systems of private mediation and informal dispute resolution or negotiation. Students now engage in more hands-on application of law, not only with moot court competitions, but also in negotiation and dispute resolution classes and competitions.

Third, the law would become more specialized. It would also lose its sacredness of content, as lawyers and judges will come to be seen more as political actors, rather than priests of a sacred order. In a sense, he anticipated the critical legal studies movement, as law schools today are more infused with critical legal studies and with "law and economics" approaches.

He noted that at Boston College Law School, five of the last seven faculty appointments had been given to experts in international law. Most of them, he said, have foreign law degrees and bring an international perspective to the academy. In addition, the school has established programs in London and Brussels.

Dean Berman reported that a series of new initiatives have been undertaken at Arizona State University Law School. The core of the new efforts consists of three parts.

First, the model of what counts as legal education has been expanded greatly. The law school obviously has to train lawyers to practice law, but it also deals with many students who are not going to become lawyers but want to know about the law. To that end, the school is teaching law to non-lawyers, undergraduates, and foreign students. A full B.A. program in law is being developed for undergraduates and will be administered by the law school. In the past, he said, undergraduate courses in law had generally been taught by professors in other disciplines, but they are now being taught by lawyers.

Second, he said, the school wants to focus more on public policy and what it can do to contribute to the world. The law school, he suggested, should be a major player in public policy, and it is working with other faculties on joint programs to help train students to be players in public-policy debates. It has created a campus in Washington, D.C., and is creating think-tank experiences in which ten or so students work with a faculty member and focus on some aspect of public policy. In addition, he said, lawyers will benefit in their eventual legal careers by receiving training in statistics and data analysis. The law school is looking to participate in conducting university research on public policy areas for others, and it is asking companies and other organizations for modest funds to underwrite university research for them that the companies would not undertake on their own.

Third, the school is focusing on bridging the gap from law school to law practice. The students help start-up enterprises to incorporate, and they work with other parts of the university, including social work students, to help people with their legal problems. The law school, he said, has a large number of clinics, a legal advocacy program with dispute-resolution components, and a professional development training course that includes networking, starting up a law practice, performing non-legal work, and training in a variety of other areas that may be helpful to a student's career path. The school plans to do more to connect third-year students directly with members of the legal profession, such as by giving the students writing projects and having lawyers critique them. The school has added post-graduate fellowships and gives students a stipend to serve as fellows or volunteer interns to get a foot in the door of a legal career. It is also considering developing an apprentice model, where recent graduates do specific work in internships to develop their skills.

Professor Vairo reported that the Socratic model is still very much in place and dominant, at least in the first year of law school. She emphasized that the changes taking place in the legal profession and the economy will affect law schools. Most importantly, she said, law school is very expensive, and some commentators advocate moving toward an accelerated two-year program for economic reasons. Her school, she added, has a core social justice mission and is placing graduates in public service jobs. The traditional big-firm model, she said, is starting to collapse, as many students go into solo practice and are doing well at it.

The law school curriculum, she said, is changing, and the school has three main goals – to improve the legal experience, to improve the students' job prospects, and to cope with the costs of legal education. Like other schools, it is looking at de-emphasizing traditional courses to devote more time to problem solving, legislation, and regulation. She said that the faculty sees students engage in social networking every day in the classroom and should take advantage of the practice to keep students' attention in the current, wired world.

The law school will focus more on trans-national and international matters and on cross-disciplinary courses. It has been hiring more combination J.D.-Ph.D.s as faculty and will offer more advanced courses. The students, she said, particularly like the kinds of simulations that are offered in the third-year curriculum, where they are called upon to act as lawyers and represent clients. For the future, she suggested, the schools also need to consider what role distance-learning may play as part of the law school model, and whether schools can continue to pay law professors what they are currently being paid.

Professor Rakoff reported that the atmosphere at Harvard is less uncomfortable for students than it used to be. The school also offers new required courses and workshops in international law, legislation and regulation, and problem solving. In the latter, the students deal with factual patterns that mirror what happens when a matter first comes to a lawyer's attention. The focus is not just on knowing the law, but also on appreciating the practical restraints imposed on a lawyer and the institutions that may deal with a problem.

In short, the substance and doctrines of the law, which were central to the Langdellian system, are emphasized less now. Moreover, students are now absorbed with being online. They do not look at books, but instead conduct legal research completely online. Word searches, though, only supply a compilation of facts and results. They do not provide the conceptual structure emphasized in the past – when treatises were consulted and legal problems researched through analysis of issues and analogy. Nevertheless, he said, much of the core curriculum remains, such as basic courses in contracts, torts, and civil procedure. About two-thirds of a student's first year experience would be about the same as in the old days.

Dean Levi suggested that the several themes mentioned by the panel keep arising in discussions on law school reform – problem solving, working in teams, knowing international law, being ready to practice on Day One, building leadership skills, having a comfort level in other disciplines, and understanding business and public policy. All have been around in one form or another for generations. Yet teaching students to be analytical thinkers and to identify issues remains the core school function, and it continues to be difficult to accomplish.

He observed that the traditional role of a trial lawyer and the courtroom experience now have far less relevance to students. Moreover, the dominance of court actions and judicial decisions in the curriculum has decreased over the years.

A member asked the panel whether the legal profession will be able to absorb all the law school graduates being produced, or whether the number of schools and graduates will shrink. A panelist suggested that some law schools may well close or merge, and there will be fewer positions available for law professors. Some schools already are receiving fewer applications and are in serious financial trouble.

Nevertheless, many people in the community continue to be under-served by lawyers, and there is more need for legal services as a whole. Therefore, more lawyers in the future may serve in small units, rather than in traditional firms. A panelist added that it is not a bad idea for law students to strike out alone or in smaller units, rather than in large firms. He said that many law-firm associates are unhappy people.

A professor added that the current business model of many law schools will have to change. There will be fewer legal jobs available, but no less need for lawyers. Students are already changing their expectations of what they will get out of law school and how they will practice. There is likely to be more emphasis on public service.

A lawyer member observed that he is not sure that the young lawyers today think the way that older lawyers do. Experienced lawyers, he said, have been ingrained with substantive law and doctrines. But the newer attorneys have grown up with computers. They are skilled at finding cases online, but they do not necessarily know what to do with all the information they succeed in compiling. A professor added that it is getting tougher to teach legal doctrines and analysis. He agreed that students generally are great at gathering piles of information quickly, but not in putting it all together or conducting deep analysis. Another added that some students now have a different view of what constitutes relevant knowledge. They do not draw as sharp a distinction between the legal rule and the rest of the world. This is clearly a different approach, but not necessarily a worse one.

A member asked how students can be encouraged to have a passion for the law. A panelist responded that her school encourages externships with local judges. The students are really enthusiastic about these experiences, and the schools need to expand them to include similar experiences with law firms. Law schools, moreover, should decrease the emphasis placed on monetary rewards.

A professor pointed out that judges provide a huge educational service through law clerkships. Law clerks, he said, generally perform better than non-clerks when they enter the legal world. Nevertheless, there is a disturbing trend towards hiring permanent law clerks in the judiciary, thereby reducing the clerkship opportunities for law school graduates.

A judge explained that he has to rely on his law clerks to keep up with his heavy docket. He expressed concern that since many law school reforms have lessened the emphasis on doctrinal law and critical analysis, judges may not be able to obtain the quality of law clerks they need to deal effectively with the cases before them. He noted that federal judges are hiring more permanent clerks today because they are a known quantity, and they know how to apply the law to cases.

A panelist said that many judges are now hiring law clerks who have a few years of law practice, and that is a good development. Another added that judges should participate actively with law school groups to let them know how well they are doing in training new lawyers.

A professor said that the benefits to the judiciary from law clerks are enormous. Among other things, law clerks provide a large pool of talented lawyers who understand and admire judges because they have worked for them. Another added that law schools need the federal judiciary to serve this important educational function. But the judiciary also benefits greatly because the law clerks are life-long friends who understand the courts and are important, natural political allies.

A member argued that the practice of law has really changed, and students' law school expectations are not being met. There are far fewer trials than in the past, and far fewer opportunities for lawyers to develop their courtroom skills. Young lawyers, moreover, are generally not allowed by courts to practice on their own.

A member said that the changes in the law school curriculum are beneficial. But the schools should be urged to continue to teach the law with rigor and offer a wide variety of high-content classes. The law requires a good lawyer to be able to analyze across different areas of the law. Thus, students who have taken soft courses or only a particular line of courses, do not have the same ability to analogize as students who have had a more rounded, rigorous curriculum.

Other members cautioned against reducing the substantive content of law school classes, and especially opposed the suggestion to move to a two-year law school curriculum for financial reasons. They said that it is essential to have three years of critical thinking and substantive courses in law school. A panelist added that his school was creating more mini-courses of one credit each rather than full semester three-credit courses.

In addition, many very bright judges' law clerks want to teach, without first ever having practiced law. Many professors may have Ph.D. degrees and other educational achievements, but too many lack actual practice experience.

A panelist added that many of the faculty assigned to hire new law professors have an ingrained prejudice against practitioners. Interviewees with practical legal experience, he said, just do not sound like scholars to them. Many law schools, he added, are now introducing fellowships and visiting professorships for practitioners.

NEXT MEETING

The members agreed to hold the next meeting in June 2010. By e-mail exchange after the meeting, the committee fixed the dates as Monday and Tuesday, June 14-15, 2010. The meeting will be held in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 16, 2010

****

All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

****

At its March 16, 2010 session, the Judicial Conference of the United States —

Elected to the Board of the Federal Judicial Center for a term of four years: Judge Edward Prado of the Court of Appeals for the Fifth Circuit to succeed Chief Judge William R. Traxler, Jr., of the Court of Appeals for the Fourth Circuit.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to bankruptcy duty stations:

a. Authorized the transfer of the duty station for Chief Judge Randy Doub in the Eastern District of North Carolina from Wilson to Greenville, and the designation of Wilson as an additional place of holding court; and

b. Authorized the transfer of the duty station of the bankruptcy administrator in the Eastern District of North Carolina from Wilson to Raleigh, subject to approval by the Judicial Council of the Fourth Circuit.

Agreed that the following recommendation would be withdrawn:

That the Judicial Conference:

a. Formally encourage chief circuit judges, chief district judges, and circuit executives, in consultation with chief bankruptcy judges, to contact each bankruptcy judge two years prior to his or her eligibility for retirement and discuss recall opportunities;

b. Formally encourage judicial circuits to offer recall status, if warranted, to a bankruptcy judge one year before the bankruptcy judge is eligible for retirement, effective upon retirement; and

c. Formally encourage judicial circuits to authorize recalled bankruptcy judges who are assigned a workload that is substantially equal to the workload of a full-time bankruptcy judge in the same district to have full chambers staff (i.e., judicial assistant and law clerk).

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

With regard to the *Civil Litigation Management Manual*:

a. Approved a revised version of the *Manual*; and

b. Delegated to the Court Administration and Case Management Committee the authority to make technical and/or conforming, non-controversial amendments to the *Manual*.

Approved a records disposition schedule that contains a retention period of 14 to 30 days before disposal of routine courtroom security surveillance recordings, as well as the authority, in the case of a security incident, for the security video to be maintained until the conclusion of the investigation or such time as determined by order of the chief judge of the court.

Amended Item I of the Electronic Public Access Fee Schedule to read, in part, as follows: "No fee is owed under this provision until an account holder accrues charges of more than $10 in a quarterly billing cycle."

Approved a one-year pilot project with the Government Printing Office (GPO), consisting of no more than 12 courts, to provide public access to court opinions through GPO's FDsys system. The Committee on Court Administration and Case Management is delegated the authority to extend the pilot for up to one additional year, if necessary to ensure sufficient data to evaluate the program.

With regard to digital audio files of court hearings:

a. Agreed to allow district and bankruptcy judges who use digital audio recording as the means of taking the record to provide, at their discretion, access to digital audio files via PACER;

b. Established a fee for public access to such recordings commensurate with the maximum fee for downloading a single file from PACER (currently $2.40); and

c. Delegated to the Administrative Office the authority to establish appropriate language in the Electronic Public Access Fee Schedule to effectuate this fee.

COMMITTEE ON CRIMINAL LAW AND COMMITTEE ON DEFENDER SERVICES

Agreed to take no position on pending tribal court legislation, but to communicate to Congress concerns about the impact on the federal courts of portions of the legislation, as set forth in a draft letter presented at the Conference session.

COMMITTEE ON DEFENDER SERVICES

Approved a proposed community defender organization severance pay policy, which is based on one applicable to federal public defender organization employees.

COMMITTEE ON FEDERAL-STATE JURISDICTION

Rescinded its position favoring the exclusion of non-economic damages in determining the amount in controversy for diversity jurisdiction under 28 U.S.C. § 1332.

Took no position on H.R. 4335, the Prison Abuse Remedies Act of 2009 (111th Congress), or similar legislation, that would amend the Prison Litigation Reform Act of 1995, with the exception of opposition to the provision that would amend 28 U.S.C. § 1915(b) to eliminate the requirement in current law that a prisoner proceeding *in forma pauperis* be assessed the filing fee upon the filing of a civil action. Should Congress proceed to modify the current filing fee requirement, the Conference respectfully urges Congress to retain the requirement for the assessment of fees upon the filing of a civil action, with allowance for the refund of the filing fee for those actions that are not dismissed under 28 U.S.C. § 1915A, 28 U.S.C. § 1915(e)(2), or 42 U.S.C. § 1997e(c)(1).

With regard to federal legislation to implement the Hague Convention on Choice of Court Agreements (Hague Convention), consistent with principles of federalism:

a. Supported the inclusion of language to provide that actions do not, solely by virtue of the fact that they have been brought for the resolution of contract disputes or for the enforcement of judgments of other courts under the Hague Convention, qualify for federal question jurisdiction;

b. Opposed the inclusion of language that would allow parties to remove actions brought pursuant to the Hague Convention to federal court at any time, but supported the application of current law governing removal to such actions; and

c. Opposed the inclusion of language that would provide for federal district court interlocutory review of state court decisions concerning conflicts between the federal and state statutes implementing the Hague Convention.

Approved lifting the current aggregate pay cap for court employees only to allow receipt of the full amount of a national judiciary award.

Approved revised procedures when a grade reduction for a court unit executive is supported by application of the grading formula, as follows:

a. Calculate a three-year average using the data from the current year and from the two previous years;

b. Retain the current grade if the three-year average falls above the respective threshold;

c. Retain the current grade for a one-year grace period if the three-year average falls below the respective threshold by less than five percent of the threshold;

d. Downgrade the position at the end of the one-year grace period if the new three-year average remains below the threshold; and

e. Downgrade the position if the original three-year average falls more than five percent below the threshold.

Approved the following stratified pay caps for application to the optional pay tables for circuit and court unit executives if the salary of a district judge increases (other than through anticipated annual Employment Cost Index-based pay adjustments), with the understanding that the aggregate pay cap of court employees cannot exceed the salary of a district judge:

a. EX-I ($196,700 in 2009) as the cap for circuit executive positions and court unit executive positions at Judiciary Salary Plan (JSP)-18;

b. EX-II ($177,000 in 2009) as the cap for court unit executive positions at JSP-16 and JSP-17; and

c. EX-III ($162,900 in 2009) as the cap for court unit executive positions at JSP-15 and below.

Agreed to seek legislation to allow unit executives to accrue eight hours of annual leave per pay period prospectively, regardless of length of service.

Approved a change to the current Court Personnel System promotion policy to set at one percent the minimum salary promotion rate, to be applied for a fiscal year at a uniform, unit-wide rate in keeping with existing policy.

Approved a request of the District of Hawaii for an exception to the March 2009 Conference policy limiting re-employment of a retired law enforcement officer to only a single period for a maximum of 18 months to allow the district to re-employ its deputy chief probation officer for a second 18-month period from November 1, 2010 to April 30, 2012.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Agreed to amend Section 1.01(b)(4) of the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Appointment and Reappointment of United States Magistrate Judges to provide that only two years' experience as a staff attorney or pro se law clerk in a court may be used toward meeting the five-year active-practice-of-law requirement.

Approved recommendations regarding specific magistrate judge positions (1) to redesignate one magistrate judge position, authorize adjoining district jurisdiction for that position, and make no other change in the magistrate judge positions in that district court; and (2) to make no changes in the magistrate judge positions in the other nine district courts reviewed by the Magistrate Judges Committee.

TAB IC

Oral Report

TAB IIA

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 12.3. Notice of a Public-Authority Defense**

(a) Notice of the Defense and Disclosure of Witnesses.

* * * * *

(4) ***Disclosing Witnesses.***

* * * * *

(C) *Government's Reply.* Within 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name~~, address, and telephone number~~ of each witness — and the address and telephone number of each witness other than a victim — that the

---

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

**Incorporates amendments approved by the Supreme Court scheduled to take effect on December 1, 2009, if Congress takes no action to the contrary.

government intends to rely on to oppose the defendant's public-authority defense.

(D) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

* * * * *

(b) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness — and the~~,~~ address, and telephone number of any additional witness other than a victim — if:

(~~1~~ A) the disclosing party learns of the witness before or during trial; and

(~~2~~ B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim-Witness.*** The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

* * * * *

COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public-authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public-authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

Rule 15. Depositions

* * * * *

(c) Defendant's Presence.

(1) ***Defendant in Custody.*** Except as authorized by Rule 15(c)(3), the ~~The~~ officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** Except as authorized by Rule 15(c)(3), a ~~A~~ defendant who is not in custody has the right upon request to be present at

the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

* * * * *

COMMITTEE NOTE

Subdivision (c). This amendment addresses the growing frequency of cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

Recognizing that important witness confrontation principles and vital law enforcement and other public interests are involved in these instances, the amended Rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances where case-specific findings are made by the trial court. New Rule 15(c) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence.

The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown. Courts have long held that when a criminal defendant raises a constitutional challenge to proffered evidence, the government must generally show, by a preponderance of the

evidence, that the evidence is constitutionally admissible. *See, e.g.*, *Lego v. Twomey*, 404 U.S. 477, 489 (1972). Here too, the party requesting the deposition, whether it be the government or a defendant requesting a deposition outside the physical presence of a co-defendant, bears the burden of proof. Moreover, if the witness's presence for a deposition in the United States can be secured, thus allowing defendants to be physically present for the taking of the testimony, this would be the preferred course over taking the deposition overseas and requiring the defendants to participate in the deposition by other means.

Finally, this amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

The Committee recognizes that authorizing a deposition under Rule 15(c)(3) does not determine the admissibility of the deposition itself, in part or in whole, at trial. Questions of admissibility of the evidence taken by means of these depositions are left to resolution by the courts applying the Federal Rules of Evidence and the Constitution.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The limiting phrase "in the United States" was deleted from Rule 15(c)(1) and (2) and replaced with the phrase "Except as authorized by Rule 15(c)(3)." The revised language makes clear that foreign depositions under the authority of (c)(3) are exceptions to the provisions requiring the defendant's presence, but other depositions outside the United States remain subject to the general requirements

of (c)(1) and (2). For example, a defendant may waive his right to be present at a foreign deposition, and a defendant who attends a foreign deposition may be removed from such a deposition if he is disruptive.

In subdivision (c)(3)(D) the introductory phrase was revised to the simpler "because."

In order to restrict foreign depositions outside of the defendant's presence, the limiting phrase "in a felony prosecution" was added to subdivision (c)(3)(A).

The Committee Note was revised in several respects. In conformity with the style conventions governing the rules, citations to cases were deleted. Other changes were made to improve clarity.

Rule 21. Transfer for Trial

* * * * *

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

* * * * *

COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

* * * * *

(6) ***Release or Detention.*** The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a)(1) pending further proceedings. The burden of establishing by clear and convincing

evidence that the person will not flee or pose a danger to any other person or to the community rests with the person.

* * * * *

COMMITTEE NOTE

Subdivision (a)(6). This amendment is designed to end confusion regarding the applicability of 18 U.S.C. § 3143(a) to release or detention decisions involving persons on probation or supervised release, and to clarify the burden of proof in such proceedings. Confusion regarding the applicability of § 3143(a) arose because several subsections of the statute are ill suited to proceedings involving the revocation of probation or supervised release. *See United States v. Mincey*, 482 F. Supp. 2d 161 (D. Mass. 2007). The amendment makes clear that only subsection 3143(a)(1) is applicable in this context.

The current rule provides that the person seeking release must bear the burden of establishing that he or she will not flee or pose a danger but does not specify the standard of proof that must be met. The amendment incorporates into the rule the standard of clear and convincing evidence.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made after the amendment was released for public comment.

TAB IIB

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Technology Rules

DATE: March 13, 2009

1. Introduction

In April 2008 Judge Tallman created a Technology Subcommittee, chaired by Judge Anthony Battaglia, to consider how and when to incorporate technological advances. At the April 2009 meeting of the Criminal Rules Committee, the Subcommittee submitted a package of proposals including one new rule, Rule 4.1, that (1) incorporates the portions of Rule 41 allowing a warrant to be issued on the basis of information submitted by reliable electronic means, and (2) makes those procedures applicable to complaints under Rule 3 and warrants or summonses issued under Rules 4 and 9. New Rule 4.1 also contains an innovation that deals with the increasingly common situation where all supporting documentation is submitted by reliable electronic means, such as fax or email. The new rule requires a live conversation in which the person submitting the material is placed under oath, and also states that the judge may keep an abbreviated record of the administration of the oath, rather than transcribing verbatim the entire conversation and the material submitted electronically.

The remaining proposals amend existing rules, as follows:

- Rule 1: expands the definition of telephone to include cell phone technology and calls over the internet from computers

- Rules 3, 4, and 9: authorize the consideration of complaints and issuance of arrest warrants and summonses based on information submitted by reliable electronic means as provided by new Rule 4.1

- Rules 4 and 41: authorized the return of search warrants, arrest warrants, and warrants for tracking devices by reliable electronic means

- Rule 32.1: upon defendant's request, allows the defendant to participate in proceedings concerning the revocation or modification of probation or supervised release by video teleconference

- Rule 40: with defendant's consent, allows his appearance by video teleconference in proceeding on arrest for failure to appear in other district

- Rule 41: deletes portions now covered by new Rule 4.1

- Rule 43: conforms the rule to permit video teleconferencing as specified in other amendments; and–with defendant's written consent–allowing arraignment, trial, and sentencing of misdemeanor to occur by video teleconference.

- Rule 49: authorizes local rules permitting papers to be filed, signed, or verified by electronic means meeting standards of Judicial Conference.

The proposed rules were approved by the Criminal Rules Committee in April 2009 and recommended to the Standing Committee.

The Standing Committee approved these amendments for publication in August 2009. The Standing Committee had already authorized, but not yet forwarded for publication, a related amendment to Rule 6(e), which provides for the taking of a grand jury return by video teleconference. Upon the recommendation of the Advisory Committee, the proposed amendment to Rule 6 was published as part of an overall package of technology related amendments.

2. The Public Comments and the Subcommittee's Recommendations

Six written comments addressed to the technology rules were received during the public comment period. Most of the comments addressed new Rule 4.1, but there were also comments on Rules 6, 32.1 and 43. The Subcommittee, now chaired by Judge David Lawson, met by telephone to review the public comments, and it recommends several changes discussed below. The members of the Subcommittee are Justice Robert Edmunds, Leo Cunningham, Andrew Leipold, and Jonathan Wroblewski for the Department of Justice.

The full text of all of these rules and the public comments are included at the end of this memorandum. As appropriate, portions of individual rules and committee notes are excerpted in the body of this memorandum as well.

Rule 1

The amendment expands the definition of telephone to include cell phone technology and calls over the internet from computers. Only one comment, (09-CR-005), was received. The Federal Magistrate Judges Association (FMJA) endorsed the proposal to extend the definition of telephone to include new technology.

The Subcommittee recommended no change in the rule as published.

Rules 3, 4, and 9

The proposals amend these rules to authorize (1) the consideration of complaints and issuance of arrest warrants and summonses based on information submitted by reliable electronic means as provided by new Rule 4.1, and (2) the return of search warrants, arrest warrants, and warrants for tracking devices by reliable electronic means. The FMJA endorsed these proposals, and no other comments were received.

The Subcommittee recommends no change in these rules as published.

Rule 4.1

This new rule incorporates the provisions, now found in Rule 41, that allow a warrant to be issued on the basis of information submitted by reliable electronic means, and makes those procedures applicable to complaints under Rule 3 and warrants or summonses issued under Rules 4 and 9. It also includes a new provision to deal with the increasingly common situation where all supporting documentation is submitted by reliable electronic means, such as fax or email.

In general the comments addressed to Rule 4.1 either endorsed or did not question its basic premise, but suggested revisions to clarify its operation or improve the procedure.

In **subdivision (a)** the FMJA (09-CR-005) objected to the use of the word "approve" to describe the magistrate judge's action on a complaint, and recommended replacing it with "decides there is probable cause for the charges in the complaint...." The Subcommittee recommends responding to the FMJA's comment by revising the language to read as follows (new language in bold):

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

(a) **In General.** A magistrate judge may consider information communicated by telephone or other reliable electronic means **when reviewing a complaint or deciding whether to** issue a warrant or summons.

The Subcommittee considered but decided against a suggestion by one of its members that the reference to complaints be deleted. The proposed amendment to Rule 3 creates an exception to the

requirement that a complaint must be made under oath before a magistrate judge as provided by Rule 4.1. Accordingly, Rule 4.1 should itself clearly provide for complaints submitted in compliance with the procedures spelled out in the rest of Rule 4.1.

In subsections **(b)(2) and (3)** the FMJA proposed rewriting to clarify the role of judge, court reporter, and prosecutor. With the changes shown below in bold on lines 13 and 14, the Subcommittee agreed the FMJA's revised language was an improvement and recommends it to the Advisory Committee:

(b) **Procedures.** If a magistrate judge decides to proceed under this rule, the following procedures apply:

* * * * *

(2) ***Recording and Certifying Testimony.*** If the judge considers information in addition to the contents of a written affidavit submitted by reliable electronic means, the testimony must be recorded verbatim by an electronic recording device, a court reporter, or in writing. The judge must have any recording or court reporter's notes transcribed, have the transcription's accuracy certified, and file the transcript. The judge must sign any written record, certify its accuracy and file it.

(3) ***Preparing a Summary or Order.*** If **the applicant does no more than attest** to the contents of a written affidavit submitted by

reliable electronic means, the judge must simply prepare, sign and file a written summary or order.

After the meeting, a Subcommittee member raised a question about the language on line 15, "the judge must simply prepare...." This might be read to suggest that the judge must adopt this procedure. If there is a circumstance in which a judge might wish to create a more extensive record in this situation, the language might be amended to read either "the judge may simply prepare" or "the judge need only prepare...."

Following the Subcommittee's conference call, the style consultant, Professor Kimble, urged the reporters to make additional changes in subsections (b)(2) and (3). The following version (which has his approval) merges those two subsections under a single heading to make it clear they are alternatives for (1) cases in which the only live testimony is the affirmation that the contents of the written affidavit are true (where the record keeping is simplified), and (2) all other cases (in which the judge must keep a verbatim record). Additionally, Professor Kimble recommended the elimination of some language he felt was repetitious.

The revised version provides:

(2) ***Creating a Record of the Testimony.***

(A) **Testimony Limited to the Contents of an Affidavit.** If the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must simply [need only or may] prepare, sign, and file a written summary of the testimony or a written order.

(B) **Additional Testimony.** If the judge considers additional testimony, it must

be recorded verbatim by an electronic recording device, by a court reporter, or in writing. The judge must have any recording or reporter's notes transcribed, have the transcription certified as accurate, and file it. The judge must sign any written record, certify its accuracy, and file it.

If this revised version is approved by the Committee, the final subsections of Rule 4.1(b) will be renumbered to reflect the merger of the two subsections.

Because this proposed language was not reviewed by the Subcommittee, it is not included in the version of the full set of technology rules included at the end of this memorandum.

One comment opposed the provision as published. The California Bar Committee (09-CR-007) expressed concern that adoption of this provision would deprive the defense of a complete and accurate record of the probable cause determination. During its conference call the Subcommittee did not discuss the California Bar letter, so Subcommittee members were invited to comment by e-mail. Members who addressed the issue concluded that the California Bar's concern was unfounded. The only time a summary or order is permitted without a full transcription is in cases in which the applicant does no more than swear to the contents of a written affidavit. It adds nothing in those cases to have the magistrate copy down the words of the oath and the words that appear in writing in the affidavit itself. Additionally, the Subcommittee is recommending changes to subdivisions (b)(6) and (7), discussed below, which provide for a more complete record.

NACDL (09-CR-006) recommended amendments to subsections (b)(6) and (7) to make a more complete record. The Subcommittee accepted NACDL's proposal to add the language in bold on lines 5 to 6 below (with slight modifications recommended by Professor Kimble for stylistic purposes) and recommends that the Advisory Committee revise the amendment to include it:

(6) ***Modification.*** The judge may modify the complaint, warrant, or summons. The judge must transmit the modified version to the applicant by reliable electronic means or direct the applicant to

so modify the proposed duplicate original accordingly. **If the judge directs the applicant [verbally] to modify the proposed duplicate original, the judge must make and keep a written record of that modification.**

After the conference call, a Subcommittee member questioned the need for the word "verbally" on line 4. Professor Kimble and the reporters recommend its omission.

The Subcommittee also accepted NACDL's proposal to add the language in bold on line 7 below:

(7) ***Signing.*** If the judge decides to approve the complaint, or to issue the warrant or summons, the judge must immediately:

(A) sign the original;

(B) enter on its face the exact date and time it is approved or issued; and

(C) transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name **and enter the date and time** on the duplicate original.

The Subcommittee does not, however, endorse NACDL's suggestion that it delete Rule 4.1(c), which provides that in the absence of bad faith, evidence obtained as a result of a warrant issued under this Rule is not subject to suppression on the ground that issuing a warrant in this manner is unreasonable. This provision tracks the language currently in Rule 41(d)(3). It was added to Rule 41 by the USA PATRIOT Act, and was carried over into proposed Rule 4.1 along with the other relevant portions of Rule 41. The Subcommittee noted that NACDL's proposal to

delete this provision is inconsistent with the rule as published, and accordingly it could not be adopted without republication. The Subcommittee did not favor republication for this purpose. Although the Rules Enabling Act allows supersession, the Rules Committees seek to avoid conflict with Congress when it is possible to do so. The only changes in the provision as published are minor stylistic changes made at the request of Professor Kimble.

NACDL also addressed the Committee Note, and suggested that it does not clearly indicate that only federal judges may issue warrants and complaints based upon information submitted by reliable electronic means. As published, the Note states (emphasis added):

> With one exception noted in the next paragraph, the new Rule preserves the procedures formerly in Rule 41 without change. Limited to "magistrate judges," the Rule continues to require, as did former Rule 41(d)(3) and (e)(3), *that a federal judge (and not a state judge)* handle electronic applications, approvals, and issuances. (emphasis added).

After substantial discussion, the Subcommittee decided not to recommend any change in the Committee Note as published. At present Rule 41(e)(1) allows either a magistrate judge or a state judge to issue warrants, but Rule 41(e)(3) allows magistrate judges to act on warrants by telephone or other reliable electronic means. It does not extend that authority to state judges. When the authority of Rule 41(e)(3) was transferred to proposed Rule 4.1, the Criminal Rules Committee decided to retain this limitation. The Subcommittee noted that under Rule 1(c) "whenever the rules authorize a magistrate judge to act, any federal judge may also act." Throughout the rules, the term "magistrate judge" is used with this provision in mind. The Department of Justice representatives indicated that federal prosecutors who use Rule 41 and will use the new rule are familiar with these restrictions and understand them. The Subcommittee concluded that the note as published is clear, and it found no reason to make a change.

Finally, Professor Kimble also suggested as a matter of style that it would be desirable to add a sentence to the first paragraph of Rule 4.1 stating that "In this rule, 'electronically' means by reliable electronic means." If this provision were added, throughout the remainder of the rule all references to "reliable electronic means" would be changed to "electronically." It would be useful to have Committee discussion of this proposal. The reporters are concerned that it would create confusion. Several current rules — Rules 5, 32.1, and 41 — now use the phrase "reliable electronic means," which is also found in other proposed amendments in this package. Changing the phrase in one rule only could cause confusion, and we could not change it in the existing rules at this time. We note as well that although this phrase has not been the subject of many published opinions, it was a compromise – between those who worried about the risks of electronic communication (manipulation, gaps in transmission, errors in attaching the wrong thing, legibility,

etc.) and proponents of expanding the telephone warrant procedure. We are concerned that eliminating references to the requirement of reliability might result in the parties and the courts losing sight of that requirement as they apply provisions of the rules that refer only to "electronic" submissions.

Rule 6(f)

This amendment allows the return of an indictment by video teleconference "to avoid unnecessary cost or delay." Although having the judge in the same courtroom remains the preferred practice to promote the public's confidence in the integrity and solemnity of federal criminal proceedings, there are situations where no judge is present in the courthouse where the grand jury sits, and a judge would have to travel a long distance to take the return, in some instances in bad weather and dangerous road conditions. This amendment will be particularly useful when the nearest judge is hundreds of miles away from the courthouse in which the grand jury sits. The amendment preserves the judge's time and safety, and accommodates the Speedy Trial Act's requirement that an indictment be returned within thirty days of arrest. See 18 U.S.C. § 3161(b).

Magistrate Judges Stewart (09-CR-003) and Ashmanskas (09-CR-004) urged that the rule be amended to follow Oregon state practice, which allows the grand jury to file indictments with the clerk's office.

The Subcommittee did not endorse this recommendation, which is inconsistent with an important tradition of a public return with solemnity. Moreover, the Subcommittee noted that a change of this nature would require republication. It recommends no change in the rule as published.

Rule 32.1

Rule 32.1 allows a defendant to request permission to participate by video teleconference in proceedings to revoke or modify probation or supervised release. This was the only proposed technology amendment that was not adopted unanimously by the Advisory Committee in April 2009. Four members dissented on the amendment to Rule 32.1.

The proposed amendment will be most useful when a defendant is alleged to have violated conditions of probation or supervised release while located in a district that lacks jurisdiction over the original sentence. Returning to the original district often involves substantial delays that work a significant hardship on defendants. The proposed amendment provides an option that could permit some defendants to remain in the district where the alleged violation occurred.

While recognizing that in some instances being transported back to the district where sentencing occurred may work a hardship, in April 2009 some members expressed concern that this amendment would become a slippery slope towards sentencing by video. There was also some concern that defendants might be pressured to appear by video teleconference in order to save the government the expense of transportation. The proposed amendment seeks to address this concern by limiting its application to cases where the defendant affirmatively requests this procedure.

One public comment (09-CR-009) addressed these concerns. Federal Defenders Carol A. Brook and Paul E. Gazanio from the Northern District of Illinois oppose the amendment on the grounds that allowing video conferencing for a revocation hearing detracts from the solemnity of the proceeding, makes it less likely defendants will believe they are being treated fairly, may occur without knowing consent, may disadvantage defendants who freeze up on camera, does not provide a true right of allocution, and may be hampered by technological problems. They also express concern that the proposed rule does not detail how the video proceedings will be conducted, and they suggest that the rule may not be necessary because video conferencing is seldom used for proceedings under Rules 5, 10, and 43.

The Subcommittee agreed that the points raised by the Defenders are important, and this policy question should be discussed when the full Advisory Committee votes on whether to recommend the amendment to the Standing Committee.

One issue of concern for the Defenders is the adequacy of the consultation between the defendant and his attorney. This concern spurred discussion among Subcommittee members of the question whether to revise the Committee Note, which currently states: "If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel." The Reporter floated the suggestion that the Subcommittee might substitute "must" for "should," but Mr. Rabiej noted that any mandatory requirement should be in the rule itself, rather than a Committee Note.

NACDL (09-CR-006) correctly noted the inconsistency between the use of the term "request" in the body of the rule and "consent" in the Committee Note. The Subcommittee agrees the Rule and Note must be consistent. Since the term "request" was chosen in order to reduce the likelihood that other parties would place any pressure on the defendant to agree to participate by video, the Subcommittee concluded that Note should be revised to use the term "request."

The Subcommittee recommends no change (other than revising the Committee note to refer to the defendant's "request") in Rule 32.1 or the Committee Note.

Rules 40 and 41

Rule 40 authorizes a defendant who consents to appear by video teleconference in proceeding on arrest for failure to appear in other district, and Rule 41 deleting portions now covered by new Rule 4.1.

No public comments were received, and the Subcommittee recommends no change in the rules as published.

Rule 43(a)

The proposed amendment expressly exempts video revocation hearings under Rule 32.1 from the requirement that the defendant be present. It was added to insure that there would be no possible conflict between Rule 43 and the new authority to conduct Rule 32.1 proceedings by video conference.

Jenner and Block (09-CR-008) and NACDL (09-CR-009), express concern that the inclusion of this exemption may, by implication, create two problems. First, it may suggest that a defendant may not waive the right to be present at proceedings not listed in Rule 43(a).[1] NACDL notes that with the court's consent and upon the execution of a knowing, intelligent, and counseled waiver, a defendant should always be allowed to waive the right to be present at proceedings not listed in Rule 43(a), including revocation proceedings under Rule 32.1. Second, the proposed cross reference suggests that parole and supervised release revocation proceedings are "sentencing" under Rule 43(a)(3). If they are not, Jenner and Block notes, then Rule 43 does not require the defendant's presence in the first instance, and no exemption for proceedings under Rule 32.1 is needed.

The Subcommittee did not favor deleting the reference to Rule 32.1 in Rule 43. Several members of the Subcommittee expressed the view that Rule 32.1 proceedings are and should be governed by Rule 43, and a defendant's presence is required unless otherwise provided in Rule 32.1. This view rests on the recognition that proceedings to revoke probation and supervised release amount to a "sentencing," at least in part. Such proceedings contain two components. First, there is the stage in which the alleged violation is adjudicated. Rule 32.1 sets forth the procedural requirements for determining that a violation has occurred and whether the status should be revoked. Second, if a violation is found and probation or supervised release is revoked (as opposed to modified), a penalty is imposed. In the view of some Subcommittee

---

[1]Rule 43(a) requires a defendant to be present at

(1) the initial appearance, the initial arraignment, and the plea;
(2) every trial stage, including jury impanelment and the return of the verdict; and
(3) sentencing.

members, this is a sentencing. Rule 32.1(d) discusses the "disposition" of the case, and makes reference to 18 U.S.C. §§ 3563, 3565, and 3583. Under section 3565 (a)(2), if probation is revoked, the court must "*resentence* the defendant." (Emphasis added.). Under section 3583(e)(3), if supervised release is revoked, the court may order "the defendant to serve in prison all or part of the term of supervised release authorized by statute . . . ." In the view of those members, when a judge sends a defendant to prison (or back to prison), a sentencing has occurred.

There was some sentiment in favor of adding a new subsection — which would be Rule 43(a)(4) — to make it clear that a defendant's presence is required in proceedings under Rule 32.1. This would be a new amendment and would require separate publication.

The reporters conducted additional research following the Subcommittee's telephone conference, seeking to shed light on two issues raised by the public comments: (1) whether an amendment to Rule 43 is necessary to give effect to the new authority granted under Rule 32.1, and (2) if not, whether the proposed amendment might have unanticipated effects in other situations.

Is the proposed amendment to Rule 43(a) necessary to give effect to Rule 32.1?

In proposing the amendment, the Committee relied upon the fact that Rule 43(a) now contains explicit exceptions for Rules 5 and 10, the rules that authorize defendants to participate by video conference at initial appearances and arraignment. The proposed amendment was a parallel to these references. But the analogy between Rules 5, 10, and 32.1 is imperfect. Rule 43(a)(1) itself requires the defendant's presence at the "initial appearance" (which is governed by Rule 5) and the "initial arraignment" (which is governed by Rule 10). Accordingly, when Rules 5 and 10 were amended in 2002 to allow the use of video conferencing, it was appropriate to also add a cross reference in Rule 43(a).

Proceedings under Rule 32.1 stand on a different footing, however, because they are not at present referred to explicitly in Rule 43(a). Accordingly, if Rule 32.1 is amended to expressly permit video participation at the defendant's request, it seems unlikely that courts would construe Rule 43(a) to nullify the more specific and recent amendment to Rule 32.1.

Rule 43(a)(3) requires the defendant to be present for "sentencing," but it doubtful whether this term encompasses proceedings under Rule 32.1. Only one court appears to have ruled directly on this issue. In *United States v. Thompson*, 09-1926 (7th Cir. Mar. 19, 2010) (the case which inspired comment 09-CR-008), the Seventh Circuit rejected the argument that supervised release proceedings are sentencing under Rule 43, concluding that "the rights at stake in each proceeding are distinguishable." Slip op. at 6. The court explained:

> The Supreme Court long ago noted that "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Because a revocation hearing is not part of a criminal prosecution, a defendant at a revocation hearing is not owed the "full panoply of rights" due a defendant at sentencing. *Id.* Although the revocation hearing is sometimes referred to colloquially as a "resentencing," the controlling statute does not use that term; instead, 18 U.S.C. § 3583(e)(3) authorizes the court, once a violation of supervised release is proven, to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute." By its terms — and based on the well established difference in the procedural scope of these proceedings — Rule 43 is inapplicable to supervised release revocation hearings.

Id. at 6-7.

The terms "sentence" and "sentencing" also appear in several other rules, and at least for some purposes proceedings under Rule 32.1 are not treated as "sentencing." For example, Rule 1101(d)(3) of the Federal Rules of Evidence provides that the rules of evidence do not apply "miscellaneous proceedings" and defines those proceedings as follows:

> Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise. (emphasis added)

Thus Rule 1101(d)(3) clearly assumes that sentencing and the revocation of probation under Rule 32.1 are different. Note, however, that Rule 1101(d)(3) refers only to "granting or revoking probation" — not supervised release hearings — and for the former only to the revocation part of the procedure and not the disposition part (which thus might be covered by the immediately-preceding reference to "sentencing").

Moreover, the definition of "sentencing" may vary from rule to rule. Federal Rule of Criminal Procedure 35(c) defines sentencing "[a]s used in this rule" as "the oral announcement of the sentence."

Given the doubtful applicability of Rule 43(a) to proceedings under Rule 32.1, it seems unlikely that courts would rely on that rule to negate the express authority for video proceedings that will be granted by the amendment to Rule 32.1. Accordingly, the proposed amendment to Rule 43(a) is not necessary to give effect to the authority being granted under Rule 32.1.

Unanticipated effects of the proposed amendment to Rule 43(a)

The proposed amendment might, however, have unanticipated effects in cases not involving the use of video conference technology to conduct revocation proceedings. As noted, several rules employ the term "sentence" and "sentencing," and litigants might rely on the proposed amendment to Rule 43(a) as an indication that revocation proceedings should be viewed as "sentencing" for purposes of Rule 43 and other rules. For example, courts have questioned whether all of the procedural rights in Rule 32 are applicable to revocation proceedings. More generally, NACDL has expressed concern that the suggestion that Rule 43(a) is applicable to proceedings not listed there might cast doubt on a defendant's right to waive the right to be present at other kinds of proceedings.

Rule 49

The proposed rule authorizes local rules permitting papers to be filed, signed, or verified by electronic means meeting standards of Judicial Conference. The proposed rule was drawn from Civil Rule 5(d)(3).

NACDL (09-CR-009) expressed concern about the clarity of the language borrowed from the Civil Rules, and proposed the following alternative:

> A paper filed and served electronically complies with any statute requiring that a paper in a criminal case be filed and served, and is 'written' or 'in writing' under these rules, but only if filed and served in compliance with any applicable local rule.

The Subcommittee took the view that the published language (which parallels the civil rule) is clear in stating that a "paper filed electronically in compliance with a local rule is written or in writing under these rules."[2]

---

[2]The Subcommittee requested that the reporter make inquiries to learn more about NACDL's concerns. I spoke by telephone with Peter Goldberger, the principal author of the NACDL letter, to find out what motivated NACDL's concern. Mr. Goldberger briefed and argued *United States v. Rivas*, 493 F.3d 131. 141-42 (3rd Cir. 2007), in which the government filed the notice required under 21 U.S.C. § 851 without the signature required by the local rules on electronic filings. The filing included the U.S. Attorney's name, but no signature block with the name of an individual attorney. Mr. Goldberger advocated the language noted above (rather than the published language) because (1) it refers to statutorily required filings as well as filings required by the rules, and (2) it makes clear that an electronic filing "is 'written' or 'in writing' under these rules, but *only if* filed and served in compliance with any applicable local rule." (emphasis added). The last point may be implicit in the Committee's published rule, but Mr. Goldberger points out that it is not made explicit. Goldberger also noted that if a filing contained some highly technical deviation from the local rule, then Rule 52(a) would allow the courts to disregard the error as harmless.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 1. Scope; Definitions

* * * * *

(b) Definitions. The following definitions apply to these rules:

* * * * *

(11) "Telephone" means any form of live electronic voice communication.

~~(11)~~(12) "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e).

* * * * *

Committee Note

Subdivision (b)(11). The added definition clarifies that the term "telephone" includes technologies enabling live voice conversations that have developed since the traditional "land line" telephone. Calls placed by cell phone or from a computer over the internet, would be included, for example. The definition is limited to live communication in order to ensure contemporaneous

---

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

communication and excludes voice recordings. Live voice communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. ~~It~~ Except as provided in Rule 4.1, it must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

Committee Note

Under the amended rule, the complaint and supporting material may be submitted by telephone or reliable electronic means, however, the Rule requires that the judicial officer administer the oath or affirmation in person or by telephone. The Committee concluded that the benefits of making it easier to obtain judicial oversight of the arrest decision and the increasing reliability and accessibility to electronic communication warranted amendment of the rule. The amendment makes clear that the submission of a complaint to a judicial officer need not be done in person and may instead be made by telephone or other reliable electronic means. The successful experiences with electronic applications under Rule 41, which permit electronic applications for search warrants, support a comparable process for arrests. The provisions in Rule 41 have been transferred

to new Rule 4.1, which governs applications by telephone or other electronic means under Rules 3, 4, 9, and 41.

Rule 4. Arrest Warrant or Summons on a Complaint

* * * * *

(c) Execution or Service, and Return.

* * * * *

(3) ***Manner.***

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the <u>original or a duplicate original</u> 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 <u>original or a duplicate original</u> warrant to the defendant as soon as possible.

* * * * *

(4) ***Return.***

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. The officer may do so by reliable electronic means. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

* * * * *

(d) Warrant by Telephone or Other Reliable Electronic Means. In accordance with Rule 4.1, a magistrate judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

Committee Note

Rule 4 is amended in three respects to make the arrest warrant process more efficient through the use of technology.

Subdivision (c). First, Rule 4(c)(3)(A) authorizes a law enforcement officer to retain a duplicate original arrest warrant, consistent with the change to subdivision (d), which permits a court to issue an arrest warrant electronically rather than by physical delivery. The duplicate original warrant may be used in lieu of the original warrant signed by the magistrate judge to satisfy the requirement that the defendant be shown the warrant at or soon after an arrest. *Cf.* Rule 4.1 (b)(5) (providing for a duplicate original search warrant).

Second, consistent with the amendment to Rule 41(f), Rule 4(c)(4)(A) permits an officer to make a return of the arrest warrant electronically. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Subdivision (d). Rule 4(d) provides that a magistrate judge may issue an arrest warrant or summons based on information submitted electronically rather than in person. This change works in conjunction with the amendment to Rule 3, which permits a magistrate judge to consider a criminal complaint and accompanying documents that are submitted electronically. Subdivision (d) also incorporates the procedures for applying for and issuing electronic warrants set forth in Rule 4.1.

Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

(a) In General. A magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons.

(b) Procedures. If a magistrate judge decides to proceed under this rule, the following procedures apply:

(1) ***Taking Testimony Under Oath.*** The judge must place under oath — and may examine — the applicant and any person on whose testimony the application is based.

(2) ***Recording and Certifying Testimony****. If the judge considers information in addition to the contents of a written affidavit submitted by reliable electronic

---

*Note that the reporters recommend combining subsections (b)(2) and (3), and renumbering the remaining subsections of (b). If this change is adopted, it will require parallel changes in the Committee Note.

means, the testimony must be recorded verbatim by an electronic recording device, a court reporter, or in writing. The judge must have any recording or court reporter's notes transcribed, have the transcription's accuracy certified, and file the transcript. The judge must sign any written record, certify its accuracy and file it.

(3) ***Preparing a Summary or Order.*** If the affiant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must simply prepare, sign and file a written summary or order.

(4) ***Applicant's Preparing a Proposed Duplicate Original of a Complaint, Warrant, or Summons.*** The applicant must prepare a proposed duplicate original of a complaint, warrant, or summons, and

must read or otherwise transmit its contents verbatim to the judge.

(5) ***Preparing an Original Complaint, Warrant, or Summons.*** If the applicant reads the contents of the proposed duplicate original, the judge must enter those contents into an original complaint, warrant, or summons. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original.

(6) ***Modification.*** The judge may modify the complaint, warrant, or summons. The judge must transmit the modified version to the applicant by reliable electronic means or direct the applicant to so modify the proposed duplicate original. If the judge directs the applicant to modify the duplicate original, the judge must make and keep a written record of that modification.

(7) ***Signing.*** If the judge decides to approve the complaint, or to issue the warrant or summons, the judge must immediately:

(A) sign the original;

(B) enter on its face the exact date and time it is approved or issued; and

(C) transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name and enter the date and time on the duplicate original.

(c) **Limited Suppression of Evidence.** Absent a finding of bad faith, evidence obtained from a warrant issued under this rule must not be suppressed on the ground that issuing the warrant in this manner was unreasonable under the circumstances.

Committee Note

New Rule 4.1 brings together in one Rule the procedures for using a telephone or other reliable electronic means to apply for, approve, or issue warrants, summonses, and complaints. The procedures that have governed search warrants "by telephonic or other means," formerly in Rule 41(d)(3) and (e)(3), have been relocated to this Rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

With one exception noted in the next paragraph, the new Rule preserves the procedures formerly in Rule 41 without change. Limited to "magistrate judges," the Rule continues to require, as did former Rule 41(d)(3) and (e)(3), that a federal judge (and not a state judge) handle electronic applications, approvals, and issuances. The Rule continues to require that the judge place an applicant under oath over the telephone, and permits the judge to examine the applicant, as Rule 41 had provided. Rule 4.1(b) continues to require that when electronic means are used to issue the warrant, the magistrate judge retains the original warrant. Minor changes in wording and reorganization of the language formerly in Rule 41 were made to aid in application of the rules, with no intended change in meaning.

The only substantive change to the procedures formerly in Rule 41(d)(3) and (e)(3) appears in new Rule 4.1(b)(2). Former Rule 41(d)(3)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1(b)(2) provides that when a warrant application and affidavit are sent

electronically to the magistrate judge and the telephone conversation between the magistrate judge and affiant is limited to attesting to the written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge can simply prepare a written *summary* or order memorializing the affirmation of the oath. Rule 4.1(b) (7) specifies that any written summary or order must be signed by the magistrate judge and filed with the clerk. This process will maintain the safeguard of documenting the warrant application process.

Rule 6. The Grand Jury

* * * * *

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury — or its foreperson or deputy foreperson — must return the indictment to a magistrate judge in open court. To avoid unnecessary cost or delay, the magistrate judge may take the return by video teleconference from the court where the grand jury sits. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

* * * * *

Committee Note

Subdivision (f). The amendment expressly allows a judge to take a grand jury return by video teleconference. Having the judge in the same courtroom remains the preferred practice because it promotes the public's confidence in the integrity and solemnity of a federal criminal proceeding. But, there are situations when no judge

is present in the courthouse where the grand jury sits, and a judge would be required to travel long distances to take the return. Avoiding delay is also a factor, since the Speedy Trial Act, 18 U.S.C. § 3161(b), requires that an indictment be returned within thirty days of the arrest of an individual to avoid dismissal of the case. The amendment is particularly helpful when there is no judge present at a courthouse where the grand jury sits and the nearest judge is hundreds of miles away.

Under the amendment, the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. Utilizing video teleconference, the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. § 3161(b), and preserves the judge's time and safety.

Rule 9. Arrest Warrant or Summons on an Indictment or Information

* * * * *

(d) Warrant by Telephone or Other Means. In accordance with Rule 4.1, a magistrate judge may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means.

Committee Note

Subdivision (d). Rule 9(d) authorizes a court to issue an arrest warrant or summons electronically on the return of an indictment or the filing of an information. In large judicial districts the need to travel to the courthouse to obtain an arrest warrant in person can be burdensome, and advances in technology make the secure transmission of a reliable version of the warrant or summons possible. This change works in conjunction with the amendment to Rule 6 that permits the electronic return of an indictment, which similarly eliminates the need to travel to the courthouse.

Rule 32.1. Revoking or Modifying Probation or Supervised Release

* * * * *

(f) On a defendant's request, the court may allow the defendant to participate in proceedings under this rule through video teleconferencing.

Committee Note

Subdivision (f). New subdivision (f) of Rule 32.1 allows a defendant to participate in revocation proceedings via video teleconferencing on the defendant's consent and the court's approval. This option may be especially useful in a case in which the defendant is arrested in one district and would otherwise have to be transported

to another district where the original sentence was imposed. If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel. The amendment does not address whether victims, witnesses, or others may participate in any hearing under Rule 32.1 through video teleconferencing or other means. The same standards and procedures for the use of video teleconferencing that were suggested in the Committee Note accompanying the 2002 amendment to Rule 5 are applicable here.

Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

* * * * *

(d) **Video teleconferencing.** If the defendant consents, video teleconferencing may be used to conduct an appearance under this rule.

Committee Note

The amendment provides for video teleconferencing, in order to bring the Rule into conformity with Rule 5(f).

Rule 41. Search and Seizure

* * * * *

(d) Obtaining a Warrant.

* * * * *

(3) ***Requesting a Warrant by Telephonic or Other Reliable Electronic Means.*** In accordance with Rule 4.1, a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.

~~(A) *In General.* A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.~~

~~(B) *Recording Testimony.* Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:~~

~~(i) place under oath the applicant and any person on whose testimony the application is based; and~~

~~(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.~~

~~(C) *Certifying Testimony*. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.~~

~~(D) *Suppression Limited*. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject~~

~~to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.~~

(e) Issuing the Warrant.

* * * * *

~~(3) ***Warrant by Telephonic or Other Means.*** If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:~~

~~(A) *Preparing a Proposed Duplicate Original Warrant.* The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.~~

~~(B) *Preparing an Original Warrant.* If the applicant reads the contents of the proposed~~

~~duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.~~

~~(C) *Modification.* The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.~~

~~(D) *Signing the Warrant.* Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued,~~

~~and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.~~

(f) Executing and Returning the Warrant.

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

* * * * *

(D) *Return.* The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate judge designated on the warrant. The officer may do so by reliable electronic means. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) ***Warrant for a Tracking Device.***

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant. The officer may do so by reliable electronic means.

* * * * *

Committee Note

Subdivisions (d)(3) and (e)(3). The amendment deletes the provisions that govern the application for and issuance of warrants by telephone or other reliable electronic means. These provisions have been transferred to new Rule 4.1, which governs complaints and warrants under Rules 3, 4, 9, and 41.

Subdivision (f)(2). The amendment permits any warrant return to be made by reliable electronic means. Requiring an in-person return can be burdensome on law enforcement, particularly in large

districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Rule 43. Defendant's Presence

(a) When Required. Unless this rule, Rule 5, ~~or~~ Rule 10, or Rule 32.1 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) When Not Required. A defendant need not be present under any of the following circumstances:

(1) ***Organizational Defendant.*** The defendant is an organization represented by counsel who is present.

(2) ***Misdemeanor Offense.*** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur by video teleconferencing or in the defendant's absence.

* * * * *

Committee Note

Subdivision (b). This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment allows participation through video teleconference as an alternative to appearing in person or not appearing. Participation by video teleconference is permitted only when the defendant has consented in writing and received the court's permission.

Rule 49. Serving and Filing Papers

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

* * * * *

(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.

Committee Note

Subdivision (e). Filing papers, by electronic means is added as new subdivision (e), which is drawn from Civil Rule 5(d)(3). It makes it clear that a paper filed electronically in compliance with the Court's local rule is a written paper.

Criminal Rule 6(f) **09-CR-003**

Janice Stewart to Rules_Comments 12/14/2009 03:05 PM

Dear Committee:

Although adding the ability to take grand jury returns by video teleconference is an improvement to this Rule 6(f), I urge you to consider a more substantive change in order to preserve the judge's time and safety, namely eliminating the need to return grand jury indictments in open court. Granted, the return only takes a few minutes, but it is an interruption that takes time away from other duties not only for the judge, but also the courtroom deputy, court reporter and Assistant United States Attorney.

In state court here in Oregon, the grand jury simply files the indictments with the clerk's office. We should be able to do the same in federal court. Therefore, I request that Rule 6(f) be amended to allow the grand jury to bypass the court and return the indictments directly to the Clerk's Office.

Janice M. Stewart
U.S. Magistrate Judge
1107 US Courthouse
1000 SW 3rd Ave.
Portland, OR 97204
503-326-8260

09-CR-004

Criminal Rule 6(f)

Donald Ashmanskas to Rules_Comments 12/15/2009 01:17 PM

Sent by: **Sara Mulroy**

Dear Committee:

I join in Judge Stewart's request that Rule 6(f) be amended to allow the grand jury to return indictments directly to the Clerk's Office.

I also agree with Bryan Garner that "[b]ecause the - person words are so ugly and ineffective, a better nonsexist expression is presiding juror." Bryan Garner, A Dictionary of Modern Legal Usage, Sexism (B), p. 802 (2d ed. 1995).

Thank you for your consideration of these two requests.

Donald C. Ashmanskas
U.S. Magistrate Judge
1604 U.S. Courthouse
1000 SW Third Avenue
Portland, OR 97204
503-326-8451

FEDERAL MAGISTRATE JUDGES ASSOCIATION

48TH ANNUAL CONVENTION - SANTA FE, NEW MEXICO
JULY 7 - JULY 9, 2010
www.fedjudge.org

OF FICER S

PRESIDENT
HON. THOMAS C. MUMMERT, III
St. Louis, MO

PRESIDENT-ELECT
HON. BARRY M. KURREN
Honolulu, HI

VICE PRESIDENT
HON. MALACHY E. MANNION
Wilkes-Barre, PA

TREASURER
HON. KAREN WELLS ROBY
New Orleans, LA

SECRETARY
HON. SIDNEY I. SCHENKIER
Chicago, IL

IMMEDIATE PAST PRESIDENT
HON. ANTHONY J. BATTAGLIA
San Diego, CA

DIRECTORS

HON. JOHN M. FACCIOLA (DC)
Washington, DC

HON. JUDITH G. DEIN (I)
Boston, MA

HON. DAVID E. PEEBLES (II)
Syracuse, NY

HON. LISA P. LENIHAN (III)
Pittsburgh, PA

HON. THOMAS M. DI GIROLAMO (IV)
Greenbelt, MD

HON. DONALD D. BUSH (V)
Plano, TX

HON. WILLIAM H. BAUGHMAN, JR. (VI)
Cleveland, OH

HON. WILLIAM E. CALLAHAN, JR. (VII)
Milwaukee, WI

HON. ARTHUR J. BOYLAN (VIII)
St. Paul, MN

HON. ROSALYN M. CHAPMAN (IX)
Los Angeles, CA

HON. JAMES P. DONOHUE (IX)
Seattle, WA

HON. ALAN C. TORGERSON (X)
Albuquerque, NM

HON. T. MICHAEL PUTNAM (XI)
Birmingham, AL

DIRECTOR AT LARGE

HON. SHON T. ERWIN
Lawton, OK

09-CR-005

January 11, 2010

09-EV-011

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rules of Criminal Procedure and Evidence

Dear Mr. McCabe:

The Federal Magistrate Judges Association submits the attached comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA, chaired by Judge Alexander. The committee members are:

Honorable S. Allan Alexander, Northern District of Mississippi, Chair
Honorable Hugh Warren Brenneman, Jr., Western District of Michigan
Honorable Geraldine Soat Brown, Northern District of Illinois
Honorable Joe B. Brown, Middle District of Tennessee
Honorable William E. Callahan, Jr., Eastern District of Wisconsin
Honorable Waugh B. Crigler, Western District of Virginia
Honorable Virginia M. Morgan, Eastern District of Michigan
Honorable Mary Pat Thynge, Delaware District Court
Honorable David A. Sanders, Northern District of Mississippi
Honorable Nita L. Stormes, Eastern District of Pennsylvania
Honorable Diane K. Vescovo, Western District of Tennessee
Honorable Andrew J. Wistrich, Central District of California

The committee members come from several kinds of districts and have varying types of duties. Many of them consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and, unanimously approved by the Officers and Directors of the FMJA.

The comments reflect the considered position of magistrate judges as a whole. The FMJA has also encouraged individual magistrate judges to forward comments to you.

We are pleased to have t his opportunity to present written comments representing the view of the FMJA, and we welcome the opportunity to testify.

Sincerely,

Thomas C. Mummert, III
President, FMJA

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (Class of 2011)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE:

A. PROPOSED RULE 1 – Scope; Definitions

COMMENT: The proposed amendment expands the definitions of "telephone" and "telephonic" to address changes in technology. **The Federal Magistrate Judges Association endorses the proposed change.**

B. PROPOSED RULE 3 – The Complaint

COMMENT: Rule 3 authorizes consideration of complaints and issuance of arrest warrants and search warrants based on information submitted by reliable electronic means as provided for in proposed Rule 4.1. **The FMJA endorses the proposed changes subject to its reservations and proposed revisions to proposed new Rule 4.1.**

C. PROPOSED RULE 4 – Arrest Warrant or Summons on a Complaint

COMMENT: The proposed changes to Rule 4 authorize the issuance of arrest warrants and summonses based on information submitted by reliable electronic means as provided for in proposed new Rule 4.1,

the return of warrants by reliable electronic means, and the use of a duplicate original warrant to be shown to the defendant. **The FMJA endorses the proposed changes subject to its reservations and proposed revisions to proposed new Rule 4.1.**

D. PROPOSED RULE 4.1

COMMENT: Proposed Rule 4.1 incorporates provisions of Rule 41 that allow a warrant to be issued based on information submitted by reliable electronic means and extends those procedures to complaints, arrest warrants and summonses. **The FMJA endorses the principle underlying proposed Rule 4.1 but believes that the purpose of the proposed rule could best be achieved by revision to more accurately reflect the function of a magistrate judge and clarify procedures calculated to assure protection of constitutional rights.**

DISCUSSION: Proposed new Fed. R. Crim. P. 4.1 is based on current Fed. R.Crim. P. 41(d)(3), which authorizes a magistrate judge to issue a search warrant based on information and application transmitted by "telephone or other reliable electronic means" rather than by the agent's personal presence before the judge. Proposed Rule 4.1 is intended to simplify the procedure now set out in Rule 41(d)(3) and to apply the procedure both to search warrants and arrest warrants under the proposed amendment to Rule 4(d).

Although FMJA endorses the principle of proposed Rule 4.1, it has the following reservations and proposes the following revisions.

Current Rule 41(d)(3) is cumbersome to use in the most common situation: when the information communicated

by electronic means which forms the basis of probable cause is limited to the agent's affidavit. Under the current rule, the judge's "conversation" with the agent and government attorney must be recorded by a recording device, a court reporter or in writing; the recording or the court reporter's notes must be transcribed; and the transcription or written record must be filed, even if the agent is only swearing to the contents of an affidavit that has been faxed or e-mailed to the judge. That is more than is generally done when the agent appears before the judge in person and swears to the contents of a affidavit; generally, that exchange is not recorded. Proposed Rule 4.1 is intended to simplify the process by allowing a judge to simply prepare and file an order or summary if the information upon which the warrant is issued is limited to the affidavit, instead of recording the entire conversation. The objective – to make a clear and permanent record of the basis for the judge's probable cause determination in case of a motion to suppress – is still achieved.

The problem with the proposed Rule 4.1 is not the intent, but the drafting.

First, subparts 4.1(a) and (b)7 refer to a magistrate judge "deciding whether to approve a complaint." That is not correct. The magistrate judge does not *approve* a complaint; the magistrate judge decides whether there is probable cause for the charges in the complaint. Thus, the FJMA suggests that those subparts be revised to read as follows:

(a) ***In General.*** A magistrate judge may consider information communicated by telephone or other reliable electronic means when deciding whether there is probable cause set forth in a complaint or

to issue a warrant or summons.

(b)(7) ***Signing.*** If the judge decides that there is probable cause set forth in the complaint or to issue the warrant or summons, the judge must immediately: [etc]

The FMJA believes that this language would also assure the intent that the specified procedures apply whether the court is addressing pre-arrest situations or situations where the person has been taken into custody on a warrantless arrest.

Second, we found 4.1(b)(2) and (3) very confusing. For example, it is unclear whether the use of "verbatim recording" and "verbatim record" is intended to mean different things in subpart (b)(3).

In addition, current Rule 41(d)(3) has certain problems that are perpetuated rather than corrected in the proposed rule. Current Rule 41(d)(3) requires the judge to certify the accuracy of a transcription of any recording or court reporter's notes. Certification is the responsibility of the court reporter who prepares the transcript, not of the judge. Also, the FTR recording system used in many magistrate judge courtrooms is already certified, so there is no need for the judge to re-certify the accuracy of that recording. Similarly, the obligation to make arrangements for the recording of testimony should belong to the government attorney seeking the warrant, not the judge.

The FMJA suggests the following in lieu of proposed subparts (b)(2) and (3):

(b)(2). ***Recording and Certifying Testimony.*** If

the judge considers information in addition to the contents of a written affidavit submitted by reliable electronic means, the testimony must be recorded verbatim by an electronic recording device, a court reporter, or in writing. The judge must have any recording or court reporter's notes transcribed, have the transcription's accuracy certified, and file the transcript. The judge must sign any written record, certify its accuracy and file it.

(b)(3) ***Preparing a Summary or Order.*** If the testimony is limited to the affiant's attesting to the contents of a written affidavit submitted by reliable electronic means, the judge must simply prepare, sign and file a written summary or order.

In making these comments, the FMJA strongly endorses the recognition in Rule 4.1 that it is up to the magistrate judge to decide whether to consider a request for a warrant made by "telephone or other reliable electronic means," or instead to require the applicant and the attesting agent to present the application in person.

E. PROPOSED RULE 6 – The Grand Jury

COMMENT: The proposed amendment permits a grand jury return to be taken by video conference. **The FMJA endorses the proposed change**

F. PROPOSED RULE 9 – Arrest Warrant of Summons on an Indictment or Information

COMMENT: The proposed changes to Rule 9 authorizes the court to consider complaints and issuance of arrest warrants and summonses based on information submitted by reliable electronic means. **The FMJA endorses the proposed**

changes subject to its reservations and proposed revisions to proposed new Rule 4.1.

G. PROPOSED RULE 32.1 – Revoking or Modifying Probation or Supervised Release

COMMENT: The proposed change to Rule 32.1 would allow a defendant to participate, upon request, in proceedings involving revocation or modification of probation or supervised release by video teleconference. **The FMJA endorses the proposed change subject to its reservations and proposed revisions to proposed new Rule 4.1.**

H. PROPOSED RULE 40 – Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District

COMMENT: The proposed change would allow a defendant to consent to participate via video conference in a proceeding on arrest for failure to appear in another district. **The FMJA endorses the proposed change.**

I. PROPOSED RULE 41 – Search and Seizure

COMMENT: The proposed change deletes provisions now found in new Rule 4.1 and authorizes return of warrants by reliable electronic means. **The FMJA endorses the proposed changes subject to its reservations and proposed revisions to proposed new Rule 4.1.**

J. PROPOSED RULE 43 – Defendant's Presence

COMMENT: The proposed change allows a defendant who consents in writing to participate in arraignment, trial and sentencing in misdemeanor cases via video conference. **The FMJA endorses the proposed change.**

K. PROPOSED RULE 49 – Serving and Filing Papers

COMMENT: The proposed change authorizes local rules permitting papers to be filed, signed or verified by electronic means. **The FMJA endorses the proposed change.**

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Peter Goldberger
CO-CHAIR, COMMITTEE ON
FEDERAL RULES OF PROCEDURE

February 16, 2010

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to the Federal Rules of Criminal Procedure
Published for Comment in August 2009

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Criminal Procedure. NACDL's comments on the proposed rewording of the Evidence Rules have been submitted separately. Our organization has more than 11,000 members; in addition, NACDL's 79 state and local affiliates, in all 50 states, comprise a combined membership of more than 28,000 private and public defenders. NACDL, which recently celebrated its 50th Anniversary, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

In the following pages, we address the August 2009 proposed amendments to the Federal Rules of Criminal Procedure.

NACDL endorses most of the proposed "technology amendments." We have a few comments and suggestions, however.

RULE 4.1 - WARRANTS, ETC.

In the new proposed Rule 4.1 ("Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means"), in subdivision (b)(6) ("Modification"), the Committee should add: "If the judge directs the applicant verbally to modify the proposed complaint, warrant or summons, the judge

1660 L Street, NW ◆ 12th Floor ◆ Washington, DC 20036
202-872-8600 Fax 202-872-8690 peter.goldberger@verizon.net www.nacdl.org

must make and keep a written record of any modification that was verbally directed." In subdivision (b)(7), the Rule should specify that the judge, in addition to directing the applicant to sign the judge's name on the duplicate original, must also direct that the date and time be noted. Thus, the words "and enter the date and time" should be inserted after "sign the judge's name." These suggestions are designed to ensure a full and accurate record of the warrant issuing process for potential review and evaluation at any later hearing.

The provision proposed to be codified in Rule 4.1(c), purporting to limit the application of the exclusionary rule, which was originally added in 2002 to Rule 41(d)(3) by the USA PATRIOT Act, and which the Committee's draft would relocate to Rule 4, should instead be omitted. By directing this provision to be added to the Rules, Congress expressed its view that the matter was procedural, and thus properly within the purview of the Rules Committee. The Committee should now recognize the inappropriateness of codifying particular applications of (or exceptions to) the Constitutionally-based, judge-defined exclusionary rule in the Rules of Criminal Procedure. In any event, this provision is problematic at best. First, the rule demands a "finding of bad faith"; that is a substantive, not a procedural requirement, and is thus disallowed by 28 U.S.C. § 2072(b). Moreover, a showing of "bad faith" is not what the Supreme Court requires to overcome the specific and limited "good faith" exception created in United States v. Leon, 468 U.S. 897 (1984). This ill-advised provision, which is out of keeping with the rest of the Rules and of doubtful constitutionality under the Fourth Amendment, should simply be repealed.

Finally, in the Advisory Committee Note for new Rule 4.1(a) we suggest a clarification in the proposed wording, which now states that the telephonic warrant power is "limited to 'magistrate judges,'." Under Rule 1(c), this really means that authority is conferred on all federal judges but not on state judges. The present wording of the Note could readily lead someone not familiar with the definitional provision to miss the point. The Note should either use to words "federal judges" or insert an explanatory cross-reference to Rule 1(c).

RULE 32.1 - REVOCATION HEARINGS

The terms of proposed amended Rule 32.1 ("Revoking or Modifying Probation or Supervised Release"), would permit the defendant to participate by video-conference only if the defendant made a "request" to do so. Other similar provisions (such as Rule 40 hearings) permit video-conferencing with the defendant's "consent." We understand the difference to be that a revocation hearing could be conducted via video-conference only on the initiative of the defense. The proceeding could not be conducted remotely at the suggestion of the court, the probation officer or the prosecutor, even if the defendant subsequently consented. This restriction wisely protects the defendant from pressure to yield to others' sense of expediency.

On this understanding, NACDL supports the proposal. However, and again on the understanding that we have properly apprehended the significance of the chosen wording, two changes need to be made in the proposed Advisory Committee Note. First, the Note misstates the amendment's requirement by referring to "the defendant's consent and the court's approval." (Emphasis added.) In the Note, the term "consent" needs to be changed to "request," to conform to the precise requirement of the Rule. Second, the Note goes on to say, "If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel." (Emphasis added.) The word "should" in this sentence needs to be changed to "must." The defendant's right to counsel -- including the effective assistance of counsel -- at any revocation hearing is guaranteed by the Due Process Clause and the Criminal Justice Act (18 U.S.C. § 3006A(a)(1)(C),(E)) and is recognized in Rule 32.1(a)(3)(B) and (b)(2)(D). The Advisory Committee Note should not depreciate the importance of the protection of this right.

RULE 43 - DEFENDANT'S PRESENCE

The proposed change to subdivision (a) of Rule 43 ("Defendant's Presence") would merely add a cross-reference to Rule 32.1. There is no Advisory Committee comment on this change, which while no doubt is intended merely to be conforming, might actually be confusing. A revocation hearing is not a proceeding of a kind listed in Rule 43(a)(1),(2) or (3) as one where the defendant's presence is required, and thus no exception for cases covered by amended Rule 32.1 is necessary in the introductory "unless" clause. If anything, adding the cross-reference opens the Rule to the interpretation that the defendant cannot waive his or her presence at any proceeding (whether or not listed in subsections (a)(1), (2) and (3)) unless mentioned in the introductory "unless" clause -- an interpretation that might also find support in the existence of subsection (c) of the Rule, which discusses waivers.

NACDL believes that interpretation would be unwarranted and unwise. We believe that with the Court's consent and upon the execution of a knowing, intelligent and counseled waiver of the right to be present, the defendant should not be required to attend every day of every listed proceeding. For example, defendants who are to receive a mandatory sentence, who do not care to allocute prior to imposition of that sentence, and who would prefer not to undergo the security procedures necessary to bring them to court, should be allowed to waive their presence at sentencing. It is unclear whether the present rule would allow this, but the addition of the mention of Rule 32.1 to the introductory "unless" clause confuses the picture even further. At the very least, an Advisory Committee Note for the subsection (a) amendment should be drafted to remove the invitation to misinterpretation.

For future study with respect to Rule 43, NACDL suggests the Committee consider whether "uncontested" proceedings in general should be open to knowing and intelligent waiver of the defendant's presence, or to being conducted at the defendant's request by video-conferencing. Fully negotiated guilty pleas, even in felony cases, and many negotiated

sentencings, might fall into that category. In larger districts, allowing such proceedings could be beneficial to all. We are not entirely convinced that this proposal should be adopted, but we do invite the Committee's consideration of it, and offer our cooperation in considering the pros and cons.

RULE 49 - FILING AND SERVICE

The proposed amendment to Rule 49(e) ("Electronic Service and Filing") which expressly allows electronic filing in criminal cases, would eliminate some but not all of the complication and potential for confusion that presently arises from the provision in Rule 49(d) which adopts by reference the filing rules "for a civil action." Few criminal lawyers know the Civil Rules very well, and requiring a cross-reference to the Civil Rules is very unusual -- and inconvenient -- in the Criminal Rules. We suggest that the Rule 49(d) cross-reference be eliminated entirely, and a full elaboration of the filing rules for criminal cases be inserted in Rule 49 instead.

As for the newly proposed Rule 49(e) itself, we would suggest several clarifications for the last sentence. In place of "A paper filed electronically in compliance with a local rule is written or in writing under these rules," we suggest: "A paper filed and served electronically complies with any statute requiring that a paper in a criminal case be filed and served, and is 'written' or 'in writing' under these rules, but only if filed and served in compliance with any applicable local rule." Compliance with the local rule on electronic filing should be a requirement, not merely an option, for acceptance of electronic filing or service, and the ECF option should expressly extend to statutory filings not merely those under the Criminal Rules. Nonprejudicial noncompliance can still be excused, of course, as may be provided in the applicable local rule.

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on these important and difficult issues. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,

s/Peter Goldberger
Alexander Bunin
Albany, New York
William J. Genego
Santa Monica, CA
Peter Goldberger
Ardmore, PA
Cheryl Stein
Washington, D.C.
National Association
of Criminal Defense Lawyers
Committee on Rules of Procedure

Please reply to:
Peter Goldberger
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

THE STATE BAR
OF CALIFORNIA
– COMMITTEE ON FEDERAL COURTS

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2515

February 16, 2010

09-BK-133

Via E-mail

Rules_Comments@ao.uscourts.gov

09-CR-007

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

09-EV-015

Re: Proposed Amendments to the Federal Rules

Dear Mr. McCabe:

The State Bar of California's Committee on Federal Courts ("Committee") has reviewed the proposed amendments to the Federal Rules of Bankruptcy Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence. The Committee appreciates the opportunity to submit these comments. By way of background, the Committee is comprised of attorneys throughout the State of California who specialize in federal court practice and volunteer their time and expertise to analyze and comment upon matters that have an impact on federal court practice in California. The Committee consists of a broad range of federal practitioners, including members with civil, criminal, bankruptcy, and appellate experience.

I. Federal Rules of Bankruptcy Procedure

Rule 2019

The Committee endorses and adopts the comments submitted by the Insolvency Law Committee of the Business Law Section of the State Bar of California, by letter dated February 12, 2010. With regard to the proposed amendments to Rule 2019, the Committee submits the following additional comments.

The Committee believes that the rule should only apply to the extent that an entity, group or committee not only (a) consists of or represents more than one holder of debt or equity but also (b) participates in the bankruptcy case in that capacity, as opposed to a standing organization with purposes beyond the scope of the case that participates in other ways (such as by filing an amicus brief). For example, if a "League of Concrete Vendors" were a multi-purpose association

which had activities beyond the scope of the specific bankruptcy case at issue (such as the National Association of Manufacturers (NAM)), and if that League were to file an amicus brief and were not representing any holders of debt or equity in the case, then Rule 2019 should not apply to the League. In addition, even if such a League were to represent creditors or equity holders in the case, the Committee believes the League should only have to disclose information relative to such creditors, not all of its other members.

The Committee also urges that any revision of Rule 2019 include clarifying language that limits its application only to (a) an "entity, group or committee" when the purpose of such a grouping is to act in the name of an official or unofficial class or group of creditors or interest holders, as opposed to the use of a name of convenience to cover specific named parties, or (b) such other entity, group or committee as the court may direct, after notice and a hearing, provided that (i) such entity, group or committee is participating in the case by seeking or opposing the granting of relief, and (ii) any such disclosures are subject to the ordinary rules limiting discovery (such as requirements as to relevance, and protections of trade secrets and confidences). For example, the Committee believes that Rule 2019 should not normally apply if an appearance is made by "Company A, Company B and Person C, referred to herein as the 'Equipment Lessors.' " In such a circumstance, the group title of "Equipment Lessors" is purely a convenient shorthand reference term for the specific parties named once in each pleading or appearance, and does not denote authority to represent any other parties, other than those specifically named.

II. Federal Rules of Criminal Procedure

Proposed New Rule 4.1

The Committee is concerned that proposed Rule 4.1 would no longer require a recording or verbatim transcription of the magistrate and the affiant during the communication pertinent to obtaining warrants, complaints, and summons. Although the rule recommends that the judge record the testimony taken under oath, there is no requirement to do so. A written summary or order suffices where the testimony is limited to attesting to the contents of a written affidavit transmitted by reliable electronic means.

The Committee is concerned about the possibility of losing a complete and accurate record. In contested search and arrest warrants, it is important to have a transcript of the probable cause determination. While the probable cause statement is available to counsel, the background is not. For this reason, the Committee recommends that the requirement for transcription or recording stay intact, whether it means producing and maintaining voice recordings, email, or other recording methods necessary to maintain a clear and complete record.

III. Federal Rules of Evidence

As an initial matter, although all the Committee Notes to the revised rules indicate the changes are stylistic and not substantive, for consistency and clarity, we believe there should be a general rule (comparable to Federal Rule of Civil Procedure 86), expressly stating that the 2010

revisions are stylistic only. In addition, we note that the proposed amendments to several rules have added or changed the subpart headings, which could make legal research confusing. One example is Federal Rule of Evidence 608(b), which now has two paragraphs, but the substance of the second paragraph would be moved to Federal Rule of Evidence 608(c). For each rule that has a change in the subpart headings, we suggest that the Committee Notes mention the change so that legal research will not be hampered.

As for the specific rule changes, the Committee has the following comments:

Rule 104(b)

The Committee believes the proposed revisions make the rule less clear, and suggests that the language proposed by the American College of Trial Lawyers be adopted instead.

Rules 802 and 901(b)(10)

The current version of Federal Rule of Evidence 802 provides that hearsay is not admissible except as provided by the Federal Rules of Evidence or "by other rules prescribed by the Supreme Court *pursuant to statutory authority or by Act of Congress*" (emphasis added). This language suggests that rules prescribed by the Supreme Court cannot provide for admissible hearsay absent some specific statutory authority or Act of Congress. The proposed revision would delete the phrase "pursuant to statutory authority or by Act of Congress." If deletion of that phrase expands the authority of the Supreme Court, it would be a substantive change, and not simply stylistic.

The current version of Federal Rule of Evidence 901(b)(10) deals with the requirement of authentication or identification, and provides for any method of authentication or identification "provided by Act of Congress or by other rules prescribed by the Supreme Court *pursuant to statutory authority*" (emphasis added). Similar to the proposed amendment to Rule 802, the proposed amendment to Rule 901(b)(10) would delete "pursuant to statutory authority." If deletion of that phrase expands the authority of the Supreme Court, it would be a substantive change, and not simply stylistic.

Rules 901(b)(7)(B), 902(4) and 1005

In each of these three rules, the phrase "authorized to be recorded or filed . . . " would be changed to "lawfully recorded or filed." In the Committee's view, this leaves it ambiguous as to whether "lawfully" modifies both "recorded" and "filed," which we believe the original rule intended. Therefore, we suggest that the amendments to these three rules add the word "lawfully" in front of "filed," reading "lawfully recorded or lawfully filed."

Disclaimer

This position is only that of the State Bar of California's Committee on Federal Courts. This position has not been adopted by the State Bar's Board of Governors or

overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

Joan Jacobs Levie
Chair, 2009-2010
The State Bar of California
Committee on Federal Courts

JENNER&BLOCK

February 15, 2010

Jenner & Block LLP
919 Third Avenue
37th Floor
New York, NY 10022
Tel 212-891-1600
www.jenner.com

Chicago
Los Angeles
New York
Washington, DC

Sharmila Sohoni
Tel 212 891-1674
ssohoni@jenner.com

Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, N.E.
Washington, D.C. 20544

09-CR-008

Re: Proposed Amendments to Federal Rule of Criminal Procedure 43

To the Committee:

We were recently appointed as amicus curiae by the U.S. Court of Appeals for the Seventh Circuit to brief the court on whether a district court may conduct a Rule 32.1 supervised release revocation hearing by videoconference. The defendant contended that the videoconferencing was improper because supervised release revocation hearings constitute "sentencings" under Rule 43 and several courts have construed Rule 43's requirement of "presence" at sentencing to forbid the use of videoconferencing. As amicus curiae, we researched the issue and concluded that supervised release revocation hearings, even those that result in a term of reincarceration for the defendant, are not in fact "sentencings" for purposes of Rule 43, and that the requirements of that rule were therefore irrelevant to the question whether a district court may utilize videoconferencing at a supervised release revocation hearing.

We are concerned to observe that one of the Committee's proposed amendments to Rule 43 will inadvertently promote the notion that Rule 43 applies to Rule 32.1 hearings. The proposed amendment would alter Rule 43(a) to state: "Unless this rule, Rule 5, Rule 10 *or Rule 32.1* provide otherwise, the defendant must be present at" appearance, arraignment, trial, and sentencing. (Emphasis added.) Although the Committee Notes are silent on this point, the Report of the Advisory Committee explains that this change "conform[s] the rule to permit video teleconferencing as specified in other amendments." This amendment appears to flow from the incorrect assumption that a Rule 32.1 proceeding constitutes a "sentencing" under Rule 43, and that Rule 32.1 must therefore be referenced in Rule 43 for the new video teleconferencing amendment to Rule 32.1 to go into effect.

This view represents a misapprehension of the law. *See* Brief of Amicus Curiae, attached, at 4-15. There is no need to amend Rule 43(a) to "conform" to new Rule 32.1, as Rule 43 does not apply to Rule 32.1 proceedings. Changes to Rule 32.1 proceedings — including the proposed amendment that introduces videoconferencing at the defendant's option — may therefore be made without impact on or alterations to Rule 43.

Of course, it may have been the Committee's intention to make Rule 43's presence requirement applicable to Rule 32.1 hearings by inserting a cross-reference to Rule 32.1 into Rule 43(a). If that is the case, the Committee ought to make that change more explicitly and ought to comment on it in the notes to the new rule, as it would represent a substantial shift in the current law.

Sincerely,

Sharmila Sohoni

No. 09-1926

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	Appeal from the United States
	)	District Court for the Northern
Plaintiff-Appellee,	)	District of Illinois, Western
v.	)	Division.
	)	
CHRISTOPHER R. THOMPSON,	)	Case No. 3:00-cr-50002-1
	)	
Defendant-Appellant.	)	Philip G. Reinhard,
	)	Judge.
	)	
	)	

BRIEF OF AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

Barry Levenstam
Counsel of Record
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654-3456
(312) 222-9350

Andrew Weissmann
Sharmila Sohoni
JENNER & BLOCK LLP
919 Third Avenue, Floor 37
New York, New York 10022
(212) 891-1600

Amicus Curiae

December 4, 2009

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1926

Short Caption: USA v. Christopher R. Thompson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

We are appointed as amicus curiae to present argument in support of the decision of the U.S. District Court

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature: _____ Date: Dec 3 2009

Attorney's Printed Name: Barry Levenstam

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

Address: 353 N. Clark Street
Chicago, Il 60654-3456
Phone Number: 312-222-9350 Fax Number: 312-840-7735
E-Mail Address: blevenstam@jenner.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1926

Short Caption: USA v. Christopher R. Thompson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

We are appointed as amicus curiae to present argument in support of the decision of the U.S. District Court.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature: _____ Date: 12/7/09

Attorney's Printed Name: Andrew Weissmann

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

Address: 919 Third Avenue
New York, New York 10022
Phone Number: 212-891-1600 Fax Number: 212-909-0806
E-Mail Address: aweissmann@jenner.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 09-1926

Short Caption: USA v. Christopher R. Thompson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

We are appointed as amicus curiae to present argument in support of the decision of the U.S. District Court.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NA

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

NA

Attorney's Signature: S. Sohoni Date: 12/2/2009

Attorney's Printed Name: Shamila Sohoni

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

Address: 919 Third Avenue
New York, New York 10022
Phone Number: 212-891-1600 Fax Number: 212-909-0806
E-Mail Address: ssohoni@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Defendant appealed on the ground that the district court improperly infringed his rights under the Federal Rules of Criminal Procedure and the due process clause of the fifth amendment to the United States Constitution by conducting his second supervised release hearing by videoconference, with both parties in court and the judge in another location. (*See* A19.)[1] In response, the government argued that the district court erred under the Federal Rules and that the error was not harmless, and thus did not address the constitutional issue. On October 9, 2009, this Court on its own motion appointed the undersigned counsel to file a brief and present oral argument in support of the district court's decision to conduct defendant's supervised release hearing by videoconference without being in the same location as the defendant.

ISSUES PRESENTED FOR REVIEW

1. Did the district court act within its discretion under the Federal Rules of Criminal Procedure by revoking the defendant's supervised release and committing him to serve time in prison at a hearing at which (a) the parties did not present evidence and (b) the defendant, his counsel, and the government were present in court, but the district court judge participated by live, two-way videoconference from a remote location?

2. Did the above-described hearing satisfy the requirements of the due process clause of the fifth amendment to the United States Constitution for

---

[1] Citations to A__ are to the appendix filed with Defendant's brief.

revoking supervised release and committing a defendant to a term of imprisonment of 12 months?

SUMMARY OF THE ARGUMENT

The district court's judgment should be affirmed. Neither the Federal Rules of Criminal Procedure nor the due process clause of the fifth amendment requires the defendant and the judge to be present in the same room during a supervised release revocation hearing, particularly where no evidence is presented. Accordingly, the district court did not err by conducting the hearing via videoconference from a remote location while the parties and counsel were present in court.

Federal Rules of Criminal Procedure 43 and 32 require the defendant's presence only at the various phases of a criminal trial and at the sentencing in connection with the trial. In contrast, no rule requires the defendant's presence at a hearing on the revocation or modification of supervised release, which is governed by Rule 32.1. Even though a district court may commit a defendant to imprisonment at such a hearing, the revocation hearing does not constitute a Rule 32 criminal "sentencing" at which the defendant's presence is required by Rule 43.

The language and drafting history of the Rules confirm that a Rule 32.1 revocation hearing does not constitute a "sentencing" as that term is used in Rules 32 and 43. A term of imprisonment for violating a condition of supervised release is not a "sentence" under either Rule 32 or Rule 43. As a

result, this case did not involve a sentencing at which Rule 43 requires the defendant's presence.

The videoconferencing of the hearing also did not abrogate the defendant's right to allocution under Rule 32.1. The right of allocution does not require that a defendant be present in the same room as the court, but only that the defendant be asked personally by the court if he wishes to make a statement or provide evidence in mitigation. The defendant enjoyed that right in the hearing that gave rise to this appeal.

Finally, the district court did not violate the defendant's due process rights by conducting the supervised release revocation hearing via videoconference. The due process clause does not guarantee a defendant the right to be present in the same room as the judge at post-trial proceedings such as supervised release revocation hearings. The hearing in this case satisfied the applicable demands of due process: the defendant, defense counsel, and the prosecutor were in the courtroom in Illinois together, and the judge therefore was equally distant from both parties. Through the videoconferencing system, the judge could see and hear all of the parties and counsel in attendance and participated fully in the proceedings. The court provided the defendant with the right to speak on his behalf and he in fact exercised that right and spoke on his own behalf. The parties did not call any witnesses and the defendant did not say anything that necessitated a hearing with witnesses. Due process requires no more.

Therefore, this Court should affirm the judgment of the district court.

ARGUMENT

I. The District Court Did Not Abrogate The Federal Rules Of Criminal Procedure By Conducting The Defendant's Supervised Release Revocation Hearing Via Videoconference.

The district court did not err under the applicable Federal Rules of Criminal Procedure when it conducted defendant's supervised release hearing via videoconference, without being present physically in the same courtroom as the defendant, his counsel, and the government's attorneys. Only two rules in the Federal Rules of Criminal Procedure arguably require a defendant's physical presence during a supervised release hearing: Rule 43, which requires that the defendant be present at "sentencing," and Rule 32.1, which safeguards the defendant's right of allocution. Neither rule requires that the defendant and the judge be present physically in the same room at a supervised release revocation hearing, as opposed to a criminal sentencing.

Rule 43 is inapplicable to supervised release revocation hearings, even those that result in a term of imprisonment for the defendant. Further, a defendant need not be present physically to exercise effectively the right of allocution protected by Rule 32.1. As neither Rule 43 nor Rule 32.1 required the defendant and the court to be present physically in the same room at this supervised release revocation hearing, the district court did not err by conducting the hearing via videoconference.

A. Rule 43 Does Not Require The Defendant's Presence At A Supervised Release Revocation Hearing.

Rule 43, captioned "Presence of the Defendant," was adopted in 1944. At that time, Rule 43 required the presence of the defendant at "the imposition of

sentence." *See* Rule 43 (U.S. Code 1946 ed.). This was a reference to Rule 32, captioned "Sentence and Judgment," which was adopted contemporaneously. *See* Rule 32 (U.S. Code 1946 ed.). The Advisory Committee Notes to Rule 43 explicitly stated that the provisions of the rule "setting forth the necessity of the defendant's presence at arraignment and trial ... [do] not apply to hearings on motions made prior to or after trial." Adv. Comm. Notes to Rule 43, 1944 Adoption.[2] Accordingly, at the adoption of Rule 43, it was clear that post-trial proceedings such as probation revocation hearings lay beyond its ambit.[3]

In the subsequent decades, Rule 43 was modified and expanded on numerous occasions. None of these amendments, however, altered the rule to add a reference to probation or supervised release revocation hearings. The version of Rule 43 currently in force provides that a defendant "must be present" at the initial appearance, the initial arraignment, the plea, at "every trial stage," and at sentencing. Fed. R. Crim. P. 43(a). Supervised release and probation revocation hearings thus remain beyond the scope of Rule 43.

The parties contend that because a Rule 32.1 supervised release hearing can result in a term of imprisonment for the defendant (as it did here), such a

---

[2] Courts may consult the Advisory Committee Notes to ascertain the drafters' intent in promulgating the federal rules. *See Williamson v. United States*, 512 U.S. 594, 614-15 (1994) (Kennedy, J., concurring) (collecting cases relying upon Advisory Committee Notes as authoritative evidence of intent).

[3] At that time, federal courts did not impose supervised release. That came about in 1987, when Congress reformed the treatment of probation and introduced supervised release pursuant to the Sentencing Reform Act of 1984, P.L. 98-473, 98 Stat. 1987. Prior to those reforms, courts could impose probation, but only in lieu of a term of imprisonment. *See* 18 U.S.C. § 3651 (repealed).

proceeding should be treated as a "sentencing" for purposes of Rule 43. This argument ignores that sentencing is governed by Rule 32, "Sentencing and Judgment." In contrast, Rule 32.1, which is captioned "Revoking or Modifying Probation or Supervised Release," governs supervised release revocation and never uses the term "sentencing." Rule 32.1(d) instead states that the "disposition" of a supervised release case is governed by 18 U.S.C. § 3583. This statute, in turn, authorizes the court to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision ...." 18 U.S.C. § 3583(e)(3). Like Rule 32.1 and unlike Rule 32, this statute does not use the term "sentence" to describe the term of imprisonment that a court may impose upon a defendant whose supervised release the court has revoked. If the drafters of the Rules intended that "revok[ing] a term of supervised release and requir[ing] the defendant to serve in prison" be treated as a "sentencing," the Rules simply would have used the word "sentencing" or required expressly that the defendant be present for the revocation proceeding.

The history of the Rules further confirms that a Rule 32.1 supervised release hearing, even one that results in a term of imprisonment for the defendant, does not constitute a "sentencing" under Rule 43. Moreover, important policy reasons exist for courts to maintain the distinction between sentencings and Rule 32.1 revocation hearings.

1. The History Of The Rules Demonstrates That A Revocation Proceeding Is Not A "Sentencing" At Which A Defendant's Presence Is Required.

The first mention of revocation of probation in the Rules occurred in 1966, when Rule 32 was amended to add a new subsection providing that the court "shall not revoke probation except after a hearing at which the defendant *shall be present* and apprised of the grounds on which such action is proposed." *See* Rule 32(f) (U.S. Code 1970 ed.) (emphasis added); Wright *et al.*, 3 Fed. Prac. & Proc. Crim. § 541 (3d ed.).

By including an express requirement of "presence" in this new subsection, the drafters of the Rules signaled that probation revocations had not been considered "sentencings," for which Rule 43 already required a defendant's presence. The drafters also indicated that probation revocation hearings should not in future be deemed "sentencings" governed by Rule 43 merely because the provision dealing with such hearings was included in a rule that otherwise addressed sentencing.

In 1980, Rule 32(f) was eliminated and a new Rule 32.1 was introduced to govern probation revocation hearings. The new rule eliminated the requirement of the defendant's presence. Instead, Rule 32.1 required only that the defendant be given "an opportunity to appear and to present evidence in his own behalf" at the revocation hearing. *See* Rule 32.1(a)(2)(C) (U.S. Code 1982 ed.).

The new Rule's substitution for the former explicit requirement of "presence" of the new weaker language requiring only the "opportunity to

appear" was a telling change. By separating out Rule 32.1 proceedings from the rules controlling Rule 32 sentencings and by removing the "presence" language from the new Rule 32.1, the drafters confirmed that the requirement of presence in Rule 43 would thereafter apply to Rule 32 sentencings, but not to Rule 32.1 revocation proceedings.

2. Amendments To Rule 32.1 Prove That A Rule 32.1 Revocation Proceeding Does Not Constitute A "Sentencing" At Which A Defendant's Presence Is Required.

In 1989, Rule 32.1 was expanded to cover supervised release revocation as well as probation revocation. Since then, the distinction between Rule 32.1 proceedings and Rule 32 sentencings has generated some confusion in the courts. Because probation and supervised release revocation hearings often result in a term of imprisonment, some courts assumed that these proceedings were sentencings governed by Rule 32. In particular, a split emerged among the circuits regarding whether a defendant had the right of allocution at a revocation hearing because Rule 32 safeguards the right to allocute at a criminal sentencing of the defendant. When the Advisory Committee stepped in to resolve this disagreement in 2005, it did so in a manner that conclusively established that a Rule 32.1 revocation hearing should not be deemed a "sentencing" even if it results in a term of imprisonment for the defendant.

Before 2005, several circuits had concluded that aspects of Rule 32's sentencing procedures applied to a Rule 32.1 revocation hearing. *See, e.g., United States v. Reyna*, 358 F.3d 344, 347 (5th Cir. 2004) (en banc); *United States v. Patterson*, 128 F.3d 1259 (8th Cir. 1997); *United States v. Carper*, 24

F.3d 1157 (9th Cir. 1994). According to these courts, a district court conducting a Rule 32.1 revocation hearing was required to grant the defendant the right to allocution under Rule 32 before imposing a "sentence" upon the defendant. For example, in *Patterson*, the Eighth Circuit held: "Rule 32 is not expressly limited to sentencing immediately following conviction.... Rules 32 and 32.1 are 'complementing rather than conflicting,' and ... Rule 32 applies to sentencing upon revocation of supervised release." 128 F.3d at 1261 (quoting *Carper*, 24 F.3d at 1159-60, 1162). Courts adopting this approach held that defendants had the right to allocution before "sentencing" at supervised release revocation hearings even though at that time Rule 32.1 did not guarantee that right.

Other circuits rejected that view. The Sixth Circuit held that despite the Rule 32 requirement of allocution before imposing sentence, a court could impose a term of imprisonment upon a defendant under Rule 32.1 without affording him the right of allocution. *See United States v. Coffey*, 871 F.2d 39, 40-41 (6th Cir. 1989) (holding that allocution was not required in Rule 32.1 hearing following revocation of the defendant's probation).[4]

---

[4] In an early and influential case decided before the adoption of Rule 32.1, *United States v. Core*, 532 F.2d 40, 42 (7th Cir. 1976), this Court held that Rule 32 "does not specifically mention probation revocation hearings but only requires the right of allocution be given before imposing sentence." 532 F.2d at 42. The Sixth Circuit relied upon *Core* in *Coffey*. This Court subsequently held that where a court postpones the imposition of an "original sentence" on an initial count to a probation revocation hearing, Rule 32 applies. *United States v. Barnes*, 948 F.2d 325, 329-30 (7th Cir. 1991). Although some courts have misread *Barnes* as requiring allocution in Rule 32.1 hearings, *Barnes* in fact did *not* address whether Rule 32 applied to the imposition of a term of

As the Sixth Circuit subsequently noted, it would make no sense to treat revocation hearings as implicitly subject to Rule 32's strictures on sentencing: "applying Rule 32 to supervised release sentencing would require, in addition to allocution, probation officers to prepare presentence reports before a supervised release sentencing.... There is no indication that Congress intended these additional requirements to apply to supervised release sentencing." *United States v. Waters*, 158 F.3d 933, 944 (6th Cir. 1998). Instead of misapplying Rule 32 in this fashion, the Sixth Circuit ruled that it would instead use its discretionary powers to require district courts under its supervision to provide defendants with an opportunity to allocute at supervised release sentencing. *Waters*, 158 F.3d at 944-45.

The Eleventh Circuit followed suit in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), *vacated as moot*, 324 F.3d 1224 (11th Cir. 2003). In *Frazier* the court rejected the defendant's contention that Rule 32.1 "incorporates" the provision of Rule 32 concerning the right of allocution:

> The focus of the discussion before us is whether Rule 32.1 also incorporates the additional provisions of Rule 32 including, but not limited to, the right of allocution. We think not. ... Were we to hold that Rule 32.1 incorporates all of the provisions of Rule 32, the sentencing court would not only have to give the defendant a right to allocution, it would have to require presentence investigation reports along with all of the other demands of the rule.... In our opinion, this would render Rule 32.1 superfluous.

---

imprisonment under Rule 32.1 due to a defendant's violation of the conditions of supervised release.

Accordingly, the Eleventh Circuit ruled that because Rule 32.1 did not expressly protect the right to allocute at a revocation hearing, there was no legal requirement that a district court grant a defendant the right to allocution at a revocation hearing for supervised release. *Frazier*, 283 F.3d at 1244-45.

Soon after the opinion in *Frazier*, the Advisory Committee addressed the dispute among the circuits, proposing to modify Rule 32.1 solely to add that it contained a right to allocution. The 2005 amendments to Rule 32.1 added a new section that expressly provided that a defendant "is entitled to ... an opportunity to make a statement and present any information in mitigation" at a revocation hearing. Rule 32.1(b)(2)(E). In the accompanying notes, the Advisory Committee cites the Eleventh Circuit's observation in *Frazier* that the protections of Rule 32 were not directly incorporated into Rule 32.1 hearings because that approach "would require application of other provisions specifically applicable to sentencing proceedings under Rule 32, but not expressly addressed in Rule 32.1." *See* Adv. Comm. Notes on Rule 32.1, 2005 Amendments.

By thus modifying Rule 32.1, the drafters confirmed that the interpretation of the Rules adopted by the Sixth and Eleventh Circuits was correct and the interpretation adopted by the Fifth, Eighth and Ninth Circuits had been incorrect. If, prior to the 2005 amendments, the imposition of a term of imprisonment at a Rule 32.1 hearing constituted a "sentencing" governed by Rule 32, then Rule 32 by its own terms would have provided the right of allocution to defendants at such hearings. The Advisory Committee rejected

this view by confirming that an amendment was necessary to guarantee the right of allocution at such a hearing. The drafters thereby also confirmed that a Rule 32.1 hearing is not itself a "sentencing" governed by Rule 32, and that where rights that attend sentencing should apply to Rule 32.1 hearings, Rule 32.1 must adopt them expressly.

Bartone v. United States, 375 U.S. 52 (1963), relied on by the defendant, does not undermine this fact. In *Bartone*, the Supreme Court held that Rule 43 prohibited a district court from imposing a term of imprisonment upon an absent defendant for violation of a condition of probation. *Id.* at 53. The Court reached this result without the courts below deciding or even addressing the issue. *See id.* at 54-55 (Clark, J., dissenting). The Court appears to have assumed that the term of imprisonment imposed by the district court after the probation hearing constituted a Rule 43 sentencing, but did not discuss the issue. *See id.* at 53-55. In view of the subsequent changes to the Rules described above and *Bartone*'s unsteady foundation, *Bartone* should be limited to its facts. Notwithstanding the outcome in *Bartone*, Rule 43 has never expressly required the presence of the defendant at a probation or supervised release revocation hearing.

3. The Distinction Between Rule 32.1 Proceedings and "Sentencings" Is Meaningful And Should Be Enforced.

The Federal Rules of Criminal Procedure set forth the boundary between Rule 32.1 proceedings and "sentencings" under Rules 32 and 43. The drafters of the Rules have deliberately maintained the distinction between the two proceedings since Rule 32.1 was adopted in 1980. Although litigants and

courts may speak informally of imposing "sentences" (or of "resentencing") when referring to Rule 32.1 hearings, this colloquial shorthand cannot convey more procedural rights to defendants than the Rules do.

The practical distinction between the two types of proceedings is not merely a matter of formality. "[T]here are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973). As many courts have recognized, the procedural safeguards on criminal sentencing imposed by Rule 32 do not apply in the context of Rule 32.1 revocation proceedings. For example, in *In re Judicial Misconduct*, 583 F.3d 597, 597 (9th Cir. 2009), the Ninth Circuit held that the Rule 32(i) requirement that judges "advise defendants of any facts conveyed by probation officers during off-the-record communications, if the judge plans to rely on those facts during sentencing ... doesn't apply when a judge merely modifies the terms of probation [under Rule 32.1]." Similarly, in *United States v. Hernandez-Gonzalez*, 163 F. App'x 520, 522 (9th Cir. 2006), the court held that Rule 32(i)(3)(B), which requires a district court to make a ruling before sentencing on any dispute as to a presentence report or any other controverted matter, does not apply to supervised release revocation proceedings.

These procedural differences reflect the different interests that are at stake in the two settings. In contrast to a criminal defendant at his original sentencing, the defendant at a supervised release hearing has a limited interest

in continued liberty. As the Supreme Court noted in *Morrissey v. Brewer*, "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." 408 U.S. 471, 480 (1972). Fewer procedural safeguards are thus necessary in this context: "there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." *Id.* at 489. Treating Rule 32.1 proceedings as "sentencings" under Rules 32 and 43 would result in the loss of the valuable procedural flexibility that courts legitimately enjoy in the supervised release context.

Blurring the distinction between the two types of proceeding would also ignore that the defendant at a revocation hearing already has received the complete panoply of procedural rights that appertain to a full-fledged criminal trial and sentencing, as well as instructions regarding the consequences of violating supervised release.[5] The procedural constraints at supervised release revocation need not be as rigorous as in the context of full criminal sentencing, where the sentencing court is determining in the first instance the appropriate contours of punishment. Although a defendant's presence may be important, even constitutionally demanded, at criminal sentencing, the same is not true at

---

[5] *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000) (recognizing that a jury need not determine the fact of a prior conviction because that fact had previously been decided by a jury with "the certainty [of] procedural safeguards").

revocation, which is merely an "administrative proceeding designed to determine whether a parolee has violated the terms of his parole, not a proceeding designed to punish a criminal defendant for violation of a criminal law." *United States v. Wyatt*, 102 F.3d 241, 244 (7th Cir. 1996); *see also United States v. Crudup*, 461 F.3d 433, 437-38 (4th Cir. 2006) (summarizing guidelines commentaries and statutory provisions indicating that "revocation sentences should not be treated exactly the same as original sentences").

In sum, although they are similar in certain respects, a Rule 32.1 proceeding culminating in a term of imprisonment differs from a Rule 32 criminal sentencing. The distinction between the two settings cannot be disregarded merely because of the frequent informal shorthand use of the term "sentencing" to apply to both types of proceedings. Rule 43 grants a defendant no right to be present at his revocation hearing, and the district court's method of conducting that hearing neither implicated nor offended Rule 43.[6]

B. The Right Of Allocution Under Rule 32.1 Does Not Require Physical Presence In The Same Room As The Court.

Under the 2005 amendments to Rule 32.1, defendants have the right of allocution at supervised release hearings. Specifically, a defendant "is entitled to ... an opportunity to make a statement and present any information in mitigation." Rule 32.1(b)(2)(E). As both defendant and the United States

---

[6] The cases cited by the parties from other circuits holding that video-conferencing at criminal sentencings after trial cannot satisfy Rule 43 are therefore irrelevant to this appeal. *See United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999) (all construing requirements of Rule 43 at criminal sentencing).

recognize, this Court has not addressed whether the requirements of Rule 32.1 can be satisfied when the defendant exercises this right via videoconference. The parties jointly contend, however, that the videoconferencing in this case abrogated the defendant's right of allocution under Rule 32.1. The parties incorrectly reason that because the right of allocution under Rule 32.1 is identical to the right of allocution under Rule 32, and because courts in other circuits have demanded a defendant's *physical* presence in the same room as the court during Rule 32 sentencing, Rule 32.1 must also require the same degree of physical presence during allocution. *See* Brief of Defendants at 12; Brief of United States at 11-12.

This argument ignores that the right to allocution does not, by itself, subsume within it the right to be physically present before the court to which allocution is being made. The core right to allocution — the right recognized in Rule 32 and extended to Rule 32.1 in 2005, *see United States v. Pitre*, 504 F.3d 657, 662 (7th Cir. 2007) — is the defendant's right to address the court personally rather than have his lawyer address the court on his behalf. In *Green v. United States*, 365 U.S. 301, 304 (1961), a plurality of the Supreme Court held: "[T]here can be little doubt that the drafters of Rule 32(a) intended that the defendant be personally afforded *the opportunity to speak* before imposition of sentence.... The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, *speak for himself.*" (Emphasis added.) Relying on *Green*, this Court recently recognized in *United States v. Noel*, 581 F.3d 490, 502 (7th Cir. 2009) that

"before imposing a sentence, a trial judge must address the defendant *personally* and offer him the opportunity to speak," rather than merely inviting defendant's counsel to speak. (Emphasis in original.) *See also United States v. Williams*, 258 F.3d 669, 674-75 (7th Cir. 2001) (holding that court satisfied right to allocution by requesting "Williams himself, not his lawyer or any other representative," to speak).

The defendant's right to the opportunity to "speak for himself" to the court does not require that he be in the same room physically as the court. Where courts have demanded physical presence during allocution at Rule 32 sentencings, they have done so because Rule 43 applies to such sentencings, not because the right of allocution itself demands presence. The right to allocute safeguards not the right to physical presence but rather the right of the defendant to make a statement to the court. *See id.* Specifically, Rule 32.1(b)(2)(E) guarantees "an opportunity to make a statement and present any information in mitigation" at a supervised release revocation hearing. There is no question that in this case, the defendant received — and exercised — that right. The court specifically informed the defendant that he would be allowed to address the court and asked him to "go ahead and tell me what you want to say." (A20.) When the defendant hesitated, the court encouraged him to continue: "Go ahead. You can say anything else in your own behalf, if you so desire." (*Id.*) As this record makes clear, the court gave the defendant a full and fair chance to allocute, and in fact he did exercise that right at his supervised release hearing. The district court thus committed no error under

Rule 32.1 when it conducted the supervised release hearing from a remote location via videoconference.

II. The Videoconferenced Supervised Release Revocation Hearing In This Case Did Not Violate The Defendant's Due Process Rights.

The constitutional question of whether the defendant was entitled to be physically present during a revocation hearing effectively is answered by the analysis of the Rules set forth in Section I because Rule 43 confers greater protections than the due process clause. The fact that the defendant's hearing did not contravene Rule 43 therefore means that it likewise did not contravene due process. "[T]he protective scope of [R]ule 43(a) is broader than the constitutional rights embodied in the rule." *United States v. Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983). *Accord United States v. Navarro*, 169 F.3d 228, 237 (5th Cir. 1999) ("The scope of the protection offered by Rule 43 is broader than that offered by the Constitution."). *See also United States v. Boyd*, 131 F.3d 951, 953 n.3 (11th Cir. 1997) (collecting cases holding that "Rule 43's protections are broader than those afforded ... by due process, and thus if the rule does not require a defendant's presence at a given proceeding, neither does the Constitution").

Consistently with the foregoing, courts discussing the scope of the due process clause have held that due process does not create a requirement of presence at post-trial hearings. While it is a settled rule of law that due process requires the defendant to be present at trial, it is equally settled that due process does not require defendant's presence at post-trial proceedings such as supervised release hearings. "We do not understand that the right of a

defendant to be present in court throughout his trial has ever been considered to embrace a right to be present also at the argument of motions prior to trial or subsequent to verdict." *United States v. Lynch*, 132 F.2d 111, 113 (3d Cir. 1942). *See also Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934), *overruled on other grounds by Duncan v. Louisiana*, 391 U.S. 145, 154-155 (1968) ("The underlying principle [that the defendant must be present at trial] gains point and precision from the distinction everywhere drawn between proceedings at the trial and those before and after."). Trial, in turn, "denote[s] the time between the impaneling of the jury and the delivery of the sentence," *United States v. Burke*, 345 F.3d 416, 422 (6th Cir. 2003), and does not extend to post-sentencing proceedings such as probation or supervised release revocation hearings. *See, e.g., Boyd*, 131 F.3d at 954 (holding that due process did not require defendant to be present at a post-trial evidentiary hearing).

United States v. Panzeca, 463 F.2d 1216, 1218 (7th Cir. 1972), the only due process case relevant to probation revocation hearings cited by the defendant, is not to the contrary. In that case, the defendant was entirely absent from his hearing and was deprived of the opportunity to speak in his own defense. *Id.* Here, the court conducted the hearing via videoconference, and specifically invited the defendant to speak. Accordingly, *Panzeca* does not control. In addition, *Panzeca*'s holding is infirm given the Supreme Court's subsequent decisions in *Morrissey*, 408 U.S. at 480, and *Gagnon*, 411 U.S. at 789, both of which extensively address the due process clause's requirements

in the probation revocation setting and neither of which demand that defendant and the court be present in the same room.

Even if the due process clause did impose some minimal requirement of presence at a supervised release revocation hearing, the videoconferencing conducted here would have satisfied that requirement. In *Morrissey*, 408 U.S. at 487, the Supreme Court announced the due process standards applicable to probation and supervised release revocation hearings. *See United States v. Neal*, 512 F.3d 427, 435 (7th Cir. 2008). *Morrissey* held that at such hearings, "[o]n request of the parolee, person[s] who ha[ve] given adverse information on which parole revocation is to be based [are] to be made available for questioning *in his presence.*" *Id.* at 487 (emphasis added).[7] The next year, in *Gagnon*, the Court addressed the due process standards applicable to probation revocation hearings and clarified that the "presence" demanded by *Morrissey* did not entail physical presence in the same room of all participants: "While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the *conventional substitutes for live testimony*, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States ... from developing *other creative solutions* to the practical difficulties of the *Morrissey* requirements." 411 U.S. at 782 n.5 (emphasis added).

---

[7] No such evidence was presented here, and in any event the defendant would have been present for such testimony had it been presented; only the district court would not have been present physically in the courtroom at the time.

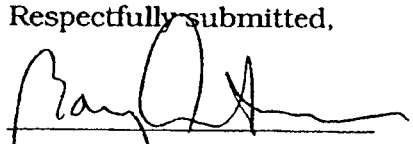
As these cases prove, the Supreme Court did not intend to impose strict procedural limits upon courts conducting probation and supervised release revocation hearings. Rather, the Supreme Court expressly sanctioned the use of "substitutes" and other "creative solutions" for actual presence at revocation hearings. Videoconferencing, whether of the defendant, of witnesses, or of the judge, is one such "creative solution." *See Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 775-76 (6th Cir. 2008) (holding, on habeas, that videoconferencing of witnesses at state parole revocation did not violate due process given the authorization of such measures by *Morrissey* and *Gagnon*); *cf. United States v. Gigante*, 166 F.3d 75, 79 (2d Cir. 1999) (affirming district court's holding over defense objection that Confrontation Clause was satisfied by use of "two-way, closed circuit, television" for witness testimony at trial).

Thus, the videoconferencing by the district court did not violate the defendant's due process rights. The defendant, defendant's counsel, and the government were gathered together in a courtroom in Illinois, while the district court participated via videoconference from a remote courtroom. Because they were together, both parties were equidistant from the judge. This was not a case where the court was closeted in the same room as the government while the defendant participated from a distance. The court affirmed that it could "both see and hear everybody in the courthouse in Rockford and [could] comprehend everything that has transpired." (A19.) The defendant was represented by able counsel and received more than one opportunity to be heard by the court. (A20-21.) The due process clause demands nothing more.

CONCLUSION

The district court did not err under either the applicable Federal Rules of Criminal Procedure or under the due process clause of the fifth amendment to the United States Constitution when it conducted defendant's supervised release revocation hearing via videoconference. The Court should affirm the judgment of the district court.

Respectfully submitted,



Barry Levenstam
Counsel of Record
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654-3456
(312) 222-9350

Andrew Weissmann
Sharmila Sohoni
JENNER & BLOCK LLP
919 Third Avenue, Floor 37
New York, New York 10022
(212) 891-1600

Amicus Curiae

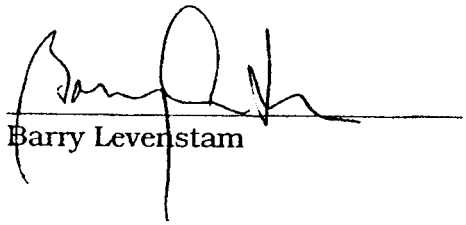
December 4, 2009

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,736 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Bookman Old Style, Font Size 12.

Dated: December 4, 2009

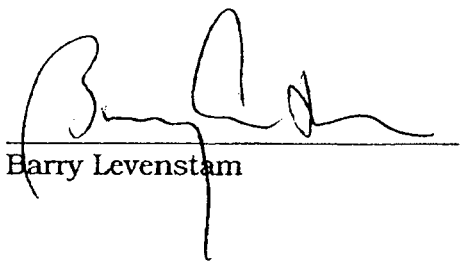


Barry Levenstam

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e)(1), the Brief of Amicus Curiae.

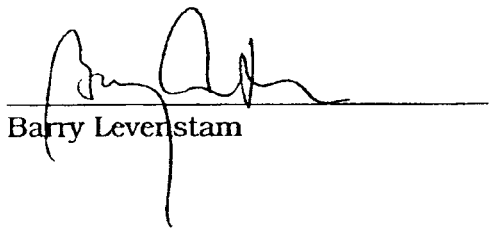
Dated: December 4, 2009



Barry Levenstam

CERTIFICATE OF SERVICE

Barry Levenstam, an attorney, hereby certifies that he caused an original and 14 copies and an electronic version of the foregoing Brief of Amicus Curiae to be transmitted to the Court for filing via hand delivery, and two copies and an electronic disk version of the Brief of Amicus Curiae to be served on the parties below, via the methods indicated, on December 4, 2009.



Barry Levenstam

William H. Theis
Office of the Federal Defender
55 E. Monroe Street, Suite 2800
Chicago, IL 60603-0000
(via messenger)

Joseph C. Pedersen
Office of the United States Attorney
308 W. State Street, Room 300
Rockford, IL 61101-0000
(via U.P.S. overnight delivery)

FEDERAL DEFENDER PROGRAM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

55 E. MONROE STREET - SUITE 2800
CHICAGO, ILLINOIS 60603

CAROL A. BROOK
EXECUTIVE DIRECTOR

312.621.8339
Fax 312.621.8399

February 16, 2010

09-CR-009

Peter G. McCabe, Secretary
Standing Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington D. C. 20544

Re: Proposed Amendment to Rule 32.1, Federal Rules of Criminal Procedure

Dear Mr. McCabe:

We, the Executive Director of the Federal Defender Program for the Northern District of Illinois and its Branch Chief, write in opposition to the proposed amendment to Rule 32.1 of the Federal Rules of Criminal Procedure. Specifically, we object to the proposal that would allow the court with the consent of the defendant to conduct a Rule 32.1 proceeding via video teleconferencing.

Our opposition is based upon several grounds. First, a Rule 32.1 proceeding is one in which the defendant's liberty is at stake. The defendant may have probation revoked or mandatory supervised release revoked resulting in a possible sentence of imprisonment. The imposition of a sentence of imprisonment is a most serious event, not only for the defendant, but also for the public. To allow a hearing of this magnitude to occur over a television screen, no matter how large, detracts from the solemnity of the procedure . Such a hearing should always occur with the defendant and the court being in the same physical location. It is our belief that defendants are more likely to believe that they are being treated fairly if they are physically before the court.

It is even more unlikely that a defendant in a Rule 32.1 proceeding will have had an adequate opportunity to meet with counsel prior to having to make a decision about teleconferencing, making it even more difficult to obtain a knowing consent. In addition, as time goes on, it has been our general experience that many people, especially those who have never appeared in front of a camera, are quite uncomfortable in that position. Thus, although they may believe that they will be fine, they may freeze up when the camera starts rolling. At that point, it will be too late.

Second, the proposed amendment does not provide any guidance in how the Rule 32.1 proceeding is to be conducted. May the witnesses be at a location accessible by video teleconferencing? If so, how is the judge to assess the credibility and demeanor of the witness? Where are the attorneys for the government and the defendant to be? Where is the court to be? Must the court be sitting in a courtroom within the jurisdiction of the offense or may it be at some other facility? What if the court wishes to do business while at a vacation home? Will a facility in that district be permissible? The proposed amendment fails to provide guidance and direction on too many issues for us to knowledgeably predict what the potential outcomes may be.

Third, as recently as 2005, Rule 32.1 was amended to recognize the importance of allocution and the defendant's ability to present mitigating evidence. *See* Rule 32.1 Fed. R. Crim. P., Advisory Committee Notes, 2005 Amendments. The right of allocution is the right to appear personally before the court and submit a statement in mitigation. The right to make a personal plea to the judge is not protected by the proposed amendment. Justice Frankfurter recognized the importance of the right of allocution when he said: "None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green v. United States*, 365 U.S. 301, 304 (1961). Allocution is effectively denied where the defendant is not speaking directly to the court, but rather is speaking to a microphone.

Fourth, we have had experience in court proceedings being conducted over a video teleconferencing device. Those experiences have not been satisfactory. A video feed may not match with the audio feed. This leaves the impression of a badly dubbed foreign movie. There may be time delays which destroy and distort the spontaneity of the actual proceeding. Too much is left to the vagaries of the equipment employed. These "glitches" detract from the decorum and solemnity of the proceedings and may cause miscommunications and misunderstandings that are never revealed.

Finally, we understand that although Rules 5, 10 and 43 now permit video conferencing with a defendant's consent (amendments that we also objected to), video conferencing is rarely chosen by the defendant.

In summary, we believe that a Rule 32.1 hearing should not be conducted with the use of video teleconferencing. We do not know what pressures may be exerted to have a defendant consent but such pressures may be employed, even unknowingly. We fear that the proceedings will lose their solemnity and that the rights of the defendants to question witnesses, present evidence and make a statement in allocution will be placed in jeopardy. We further fear that it will be most difficult for the court to fulfill its obligation to assess the credibility of both the defendant and the witnesses based on their physical demeanor if they are in remote locations.

We appreciate the opportunity to offer our comments on the Standing Committee's proposal.

Very truly yours,

/s/Carol A. Brook
Carol A. Brook
Executive Director, Federal Defender Program
For the Northern District of Illinois

/s/Paul E. Gaziano
Paul E. Gaziano
Rockford Branch Chief, Federal Defender Program
For the Northern District of Illinois

TAB IIIA

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

FROM: **Judge Tallman, Chair, Subcommittee on Rule 16**

RE: **Rule 16**

DATE: **March 15, 2010**

1. Introduction

Since we last met in Seattle in October 2009, your Subcommittee on Rule 16 has been busy. We hosted a very successful consultation meeting in Houston on February 1, 2010. Minutes of that meeting are enclosed for your review and consideration.

In April 2009, we received a letter from the Hon. Emmet Sullivan, who had presided over the trial of Senator Ted Stevens in the United States District Court for the District of Columbia, urging the Committee to again advocate amending Rule 16 by resubmitting to the Standing Committee the previous proposal presented in June 2007. I also received a similar letter from Chief Judge Mark Wolf of the District of Massachusetts, requesting reconsideration of Rule 16 and its disclosure requirements. Judge Wolf's letter is attached. The Rule 16 Subcommittee met by teleconference prior to and after the October meeting.[1]

You will recall our discussion that more extensive disclosure practices already occur in some districts by local rules or standing orders, facilitating broader discovery than is the norm in the majority of the 94 federal districts. I have requested the assistance of the Federal Judicial Center in surveying judges and lawyers in districts with such local rules requiring greater discovery to determine whether they have fewer *Brady*-type problems, what their experiences have been in regard to threats to the integrity of the trial process and participants in it, and whether other problems have surfaced about which we need to be better informed.

There was general agreement in October that it would useful for the Rule 16 Subcommittee to host a consultative session, as the Civil Rules Committee did when considering changes to summary judgment and expert witness rules in civil litigation. The Civil Rules Committee found this procedure to be very useful. Using that model, we brought together recognized criminal justice experts from the bench, bar, and academia to share their views on these difficult issues.

Shortly before the February 1 consultation session, Deputy Attorney General David Ogden released various memoranda outlining efforts initiated within the Department of Justice after the dismissal of the *Stevens* indictment to improve discovery practices by federal prosecutors. Those documents are also included for your review.

---

[1] The members of the Subcommittee chaired by Judge Tallman are Judge Morrison England, Professor Andrew Leipold, Ms. Rachel Brill, and Assistant Attorney General Lanny Breuer.

Although we are not yet ready to make any recommendations as to whether or not Rule 16 should be amended, and, if so, in what form, the materials we are transmitting for consideration by the committee of the whole constitutes a full report on what we have learned in the interim. We will be discussing this issue when the Subcommittee makes its oral report in Chicago.

2. Action by the Subcommittee

A. The February 1, 2010, consultative session

A consultative session was held on February 1, 2010, in Houston, Texas. The reporters and members of the Rule 16 subcommittee were joined by a small group of practitioners, academics, and judges with substantial experience bearing on different issues of concern. Minutes of the meeting, which list the participants and describe the discussion of these issues, are attached.

The consultative session was extremely valuable because it allowed the Subcommittee to draw on the expertise and experience of the participants to explore the following issues:

- How frequent are *Brady* violations?
- How should concerns regarding witness intimidation and safety be addressed?
- How feasible is it to require disclosure of information that is not "material," as that term is defined in *Brady*?
- How is materiality defined?
- Why does the defense want "non-material" evidence or information in addition to exculpatory and impeaching information?
- What information can the defense develop independently?
- Would it be desirable to require disclosure earlier in the process, and, if so, when?
- How should early guilty pleas affect disclosure practices?
- How do these concerns play out in national security cases or international criminal cases (e.g., money laundering, narcotics, fraud)?
- What proposals other than the 2007 Committee proposal should be considered?
- Has a case been made that there exists a need to amend Rule 16?

The insights gained from the consultative session will guide the Subcommittee as it moves forward.

B. Federal Judicial Center Survey

The Subcommittee again met by teleconference after the consultative session and provided comments on a draft survey designed by the Federal Judicial Center and then revised by the reporters and myself. The reporters and I have incorporated the Subcommittee's suggestions and forwarded the draft survey to the Federal Judicial Center for its review and comment. A copy of the latest draft is attached for your consideration as well.

3. Additional Considerations

A. Reciprocal Discovery

One of the issues discussed in both the consultative session and the Subcommittee's conference call was the subject of reciprocal discovery, i.e., the discovery obligations of the defense. This presently includes the disclosures required under Rules 16(b), 12.1, 12.2, 12.3, and 26.2. The Subcommittee agreed that the Federal Judicial Center survey should include some questions about defense compliance with these discovery obligations as well as the prosecution's compliance with its discovery obligations.

B. The Checklist Approach

One of the ideas discussed at the consultative session was the court's use of a checklist to review, on the record, the question whether the parties have complied with their disclosure obligations. This would include questioning whether the prosecution has disclosed each of the types of information that have most often led to *Brady* violations, which are:

- promises made to, or deals with, government witnesses;
- favorable disposal of criminal charges pending against witnesses; and
- prior statements by witnesses.

There was considerable interest in the idea of using a checklist that might be in the Federal Judicial Center Bench Book for Judges. The checklist could be limited to cases that go to trial, and not for cases resolved by guilty plea. The Subcommittee noted that the Judge's Bench Book could be used to implement the checklist, without requiring a formal change in the Federal Rules. It could thus be implemented more rapidly than a change in the Rules.

C. The Proposed 1995 Amendment

Some participants in the consultative meeting urged the Subcommittee to study the 1995 Amendment that was approved by the Advisory Committee and Standing Committee, but not by the Judicial Conference. This proposal would have required disclosure of (1) witness names, and (2) witness statements, 7 days before trial. It also gave the prosecution an unreviewable veto, allowing it to withhold a witness's name and/or statement at the prosecution's discretion. The latter was designed to give the prosecution the unilateral right to withhold information until trial if it had concerns over preserving the integrity of the prosecution or potential harm to witnesses.

By focusing on witness names and statements, rather exculpatory or impeachment information per se, the proposal avoided some of the definitional issues that may be troublesome. It addressed concerns about witness safety by limiting disclosure to 7 days before trial, and by giving the prosecution unreviewable discretion to withhold a particular witness's name or statement.

The 1995 proposed amendment is attached.

D. ABA Formal Ethics Opinion 09-454

Participants in the consultative session referred to the release in 2009 of ABA Formal Opinion 09-454 (July 8, 2009) addressing the Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense, and the Subcommittee also discussed the opinion in its

conference call. Very little is currently known about the background for issuance of that opinion and the legal affect of the opinion on Judicial Conference policy. I will confer with Judge Margaret McKeown, Chair of the JCUS Code of Conduct Committee, to gain some additional information on how this might impact our Committee's deliberations.

Under the McDade amendment, 28 U.S.C. § 530B(a), federal prosecutors are bound by state ethics laws. Participants from the Department of Justice stated during the conference call that they were exploring the background of the opinion. Department representatives were generally unaware of how the opinion came to be released and they too intend to investigate further. They also noted that ethics opinions do not have legal effect until adopted by individual jurisdictions.

The ABA opinion is attached.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 4, 2010

Hon. Anthony J. Scirica
Chief Judge
United States Court of Appeals
for the Third Circuit
22614 United States Courthouse
Independence Mall West
Philadelphia, PA 19106

Dear Judge Scirica:

Over the past several months, the Department of Justice has taken several significant steps in its ongoing effort to ensure compliance with federal prosecutors' discovery obligations in criminal cases. Given the federal judiciary's appropriate interest in that subject, I wanted to apprise you of those efforts in your capacity as Chair of the Executive Committee of the Judicial Conference. Please feel free to share this letter and the enclosed memoranda with other members of the judiciary, as you deem appropriate.

Earlier this year, on behalf of the Attorney General, I asked the Assistant Attorney General for the Criminal Division and the Chair of the Attorney General's Advisory Committee to convene a Criminal Discovery and Case Management Working Group (Working Group) to undertake a thorough review of the Department's policies, practices, and training related to criminal case management and discovery and to evaluate areas for improvement. The Working Group examined current Department of Justice policies, and surveyed all of the USAOs, the criminal litigating components of Main Justice, and the Department of Justice's law enforcement agencies, as well as the United States Postal Inspection Service, to evaluate current discovery practices, case management practices, and related training, and to identify areas for improvement. Members of the Working Group included senior level prosecutors from United States Attorneys' Offices and Main Justice, Information Technology support personnel, and law enforcement representatives. In addition, members of the Attorney General's Advisory Committee and the Department's Criminal Chiefs Working Group provided comments to the Working Group.

The Working Group concluded that federal prosecutors take their obligations very seriously and meet them in the overwhelming majority of cases. But it also made a number of recommendations for improvements. In response, the Department has taken a number of steps to ensure that prosecutors have the resources, training and guidance necessary to evaluate and meet those obligations in every case.

Today, I issued a memorandum entitled "Guidance for Prosecutors Regarding Criminal Discovery." That memorandum is enclosed. The guidance was developed at my request by seasoned attorneys with expertise regarding criminal discovery issues, who broadly sought input from experts across the Department. The guidance is a consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process. I issued a second memorandum directing each United States Attorney's Office to develop district-specific discovery policies to ensure appropriate and uniform practices in each district.

Finally, I also issued a third memorandum today to Department prosecutors that discusses the additional steps that the Department has taken or will take in the future, including:

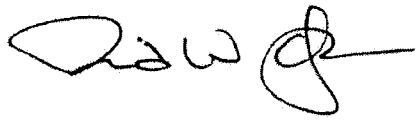
- Implementing a new annual training requirement for federal prosecutors on discovery issues;
- Appointing criminal discovery experts in every office, each of whom attended training conducted at the National Advocacy Center in October to enable them to hone their subject matter expertise and provide training and advice to the prosecutors in their offices;
- Appointing a national criminal discovery/electronic evidence coordinator in the Executive Office for United States Attorneys who will oversee all efforts in this area as a full-time responsibility;
- Creating an online directory of resources pertaining to discovery issues that will be available to all prosecutors at their desktop;
- Producing a Handbook on Discovery and Case Management similar to the Grand Jury Manual so that prosecutors will have a one-stop resource that addresses various topics relating to discovery obligations;
- Implementing a training curriculum and a mandatory training program for paralegals and law enforcement agents;
- Revitalizing the Computer Forensics Working Group to address the problem of properly cataloguing electronically stored information recovered as part of federal investigations; and
- Creating a pilot case management project to fully explore the available case management software and possible new practices to better catalogue law enforcement investigative files and to ensure that all the information is transmitted in the most useful way to federal prosecutors.

The Attorney General and I are committed to the truth-seeking role of the prosecutor as indispensable to our system of justice, and to that end to ensuring that Department attorneys comply with all obligations imposed by law, rule, and policy. We firmly believe that Department lawyers are dedicated to these principles as well, and in the overwhelming majority of cases

succeed admirably in serving them in letter and spirit. We hope these steps will ensure that they continue to have the resources and guidance to do so into the future.

We value the input we have already received from the judiciary on these subjects, and we look forward to continuing this dialogue with the courts. If you have any questions about the enclosed documents or the Department's overall approach, please feel free to contact me at your convenience.

Sincerely,



David W. Ogden
Deputy Attorney General

Enclosures

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 4, 2010

MEMORANDUM FOR DEPARTMENT PROSECUTORS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Guidance for Prosecutors Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. *See* USAM §9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979).

The guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group received comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced this consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process.

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case. Prosecutors are reminded to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases. Prosecutors are also reminded to contact the Professional Responsibility Advisory Office when they have questions about those or any other ethical responsibilities.

Department of Justice Guidance for Prosecutors Regarding Criminal Discovery

Step 1: Gathering and Reviewing Discoverable Information[1]

A. Where to look–The Prosecution Team

Department policy states:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM §9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

---

[1] For the purposes of this memorandum, "discovery" or "discoverable information" includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jencks Act, *Brady*, and *Giglio*, and additional information disclosable pursuant to USAM §9-5.001.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional guidance for such cases. Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges.

This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.[2] The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,[3] the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.[4] Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation

---

[2] How to conduct the review is discussed below.

[3] Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying source's files.

[4] Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

assessments, payment information, and other potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

Prosecutors should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes.

"Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors should also remember that with few exceptions (*see, e.g.*, Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))
- Statements or reports reflecting witness statement variations (see below)
- Benefits provided to witnesses including:
  - Dropped or reduced charges
  - Immunity
  - Expectations of downward departures or motions for reduction of sentence
  - Assistance in a state or local criminal proceeding
  - Considerations regarding forfeiture of assets
  - Stays of deportation or other immigration status considerations
  - S-Visas
  - Monetary benefits
  - Non-prosecution agreements

  - Letters to other law enforcement officials (*e.g.* state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
  - Relocation assistance
  - Consideration or benefits to culpable or at risk third-parties
- Other known conditions that could affect the witness's bias such as:
  - Animosity toward defendant
  - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
  - Relationship with victim
  - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
- Prior acts under Fed.R.Evid. 608
- Prior convictions under Fed.R.Evid. 609
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews[5] should be memorialized by the agent.[6] Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

---

[5] "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

[6] In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *See, e.g., United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vallee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

Step 2: Conducting the Review

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying *potentially* discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties,

prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

Step 3: Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something

will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, *e.g.* agent notes or internal memos, that the court may deem to have been part of the "file."

When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM §9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery, as is common in complex cases. Prosecutors must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed.R.Crim.P. 16(b)(1).

Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

C. Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If

discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

Step 4: Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, prosecutors have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, discovery coordinators in each office, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website, not to mention the experienced career prosecutors throughout the Department. And, additional resources are being developed through efforts that will be overseen by a full-time discovery expert who will be detailed to Washington from the field. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution. Thank you very much for your efforts to achieve those most important objectives.

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 4, 2010

MEMORANDUM FOR DEPARTMENT PROSECUTORS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Guidance for Prosecutors Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. *See* USAM §9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. *See United States v. Caceres*, 440 U.S. 741 (1979).

The guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group received comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced this consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process.

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case. Prosecutors are reminded to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases. Prosecutors are also reminded to contact the Professional Responsibility Advisory Office when they have questions about those or any other ethical responsibilities.

Department of Justice Guidance for Prosecutors Regarding Criminal Discovery

Step 1: Gathering and Reviewing Discoverable Information[1]

A. Where to look–The Prosecution Team

Department policy states:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM §9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

---

[1] For the purposes of this memorandum, "discovery" or "discoverable information" includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jencks Act, *Brady*, and *Giglio*, and additional information disclosable pursuant to USAM §9-5.001.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady* and *Giglio* issues and avoid surprises at trial.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional guidance for such cases. Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges.

This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed.[2] The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions,[3] the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted.[4] Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation

---

[2] How to conduct the review is discussed below.

[3] Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a non-testifying source's files.

[4] Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

assessments, payment information, and other potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

Prosecutors should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes.

"Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors should also remember that with few exceptions (*see, e.g.*, Fed.R.Crim.P. 16(a)(1)(B)(ii)), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

7. Potential *Giglio* Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential *Giglio* information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

- Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))
- Statements or reports reflecting witness statement variations (see below)
- Benefits provided to witnesses including:
  - Dropped or reduced charges
  - Immunity
  - Expectations of downward departures or motions for reduction of sentence
  - Assistance in a state or local criminal proceeding
  - Considerations regarding forfeiture of assets
  - Stays of deportation or other immigration status considerations
  - S-Visas
  - Monetary benefits
  - Non-prosecution agreements

  - Letters to other law enforcement officials (*e.g.* state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf
  - Relocation assistance
  - Consideration or benefits to culpable or at risk third-parties
- Other known conditions that could affect the witness's bias such as:
  - Animosity toward defendant
  - Animosity toward a group of which the defendant is a member or with which the defendant is affiliated
  - Relationship with victim
  - Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)
- Prior acts under Fed.R.Evid. 608
- Prior convictions under Fed.R.Evid. 609
- Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews[5] should be memorialized by the agent.[6] Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

---

[5] "Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

[6] In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *See, e.g., United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vallee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

Step 2: Conducting the Review

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying *potentially* discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties,

prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

Step 3: Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is required under the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something

will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, *e.g.* agent notes or internal memos, that the court may deem to have been part of the "file."

When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. *See* USAM §9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery, as is common in complex cases. Prosecutors must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed.R.Crim.P. 16(b)(1).

Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

C. Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If

discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

Step 4: Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, prosecutors have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, discovery coordinators in each office, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website, not to mention the experienced career prosecutors throughout the Department. And, additional resources are being developed through efforts that will be overseen by a full-time discovery expert who will be detailed to Washington from the field. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution. Thank you very much for your efforts to achieve those most important objectives.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 4, 2010

MEMORANDUM FOR DEPARTMENT PROSECUTORS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group

Earlier this year, on behalf of the Attorney General, I asked the Assistant Attorney General of the Criminal Division and the Chair of the Attorney General's Advisory Committee to convene a working group to undertake a thorough review of the Department of Justice's policies, practices, and training related to criminal case management and discovery and to evaluate areas for improvement. Members of this working group included senior level prosecutors from United States Attorneys' Offices (USAOs) and Main Justice, Information Technology support personnel, and law enforcement representatives. In addition, members of the Attorney General's Advisory Committee and the Department's Criminal Chiefs Working Group reviewed and provided comments on the Report. The case management discovery working group examined current Department of Justice policies, and surveyed all of the USAOs, the criminal litigating components of Main Justice, and the Department of Justice's law enforcement agencies, as well as the United States Postal Inspection Service, to evaluate current discovery practices, case management practices, and related training, and to identify areas for improvement.

The Attorney General and I want to thank the members of the Working Group for the time and effort they put into this review and for the thorough and helpful report that the review produced. I called for the review in order to determine whether the Department was well positioned to meet its discovery obligations in future cases. The Working Group primarily focused on three areas pertinent to this determination: resources, training, and policy guidance. The Working Group's survey demonstrated that incidents of discovery failures are rare in comparison to the number of cases prosecuted. This conclusion was not surprising and reflects that the vast majority of prosecutors are meeting their discovery obligations. I thank you all for the extraordinary efforts you make every day in pursuit of criminal justice. Any discovery lapse, of course, is a serious matter. Moreover, even isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system. Beyond the consequences in the individual case, such a loss in confidence can have significant negative consequences on our effort to achieve justice in every case.

Justice Sutherland's observations regarding the role of a prosecutor are as true today as they were when he wrote them over 70 years ago. He wrote:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). In the alcove outside the Attorney General's Office here in Washington, an inscription that rings the space reads: "The United States wins its point whenever justice is done its citizens in the courts." Over the years, the Department has consistently taken the necessary steps to assure that we meet these expectations. Towards that end, the United States Attorney's Manual (USAM) sets forth broad discovery policies that establish the Department's minimum expectations for prosecutors handling criminal cases in all jurisdictions. *See* USAM §§ 9-5.001 and 9-5.100. In 2006, the Department amended the United States Attorney's Manual regarding *Brady/Giglio*[1] obligations by requiring prosecutors to go beyond the requirements of the Constitution and "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." USAM § 9-5.001. With the advice of the Working Group, I have approached any further revisions to Department policy with the understanding that local practices and judicial expectations vary among districts, and that a one-size-fits-all approach might result in significant changes in some districts and no changes in others.

As representatives of the United States, our duty is to seek justice. In many cases, broad and early disclosures might lead to a speedy resolution and preserve limited resources for the pursuit of additional cases. In other cases, disclosures beyond those required by relevant statutes, rules and policies may risk harm to victims or witnesses, obstruction of justice, or other ramifications contrary to our mission of justice.

---

[1] *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

Recognizing this reality, we have today issued the Department's Guidance for Prosecutors Regarding Criminal Discovery that establishes the minimum considerations that prosecutors should undertake in every case. This guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group sought comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced a consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process. I thank all concerned for the resulting memorandum.

By making deliberate choices regarding discovery issues, prosecutors are most likely to comply with discovery obligations imposed by law and Department policy and assure that the goals of a prosecution are met. By separate memorandum to the United States Attorneys and to the heads of components that prosecute criminal cases, I am directing that each USAO and component develop a discovery policy that establishes discovery practice within the district or component. This directive will assure that USAOs and components have developed a discovery strategy that is consistent with the guidance and takes into account controlling precedent, existing local practices, and judicial expectations.

In addition to issuing this discovery guidance and establishing component discovery policies, the Department is taking further steps in response to the Working Group report. Each USAO and the litigating components handling criminal cases have now named a discovery coordinator, and those coordinators attended a "Train the Trainer" discovery conference at the National Advocacy Center in October. These coordinators will provide discovery training to their respective offices no less than annually and serve as on-location advisors with respect to discovery obligations. In addition, we will:

- Create an online directory of resources pertaining to discovery issues that will be available to all prosecutors at their desktop;
- Produce a Handbook on Discovery and Case Management similar to the Grand Jury Manual so that prosecutors will have a one-stop resource that addresses various topics relating to discovery obligations;
- Implement a training curriculum and a mandatory training program for paralegals and law enforcement agents;

- Revitalize the Computer Forensics Working Group to address the problem of properly cataloguing electronically stored information recovered as part of federal investigations;
- Create a pilot case management project to fully explore the available case management software and possible new practices to better catalogue law enforcement investigative files and to ensure that all the information is transmitted in the most useful way to federal prosecutors.

These efforts will be overseen by an attorney detailed to Washington to assure timely completion of all of these measures.

All of the steps that the Department is taking are intended to ensure that we have the resources, training and guidance to meet our obligations and that we thoroughly and thoughtfully evaluate our discovery obligations in every case in a manner that facilitates our sole function–to seek justice. Thank in you in advance for your cooperation in this effort.

SURVEY OF DISTRICT JUDGES AND MAGISTRATE JUDGES
ABOUT
RULE 16 AND DISCLOSURE PRACTICES
DRAFT 3/12/10 – RCT

Demographic Information

The information we ask for in this section will help us to analyze survey responses according to various groups to which respondents belong – e.g., those in large or small courts; those who have been on the bench for a long or relatively short time; and type of judge: active, senior, or magistrate judge.

Your District: _____

1) What is your current status?

   a. Chief district judge
   b. Active district judge
   c. Magistrate judge
   d. Senior judge

2) How long have you been on the federal bench?

   a. Less than 5 years
   b. 5-10 years
   c. 11-15 years
   d. More than 15 years

The questions in the survey are divided into three parts: your experiences with district-wide rules regarding disclosure, your experiences with constitutional obligations of disclosure, and potential amendments to Rule 16. Please respond by marking the box next to your answer or, if the question is open-ended, by using the box below the question to record your answer.

I. District Specific Local Court Rules, Standing Orders or Other Policies Regarding Disclosure, and Sanctions

3) Does a local rule, standing order or other policy in your district require disclosure by the prosecution to the defense that extends beyond the requirements of *Brady* ,Rule 16, and Rule 26.2?

   a) if yes, please explain:

   _____

   _____

   b) if no, please skip to question [**39**]

4) Does your district require prosecutors to disclose to the defense EXCULPATORY evidence within a fixed time after indictment or arraignment?

a. Yes [Go to Question []
b. No [Go to Question []

5) Does your district require prosecutors to disclose to the defense IMPEACHMENT evidence within a fixed time after indictment or arraignment?

a. Yes [Go to Question []
b. No [Go to Question []

6) Do you believe that this broader disclosure requirement in your district has operated in a manner that is fair to all parties involved? Please choose the response that best represents your view.

a. Broader disclosure generally serves or facilitates the process well for all parties.
b. Broader disclosure has resulted in serious problems for the prosecution in some cases.
c. No opinion
d. Please explain

_____

7) In your opinion, do federal prosecutors who appear before you have a comprehensive understanding of their discovery disclosure obligations pursuant to your local rule or standing order?

a. Yes
b. No

8) In your opinion, do federal prosecutors in your district follow a consistent policy or approach with respect to disclosure to the defense of exculpatory information in criminal cases?

a. Yes
b. No [Please describe below]

Comments: _____

_____

_____

9) If your district requires the prosecution to disclose to the defense before trial government witness statements that could be used to impeach, does your district also require the defense to disclose to prosecutors prior to trial potentially impeaching statements by defense witnesses?

a. Yes
b. No

10) In your opinion, do defense lawyers who appear before you have a comprehensive understanding of their discovery disclosure obligations, including their obligation to provide reciprocal discovery under Rule 16(b) and Jencks material pursuant to Rule 26.2?

a. Yes
b. No

11) Have you adopted any case management procedures to ensure compliance with your local rules?

a. Yes [Please describe below]
b. No

Comments: _____

12) Have you ever been asked by the government to enter a protective order prohibiting disclosure based on witness safety or other security considerations?

a. Yes
b. No

13) Have you adopted any case management procedures to ensure other participants in the criminal justice system process-- e.g., witnesses, law enforcement officers and victims – are not unnecessarily subjected to physical harm, harassment, public embarrassment or other prejudice ?

a. Yes [Please describe below]
b. No

Comments: _____

14) To your knowledge, have your district's requirements regarding pretrial disclosure of EXCULPATORY information by the government resulted in instances of threats or harm to a prosecution witness?

a. Yes [Go to Question []]

b. No [Go to Question []]
c. Don't Know

15) Please estimate the number of cases in which you have a reliable basis for concluding that this has been an issue in the past five years (include cases involving a protective order or where the prosecutor alerted the court to a potential threat).

a. 1
b. Less than 5
c. 5 – 10
d. 10-20
e. More than 20

16) To your knowledge, have your district's requirements regarding pretrial disclosure of IMPEACHING information by the government resulted in instances of threats or harm to a prosecution witness?

a. Yes [Go to Question []
b. No Go to Question []
c. Don't Know

17) Please estimate the number of cases in which you have a reliable basis for concluding that this has been an issue in the past five years (include cases involving a protective order or where the prosecutor alerted the court to a potential threat).

a. 1
b. Less than 5
c. 5-10
d. 10-20
e. More than 20

18) In the past five years, have you ever been assigned a criminal case in which you **became aware** that exculpatory or impeachment evidence was not disclosed to the defense in compliance with your local rules or procedures?

a. Yes [Go to Question __]
b. No [Go to Question __]

19) Please estimate the number of cases in which this has been an issue in the past five years.

a. none
b. 1
c. 2 - 5
d. 6 -10
e. More than 10

20) In the past five years, have you ever been assigned a criminal case in which you have **had to rule** on a motion or motions concerning the prosecution's failure to comply with disclosure obligations under your *local rules and procedures* governing the disclosure exculpatory or impeaching evidence, e.g., the scope and/or timing of disclosure?

a. Yes [Go to Question __]
b. No [Go to Question __]

21) If you answered Yes to Question 20, what was the most frequently raised issue (e.g., failure to disclose at all; failure to disclose on time; etc.)

Please specify: _____

_____

22) In the past five years, have you ever been assigned a criminal case in which you **became aware** that reciprocal Jencks or other reciprocal discovery information was not disclosed by the defense to the prosecution in compliance with your local rules or procedures? Please estimate the number of cases in which this has been an issue in the past five years.

a. none
b. 1
c. 2 - 5
d. 6 -10
e. More than 10

23) If your district currently has a local rule or standing order that eliminates the *Brady* materiality requirement for disclosure of exculpatory information by prosecutors, and you were on the bench both before and after this rule was adopted, did the rule change affect the frequency of filing motions challenging the scope of disclosure?

a. Motions challenging the scope of disclosure increased as a result.
b. There was no change.
c. Motions challenging the scope of disclosure decreased as a result.
d. In my district no such rule has been adopted
e. I was not on the bench before the rule was adopted.

24) In the past five years, has defense counsel ever requested that sanctions be imposed for the government's failure to disclose exculpatory or impeachment evidence within the time limits imposed by your local rules and procedures?

a. Yes [Go to Question __]
b. No [Go to Question __]

25) Have you ever imposed sanctions for the government's failure to disclose exculpatory or impeachment evidence within the time limits imposed by your local rules and procedures?

a. Yes [Go to Question __]
b. No [Go to Question __]

26) Please describe below the type(s) of sanction(s) that was/were imposed.

_____

27) Have you ever concluded that the prosecution was in violation of its disclosure obligations under your local rules and procedures but decided not to impose sanctions?

a. Yes
b. No

28) Have you ever reported a federal prosecutor to the United States Department of Justice's Office of Professional Responsibility (OPR) as a result of his or her failure to disclose exculpatory or impeachment evidence to the defense in violation of your local rules and procedures?

a. Yes
b. No

29) Have you ever reported a federal prosecutor to your district's Bar Counsel as a result of his or her failure to disclose exculpatory or impeachment evidence to the defense in violation of your local rules and procedures?

a. Yes
b. No

30) Have you ever imposed sanctions for the defendant's failure to disclose reciprocal Jencks material to the prosecution within the time limits imposed by your local rules and procedures?

a. Yes [Go to Question __]
b. No [Go to Question __]

31) Please describe below the type(s) of sanction(s) that was/were imposed.

_____

33) Have you ever reported a defendant's attorney to your district's Bar Counsel as a result of his or her failure to disclose reciprocal Jencks material in violation of your local rules and procedures?

a. Yes
b. No

34) Do you feel that the current ethics rules governing federal prosecutors, available disciplinary procedures, and other sanctions sufficiently address any **intentional failure** of prosecutors to comply with your district's disclosure obligations?

a. Yes
b. No

35) Do you feel that the current ethics rules governing federal prosecutors, available disciplinary procedures, and other sanctions sufficiently address any **negligent failure** of prosecutors to comply with your district's disclosure obligations?

a. Yes
b. No

36) Do you feel that the current ethics rules governing defense attorneys, available disciplinary procedures, and other sanctions sufficiently address any **intentional failure** of defense attorneys to comply with your district's disclosure obligations?

a. Yes
b. No

37) Do you feel that the current ethics rules governing defense attorneys, available disciplinary procedures, and other sanctions sufficiently address any **negligent failure** of defense attorneys to comply with your district's disclosure obligations?

a. Yes
b. No

38) Overall, how satisfied are you regarding compliance by prosecutors and defense counsel with your district's disclosure rule and/or standing order regarding disclosure or exculpatory and impeaching information in criminal cases?

a. Very Satisfied
b. Satisfied
c. Neither Satisfied nor Dissatisfied
d. Dissatisfied
e. Very Dissatisfied

II. Your experiences with federal prosecutors' disclosure of exculpatory and impeaching information in compliance with the *Constitution*

39) In your opinion, do federal prosecutors who appear before you have a comprehensive understanding of their *constitutional* discovery disclosure obligations (i.e., *Brady* and its progeny)?

a. Yes
b. No

40) Overall, how satisfied are you regarding compliance by federal prosecutors with the *constitutional rules* regarding disclosure or exculpatory and impeaching information in criminal cases?

a. Very Satisfied
b. Satisfied
c. Neither Satisfied nor Dissatisfied
d. Dissatisfied
e. Very Dissatisfied

41) In the past five years, have you ever been assigned a criminal case in which you have had to rule on a motion or motions concerning the failure to comply with the *Constitution*'s requirements regarding the disclosure of exculpatory or impeaching evidence?

a. Yes [Go to Question __]
b. No [Go to Question __]

42) Please estimate the number of cases in which this has been an issue in the past five years.

a. none
b. 1
c. 2 - 5
d. 6 - 10
e. More than 10

43) If you answered Yes to Question 41, what was the most frequently raised issue (e.g., failure to disclose at all; failure to disclose on time; etc.)

Please specify: _____

44) In the past five years, has defense counsel ever requested that sanctions be imposed for the government's failure to disclose exculpatory or impeachment evidence as required by the *Constitution*?

a. Yes [Go to Question __]
b. No [Go to Question __]

45) Have you ever imposed sanctions for the government's failure to disclose exculpatory or impeachment evidence as required by the *Constitution*?

a. Yes [Go to Question __]
b. No [Go to Question __]

46) Please describe below the type(s) of sanction(s) that was/were imposed.

---

47) Have you ever reported a federal prosecutor to the United States Department of Justice's Office of Professional Responsibility (OPR) as a result of his or her failure to disclose exculpatory or impeachment evidence as required by the *Constitution*?

a. Yes
b. No

48) Have you ever reported a federal prosecutor to your district's Bar Counsel as a result of his or her failure to disclose exculpatory or impeachment evidence as required by the *Constitution*?

a. Yes
b. No

III. Potential Amendments to Rule 16

49) Do you favor amending Rule 16 to address pretrial disclosure of exculpatory and or impeaching information?
   a. If yes, answer Question 50
   b. If no, answer Question 51

50) Which of the following statements best describes your view? Please check all that apply and if desired, provide your alternative comments in the box below.

   a. An amendment **is needed** because it will reduce the possibility that innocent persons will be convicted in federal proceedings
   b. An amendment **is needed** because many *Brady* violations pass undiscovered or without remedy.
   c. An amendment **is needed** because it will eliminate the confusion surrounding *Brady's* use of materiality as a measure of a prosecutor's pretrial disclosure obligations.
   d. An amendment **is needed** because it will reduce the variations that currently exist in the circuits.
   e. Other:_____

51) Which of the following statements best describes your view? Please check all that apply and if desired, provide your alternative comments in the box below.

   a. An amendment **is not needed** because it will not reduce the possibility that innocent persons will be convicted in federal proceedings.
   b. An amendment **is not needed** because the current remedies for prosecutorial misconduct, such as reversal of conviction or dismissal of charges, are available to the defendant.
   c. An amendment **is not needed** because it does not address what is really needed to stop abuse of *Brady* obligations by prosecutors—increasing the frequency, types, and strictness of sanctions against prosecutors for failure to disclose such evidence.
   d. An amendment **is not needed** because there is no demonstrated need for change.
   e. An amendment **is not needed** because the recent reforms put into place by the Department of Justice will significantly decrease *Brady* violations so that an amendment to Rule 16 is no longer needed to increase compliance with *Brady*.
   f. Other:_____

In 2007, the Committee proposed the following amendment to Rule 16, which was not approved by the Judicial Conference's Standing Committee on Rules of Practice and Procedure. Although the amendment as written was not approved by the Standing Committee, the Advisory Committee is continuing to study this issue. The remaining questions of the survey address potential amendments to Rule 16

Rule 16. Discovery and Inspection

(a) GOVERNMENT'S DISCLOSURE.

(1) *INFORMATION SUBJECT TO DISCLOSURE.*

...

(H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

52) What effect, if any, do you think this amendment might have on the privacy and security of cooperating witnesses?

Comments: _____

_____

_____

53) What effect, if any, do you think this amendment might have on the privacy and security of crime victims?

Comments: _____

_____

_____

54) What are the advantages of this amendment to the court?

Comments: _____

_____

_____

55) What are the disadvantages of this amendment to the court?

Comments: _____

_____

_____

56) In your opinion, would the previously proposed amendment increase or decrease litigation costs?

a. Increase
b. Decrease

57) Do you think information about a victim's or witness' background that would not be admissible in evidence -- such as mental health treatment that the prosecutor believes does not bear directly on the witness' testimony -- should be disclosed?

a. Yes
b. No

58) Do you think all allegations of misconduct against law enforcement witnesses, including those found not to be substantiated by an internal investigation, should be disclosed?

a. Yes
b. No

59) With respect to defense witnesses, do you think all impeachment information in the possession of the defense should be disclosed to the prosecution prior to trial?

a. Yes
b. No

61) If you favor an amendment to Rule 16 different from that proposed in 2007, what language would you suggest?

_____

_____

_____

62) If you have any another comments or suggestions regarding the previously proposed amendment to Rule 16 or discovery disclosure in general that have not been covered in this survey, please provide them here.

_____

_____

_____

THANK YOU FOR COMPLETING THE SURVEY.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JAMES K. LOGAN
APPELLATE RULES

PAUL MANNES
BANKRUPTCY RULES

PATRICK E. HIGGINBOTHAM
CIVIL RULES

D. LOWELL JENSEN
CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

TO: **Hon. Alicemarie H. Stotler, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Hon. D. Lowell Jensen, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT **Report of Advisory Committee on Rules of Criminal Procedure**

DATE: **May 23, 1995**

I. INTRODUCTION.

At its meeting on April 10, 1995, the Advisory Committee on the Rules of Criminal Procedure considered proposed or pending amendments to several Rules of Criminal Procedure. This report addresses those proposals. The minutes of that meeting, a GAP Report, and a proposed amendment to Rule 24(a) are attached.

II. ACTION ITEMS

A. Action on Rules Published for Public Comment: Rules 16 and 32

At its June 1994 meeting the Standing Committee approved for publication for public comment amendments to Rule 16 and 32. The deadline for those comments was February 28, 1995 and at its April 1995 meeting the Advisory Committee considered the comments, made several minor changes to the rules and now presents them to the Standing Committee. The amended Rules and Committee Notes are included in the attached GAP Report.

Rule 16. Discovery and Inspection[1]

(a) GOVERNMENTAL DISCLOSURE OF EVIDENCE.

(1) Information Subject to Disclosure.

* * * * *

(E) EXPERT WITNESSES. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, and 705 as evidence at trial on the issue of the defendant's mental condition. ~~This~~ The summary provided under this subdivision shall

[1]. New matter is underlined and matter to be omitted is lined through.

~~must~~ describe the witnesses' opinions, the bases and the reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

(F) NAMES OF WITNESSES. At the defendant's request in a noncapital felony case, the government shall, no later than seven days before trial unless the court orders a time closer to trial, disclose to the defendant the names of the witnesses that the government intends to call during its case-in-chief. But disclosure of that information is not required if the attorney for the government believes in good faith that pretrial disclosure of this information might threaten the safety of any person or might lead to an obstruction of justice. If the attorney for the government submits to the court, ex parte and under seal, a written statement indicating why the government believes in good faith that the name of a witness cannot be disclosed, then the witness's

name shall not be disclosed. Such a statement is not reviewable.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), (D), ~~and~~ (E), and (F) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent ~~agents in connection with the investigation or prosecution of~~ investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

* * * * *

(b) THE DEFENDANT'S DISCLOSURE OF EVIDENCE.

(1) *Information Subject to Disclosure.*

* * * * *

(C) EXPERT WITNESSES. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, and 705 of the Federal Rules of Evidence as evidence at trial: (i) if ~~If~~ the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. ~~the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial.~~ This summary ~~must~~ shall describe the witnesses' opinions ~~of the witnesses~~, the bases and reasons for those opinions ~~therefor~~, and the witnesses' qualifications.

(D) NAMES OF WITNESSES. If the defendant requests disclosure under subdivision (a)(1)(F) of this

rule, and the government complies, the defendant shall, at the government's request, disclose to the government before trial the names of witnesses that the defense intends to call during its case-in-chief. The court may limit the government's right to obtain disclosure from the defendant if the government has filed an ex parte statement under subdivision (a)(1)(F).

* * * * *

COMMITTEE NOTE

The amendments to Rule 16 cover two issues. The first addresses the ability of the government to require, upon request, the defense to provide pretrial disclosure of information concerning its expert witnesses on the issue of the defendant's mental condition. The amendment also requires the government to provide reciprocal pretrial disclosure of information about its expert witnesses when the defense has complied. The second amendment provides for pretrial disclosure of witness names.

Subdivision (a)(1)(E). Under Rule 16(a)(1)(E), as amended in 1993, the defense is entitled to disclosure of certain information about expert witnesses which the government intends to call during the trial as well as reciprocal pretrial disclosure by the government upon defense disclosure. This amendment is a parallel reciprocal disclosure provision which is triggered by a government request for information concerning defense expert witnesses as to the defendant's mental condition, which is provided for in an amendment to (b)(1)(C), *infra*.

Subdivision (a)(1)(F). No subject has generated more controversy in the Rules Enabling Act process over many years than pretrial discovery of the witnesses the government intends to call at trial. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided pretrial disclosure to a defendant of the names of government witnesses, subject to the government's right to seek a protective order. Congress, however, refused to approve the rule in the face of vigorous opposition by the Department of Justice. In recent years, a number of proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it has argued that the threats of harm to witnesses and obstruction of justice have increased over the years along with the increase in narcotics offenses, continuing criminal enterprises, and other crimes committed by criminal organizations.

Notwithstanding the absence of an amendment to Rule 16, the federal courts have continued to confront the issue of whether the rule, read in conjunction with the Jencks Act, permits a court to order the government to disclose its witnesses before they have testified at trial. *See United States v. Price*, 448 F.Supp. 503 (D. Colo. 1978)(circuit by circuit summary of whether government is required to disclose names of its witnesses to the defendant).

The Committee has recognized that government witnesses often come forward to testify at risk to their personal safety, privacy, and economic well-being. The Committee recognized, at the same time, that the great majority of cases do not involve any such risks to witnesses.

The Committee shares the concern for safety of witnesses and third persons and the danger of obstruction of justice. But it is also concerned with the burden faced by defendants in attempting to prepare for trial without adequate discovery, as well as the burden placed on court resources and on jurors by unnecessary trial delay. The Federal Rules of Criminal Procedure recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it. In several

amendments -- approved by Congress since its rejection of the proposed 1974 amendment to Rule 16 regarding pretrial disclosure of witnesses -- the rules now provide for defense disclosure of certain information. *See, e.g.*, Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The Committee notes also that both Congress and the Executive Branch have recognized for years the value of liberal pretrial discovery for defendants in military criminal prosecutions. *See* D. Schlueter, *Military Criminal Justice: Practice and Procedure*, § 10-4(A) (3d ed. 1992)(discussing automatic prosecution disclosure of government witnesses and statements). Similarly, pretrial disclosure of prosecution witnesses is provided for in many State criminal justice systems where the caseload and the number of witnesses are much greater than that in the federal system. *See generally* Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 Cath. U. L. Rev. 641, 657-674 (1989)(citing State practices). Moreover, the vast majority of cases involving charges of violence against persons are tried in State courts.

The arguments against similar discovery for defendants in federal criminal trials seem unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information to avoid surprise as is the government. The fact that the government bears the burden of proving all elements of the charged offense beyond a reasonable doubt is not a compelling reason for denying a defendant adequate means for responding to government evidence. In providing for enhanced discovery for the defense, the Committee believes that the danger of unfair surprise to the defense and the burden on courts and jurors will be reduced in many cases, and that trials in those cases will be fairer and more efficient.

The Committee regards the addition of Rule 16(a)(1)(F) as a reasonable, measured, step forward. In this regard it is noteworthy that the amendment rests on the following three assumptions. First, the government will act in good faith, and there

will be cases in which the information available to the government will support a good faith belief as to danger although it does not constitute "hard" evidence to prove the actual existence of danger. Second, in most cases judges will not be in a better position than the government to gauge potential danger to witnesses. And third, post-trial litigation as to the sufficiency of government reasons in every case of an *ex parte* submission under seal would result in an unacceptable drain on judicial resources.

The Committee considered several approaches to discovery of witness names. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. The amendment requires the government to provide pretrial disclosure of names of witnesses unless the attorney for the government submits, *ex parte* and under seal, to the trial court written reasons, based upon the facts relating to the individual case, why this information cannot be disclosed. The amendment adopts an approach of presumptive disclosure that is already used in a significant number of United States Attorneys offices. While the amendment recognizes the importance of discovery in all cases, it protects witnesses when the government has a good faith basis for believing that disclosure will pose a threat to the safety of a person or will lead to an obstruction of justice.

The provision that the government provide the names no later than seven days before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. The seven-day provision extends only to noncapital felony cases. Currently, in capital cases the government is required to disclose the names of its witnesses at least three days before trial. The Committee believes that the difference in the timing requirements is justified in light of the fact that any danger to witnesses would be greater in capital cases. The rule also recognizes, however, that the trial court may permit the government to disclose the names of its witnesses at a time closer to trial.

The amendment provides that the government's *ex parte* submission of reasons for not disclosing the requested information

will not be reviewed, either by the trial or the appellate court. The Committee considered, but rejected, a mechanism for post-trial review of the government's statement. It was concerned that such *ex parte* statements could become a subject of collateral litigation in every case in which they are made. Although it is true that under the rule the government could refuse to disclose a witness' name even though it lacks sufficient evidence for doing so in an individual case, the Committee found no reason to assume that bad faith on the part of the prosecutor would occur. The Committee was certain, however, that it would require an investment of significant judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions. No defendant will be worse off under the amended rule than under the current version of Rule 16, because the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so.

It should also be noted that the amendment does not preclude either the defendant or the government from seeking protective or modifying orders or sanctions from the court under subdivision (d) of this rule.

Subdivision (b)(1)(C). Amendments in 1993 to Rule 16 included provisions for pretrial disclosure of information, including names and expected testimony of both defense and government expert witnesses. Those disclosures are triggered by defense requests for the information. If the defense makes such requests and the government complies, the government is entitled to similar, reciprocal discovery. The amendment to Rule 16(b)(1)(C) provides that if the defendant has notified the government under Rule 12.2 of an intent to rely on expert testimony to show the defendant's mental condition, the government may request the defense to disclose information about its expert witnesses. Although Rule 12.2 insures that the government will not be surprised by the nature of the defense or that the defense intends to call an expert witness, that rule makes no provision for discovery of the identity, the expected testimony, or the qualifications of the expert witness. The amendment provides the government with the limited right to

respond to the notice provided under Rule 12.2 by requesting more specific information about the expert. If the government requests the specified information, and the defense complies, the defense is entitled to reciprocal discovery under an amendment to subdivision (a)(1)(E), *supra*.

Subdivision (b)(1)(D). The amendment, which provides for reciprocal discovery of defense witness names, is triggered by compliance with a defense request made under subdivision (a)(1)(F). If the government withholds any information requested under that provision, the court in its discretion may limit the government's right to disclosure under this subdivision. The amendment provides no specific deadline for defense disclosure, as long as it takes place before trial starts.

Rule 32. Sentence and Judgment

(d) JUDGMENT.

* * * * *

(2) *Criminal Forfeiture.* ~~When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.~~ If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve proposed amendments to Appellate Rules 21, 25, and 26 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 2-4

2. Approve proposed amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court in accordance with the law . . . . . pp. 7-9

3. Approve proposed amendments to Civil Rules 5 and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law . . . . . pp. 12-14

4. Approve the proposed amendments to Criminal Rules 16 and 32 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court in accordance with the law . . . . . pp. 17-21

The remainder of the report is for information and the record.

advantages of twelve-member juries. The advisory committee noted that many courts now routinely sit juries of eight or ten or more in all but the shortest cases.

Your committee believes that public comment would be especially helpful in assessing whether the advantages of a larger jury size, including increased minority representation and possibly moderation of unreasonable damages awards, outweigh the increased costs associated with a larger sized jury.

Your committee voted to circulate the proposed amendments to the bench and bar for comment.

IV. AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted to your committee proposed amendments to Federal Rules of Criminal Procedure 16 and 32 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in September 1994. A public hearing was held in Los Angeles in January 1995.

The proposed amendments to Rule 16 (*Discovery and Inspection*) would establish parallel reciprocal disclosure provisions for the prosecution and the defense regarding the testimony of an expert witness on the defendant's mental condition. The amendments would also require the government, seven days before trial, to disclose to the defense the names of government witnesses and their statements, unless it believes in good faith that pretrial disclosure of this information might threaten the safety of a person or risk the obstruction of justice.

In such a case, the government simply would file an ex parte, unreviewable statement with the court stating why it believes - under the facts of the particular case - that a safety threat or risk of obstruction of justice exists.

The comments and testimony highlighted the contrast between the ease of counsel obtaining discovery in a civil case and the difficulty of defense counsel in preparing for trial in the absence of witness disclosure in a criminal case. Although many federal prosecutors already timely disclose witnesses' names and statements, many others do not. There is no national uniform policy on disclosure. The extent of disclosure ultimately depends on the policies of local U.S. attorney offices and individual assistant U.S. attorneys, which often vary from district to district and even within an office. Other commentators stressed that the plea bargaining process would be more effective and efficient if disclosure is made timely so that the defendant understands the strength of the prosecution's case.

The proposed amendments recognize clearly that some government witnesses come forward to testify at risk to their personal safety, privacy, and economic well-being. At the same time, most cases do not involve risks to witnesses. The proposed amendments are intended to create a fairer trial by reducing the practical and inequitable hardships defendants presently face in attempting to prepare for trial without adequate discovery. Unnecessary trial delay is now incurred because once a witness is called to testify at the trial, a recess must be ordered to allow the defense time to review any previous statements made by the witness in order to effectively cross-examine the witness, which only places additional burdens on all

parties, court resources, and jurors.

Many state criminal justice systems and the military already provide pretrial disclosure of witnesses, and it is presently standard operating procedure in many federal district courts. The proposed amendments are less demanding than the amendments recommended by the Judicial Conference and approved by the Supreme Court in 1974, which required disclosure of the names and addresses of all government witnesses upon request of the defendant. If the government believed that disclosure would create an undue risk of harm to the witness it could request the court for a protective order. The amendments were rejected ultimately by Congress.

The proposed amendments, as published for comment, admittedly created a conflict with the Jencks Act in so far as they would require pretrial disclosure of witnesses' statements. But they were consistent with the Act in recognizing the importance of defense pretrial discovery while permitting the government to block it when necessary. The amendments are procedural and are similar to several other previously approved amendments that require the defense and prosecution to disclose certain information before trial.

Your committee decided to eliminate the conflict with the Jencks Act by limiting the proposed amendments to the disclosure of witnesses' names only. It also revised the time provisions by providing the court with discretion to require disclosure in less than seven days before trial to accommodate cases in which the prosecution is unable itself to prepare for the trial.

The Department of Justice continues to oppose any required pretrial

disclosure of witnesses' names. The Department believes that the proposed amendments are unnecessary because most prosecutors already disclose such information before trial. It is also concerned that the proposed amendments would: (1) impose subtle but real restraints on prosecutors who would prefer not to disclose the name of a witness based on their assessment of the potential risks, but who do not want to incur disapproval of the trial judge, (2) add new safety risks to witnesses who would otherwise never be identified in cases in which a plea was entered immediately before trial, and (3) create unnecessary satellite litigation on review. The advisory committee substantially modified earlier versions of the proposed amendments to Rule 16 over the course of several past meetings to meet the Department's concerns.

As amended, your committee voted to recommend approval of the proposed amendments with the representative of the Department of Justice and one other committee member opposed.

Rule 32 (*Sentence and Judgment*) would be amended to permit a court explicitly to conduct forfeiture proceedings after the return of a verdict, but before sentencing.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your committee, are in *Appendix D* together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 16 and 32 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 09-454 **July 8, 2009**

Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligation.

There are various sources of prosecutors' obligations to disclose evidence and other information to defendants in a criminal prosecution.[1] Prosecutors are governed by federal constitutional provisions as interpreted by the U.S. Supreme Court and by other courts of competent jurisdiction. Prosecutors also have discovery obligations established by statute, procedure rules, court rules or court orders, and are subject to discipline for violating these obligations.

Prosecutors have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct, which provides: "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." This obligation may overlap with a prosecutor's other legal obligations.

Rule 3.8(d) sometimes has been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*,[2] which held that criminal defendants have a due process right to receive favorable information from the prosecution.[3] This inaccurate description may lead to the incorrect assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by the courts in litigation. Yet despite the importance of prosecutors fully understanding the extent of the separate obligations imposed by Rule 3.8(d), few judicial opinions, or state or local ethics opinions, provide guidance in interpreting the various state analogs to the rule.[4] Moreover, although courts in criminal litigation frequently discuss the scope of prosecutors' legal obligations, they rarely address the scope of the ethics rule.[5] Finally, although courts

---

[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] 373 U.S. 83 (1963). *See* State v. York, 632 P.2d 1261, 1267 (Or. 1981) (Tanzer, J., concurring) (observing parenthetically that the predecessor to Rule 3.8(d), DR 7-103(b), "merely codifies" *Brady*).

[3] *Brady*, 373 U.S. at 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *see also* Kyles v. Whitley, 514 U.S. 419, 432 (1995) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland*.")

[4] *See* Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 2001-03 (2001); Arizona State Bar, Comm. on Rules of Prof'l Conduct, Op. 94-07 (1994); State Bar of Wisconsin, Comm. on Prof'l Ethics, Op. E-86-7 (1986).

[5] *See, e.g.*, Mastracchio v. Vose, 2000 WL 303307 *13 (D.R.I. 2000), *aff'd*, 274 F.3d 590 (1st Cir.2001) (prosecution's failure to disclose nonmaterial information about witness did not violate defendant's Fourteenth Amendment rights, but came "exceedingly close

sometimes sanction prosecutors for violating disclosure obligations,[6] disciplinary authorities rarely proceed against prosecutors in cases that raise interpretive questions under Rule 3.8(d), and therefore disciplinary case law also provides little assistance.

The Committee undertakes its exploration by examining the following hypothetical.

> A grand jury has charged a defendant in a multi-count indictment based on allegations that the defendant assaulted a woman and stole her purse. The victim and one bystander, both of whom were previously unacquainted with the defendant, identified him in a photo array and then picked him out of a line-up. Before deciding to bring charges, the prosecutor learned from the police that two other eyewitnesses viewed the same line-up but stated that they did not see the perpetrator, and that a confidential informant attributed the assault to someone else. The prosecutor interviewed the other two eyewitnesses and concluded that they did not get a good enough look at the perpetrator to testify reliably. In addition, he interviewed the confidential informant and concluded that he is not credible.

Does Rule 3.8(d) require the prosecutor to disclose to defense counsel that two bystanders failed to identify the defendant and that an informant implicated someone other than the defendant? If so, when must the prosecutor disclose this information? Would the defendant's consent to the prosecutor's noncompliance with the ethical duty eliminate the prosecutor's disclosure obligation?

The Scope of the Pretrial Disclosure Obligation

A threshold question is whether the disclosure obligation under Rule 3.8(d) is more extensive than the constitutional obligation of disclosure. A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal.[7] In the hypothetical, information known to the prosecutor would be favorable to the defense but is not necessarily material under the constitutional case law.[8] The following review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.

Courts recognize that lawyers who serve as public prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

---

to violating [Rule 3.8]").

[6] *See, e.g., In re* Jordan, 913 So. 2d 775, 782 (La. 2005) (prosecutor's failure to disclose witness statement that negated ability to positively identify defendant in lineup violated state Rule 3.8(d)); N.C. State Bar v. Michael B. Nifong, No. 06 DHC 35, Amended Findings of Fact, Conclusions of Law, and Order of Discipline (Disciplinary Hearing Comm'n of N.C. July 24, 2007) (prosecutor withheld critical DNA test results from defense); Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re* Grant, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state's key witness in murder prosecution). *Cf.* Rule 3.8, cmt. [9] ("A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.")

[7] *See, e.g.,* Strickler v. Greene, 527 U.S. 263, 281-82 (1999); *Kyles*, 514 U.S. at 432-35, United States v. Bagley, 473 U.S. 667, 674-75 (1985).

[8] "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.. . . [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (citations omitted); *see also* United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) ("The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.")

impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[9] Similarly, Comment [1] to Model Rule 3.8 states that: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."

In 1908, more than a half-century prior to the Supreme Court's decision in *Brady v. Maryland*,[10] the ABA Canons of Professional Ethics recognized that the prosecutor's duty to see that justice is done included an obligation not to suppress facts capable of establishing the innocence of the accused.[11] This obligation was carried over into the ABA Model Code of Professional Responsibility, adopted in 1969, and expanded. DR 7-103(B) provided: "A public prosecutor . . . shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." The ABA adopted the rule against the background of the Supreme Court's 1963 decision in *Brady v. Maryland*, but most understood that the rule did not simply codify existing constitutional law but imposed a more demanding disclosure obligation.[12]

Over the course of more than 45 years following *Brady*, the Supreme Court and lower courts issued many decisions regarding the scope of prosecutors' disclosure obligations under the Due Process Clause. The decisions establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.

The drafters of Rule 3.8(d), in turn, made no attempt to codify the evolving constitutional case law. Rather, the ABA Model Rules, adopted in 1983, carried over DR 7-103(B) into Rule 3.8(d) without substantial modification. The accompanying Comments recognize that the duty of candor established by Rule 3.8(d) arises out of the prosecutor's obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence,"[13] and most importantly, "that special precautions are taken to prevent . . . the conviction of innocent persons."[14] A prosecutor's timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions. The premise of adversarial proceedings is that the truth will emerge when each side presents the testimony, other evidence and arguments most favorable to its position. In criminal proceedings, where the defense ordinarily has limited

---

[9] Berger v. United States, 295 U.S. 78, 88 (1935) (discussing role of U.S. Attorney). References in U.S. judicial decisions to the prosecutor's obligation to seek justice date back more than 150 years. *See, e.g.*, Rush v. Cavanaugh, 2 Pa. 187, 1845 WL 5210 *2 (Pa. 1845) (the prosecutor "is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.")

[10] Prior to *Brady*, prosecutors' disclosure obligations were well-established in federal proceedings but had not yet been extended under the Due Process Clause to state court proceedings. *See, e.g.*, Jencks v. United States, 353 U.S. 657, 668, n. 13 (1957), *citing* Canon 5 of the American Bar Association Canons of Professional Ethics (1947), for the proposition that the interest of the United States in a criminal prosecution "is not that it shall win a case, but that justice shall be done;" United States v. Andolschek, 142 F. 2d 503, 506 (2d Cir. 1944) (L. Hand, J.) ("While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate.")

[11] ABA Canons of Professional Ethics, Canon 5 (1908) ("The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.")

[12] *See, e.g.*, OLAVI MARU, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 330 (American Bar Found., 1979) ("a disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's duty as a matter of ethics"). For example, *Brady* required disclosure only upon request from the defense – a limitation that was not incorporated into the language of DR 7-103(B), *see* MARU, *id.* at 330 – and that was eventually eliminated by the Supreme Court itself. Moreover, in United States v. Agurs, 427 U.S. 97 (1976), an opinion post-dating the adoption of DR 7-103(B), the Court held that due process is not violated unless a court finds after the trial that evidence withheld by the prosecutor was material, in the sense that it would have established a reasonable doubt. Experts understood that under DR 7-103(B), a prosecutor could be disciplined for withholding favorable evidence even if the evidence did not appear likely to affect the verdict. MARU, *id.*

[13] Rule 3.8, cmt. [1].

[14] *Id.*

access to evidence, the prosecutor's disclosure of evidence and information favorable to the defense promotes the proper functioning of the adversarial process, thereby reducing the risk of false convictions.

Unlike Model Rules that expressly incorporate a legal standard, Rule 3.8(d)[15] establishes an independent one. Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation.[16] The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation.[17]

In particular, Rule 3.8(d) is more demanding than the constitutional case law,[18] in that it requires the disclosure of evidence or information favorable to the defense[19] without regard to the anticipated impact of the evidence or information on a trial's outcome.[20] The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.[21]

---

[15] For example, Rule 3.4(a) makes it unethical for a lawyer to "*unlawfully* obstruct another party's access to evidence or *unlawfully* alter, destroy or conceal a document or other material having potential evidentiary value" (emphasis added), Rule 3.4(b) makes it unethical for a lawyer to "offer an inducement to a witness that is *prohibited by law*" (emphasis added), and Rule 3.4(c) forbids knowingly disobeying "an obligation under the rules of a tribunal . . . ." These provisions incorporate other law as defining the scope of an obligation. Their function is not to establish an independent standard but to enable courts to discipline lawyers who violate certain laws and to remind lawyers of certain legal obligations. If the drafters of the Model Rules had intended only to incorporate other law as the predicate for Rule 3.8(d), that Rule, too, would have provided that lawyers comply with their disclosure obligations under the law.

[16] This is particularly true insofar as the constitutional cases, but not the ethics rule, establish an after-the-fact, outcome-determinative "materiality" test. *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing inter alia*, Rule 3.8(d); *Kyles*, 514 U.S. at 436 (observing that *Brady* "requires less of the prosecution than" Rule 3.8(d)); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 375 (ABA 2007); 2 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d 2001 & Supp. 2009) ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny"); PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009).

[17] The current version provides: "A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. The accompanying Commentary observes: "This obligation, which is virtually identical to that imposed by ABA model ethics codes, goes beyond the corollary duty imposed upon prosecutors by constitutional law." *Id.* at 96. The original version, approved in February 1971, drawing on DR7-103(B) of the Model Code, provided: "It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity."

[18] *See, e.g.*, United States v. Jones, 609 F.Supp.2d 113, 118-19 (D. Mass. 2009); United States v. Acosta, 357 F. Supp. 2d 1228, 1232-33 (D. Nev. 2005). We are aware of only two jurisdictions where courts have determined that prosecutors are not subject to discipline under Rule 3.8(d) for withholding favorable evidence that is not material under the Brady line of cases. *See In re* Attorney C, 47 P.3d 1167 (Colo. 2002) (en banc) (court deferred to disciplinary board finding that prosecutor did not intentionally withhold evidence); D.C. Rule Prof'l Conduct 3.8, cmt. 1 ("[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.")

[19] Although this opinion focuses on the duty to disclose evidence and information that tends to negate the guilt of an accused, the principles it sets forth regarding such matters as knowledge and timing apply equally to evidence and information that "mitigates the offense." Evidence or information mitigates the offense if it tends to show that the defendant's level of culpability is less serious than charged. For example, evidence that the defendant in a homicide case was provoked by the victim might mitigate the offense by supporting an argument that the defendant is guilty of manslaughter but not murder.

[20] Consequently, a court's determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d). *See, e.g.*, U.S. v. Barraza Cazares, 465 F.3d 327, 333-34 (8th Cir. 2006) (finding that drug buyer's statement that he did not know the defendant, who accompanied seller during the transaction, was favorable to defense but not material).

[21] *Cf.* Cone v. Bell, 129 S. Ct. at 1783 n. 15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at 439 (prosecutors should avoid "tacking too close to the wind"). In some jurisdictions, court rules and court orders serve a similar purpose. *See, e.g.*, Local Rules of the U.S. Dist. Court for the Dist. of Mass., Rule 116.2(A)(2) (defining "exculpatory information," for purposes of the prosecutor's pretrial disclosure obligations under the Local Rules, to include (among other things) "all information that is material and favorable to the accused because it tends to [c]ast doubt on defendant's guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief.")

Under Rule 3.8(d), evidence or information ordinarily will tend to negate the guilt of the accused if it would be relevant or useful to establishing a defense or negating the prosecution's proof.[22] Evidence and information subject to the rule includes both that which tends to exculpate the accused when viewed independently and that which tends to be exculpatory when viewed in light of other evidence or information known to the prosecutor.

Further, this ethical duty of disclosure is not limited to admissible "evidence," such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable "information." Though possibly inadmissible itself, favorable information may lead a defendant's lawyer to admissible testimony or other evidence[23] or assist him in other ways, such as in plea negotiations. In determining whether evidence and information will tend to negate the guilt of the accused, the prosecutor must consider not only defenses to the charges that the defendant or defense counsel has expressed an intention to raise but also any other legally cognizable defenses. Nothing in the rule suggests a de minimis exception to the prosecutor's disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant's guilt, or that the favorable evidence is highly unreliable.

In the hypothetical, supra, where two eyewitnesses said that the defendant was not the assailant and an informant identified someone other than the defendant as the assailant, that information would tend to negate the defendant's guilt regardless of the strength of the remaining evidence and even if the prosecutor is not personally persuaded that the testimony is reliable or credible. Although the prosecutor may believe that the eye witnesses simply failed to get a good enough look at the assailant to make an accurate identification, the defense might present the witnesses' testimony and argue why the jury should consider it exculpatory. Similarly, the fact that the informant has prior convictions or is generally regarded as untrustworthy by the police would not excuse the prosecutor from his duty to disclose the informant's favorable information. The defense might argue to the jury that the testimony establishes reasonable doubt. The rule requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use.

The Knowledge Requirement

Rule 3.8(d) requires disclosure only of evidence and information "known to the prosecutor." Knowledge means "actual knowledge," which "may be inferred from [the] circumstances."[24] Although "a lawyer cannot ignore the obvious,"[25] Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.

The knowledge requirement thus limits what might otherwise appear to be an obligation substantially more onerous than prosecutors' legal obligations under other law. Although the rule requires

---

[22] Notably, the disclosure standard endorsed by the National District Attorneys' Association, like that of Rule 3.8(d), omits the constitutional standard's materiality limitation. NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 53.5 (2d ed. 1991) ("The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged."). The ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE PROSECUTION FUNCTION (3d ed. 1992), never has included such a limitation either.

[23] For example an anonymous tip that a specific individual other than the defendant committed the crime charged would be inadmissible under hearsay rules but would enable the defense to explore the possible guilt of the alternative suspect. Likewise, disclosure of a favorable out-of-court statement that is not admissible in itself might enable the defense to call the speaker as a witness to present the information in admissible form. As these examples suggest, disclosure must be full enough to enable the defense to conduct an effective investigation. It would not be sufficient to disclose that someone else was implicated without identifying who, or to disclose that a speaker exculpated the defendant without identifying the speaker.

[24] Rule 1.0(f).

[25] Rule 1.13, cmt. [3], *cf.* ABA Formal Opinion 95-396 ("[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(c) (3d ed. 1993) ("A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.").

prosecutors to disclose *known* evidence and information that is favorable to the accused,[26] it does not require prosecutors to conduct searches or investigations for favorable evidence that may possibly exist but of which they are unaware. For example, prior to a guilty plea, to enable the defendant to make a well-advised plea at the time of arraignment, a prosecutor must disclose known evidence and information that would be relevant or useful to establishing a defense or negating the prosecution's proof. If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information. In the hypothetical, for example, the prosecutor would have to disclose that two eyewitnesses failed to identify the defendant as the assailant and that an informant attributed the assault to someone else, because the prosecutor knew that information from communications with the police. Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favorable to the defense unless he was closing his eyes to the existence of such evidence or information.[27]

The Requirement of Timely Disclosure

In general, for the disclosure of information to be timely, it must be made early enough that the information can be used effectively.[28] Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.

Evidence and information disclosed under Rule 3.8(d) may be used for various purposes prior to trial, for example, conducting a defense investigation, deciding whether to raise an affirmative defense, or determining defense strategy in general. The obligation of timely disclosure of favorable evidence and information requires disclosure to be made sufficiently in advance of these and similar actions and decisions that the defense can effectively use the evidence and information. Among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty.[29] Because the defendant's decision may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case,[30] timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant's arraignment.[31] Defendants first decide whether to plead guilty when they are arraigned on criminal charges, and if they plead not guilty initially, they may enter a guilty plea later. Where early disclosure, or disclosure of too much information, may undermine an ongoing investigation or jeopardize a witness, as may be the case when an informant's identity would be revealed, the prosecutor may seek a protective order.[32]

---

[26] If the prosecutor knows of the existence of evidence or information relevant to a criminal prosecution, the prosecutor must disclose it if, viewed objectively, it would tend to negate the defendant's guilt. However, a prosecutor's erroneous judgment that the evidence was not favorable to the defense should not constitute a violation of the rule if the prosecutor's judgment was made in good faith. *Cf.* Rule 3.8, cmt. [9].

[27] Other law may require prosecutors to make efforts to seek and review information not then known to them. Moreover, Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

[28] *Compare* D.C. Rule Prof'l Conduct 3.8(d) (explicitly requiring that disclosure be made "at a time when use by the defense is reasonably feasible"); North Dakota Rule Prof'l Conduct 3.8(d) (requiring disclosure "at the earliest practical time"); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, *supra* note 17 (calling for disclosure "at the earliest feasible opportunity").

[29] *See* ABA Model Rules of Professional Conduct 1.2(a) and 1.4(b).

[30] In some state and local jurisdictions, primarily as a matter of discretion, prosecutors provide "open file" discovery to defense counsel – that is, they provide access to all the documents in their case file including incriminating information – to facilitate the counseling and decision-making process. In North Carolina, there is a statutory requirement of open-file discovery. *See* N.C. GEN. STAT. § 15A-903 (2007); *see generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

[31] *See* JOY & MCMUNIGAL, *supra* note 16 at 145 ("the language of the rule, in particular its requirement of 'timely disclosure,' certainly appears to mandate that prosecutors disclose favorable material during plea negotiations, if not sooner").

[32] Rule 3.8, Comment [3].

Defendant's Acceptance of Prosecutor's Nondisclosure

The question may arise whether a defendant's consent to the prosecutor's noncompliance with the disclosure obligation under Rule 3.8(d) obviates the prosecutor's duty to comply.[33] For example, may the prosecutor and defendant agree that, as a condition of receiving leniency, the defendant will forgo evidence and information that would otherwise be provided? The answer is "no." A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d), and therefore a prosecutor may not solicit, accept or rely on the defendant's consent.

In general, a third party may not effectively absolve a lawyer of the duty to comply with his Model Rules obligations; exceptions to this principle are provided only in the Model Rules that specifically authorize particular lawyer conduct conditioned on consent of a client[34] or another.[35] Rule 3.8(d) is designed not only for the defendant's protection, but also to promote the public's interest in the fairness and reliability of the criminal justice system, which requires that defendants be able to make informed decisions. Allowing a prosecutor to avoid compliance based on the defendant's consent might undermine a defense lawyer's ability to advise the defendant on whether to plead guilty,[36] with the result that some defendants (including perhaps factually innocent defendants) would make improvident decisions. On the other hand, where the prosecution's purpose in seeking forbearance from the ethical duty of disclosure serves a legitimate and overriding purpose, for example, the prevention of witness tampering, the prosecution may obtain a protective order to limit what must be disclosed.[37]

The Disclosure Obligation in Connection with Sentencing

The obligation to disclose to the defense and to the tribunal, in connection with sentencing, all unprivileged mitigating information known to the prosecutor differs in several respects from the obligation of disclosure that apply before a guilty plea or trial.

First, the nature of the information to be disclosed is different. The duty to disclose mitigating information refers to information that might lead to a more lenient sentence. Such information may be of various kinds, *e.g.*, information that suggests that the defendant's level of involvement in a conspiracy was less than the charges indicate, or that the defendant committed the offense in response to pressure from a co-defendant or other third party (not as a justification but reducing his moral blameworthiness).

Second, the rule requires disclosure to the tribunal as well as to the defense. Mitigating information may already have been put before the court at a trial, but not necessarily when the defendant has pled guilty. When an agency prepares a pre-sentence report prior to sentencing, the prosecutor may provide mitigating information to the relevant agency rather than to the tribunal directly, because that ensures disclosure to the tribunal.

Third, disclosure of information that would only mitigate a sentence need not be provided before or during the trial but only, as the rule states, "in connection with sentencing," *i.e.*, after a guilty plea or

---

[33] It appears to be an unresolved question whether, as a condition of a favorable plea agreement, a prosecutor may require a defendant entirely to waive the right under *Brady* to receive favorable evidence. In United States v. Ruiz, 536 U.S. 622, 628-32 (2002), the Court held that a plea agreement could require a defendant to forgo the right recognized in Giglio v. United States, 405 U.S. 150 (1972), to evidence that could be used to impeach critical witnesses. The Court reasoned that "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." 536 U.S. at 630. In any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor's constitutional duties of disclosure, as already discussed.

[34] *See, e.g.*, Rules 1.6(a), 1.7(b)(4), 1.8(a)(3), and 1.9(a). Even then, it is often the case that protections afforded by the ethics rules can be relinquished only up to a point, because the relevant interests are not exclusively those of the party who is willing to forgo the rule's protection. *See, e.g.*, Rule 1.7(b)(1).

[35] *See, e.g.*, Rule 3.8(d) (authorizing prosecutor to withhold favorable evidence and information pursuant to judicial protective order); Rule 4.2 (permitting communications with represented person with consent of that person's lawyer or pursuant to court order).

[36] *See* Rules 1.2(a) and 1.4(b).

[37] The prosecution also might seek an agreement from the defense to return, and maintain the confidentiality of evidence and information it receives.

verdict. To be timely, however, disclosure must be made sufficiently in advance of the sentencing for the defense effectively to use it and for the tribunal fully to consider it.

Fourth, whereas prior to trial, a protective order of the court would be required for a prosecutor to withhold favorable but privileged information, Rule 3.8(d) expressly permits the prosecutor to withhold privileged information in connection with sentencing.[38]

The Obligations of Supervisors and Other Prosecutors Who Are Not Personally Responsible for a Criminal Prosecution

Any supervisory lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations.[39] Thus, supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure,[40] and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations.[41] To promote compliance with Rule 3.8(d) in particular, supervisory lawyers must ensure that subordinate prosecutors are adequately trained regarding this obligation. Internal office procedures must facilitate such compliance.

For example, when responsibility for a single criminal case is distributed among a number of different lawyers with different lawyers having responsibility for investigating the matter, presenting the indictment, and trying the case, supervisory lawyers must establish procedures to ensure that the prosecutor responsible for making disclosure obtains evidence and information that must be disclosed. Internal policy might be designed to ensure that files containing documents favorable to the defense are conveyed to the prosecutor providing discovery to the defense, and that favorable information conveyed orally to a prosecutor is memorialized. Otherwise, the risk would be too high that information learned by the prosecutor conducting the investigation or the grand jury presentation would not be conveyed to the prosecutor in subsequent proceedings, eliminating the possibility of its being disclosed. Similarly, procedures must ensure that if a prosecutor obtains evidence in one case that would negate the defendant's guilt in another case, that prosecutor provides it to the colleague responsible for the other case.[42]

---

[38] The drafters apparently concluded that the interest in confidentiality protected by an applicable privilege generally outweighs a defendant's interest in receiving mitigating evidence in connection with a sentencing, but does not generally outweigh a defendant's interest in receiving favorable evidence or information at the pretrial or trial stage. The privilege exception does not apply, however, when the prosecution must prove particular facts in a sentencing hearing in order to establish the severity of the sentence. This is true in federal criminal cases, for example, when the prosecution must prove aggravating factors in order to justify an enhanced sentence. Such adversarial, fact-finding proceedings are equivalent to a trial, so the duty to disclose favorable evidence and information is fully applicable, without regard to whether the evidence or information is privileged.

[39] Rules 5.1(a) and (b).

[40] Rule 5.1(b).

[41] Rule 5.1(c). *See, e.g., In re* Myers, 584 S.E.2d 357, 360 (S.C. 2003).

[42] In some circumstances, a prosecutor may be subject to sanction for concealing or intentionally failing to disclose evidence or information to the colleague responsible for making disclosure pursuant to Rule 3.8(d). *See, e.g.*, Rule 3.4(a) (lawyer may not unlawfully conceal a document or other material having potential evidentiary value); Rule 8.4(a) (lawyer may not knowingly induce another lawyer to violate Rules of Professional Conduct); Rule 8.4(c) (lawyer may not engage in conduct involving deceit); Rule 8.4(d) (lawyer may not engage in conduct that is prejudicial to the administration of justice).

United States District Court

Boston, Massachusetts 02210

MARK L. WOLF
CHIEF JUDGE

June 23, 2009

Honorable Richard C. Tallman
United States Court of Appeals
902 William Kenzo Nakamura
United States Courthouse
1010 Fifth Avenue
Seattle, WA 98104-1195

Dear Judge Tallman:

I am writing to endorse Judge Emmet G. Sullivan's April 28, 2009 request that the Advisory Committee on the Rules of Criminal Procedure (the "Advisory Committee") again recommend that Rule 16 of the Federal Rules of Civil Procedure be revised to require the disclosure of all exculpatory information to defendants. As you know, I was a member of the Advisory Committee in 2007, when this recommendation was made to the Standing Committee on Rules of Practice and Procedure (the "Standing Committee"). The Department of Justice opposed the proposed amendment. The Standing Committee rejected the Advisory Committee's recommendation in part "to obtain information about the experience with the Department of Justice's recent revisions to its U.S. Attorneys' Manual," which for the first time added a section on the prosecutor's duty to disclose material exculpatory information.[1] Regrettably, my recent experience, like the recent experience of Judge Sullivan and other judges, indicates that the revision of the United States Attorneys' Manual has not prevented problems that threaten the fairness of federal criminal prosecutions and, when discerned, injure the reputations of even well-meaning prosecutors who do not properly understand or perform their duties.

In United States v. Jones, 2009 WL 1396385 (D. Mass. May 18, 2009), I describe another admitted failure of a federal prosecutor to produce material exculpatory information to a defendant despite the efforts by judges of the District of Massachusetts to minimize

---

[1]September, 2007 Committee on Rules of Practice and Procedure Report to Judicial Conference, available at http://www.uscourts.gov/rules/reports/ST09-2007.pdf.

such problems by adopting Local Rules that codify existing obligations under Brady v. Maryland, 373 U.S. 83 (1964) and its progeny, and that provide a road map for the proper discharge of a prosecutor's responsibilities concerning discovery. While I have not made a systematic study, it is evident that United States v. Stevens is not the only recent case involving comparable misconduct. In April, 2009, District Judge Alan Gold sanctioned the government and the prosecutors individually for a wide array of misconduct, including violations of the duty to disclose material exculpatory evidence. See United States v. Shaygan, 2009 WL 980289, at *6, *15-*16, *19, *25-*27 (S.D. Fl. Apr. 9, 2009). The Judge imposed sanctions that included an order that the government pay approximately $600,000 of the defendant's legal fees under the Hyde Amendment. Id. at 49. In United States v. W.R. Grace, CR 05-07-M-DWM (D. Mont. April 28, 2009) (Order at 6), in response to "clear and admitted violations of... Brady and Giglio [405 U.S. 150 (1972)]," District Judge Donald Molloy instructed the jury to disregard the testimony of an important witness concerning one defendant. The jury ultimately found all of the defendants not guilty.

In 2007, the Department of Justice persuaded the Standing Committee to reject the Advisory Committee's recommendation that Rule 16 be revised. The new leadership of the Department of Justice, however, may have a different view of the matter. Attorney General Eric Holder's request that Senator Stevens' conviction be vacated indicates that he recognizes that the failure to disclose material exculpatory information is serious misconduct that injures the public interest, either by contributing to a wrongful conviction or by allowing a guilty person to escape punishment. The Attorney General subsequently established a Department of Justice working group to review the need for improvements in the government's discharge of its discovery obligations.[2] Perhaps this process will lead to a reversal of the Department's opposition to amending Rule 16.

However, regardless of the Department of Justice's position, I agree with Judge Sullivan that this matter is sufficiently important to be revisited now. The Advisory Committee had compelling reasons to recommend that Rule 16 be revised in 2007. The need for the amendment has not diminished. The proposed amendment to Rule 16 would clarify and highlight the government's

---

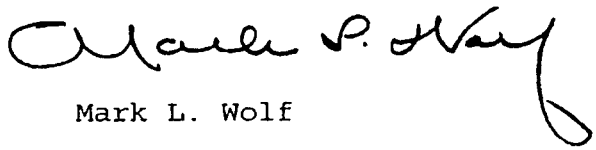
[2]See April 14, 2009 Department of Justice Press Release: Attorney General Announces Increased Training, Review, Process for Providing Materials to Defense in Criminal Cases, available at http://www.usdoj.gov/opa/pr/2009/April/09-opa-338.html.

discovery obligations, promote fairness in the prosecution of criminal cases, and protect prosecutors from inadvertently making errors which, if discovered, damage their reputations.

I know that the Advisory Committee has many matters on its agenda. Therefore, I thank you for your consideration of this request and for what I hope will be your renewed attention to amending Rule 16.

With best wishes,

Sincerely yours,



Mark L. Wolf

cc: Attorney General Eric H. Holder

TAB IIIB

TO: **Criminal Rules Committee**

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

RE: **Proposed Amendments to Rules 12 and 34**

DATE: **March 14, 2010**

The Rule 12 Subcommittee, chaired by Judge Morrison England, recommends that the Committee consider the proposed amendment to Rule 12 included at the conclusion of this memorandum. After a brief summary of the history of this proposal, this memorandum details the Subcommittee's discussion of this proposed amendment.

I. Consideration Prior to the October 2009 Criminal Rules Meeting

A proposed amendment to Rule 12 has been under study for three years. It was the subject of extensive discussion by the full committee in October 2008 and April 2009. The proposal was a response to the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which made it clear that an indictment's failure to state an offense does not deprive the court of jurisdiction. This aspect of the decision in *Cotton* undercut the justification for the current rule, which allows such claims to be raised at any time, even on appeal.

At the April 2009 meeting, the Advisory Committee voted, with four dissents, to recommend that the Standing Committee approve for publication an amendment to Rule 12(b). The Committee's proposal (1) made the general rule that claims not raised prior to trial are "waived" applicable to claims that an indictment fails to state an offense, and (2) provided for relief from the waiver of this particular claim for "good cause" *or* when the defect in the indictment "has prejudiced the substantial rights of the defendant." Finally, the proposal included a conforming amendment to Rule 34.

The Standing Committee remanded the proposed amendments to the Advisory Committee for further study. Members of the Standing Committee generally approved of the concept of the proposed amendment to Rule 12, but wanted the Advisory Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision. Members raised a number of concerns, namely: (1) the term "forfeiture" not "waiver" may more accurately define the operation of Rule 12; (2) the proposal might not be consistent with the Supreme Court's opinion in *Cotton*, which used the term "forfeiture"; and (3) the relationship between the two clauses of the proposed amendment to Rule 12(e) was unclear.

At the October 2009 meeting, Judge Tallman, noting that the full Committee had not previously considered the option of using "forfeiture" and the impact of such a choice was unclear,

remanded to the Rule 12 Subcommittee the question whether to recommend an amendment to Rule 12 in light of the Standing Committee's action in June, 2009.

II. Subcommittee Action Since the October 2009 Meeting

The Subcommittee met by telephone in January and March, 2010.

In January, the Subcommittee considered once again the potential advantages and disadvantages of pursuing an amendment to Rule 12 in light of the issues raised at the Standing Committee and agreed an amendment would be beneficial. The Subcommittee also revisited whether *Cotton* was inconsistent with an amendment to Rule 12 that would result in the "waiver" rather than the "forfeiture" of a claim that the indictment fails to state an offense. The Subcommittee agreed with the conclusion in a memorandum submitted before the meeting from Professor Beale, that

> nothing in *Cotton* suggests that the Supreme Court intended to foreclose an amendment that would end Rule 12's exceptional treatment of claims that an indictment fails to state an offense by bringing them within the general rule requiring a variety of claims and defenses to be presented by pretrial motion under Rule 12(b). Indeed, the Court's ruling that such errors are not jurisdictional is fully consistent with treating them similarly to all other nonjurisdictional errors under Rule 12(b)(3).[2]

The Subcommittee at its January meeting concluded that treating this particular charging error as forfeited rather than waived was desirable, but that members needed more information about how courts were actually dealing with the "waiver" versus "forfeiture" issue in other cases in order to decide whether the proposed amendment should reach other untimely claims of error. Finally, the Subcommittee requested confirmation that the proposed amendment would not run afoul of the Rules Enabling Act.

For its March meeting, the Subcommittee considered the following additional materials (1) a memo prepared by Professor Beale on the Rules Enabling Act; (2) a memo prepared by Professor King summarizing appellate court application of Rule 12 to a range of claims, attached as []; and (3) a memo proposing a new, alternative amendment to Rule 12 submitted by the Department of Justice, attached as [], under which untimely claims that the charge failed to state an offense would be treated as plain error under Rule 52(b). After extended discussion and revisions, the Subcommittee agreed, with one dissent, to recommend to the Committee a revised version of the Department's proposed amendment.

---

[2]Professor Beale, in her January 19, 2010 memo, explained:
The Supreme Court [in *Cotton*] did not mention Rule 12, and the rule received very little attention in the briefs. The defendant mentioned the rule in only one paragraph of this brief, in support of the argument that the "discretionary nature" of such review is "logically incompatible with jurisdictional error," as reflected in Federal Rule 12's requirement that courts notice at any time an error in an indictment that fails to show the court's jurisdiction or state an offense. The government dealt equally briefly with Rule 12, referring to it in only one paragraph of text and one footnote. It argued that Rule 12(b)–if applicable to failure to allege the facts in question–simply did not address the standard to be applied by a reviewing court, and that Rule 12 and Rule 52 should be read together. *See* Petitioner's Brief at 36 n.11; Petitioner's Reply Brief at 5.

III. Rationale for the Proposed Amendment

A majority of the Subcommittee continues to support an amendment to Rule 12 that would encourage defendants to raise prior to trial any claim that the charge fails to state an offense. But the Subcommittee's recommendation is no longer limited to accommodating this particular claim. After looking more deeply into the inconsistencies in the present review of a wide range of claims defendants failed to raise before trial under Rule 12 as tasked by the full Committee, a majority of the Subcommittee believes that an amendment could have benefits beyond those that motivated its initial proposal last year. In particular, an amendment could not only clarify the review of untimely failure-to-state-an-offense claims, but also clarify ongoing disputes about the review of other untimely claims.

Accordingly, the proposed amendment has a more ambitious purpose than the earlier amendment considered last year. This amendment is designed to (1) address the review of failure-to-state-an-offense claims following the Court's pronouncement that such claims are not "jurisdictional"; *and* (2) clarify the standards of review for all claims under Rule 12, generally. The Subcommittee also concluded that the amendment would not be problem under the Rules Enabling Act.

IV. Individual Aspects of the Proposed Amendment Explained

A. Forfeiture and plain error review -- not waiver – for failure-to-state-an-offense claims. The proposed amendment continues to be based on the premise that a court should grant relief for the failure to state an offense whenever the defendant shows prejudice from this defect, even without a showing of "cause." This has been the consistent position of the Subcommittee and the Committee. The proposal that the Standing Committee remanded last year accomplished this by including a separate section mandating relief once a defendant established *either* cause *or* prejudice to "substantial rights" (a term of art that appears in Rule 7). The new proposed amendment accomplishes the same thing, but with different language. Instead of requiring a showing of prejudice to substantial rights, subsection (e)(2) of the new proposal references Rule 52(b) and is subtitled "forfeiture." This language clarifies that relief is conditioned upon the requirements of plain error under Rule 52(b), which include a showing of prejudice by the defendant, but not a showing of "cause."

The Subcommittee agreed that rather than draft new language to describe the review of a claim "forfeited" under Rule 12 -- language whose meaning could become the subject of additional litigation -- it would be better simply to adopt the well-known parameters of plain error review under Rule 52(b). Those parameters were established by the Court beginning with the *Olano* decision in 1993.

B. Waiver -- not forfeiture – for most other untimely pre-trial claims. By contrast, a majority of the Subcommittee concluded that plain error review should *not* be available for most other claims that, unlike "failure-to-state-an-offense" claims, have always fallen under Rule 12's "waiver" provision. The Subcommittee was persuaded that the Rule was intended to, and should continue to, significantly restrict relief for untimely claims to those cases in which a defendant could meet the "cause and prejudice" standard announced by the Court in the decision *Davis v.*

United States, 411 U.S. 233 (1973). As explained by the Department of Justice in its memorandum to the Subcommittee, the *Davis* Court considered a claim of discrimination in the selection of the grand jury raised for the first time on collateral review, and held that "an untimely claim under Rule 12 'once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of 'cause' which that Rule requires.' Id. at 242."

The Subcommittee recognized that many courts of appeals in construing the "waiver" and "cause" terms in Rule 12 have departed from this interpretation, sometimes adopting Rule 52(b) plain error review instead. There are probably multiple explanations for this - including the development of plain error standards in *Olano* and *Johnson* years after *Davis* had addressed waiver under Rule 12 as well as the failure of the Department of Justice to be consistent in its advocacy on this point. Examining the issue afresh, the Subcommittee believes that there is no persuasive basis for scrapping the "waiver" and "cause" standard of the original Rule, as construed by the Court in *Davis*, and replacing it with plain error review. Indeed, the reasons for denying relief for untimely claims absent a showing of cause and prejudice remain unchanged.

C. Categories of claims that the Subcommittee tentatively recommends be reviewed for plain error rather than waived. After agreeing that most Rule 12 claims belong in the class of claims that should be considered "waived," and that "failure-to-state-an-offense" claims belong in the class of claims that should be considered "forfeited" (assuming such claims should no longer automatically require relief whenever raised), the Subcommittee turned to whether it had appropriately defined the scope of those two separate classes. Are there other claims, in addition to "failure-to-state-an-offense" claims, that belong in the class of claims that should be considered "forfeited" and not "waived"?

The Subcommittee tentatively decided to recommend that the Committee add claims based on double jeopardy and the statute of limitations to the class of claims that are "forfeited" rather than "waived." The rationale for doing so was based upon two observations. First, the Subcommittee believed that these particular claims were never intended to be included as motions that *must* be made before trial or else be waived. The original Rule provided that a defendant "may" raise "any defense or objection which is capable of determination without the trial of the general issue" but it provided that a defendant "must" raise pretrial "defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense . . . ." See 1A Wright and Leipold, Federal Practice and Procedure, Criminal 4th, § 190. The 1944 Committee Note states (emphasis added):

> In the other group of objections and defenses, which the defendant *at his option may raise by motion before trial*, are included all defenses and objections which are capable of determination without a trial of the general issue. They include such matters as *former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc.* Such matters have been heretofore raised by demurrers, special please in bar and motions to quash.

Although the Rule has been amended several times since, it has always distinguished between matters that "must" be made and matters that "may" be made before trial. Presently, (b)(3) lists the "must" group as follows: motions "alleging a defect in instituting the prosecution" or "a defect in the indictment or information, " "to suppress evidence," "to sever charges or defendants;" or "for discovery." The suppression, severance and discovery issues were added in 1975. There appears to be no suggestion in the history of the Rule that double jeopardy and statute of limitations claims were shifted from the "may" group to the "must."

The second reason the Subcommittee decided, tentatively, that these particular claims should be singled out for plain error review rather than waived if raised late is that the question of how to review these claims divides the courts of appeals today. As noted in Professor King's memo, at least one court of appeals has interpreted the Rule so that such claims fall within the (b)(2) "may" raise category rather than the (b)(3) "must" raise category. The Second Circuit has concluded that challenges based on multiplicity are not waived, relying on the 1944 Committee Note to Rule 12 that discusses double jeopardy objections. See *United States v. Chacko*, 169 F.3d 140, 145-46 (2d Cir.1999). It has even gone so far as granting relief after noting a multiplicity problem on the face of an indictment that neither party had mentioned on appeal. *United States v. Ansaldi*, 372 F.3d 118, 124 (2nd Cir. 2004). See also *United States v. Baldwin*, 414 F.3d 791 (7th Cir. 2005) (recognizing that other circuits treat statutes of limitations objection as a challenge to a defect in instituting prosecution or in the indictment or information, such that if not made before trial they are waived, but noting opposing precedent in Seventh Circuit and concluding that "statute of limitations arguments not timely raised in the district court are considered forfeited, not waived, and are accorded plain error review").

The Department of Justice expressed its intention to study the matter further, but was of the opinion that only "failure-to-state-a-claim" errors should be singled out for plain error review and that all other errors are appropriately considered waived under the Rule if not raised on time. The Subcommittee discussed only whether or not to propose that additional claims be subject to plain error review under the Department's proposed amendment. It did not consider alternative approaches to addressing the distinction between waived and forfeited claims - such as an amendment that would clarify which claims fall within (b)(2)'s "may raise" language.

It is possible that the Committee may want to limit the new "forfeiture" subsection in (e) to failure-to-state-an-offense claims only for a reason not discussed by the Subcommittee during its meeting. If the Second and the Seventh Circuits' reading of the Rule is appropriate, and double jeopardy and statute of limitations claims actually fall under (b)(2) and not (b)(3), then these particular claims are not waived under Rule 12(e) when delayed until after trial begins. An amendment that lumps these potential (b)(2) claims together with failure-to-state-an-offense challenges in new 12(e)(2) could create confusion. Put differently, the Subcommittee's first rationale for adding double jeopardy and statute of limitations challenges to (e)(2) – the original structure of the rule, explained in the 1944 Committee Note, which suggests that these claims are not waived if raised late -- is a basis for leaving them out of 12(e) altogether.

Singling out for plain error review *only* failure-to-state-an-offense claims would permit the courts to continue to debate the question of what other claims fall under (b)(3) and (b)(2). If the Committee thinks it is desirable to clarify whether or not untimely double jeopardy and statute of

limitations claims are "waived" or "forfeited," then the reporters suggest that the Committee consider alternative approaches to accomplishing this. For example, additional subsections could be added to the list of "must raise before trial" challenges in (b)(3), and/or (b)(2) could be further defined or eliminated altogether.

D. Determining "cause" - District Court Only? One of the issues that arose in the Subcommittee's discussions was whether or not Rule 12's waiver and forfeiture standards applied both in the court of appeals as well as the district court. The Subcommittee recognized that the establishment of "cause" for waiver often requires reliance on non-record evidence – to establish ineffective assistance or some impediment to counsel's ability to discover the basis for the challenge or file on time – and that appellate courts were not equipped for these evidentiary showings. If a defendant raises a claim for the first time at the appellate level, the appellate court would have to decide whether to reject the claim for failure to create a record, grant relief based on the existing record, accept non-record submissions in support of the claim, or remand the case for an evidentiary hearing. The Subcommittee tentatively proposed that the Rule be amended to specify that district courts, not appellate courts, conduct the "cause" review, but wishes the Committee to consider this matter carefully. Plain error review specified in the new section (e)(2) could be conducted at either the trial or appellate level.

E. Clarifying the "cause" standard for reviewing "waived" claims. Professor King's memo to the Subcommittee noted that there is some disagreement in the courts of appeals concerning what showing will constitute "cause" sufficient to excuse waiver under Rule 12. The Subcommittee did not address this issue in its discussion. It did accept the representation by the Department of Justice that the concept of "cause," as interpreted by the Court, includes the requirement of "prejudice." The use of the phrase "cause and prejudice" was not intended by the Subcommittee to change the meaning or operation of the existing standard. [Cases applying the cause standard are collected both in the Department's memo and in an earlier memo prepared for the Subcommittee in July 2008 by Professor King.]

F. Miscarriage of Justice. Finally, the Subcommittee bracketed for Committee focus the possibility of adding the phrase "or miscarriage of justice" following the term "cause and prejudice." The term of art "miscarriage of justice" is a familiar alternative showing to "cause and prejudice," sufficient to overcome "procedural default" of a claim raised on collateral review. "Miscarriage of justice" is also a term used by the Court in its decisions applying plain error, but the Subcommittee did not discuss its use in this alternative context.

G. Other issues. The Subcommittee decided to limit its recommendations to amendments that would clarify when relief is available for untimely claims, and did not discuss amendments to other parts of the rule, such as the reference to motions to suppress in (b)(3).

H. Committee Note. The Committee Note was drafted by the reporters after the Subcommittee's meeting; Subcommittee members have not had the opportunity to discuss the Note.

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

* * * * *

(2) Motions that May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including failure to state an offense – but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction ~~or to state an offense~~;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

* * * * *

(e) Waiver or Forfeiture of a Defense, Objection, or Request.

(1) Waiver. Except as provided in (2), a ~~A~~ party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. ~~For good cause~~ Upon a showing of cause and prejudice [or a miscarriage of justice], the [district] court may grant relief from the waiver. Absent relief from the waiver, a party may not thereafter raise the claim.

(2) Forfeiture. A party forfeits a claim [based upon double jeopardy, the statute of limitations, or] the failure of the indictment or information to state an offense, not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides.

A forfeited claim is subject to review under Rule 52(b).

* * * * *

Committee Note

Rule 12(b)(3)(B) has been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered "jurisdictional," fatal whenever raised, and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

Rule 12(e) has also been amended to clarify when a court may grant relief for untimely claims that should have been raised prior to trial under Rule 12(b)(3). Rule 12(e) has been subdivided into two sections. Rule 12(e)(2) now provides that when the untimely claim alleges [a violation of double jeopardy or the statute of limitations or] that the charge fails to state an offense, a court may grant relief whenever the error amounts to plain error under Rule 52(b), such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense. Rule 12(e)(1) clarifies that all other challenges not raised on time as required by Rule 12(b)(3) are "waived," and that relief is available only if the defendant can establish cause for the failure to raise the claim on time and prejudice from the error. *Davis v. United States,* 411 U.S. 233 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963).

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment ~~if: (1) the indictment or information does not charge an offense; or (2)~~ the court does not have jurisdiction of the charged offense.

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

To: **Rule 12 Subcommittee**
From: **Nancy King**
Re: **Appellate review of objections "waived" under Rule 12**
Date: **February 24, 2010**

This memo summarizes court of appeals cases addressing claims of error that should have been raised prior to trial under Federal Rule of Criminal Procedure 12 but were not. Specifically, it collects decisions that examine whether appellate review of such a claim is "waived" absent a showing of good cause by the defendant, or, rather, whether plain error review is available for the forfeited claim. The summary is organized by type of error, beginning with the more frequent grounds of objection.

Generally review of an objection that should have been raised prior to trial is considered waived absent a showing of good cause, but there are a number of errors that at least some courts will review for plain error, including motions to suppress, claims of multiplicity, objections to joinder, motions raising the statute of limitations, and motions to dismiss for outrageous governmental conduct. It is also clear that the courts of appeals are actively addressing this issue.

I. Motions to suppress

A. Waiver/Good Cause

Six circuits treat untimely motions to suppress as waived absent a showing of good cause: **D.C., Second, Third, Fourth, Seventh, and Eleventh Circuits**. See *United States v. Hewlett*, 395 F.3d 458 (D.C. Cir. 2005) ; *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003); *United States. v. Kopp*, 562 F.3d 141, 143 (2d Cir. 2009); *United States v. Rose*, 538 F.3d 175 (3d Cir. 2008); *United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008); *United States v. Kirkland*, 567 F.3d 316 (7th Cir. 2009); *United States v. Brodie*, 507 F.3d 527 (7th Cir. 2007); *United States v. Salahuddin,* 509 F.3d 858 (7th Cir. 2007) (defendant had good cause, district court should have considered untimely suppression motion); *United States v. Clark,* 535 F.3d 571 (7th Cir. 2008); *United States v. Acox*, 2010 U.S. App. LEXIS 2650, 2010 WL 431698 (7th Cir. 2010); United States v. Smith, 918 F.2d 1501, 1509 (11th Cir. 1990); *United States v. Salom*, 2009 WL 3297131 (11th Cir. 2009). Note: the Seventh Circuit will apply plain error review *if* good cause is shown see United States v. Murdock, 491 F.3d 694, 699 (7th Cir. 2007).

B. Forfeiture/Plain Error

In the remaining six circuits, the cases generally provide that untimely suppression motions are waived unless the defendant can show good cause under Rule 12, but some decisions either recognize the potential for applying plain error review, or apply plain error review as well.

In the **First Circuit** an untimely suppression motion is waived unless the defendant can demonstrate cause, at least in cases where the defense failed to create adequate record. United States v. Santos Batista, 239 F.3d 16, 20 (1st Cir. 2001); United States v. Hansen, 434 F.3d 92 (1st Cir. 2006); *United States v. Nunez*, 19 F.3d 719 (1st Cir. 1994); *United States v. Mendoza-Acevedo,* 950 F.2d 1, 3 (1st Cir. 1991). However, the court has also held open the possibility of applying plain error review in cases where the record is adequate to permit such review, and it has applied plain error to untimely suppression claims in dicta. For example, in *United States v. Lopez-Lopez,* 282 F.3d 1, 10 (1st Cir. 2002), the court refused to apply plain error review to an argument that was waived under Rule 12, in part because the district court record was "insufficiently developed," due to the defendant's "own failure to raise the issue, to permit reliable appellate review." But the court went on to note as an "open" issue whether an appellate court can review for plain error where the record is sufficiently developed. *Id.* at 10 n. 4. It continues to be an open question in the First Circuit. See *United States v. Perez-Gonzalez,* 445 F.3d 39, 44 (1st Cir. 2006) ("even if we assume the power to correct a plain error in circumstances such as these, we would not do so here"); *United States v. Lugo Guerrero*, 524 F.3d 5, 11 (1st Cir. 2008) ("Assuming that we may review the claim for plain error despite the Rule 12(e) waiver. . . it is clear from the record that no *Miranda* violation occurred.").

Thirteen years ago, the **Fifth Circuit** rather forcefully rejected a forfeiture analysis in favor of waiver in its decision in *United States v. Chavez-Valencia*, 116 F.3d 127, 134 (5th Cir. 1997) (holding failure to raise motion to suppress pre-trial constitutes waiver. "...the plain language of [Rule 12], the history of the rules relating to suppression motions, Fifth Circuit case law, case law from the majority of our sister circuits, and sound policy considerations convince us that appellate review is barred when a defendant does not raise a suppression claim in accordance with the Federal Rules of Criminal Procedure"). Yet subsequent decisions are much less definitive. See, e.g., *United States v. Stevens,* 487 F.3d 232 (5th Cir. 2007) (reviewing untimely claim for plain error). As the Court recently stated in *United States v. Baker,* 538 F.3d 324 (5th Cir. 2008) (footnotes omitted):"[T]his court held in United States v. Pope that an issue not raised in a motion to suppress in the trial court is waived, citing Rule 12(b)(3)(C) of the Federal Rules of Criminal Procedure and prior decisions of this court. The *Pope* decision considered at some length reasons supporting its conclusion that arguments not urged in a motion to suppress may not be considered on appeal. Nevertheless, the *Pope* decision also conducted a plain-error analysis and concluded there was no plain error as did our court in United States v. Maldonado. We follow the same course today."

The **Sixth** and **Eighth Circuits** appear to follow an approach similar to the Fifth, stating that the failure to raise the motion waives the claim, but going on, at least in some opinions, to apply plain error review anyway. See *United States v. Lopez-Medina,* 461 F.3d 724, 738 (6th Cir. 2006) ("When faced with a defendant's complete failure to file a pretrial suppression motion, we have held that "we are categorically without jurisdiction to hear appeals of suppression issues raised for the first time on appeal." On the other hand, we have applied Rule 52's plain error review to new suppression arguments raised for the first time on appeal after a defendant's original suppression arguments proved unsuccessful at the trial court level. ... Regardless of whether a Rule 12(e) waiver precludes plain error review under Rule 52, it is clear that Medina's arguments would not prevail under plain error review . . . .); *United States v. Trobee*, 551 F.3d 835 (8th Cir. 2009) (no abuse of discretion for district court to refuse to

consider late motion to suppress when no showing of good cause); *United States v. Bloate*, 534 F.3d 893 (8th Cir. 2008) (same); *United States v. Salgado-Campos*, 442 F.3d 684 (8th Cir. 2006) (same); but compare *United States v. Spotted Elk*, 548 F.3d 641 (8th Cir. 2008) ("even if we were to review this point for plain error, we would have to conclude that any error was not plain."); *United States v. Frazier*, 280 F.3d 835 (8th Cir. 2002) ("As interesting as the issue is, we decline to join the debate because we find no merit to Frazier, Sr.'s *Franks* claim under *any* review.").

Numerous cases in the **Ninth Circuit** hold that the failure to raise a motion to suppress prior to trial will waive the objection unless the defendant can show good cause. E.g., United States v. Atcheson, 94 F.3d 1237 (9th Cir. 1996); *United States v. Tekle*, 329 F.3d 1108 (9th Cir. 2003). However, the court has also held open an exception to the waiver rule for cases in which no further fact development is needed, similar to that of the First Circuit, and its case law has also hinted that plain error is available as well. In United States v. Hawkins, 249 F.3d 867, 871-72 (9th Cir. 2001), the court noted review may not be waived where "the issue not raised in the trial court does not affect or rely on the factual record developed by the parties." This exception was applied to permit review in *United States v. Gabriel,* 625 F.2d 830, 832 (9th Cir.), *cert. denied,* 449 U.S. 1113, 101 S.Ct. 925, 66 L.Ed.2d 843 (1980). The case that *Hawkins* cites as recognizing this exception -- United States v. Whitten, 706 F.2d 1000 (9th Cir. 1983) -- also notes another exception: "where plain error has occurred and injustice might otherwise result, *Okada,* 694 F.2d at 570 n. 8; *United States v. Fong,* 529 F.2d 55 (9th Cir.1975)."

Decisions from the **Tenth Circuit** follow the pattern of those in the Eighth, noting no review for untimely claims is available absent cause, but going on to apply plain error review nevertheless in rejecting the claim. *Compare United States v. Brooks*, 438 F.3d 1231 (10th Cir. 2006) (motions to suppress are waived if not raised before trial under Rule 12; "When a motion to suppress evidence is raised for the first time on appeal, we must decline review.") *with United States v. Hamilton*, 587 F.3d 1199 (10th Cir. 2009) (noting suppression arguments not timely raised are waived under Rule 12 unless the defendant can show good cause, but going on to note:

> We recognize that "[i]n several cases, we have engaged in plain-error review even after a defendant has failed to make a motion to suppress evidence prior to trial." . . . Even though we acknowledge that plain error review is a possible option under our precedent, that does not avail Mr. Hamilton. Our cases counsel that, under the circumstances of this case, either plain error review is inappropriate altogether or a conclusion of plain error is untenable. We have stated that "plain error review is not appropriate when the alleged error involves the resolution of factual disputes. . . The resolution of the Fifth and Fourth Amendment claims that Mr. Hamilton advances on appeal are heavily dependent on the character of the established facts... Furthermore... we would not be situated on this sparse and deficient record to conclude that any errors by the district court concerning Mr. Hamilton's Fifth and Fourth Amendment claims were obvious and clear. ... Consequently, even if we were to apply plain error review to Mr. Hamilton's claims, he could not prevail under this rigorous standard because any alleged errors could not be deemed to be obvious and clear.

C. Policy considerations

Decisions rejecting appellate review of untimely motions to suppress sometimes offer as justification reasons that are particular to suppression motions, reasons that would not necessarily apply to the review of other sorts of pretrial motions. For example, consider this discussion by the Tenth Circuit in *Hamilton*:

> We have observed that "[t]here are a number of policy reasons for requiring defendants to move to suppress evidence prior to trial" and for deeming their failure to do so to be a waiver. [United States v.]*Brooks*, 438 F.3d [1231]at 1240 [10th Cir. 2006]. Among other things, because the exclusionary rule was crafted more to benefit society at large by deterring overzealous police conduct than to personally benefit defendants, "the exclusionary rule should be used sparingly in instances where its deterrent effect on police violations is minimal (as with appellate review for plain error)." *Id.*; *see Pope*, 467 F.3d at 919 (noting that "little deterrence of unacceptable police conduct is lost by refusing to review suppression claims not raised in the district court" (internal quotation marks omitted)). Furthermore, there are fairness concerns militating in favor of a waiver rule because "although the government can appeal an adverse ruling on a suppression motion prior to trial, it cannot do so once jeopardy has attached, as would be the case on appeal." *Brooks*, 438 F.3d at 1240; *see Pope*, 467 F.3d at 919. Similarly, "if a defendant is able to challenge the inclusion of evidence upon appeal, the government will face the difficult task of defending itself based on a potentially meager record." *Brooks*, 438 F.3d at 1240; *see United States v. Cormier*, 220 F.3d 1103, 1113 (9th Cir.2000) (holding suppression argument waived and noting that defendant's "failure to raise the issue before the district court has left us without the benefit of any factual findings"). . .

II. Motions raising defects in the indictment – duplicity, and specificity

Courts seem to agree that objections to duplicity (the joining in a single count of two or more distinct and separate offenses) and lack of specificity in the indictment are waived absent good cause if not raised before trial. Plain error review has not been applied to these objections.

- **D.C. Circuit:** *United States v. Hemphill*, 514 F.3d 1350, 1365 (D.C. Cir. 2008) (citing *United States v. Weathers*, 186 F.3d 948 (D.C. Cir. 1999), rejecting as waived claim that argues an indictment on alternative grounds is valid only if all the grounds are legally permissible); *United States v. Mathis*, 216 F.3d 18 (D.C. Cir. 2000) (citing *Weathers*, challenge to indictment as duplicative waived).
- **First Circuit**: *United States v. Pimentel*, 539 F.3d 26 (1st Cir. 2008) (failure to challenge the omission of specific drug quantities in the indictment resulted in waiver under Rule 12); *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004) (challenge to specificity of the indictment waived when not raised before trial)
- **Second Circuit**: *United States v. Crowley*, 236 F.3d 104 (2d Cir. 2000) (defendants waived their objection to the indictment's lack of specificity by not raising it before trial); Compare *United States v. Spero*, 331 F.3d 57, 61 (2d Cir. 2003); *United States v.*

Sturdivant, 244 F.3d 71 (2d Cir. 2001) ("...we will not find a defendant has waived a duplicity argument where the claimed defect in the indictment was not apparent on its face at the institution of the proceeding").

- **Third Circuit:** *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, (3d Cir. 1979) (motion to strike waived)
- **Fifth Circuit:** *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009) (failure to make a motion alleging a defect in the indictment before trial "generally constitutes a waiver"; factual error in indictment was waived, and defendant was not prejudiced in any event); *United States v. Creech*, 408 F.3d 264 (5th Cir. 2005) (duplicity objection to indictment waived by failing to raise it prior to trial); *United States v. Payne*, 341 F.3d 393 (5th Cir. 2003) (trial court acted within its discretion in refusing to grant defendant relief from his waiver of objection to duplicity in indictment count).
- **Sixth Circuit:** Defects in an indictment, unless they pertain to jurisdiction, must be raised prior to trial. *See United States v. Adesida*, 129 F.3d 846, 849 (6th Cir. 1997), but noting a defendant "may raise the alleged harm stemming from the duplicitous indictment at trial or on appeal even if he does not object to the duplicitous indictment before trial." See also: *United States v. Davis*, 306 F.3d 398 (6th Cir. 2002) (noting, in case where indictment not challenged as duplicitous prior to trial, "the defendant can raise the fact that because of the indictment, it is unclear whether the jury's verdict with respect to either offense was unanimous, finding indictment not duplicitous).
- **Seventh Circuit**: *United States v. Simone*, 931 F.2d 1186 (7th Cir. 1991) (Defendants' challenge to indictment charging them with narcotics offenses, based on claim that indictment improperly charged multiple conspiracies on single count, was waived, and would not be considered on appeal, where defendants did not challenge indictment prior to trial, and failed to give any cause to justify relief from waiver).
- **Ninth Circuit:** *United States v. Technic Servs.*, 314 F.3d 1031 (9th Cir. 2002) (court refused to consider challenge to indictment as duplicitous because it was waived under Rule 12 and no cause was shown); *United States v. Klinger*, 128 F.3d 705, 708 (9th Cir.1997)
- **Tenth Circuit:** *United States v. Rodriguez-Chavez*, 291 Fed. Appx. 915 (10th Cir. 2008) (defendant waived argument that indictment was ambiguous under Rule 12 by failing to raise the argument before trial); *United States v. Haber*, 251 F.3d 881 (10th Cir. 2001) (defendant's failure to raise timely challenge to his indictment on duplicity grounds waives any later challenge based on a failure to use a special verdict form to avoid the alleged duplicity problem).
- **Eleventh Circuit**: *United States v. Ramirez*, 324 F.3d 1225, 1228 (11th Cir.2003) (holding, in the context of defenses based on defects in the indictment, that Rule 12 was designed precisely to prevent a situation where defendants merely wait to gain a strategic advantage by raising a defense out of time); *United States v. Seher*, 562 F.3d 1344 (11th Cir. 2009) (duplicity challenge waived absent good cause).

III. Motions raising defects in the indictment – multiplicity

A. Waiver/Good Cause

- **D.C. Circuit:** *United States v. Weathers*, 186 F.3d 948 (D.C. Cir. 1999) (multiplicity claims waived by failing to raise them before trial, distinguishing Rule 12 waiver and forfeiture under Rule 52(b), noting "untimely objections that come within the ambit of Rule 12(b)(2) must be considered waivers and may not be revived on appeal");
- **Fourth Circuit:** *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000) ("Failure to object to a count on grounds of multiplicity prior to trial generally waives that objection" relief from waiver is only appropriate where the moving party can demonstrate cause for the failure to object and actual prejudice resulting from the defect.)
- **Seventh Circuit:** *United States v. Wilson*, 962 F.2d 621 (7th Cir. 1992) (failure to raise multiplicity challenges to indictments before trial will result in waiver – defendant deliberately pursued strategy of tainting his entire conviction with a double jeopardy problem).

B. Forfeiture/Plain error

- **Second Circuit** has concluded that challenges based on multiplicity are not waived, relying on the Committee Note to Rule 12 that discusses double jeopardy objections. See *United States v. Chacko*, 169 F.3d 140 (2d Cir.1999). See also *United States v. Ansaldi*, 372 F.3d 118, 124 (2nd Cir. 2004) (granting relief after government conceded following oral argument that the indictment charged the same offense in two counts, a point not raised by defendant at trial or on appeal). It has more recently noted that multiplicity challenges are waived by a guilty plea unless they are clear on the face of the indictment. ***United States v. Kurti***, 427 F.3d 159, 162 (2005).
- **Fifth Circuit** has held that multiplicity claims are waived, *United States v. Soape,* 169 F.3d 257 (5th Cir.1999), but has also entertained challenges to sentences imposed consecutively. *United States v. Lemons*, 941 F.2d 309 (5th Cir. 1991) (even if a defendant waives his right to assert a multiplicity claim, by failing to object before trial, he may still object to multiple sentences, but only if the sentences are not to be served concurrently); *United States v. Galvan*, 949 F.2d 777 (5th Cir. 1991) (defendant waived objection to multiplicity in indictment where she failed to raise issue in pretrial motion, however, defendant could still raise issue of multiplicity of sentences where monetary assessments were imposed so that sentences were not concurrent).
- **Sixth Circuit** has also addressed this issue, finding the double jeopardy aspect of the claim is not waived. See *United States v. Abboud*, 438 F.3d 554 (6th Cir. 2006) (Under Rule 12, "a defense or objection 'based on defects in the indictment or information,' other than jurisdictional objections, must be raised by pretrial motion. If a defendant does not make such a motion, the defense or objection is waived, but the court may grant relief from the waiver for cause." The court recognizes a split within the circuit as to "whether a defendant who does not raise a claim of multiplicity before trial waives the claim not only with respect to the error in the indictment but also to the error affecting substantive rights." The court held that the prior ruling should stand such that Rule 12 applies only to objection with regard to the error in the indictment itself.)

- **Eighth Circuit** has applied the plain error standard in a case in which the defendant failed to challenge the multiplicity of his indictment prior to trial. *See United States v. Jackson,* 155 F.3d 942, 947 (8th Cir.1998). [But compare ***United States v. Herzog***, 644 F.2d 713 (8th Cir. 1981) (defendant's failure to raise multiplicity complaint until more than one year after entry of his guilty and nolo contendere pleas acted as a waiver of that complaint, where defendant had ample time prior to entering his pleas in which to scrutinize closely charges in the indictment and determine if they were subject to objection and where defendant chose not to challenge indictment but rather to negotiate for dismissal of numerous counts in return for his pleas).]
- **Ninth Circuit** has stated, *United States v. Brooks*, 508 F.3d 1205 (9th Cir. 2007) ("We have recognized that claims of multiplicity are subject to Rule 12(b)(3)), but has also noted in *United States v. Zalapa*, 509 F.3d 1060 (9th Cir. 2007) (Although objections to multiplicity in the indictment can be waived, objections to multiplicitous sentences and convictions cannot be waived).
- **Tenth Circuit** reviews for plain error: See *United States v. Barrett*, 496 F.3d 1079, 1095 (10th Cir. 2007); *United States v. McCullough*, 457 F.3d 1150 (10th Cir. 2006) (Where a defendant fails to raise the issue of multiplicity in the indictment in a pretrial motion, an appellate court reviews for plain error).

IV. Motions to sever/ objections to joinder

A. Waiver /Good Cause

- **First Circuit:** *United States v. Rodriguez-Lozada*, 558 F.3d 29, 37 (1st Cir. 2009) ("Failure to move for severance before the deadline for filing pretrial motions constitutes waiver, which may be excused only on a showing of good cause."); *United States v. Page*, 521 F.3d 101 (1st Cir. 2008) (defendant waived his right to challenge joinder of his case with codefendant's case for trial; defendant failed in the trial court either to submit his own severance motion or expressly to join in the codefendant's severance motion).
- **Fourth Circuit**: *United States v. Jacobs*, 70 Fed.Appx. 689 (4th Cir. 2003) (defendant waived his objection to trial court's denial of his motion to sever his trial from that of his co-defendants, where he failed to file motion to sever prior to trial, and did not claim on appeal that he had insufficient information to make severance motion prior to trial).
- **Sixth Circuit**: *United States v. Deitz*, 577 F.3d 672 (6th Cir. 2009) (defendant who failed to move for severance under Rule 14 prior to trial waived the objection under Rule 12, but going on to consider merits).
- **Eighth Circuit:** *United States v. Gio*, 7 F.3d 1279, 1285 (7th Cir. 1993) ("Because Marchiafava failed to show cause for his failure to file a pretrial severance motion based on his coercion defense, Fed. R. Crim. P. 12(f) does not provide Marchiafava with relief from waiver due to the untimeliness of his severance motion," finding no cause shown, but also noting "Despite Marchiafava's waiver under Rule 12(f), a "trial court has a continuing duty to grant [a] severance ... if it appears during trial that the failure to grant severance will result in undue prejudice to one of the defendants.").
- **Ninth Circuit:** *United States v. Gonzalez-Torres*, 309 F.3d 594 (9th Cir. 2002) (defendant's motion to sever on the morning of trial was untimely under Rule 12, but also noting defendant's motion was properly denied on the merits); *United States v.*

Mausali, 590 F.3d 1077 (9th Cir. 2010) (defendant waived his argument that the district court erroneously failed to sever his and codefendant's trials, when he neither moved for severance before trial nor joined codefendant's pre-trial severance motion).

- **Eleventh Circuit**: *United States v. Muza Kim*, 307 Fed. Appx. 324, 327 (11th Cir. 2009) ("motion for severance should be made prior to trial, and unless the grounds were unknown prior to trial, a mid-trial motion is considered untimely" under Rule 12).

B. Fofeiture/Plain error

- **D.C. Cir:** *United States v. Moore*, 104 F.3d 377 (D.C. Cir. 1997) (reviewing failure to sever for plain error when defendant failed to request severance in trial court either before or during trial).
- **Fifth Circuit:** *United States v. Mann*, 161 F.3d 840 (5th Cir. 1998) ("We have held that where, as here, appellants have failed to show any cause for failing to move for severance prior to trial, we need not even address the merits of their argument. Alternatively, we have limited review to plain error review in such circumstances." - noting "*Tolliver* notes that a failure to move for severance prior to trial might leave room for review under the plain error standard of review, *id.* at 1199 n. 6, and other cases have reviewed the district court's failure to sever for plain error where there was no objection. *United States v. Misher*, 99 F.3d 664, 669 (5th Cir.1996); *United States v. Carreon*, 11 F.3d 1225, 1240 (5th Cir.1994) (court found no clear error); *United States v. Whittington*, 269 Fed.Appx. 388, 401 (5th Cir. 2008) (reviewing untimely severance motion for plain error).
- **Tenth Circuit:** *United States v. Jones*, 530 F.3d 1292 (10th Cir. 2008) ("...under rule 12(e) [Defendant] appears to have 'waived' her objection to joinder of the offenses against her. Nevertheless, we have reviewed untimely objections to joinder for plain error, even absent a finding of good cause.").
- **Eleventh Circuit**: ***United States v. Galdos***, 308 Fed.Appx. 346 (11th Cir. 2009) ("Because Galdos did not move for a severance of the charges in the district court and raises the severance issue for the first time on appeal, we review this issue only for plain error").

V. Various errors in the grand jury

These errors are considered waived; plain error is not applied.

- **D.C. Circuit**: *United States v. Madeoy*, 912 F.2d 1486, 1490 (D.C. Cir. 1990) (defendants' "failure to object to the indictment prior to trial constituted a waiver of their claim of grand jury bias").
- **First Circuit:** *United States v. Colon-Munoz*, 192 F.3d 210 (1st Cir. 1999) (participation of an interim US Attorney in the grand jury proceedings waived when not raised until after verdict, declining to resolve whether "waiver" under Rule 12 precludes plain error review, noting that under Mechanick, the error was rendered harmless as a matter of law by a subsequent guilty verdict at trial) *compare United States v. Negron*, 23 Fed. Appx. 10 (1st Cir. 2001) (unpublished per curiam) (challenge that defendant was not indicted by a vote of at least 12 grand jurors came ten years too late and was therefore waived).

- **Tenth Circuit**: *United States v. Coppola,* 526 F.2d 764 (10th Cir. 1975) (defendant's failure to challenge the indictment and the special attorney's authority before trial resulted in waiver under Rule 12).
- **Eleventh Circuit**: *United States v. Suescun*, 237 F.3d 1284, 1288 (11th Cir. 2001) (when defendant objected, on appeal, to the validity of the appointment of the AUSA prosecuting the case, his objection to the validity of the indictment was waived because he did not present it as required by 12(b), and waiver precludes plain error review).

VI. Selective or Vindictive Prosecution or Outrageous Governmental Misconduct

A. Waiver/Good Cause

- Second Circuit: *United States v. Nunez-Rios,* 622 F.2d 1093 (2d Cir.1980) (the defense of outrageous government conduct is based on an alleged defect in the institution of the prosecution itself and, as a consequence, is covered by Rule 12); *United States v. Beras*, 131 Fed. Appx. 313 (2d Cir. 2005) (selective prosecution claim waived by failure to raise before trial, unless the defendant can show (1) good cause for failing to raise the issue in a timely manner, and (2) "actual prejudice arising from the waiver.")
- **Third Circuit:** *United States v. Neely*, 128 Fed. Appx. 865 (3d Cir. 2005) (defendant waived challenge to "outrageous government conduct" under Rule 12 by failing to raise the challenge before trial even though he was already aware of the alleged conduct before trial, citing *United States v. Pitt*, 193 F.3d 751 (3d Cir.1999)).
- **Fourth Circuit**: *United States v. Schmidt,* 935 F.2d 1440 (4th Cir. 1991) (defendants' failure to comply with rule 12 resulted in a waiver of selective prosecution claims on appeal).
- **Eighth Circuit:** *Dyer v. United States*, 1992 U.S. App. LEXIS 27714 (8th Cir. 1992) (District Court correctly ruled that Defendant had waived selective prosecution claim by failing to raise it before trial.); *United States v. Jorgensen*, 144 F.3d 550 (8th Cir. 1998) (The district court properly declined to submit proposed jury instructions to the effect that the government failed to abide by its own regulations before seeking indictment, a defect in the indictment that should have been raised pre-trial); *United States v. Henderson-Durand*, 985 F.2d 970 (8th Cir. 1993) (Failure to raise challenge based on outrageous government conduct until posttrial motions constituted waiver of that claim under Rule 12).

B. Fofeiture/Plain error

- **Seventh Circuit:** *United States v. Duncan*, 896 F.2d 271 (7th Cir. 1990) (after noting that an outrageous governmental conduct defense must be raised before trial under Rule 12, the court then stated that its review is limited by the plain error doctrine of Rule 52(b)).

VII. Statute of Limitations

A. Waiver /Good Cause

- **Eleventh Circuit:** *United States v. Ramirez*, 324 F.3d 1225 (11th Cir. 2003) (the court viewed statute of limitations defense as a challenge based on the sufficiency of the indictment that should have been raised before trial; waived by failing to raise it in a pretrial motion).

B. Fofeiture/Plain Error

- **Seventh Circuit**: *United States v. Baldwin*, 414 F.3d 791 (7th Cir. 2005) (the court recognizes that other circuits see challenges to statutes of limitations as falling under Rule 12(b)(3) as a challenge to a defect in instituting prosecution or in the indictment or information, such that if not made before trial they are waived, but following United States v. Ross, 77 F.3d 1525 (1996) and stating that "statute of limitations arguments not timely raised in the district court are considered forfeited, not waived, and are accorded plain error review").

VIII. Defects in venue

Waiver/Good Cause

- **D.C. Circuit:** *United States v. Burroughs*, 161 Fed. Appx. 13 (D.C. Cir. 2005) (Failure to challenge venue before trial results in waiver under Rule 12 absent a showing of good cause).
- **Eighth Circuit**: *United States v. Cordova*, 157 F.3d 587 (8th Cir. 1998) (Defendants waived objections to venue when they failed to file motion for change of venue and did not object to venue before, during, or at conclusion of trial).
- **Eleventh Circuit**: *United States v. Dabbs*, 134 F.3d 1071, 1078 (11th Cir.1998)

IX. Delayed Indictment or Trial

The Speedy Trial Act in § 3162(a)(2) provides that the failure to move for dismissal prior to trial waives relief under the Act, and does not provide for judicial relief from the waiver as Rule 12 does. As The Fifth Circuit has held, since the Act took effect after the effective date of the 1975 amendments to Rule 12, the waiver provision in the Act governs and no relief is available, a position that appears uniformly accepted. See *United States v. Westbrook*, 119 F.3d 1176 (5th Cir. 1997); *United States v. Alvarado*, 321 Fed.Appx. 399, 400 (5th Cir. 2009). See also *United States v. Brickey*, 289 F.3d 1144, 1150 (9th Cir. 2002) (overruled on other grounds by *United States v. Contreras*, --- F.3d ----, 2010 WL 348004)); *United States v. Gearhart, 576 F.3d 459 (7th Cir.* 2009) ("every circuit to consider the issue has held that the failure to move for dismissal under the act constitutes a waiver, not merely a forfeiture", citing *United States v. Morgan*, 384 F.3d 439, 442 (7th Cir.2004) (collecting cases)); *United States v. Spagnuolo, 469 F.*3d 39 (1st Cir. 2006) (a defendant who fails to file a timely motion as required

by the last sentence of § 3162(a)(2) waives such claims as a matter of statutory command. Consequently, not even plain error review is available to such a defendant).

As for constitutional objections, at least one court has suggested that it will apply plain error to untimely claims. Compare *United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007) ("Brown never moved to dismiss the indictment based on delay. His argument on appeal is therefore waived," noting failure to raise 12(b) motions in a timely fashion precludes appellate review, but going on to review merits anyway; also reviewing *Barker* claim on the merits that was never raised in the trial court, counting failure to raise in assessing the defendant's assertion of the right, one of the Barker factors); ***United States v. Abad***, 514 F.3d 271 (2d Cir. 2008) (while unpreserved constitutional claims are subject to review for plain error, unpreserved Speedy Trial Act claims are deemed waived, in accordance with § 3162(a)(2)).

X. Miscellaneous other errors considered waived

- **Fourth Circuit:** *United States v. Soriano-Jarquin*, 492 F.3d 495 (4th Cir. 2007) (defect in preliminary hearing waived)
- **Ninth Circuit**: *United States v. Anderson*, 472 F.3d 662 (9th Cir. 2006) (Defendant's motion to dismiss based on lack of personal jurisdiction waived since it was raised for the first time on appeal. While recognizing that the use of "waiver" in Rule 12 seemed more akin to forfeiture, the court stated "Interpreting a Rule 12 waiver as a forfeiture, however, would render the waiver of "no consequence other than that it would be reviewed for plain error, the same result as if there were no Rule 12" and such a result could not have been intended by the Supreme Court or Congress, finding good cause.). [For earlier cases from other circuits finding waiver for this error, see Wright & Liepold, *Federal Practice & Procedure* § 193, n. 17.]
- **Tenth Circuit:** *United States v. Brown*, 2009 U.S. App. LEXIS 27760 (10th Cir. 2009) (In failing to bring motion for discovery before trial, Defendant "waived his right to object pursuant to Rule 16 and...the district court did not abuse its discretion in overruling his objection.")
- **Eleventh Circuit:** *United States v. Marquez*, 2010 U.S. App. LEXIS 1441 (11th Cir. 2010) (defendant waived, under Rule 12, right to assert the protection of the rules of specialty and dual criminality as challenges to personal jurisdiction and bars to prosecution since he failed to raise such issues until a motion to arrest judgment)

* This memo does not examine decisions addressing the scope of "good cause," or decisions addressing if and when it is appropriate to remand for determination of "cause." There is further disagreement among the cases on these points.

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

February 24, 2010

MEMORANDUM

TO: Judge Morrison England
Chair, Subcommittee on Rule 12(b)

Professor Sara Sun Beale
Reporter to Advisory Committee

Professor Nancy J. King
Special Reporter to the Subcommittee

FROM: Kathleen A. Felton, Deputy Chief
Appellate Section

Jonathan J. Wroblewski, Director
Office of Policy and Legislation

SUBJECT: Proposed Amendment to Rule 12(b)

Background

As explained in detail in the memo provided by Professor Beale before the last subcommittee conference call, the Committee has been considering a proposed amendment to Rule 12(b) for the past two years. The proposal was made in response to the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625, 629-631 (2002), where the Court held that the failure of an indictment to charge an offense was not a jurisdictional defect, *i.e.*, a defect that can never be forfeited or waived. The Court accordingly applied the plain-error test of Fed. R. Crim. P. 52(b) to a forfeited claim that the indictment had failed to allege the drug quantity and thus, after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), could not support a higher sentence under the drug statute.

After considerable study, at the April 2009 meeting, the full Committee voted, with four dissents, to recommend for approval an amendment to Rule 12 that would (1) make the general rule that claims not raised before trial are "waived" applicable to claims that an indictment fails to state an offense, and (2) provide for relief from this waiver for good cause or when the defect in the indictment "has prejudiced the substantial rights of the defendant." The proposal also included a conforming amendment to Rule 34.

At its June 2009 meeting, the Standing Committee remanded the proposed amendment to the Advisory Committee to consider whether the proposal was consistent with *Cotton*, in which the Supreme Court had used the term "forfeiture" but had not discussed "waiver." The Standing Committee also raised questions about the standards for relief in the proposed amendment and how the language of the amended rule would relate to the plain error standard of Rule 52(b).

After further discussion at the October 2009 Committee meeting, Judge Tallman remanded the matter to the subcommittee. In a conference call on January 25, 2010, the subcommittee discussed the possibility of amending Rule 12 more broadly in light of the concerns expressed by the Standing Committee. The proposal previously approved by the Committee had made no fundamental change in Rule 12 itself. The proposal had simply added the claim of failure to state an offense to those claims required to be raised before trial; left in place each circuit's understanding of the meaning of "cause" in Rule 12(e)'s provision for relief from the waiver of most of these claims; and then grafted onto the Rule a slightly different standard for relief from the waiver of the claim that an indictment failed to state an offense – a variant of plain-error review.

The subcommittee recognized, however, that attempting a piecemeal change to Rule 12 could have uncertain results when the state of the law among the circuits is already somewhat unsettled and in conflict. And it appreciated the Standing Committee's concern about possibly adding to the analytical confusion over the concepts of "waiver," "forfeiture," "cause," and the plain-error standard of Rule 52(b). The subcommittee decided that it might be worth reexamining Rule 12(b)(3) and (e) in their entirety, particularly in light of the Supreme Court's more recent case law on waiver and forfeiture, with an eye towards clarifying the rule and settling the present conflict in the circuits. The subcommittee asked the Department to explore this idea and to offer a proposal for consideration by the subcommittee before the next

Committee meeting in April 2010. The following summarizes the results of the Department's study of this question.

Rule 12(e) Waiver

The first question that arises, and about which there is some confusion in the lower courts, is the precise meaning of Rule 12(e)'s admonition that "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides." What does it mean to "waive" a Rule 12(b)(3) claim? We know from the Supreme Court's decision in *United States v. Olano*, 507 U.S. 725, 733 (1993), that "[w]aiver is different from forfeiture." As the Court there explained, "[d]eviation from a legal rule is 'error' unless the rule has been waived. A good example is the case of a defendant who pleads guilty and then asks a court of appeals to vacate his conviction because he had no trial. "Because the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not 'error.'" *Olano*, 507 U.S. at 732-733.

A waiver is generally described as the intentional abandonment of a known right, and the effect of a waiver is to extinguish any error.[1] By contrast, a forfeiture is "the failure to make the timely assertion of a right." *Id.* at 733. "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." Thus, if a defendant has failed to raise a claim in the district court but has not waived the claim, there may still be an error, and if so, the court of appeals will review it under Rule 52(b)'s familiar "plain error" standard. That is, relief may still be granted for a forfeited claim if the four prongs of plain error review are satisfied. There must be (1) error that is (2) plain and (3) that affected the defendant's substantial rights; if all those requirements are met, a court of appeals has discretion to correct the error, but only if (4) it "seriously affect[ed]the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157 (1936)).

---

[1] The particular "right at stake," however, determines "[w]hether a . . . right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary." *Olano*, 507 U.S. at 733.

As both Professor King and Professor Beale have previously noted in memos to the Committee and subcommittee, the courts of appeals are in conflict about how to treat an untimely claim governed by Rule 12(b)(3) and (e). Some courts hold that a failure to timely raise a Rule 12(b) claim waives the claim entirely and extinguishes any error, absent a showing of "good cause" under Rule 12(e). See, *e.g.*, *United States v. Rose*, 538 F.3d 175, 177-182 (3d Cir. 2008) (collecting authority); *United States v. Yousef*, 327 F.3d 56, 124-125 (2d Cir. 2003); *United States v. Weathers*, 186 F.3d 948, 952-958 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1005 (2000); *United States v. Chavez-Valencia*, 116 F.3d 127, 129-130 (5th Cir.), *cert. denied*, 522 U.S. 926 (1997). Others treat such a failure as a forfeiture and apply Rule 52(b)'s plain error review. *United States v. Hamilton*, 587 F.3d 1199, 1215-1216 & n. 9 (10th Cir. 2009); *United States v. Hargrove*, 508 F.3d 445, 450 (7th Cir. 2007); *United States v. Buchanon*, 72 F.3d 1217, 1226-1227 (6th Cir. 1995); *United States v. Milian-Rodriguez*, 828 F.2d 679, 683-684 (11th Cir.), *cert. denied*, 486 U.S. 1054 (1987).

We believe that this confusion can be dispelled with a clarified rule that better reflects the Supreme Court's teaching that the intent of the provision now in Rule 12(e) was to effect an actual waiver extinguishing the claim.[2] In *Davis v. United States*, 411 U.S. 233 (1973), the defendant claimed, in a collateral attack on his conviction, that there had been unconstitutional discrimination in the selection of the grand jury that indicted him. The defendant had failed to raise the claim at all until three years after his conviction, and the district court determined that he had waived the claim by not raising it under Rule 12(b), and that there was no cause to excuse the waiver. *Id.* at 235-236. At that time, Rule 12(b)(2) provided that "defenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to do so "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." See *id.* at 236-237. The court of appeals affirmed, and the Supreme Court granted review.

The Supreme Court rejected the defendant's argument that a fundamental constitutional right cannot be waived absent a finding, after a hearing, that the defendant had understandingly and knowingly relinquished the right. *Id.* at 236. The Court noted that "[b]y its terms," the Rule "applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court." The Court found defendant's reliance on other

---

[2] The numbering of the various provisions in Rule 12 has shifted over the years, so that present Rule 12(b)(3) used to be 12(b)(2), and the present subsection (e) used to be (f), but the substance of the provisions relevant here has not essentially changed.

Supreme Court precedent on waiver inapposite where a specific rule, "promulgated by this Court and 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived." *Id.* at 241. The Court therefore held that an untimely claim under Rule 12 "once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of 'cause' which that Rule requires." *Id.* at 242.

The Supreme Court explained the rationale for Rule 12's waiver provisions, describing the kind of "sandbagging" that has often been cited as a purpose for the pretrial timing requirements in the rule (*Davis*, 411 U.S. at 241):

> If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

Two critical points emerge from *Davis*. First, the Supreme Court was construing the meaning of Rule 12's waiver provision: "We are called upon to determine the effect of Rule 12(b)(2) of the Federal Rules of Criminal Procedure on a postconviction motion for relief which raises for the first time a claim of unconstitutional discrimination in the composition of a grand jury." *Davis*, 411 U.S. at 234. The Court did not read Rule 12's waiver provision to require a showing that the defendant knowingly and voluntarily relinquished the claim, only that he had failed to raise a claim that Rule 12 requires be raised before trial and that he had also failed to make any showing of "cause" for his waiver: "We hold that the District Court did not abuse its discretion in denying petitioner relief from the application of the waiver provision of Rule 12(b)(2), and that having concluded he was not entitled to such relief, it properly dismissed his motion under s. 2255." *Davis*, 411 U.S. at 245. Although *Davis* involved post-conviction proceedings, the Court made clear that its construction of Rule 12's waiver language equally prevented resurrection of a waived claim "in the criminal proceedings *or* in federal habeas." *Id.* at 242 (emphasis added).

The analysis in *Davis* remains valid; indeed, in *Weathers*, 186 F.3d at 952-958, the D.C. Circuit concluded that *Davis*, as well as previous D.C. Circuit cases applying *Davis*, required it to hold that the multiplicity claim in the case before it had been waived. In particular, the court in *Weathers* rejected the argument that *Olano* had somehow overruled *Davis*. The issue in *Olano* was whether a belated claim of error under Fed. R. Crim. P. 23, regarding the presence of alternate jurors in the jury room during deliberations, was plain error. Given that the issue did not concern pre-trial motions, the Supreme Court in *Olano* had no occasion to mention *Davis* in its discussion of the difference between waiver and forfeiture. And while *Olano* did describe "waiver" as the "intentional relinquishment or abandonment of a known right," it also went on to note that "whether the defendant's choice must be particularly informed or voluntary . . . depend[s] on the right at stake," *Olano*, 507 U.S. at 733. See *Weathers*, 186 F.3d at 955. The *Weathers* court concluded (186 F.3d at 957, footnote omitted):

> In sum, *Olano* and *Davis* . . . are not inconsistent with each other. Although *Olano* indicates that untimely objections are generally regarded as forfeitures subject to Rule 52(b), *Davis* dictates that untimely objections that come within the ambit of Rule 12(b)(2) must be considered waivers and may not be revived on appeal. We cannot conclude that the Court intended *Olano*, a case which mentioned neither Rule 12 nor *Davis*, to overrule *Davis* by redefining sub silentio the meaning of the word "waiver" in Rule 12.

See also Rose, supra, 538 F.3d at 183 (finding no indication that the Rule 12 concept of waiver – extinguishing an unraised claim – is at odds with *Olano*).

It appears clear, then, that the majority view of the courts of appeals – holding that a claim governed by Rule 12 and not raised before trial is waived, i.e., extinguished, absent a showing of cause – is the only correct one, because the question is controlled by the Supreme Court's decision in *Davis*.[3]

---

[3] It is curious that courts of appeals have so often failed to cite *Davis* in resolving Rule 12 claims. A few decisions, in addition to *Weathers*, above, have relied directly on *Davis* in ruling that a Rule 12 claim was waived. *See United States v. Crowley*, 236 F.3d 104, 108-109 (2d Cir. 2000); *United States v. Clarke*, 24 F.3d 257, 261 (D.C. Cir. 1994); *United States v. Herzog*, 644 F.2d 713, 716 (8th Cir. 1981). It is also curious that at least one court of appeals, while quoting *Davis* and its definition of waiver, went on to treat an untimely Rule 12 claim as a forfeiture

Rule 12(e) "Good Cause"

The precise nature of the showing that must be made for relief from Rule 12's waiver provision, now contained in subsection (e) ("For good cause, the court may grant relief from the waiver.") is also a source of confusion among the courts of appeals. Most courts appear to require that a defendant show both a reason for failing to raise the claim and some prejudice to his case in order to be relieved from his waiver of a Rule 12 objection. See *United States v. Kopp*, 562 F.3d 141, 143 (2d Cir.), *cert. denied*, 130 S. Ct. 529 (2009); *United States v. Santos-Batista*, 239 F.3d 16, 19-20 (1st Cir. 2001), *cert. denied*, 534 U.S. 850 (2001); *United States v. Oldfield*, 859 F.2d 392, 397 (6th Cir. 1988); *United States v. Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981); *United States v. Williams*, 544 F.2d 1215, 1217 (4th Cir. 1976). Others seem to require only a good reason for the failure. See *Rose*, 538 F.3d at 184; *United States v. Campbell*, 999 F.2d 544 (9th Cir.), 1993 WL 263432, *6 n.2 (unpublished), *cert. denied*, 510 U.S. 954 (1993); *United States v. Cathey*, 591 F.2d 268, 271 n.1 (11th Cir. 1979).

Once again, the Supreme Court in *Davis* has already decided the question on which the courts of appeals differ. After holding that the defendant in that case had waived his claim of unconstitutional grand jury selection, the Supreme Court considered whether he had shown cause for his waiver. The Court found the relevant test dictated by a prior case, *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963), where the Court had stated that "it [was] entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of [Rule 12(b)(2)]." Applying *Shotwell*, the Court approved the approach, taken by the district court, which had examined both the reason offered for the failure to make a timely objection and the question whether the defendant had suffered any prejudice. *Davis*, 411 U.S. at 243-244. And the Court specifically rejected a defense suggestion that prejudice should have been presumed because of the particular claim at issue, holding that "actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner." *Id.*, at 245.

---

reviewable for plain error, while requiring the defendant to show "good cause." *United States v. Hargrove*, 508 F.3d 445, 450 (7th Cir. 2007). In any event, the failure to follow *Davis* consistently and correctly seems to account for (or may well explain) the confusion into which the courts of appeals have fallen.

In later cases involving the "cause and prejudice" standard as applied to other types of defaulted claims brought on collateral attack, the Court referred to *Davis*, noting that the same test applied in the Rule 12(b) context. In *Murray v. Carrier*, 477 U.S. 478 (1986), for example, both Justice O'Connor's opinion for the Court and Justice Stevens' opinion concurring in the judgment agreed on the content of Rule 12's "cause" standard. 477 U.S. at 494 ("the former Rule 12(b)(2) of the Federal Rules of Criminal Procedure, as interpreted in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 83 S. Ct. 448, 9 L.Ed.2d 357 (1963), and *Davis v. United States*, 411 U.S. 233, 93 1577, 36 L.Ed.2d 216 (1973), treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule") (opinion of the Court); *id.* at 502-503 (though " [t]he term 'prejudice' was not used in Rule 12(b)(2)," the Court in *Shotwell* "decided that a consideration of the prejudice to the defendant, or the absence thereof, was an appropriate component of the inquiry into whether there was 'cause' for excusing the waiver that had resulted from the failure to follow the Rule") (Stevens, J., concurring in the judgment). See also *Coleman v. Thompson*, 501 U.S. 722, 745 (1991) (noting that *Davis* had held that a defaulted Rule 12 claim could not be heard absent a showing of cause and actual prejudice).

Because the Supreme Court was absolutely clear that the "cause" standard in Rule 12's waiver provision, the substance of which has not changed with the slight alterations in language and section numbering, includes a consideration of prejudice, those courts that have dropped that requirement are simply wrong. Thus, while the Committee has expressed come concern that amending the rule would require it to take sides in a conflict among the courts, that concern is misplaced given that the present confusion stems from a failure to recognize the controlling Supreme Court law on the subject. As the present Rule 12 stands, the showing of "cause" that allows relief from the waiver should include some indication of actual prejudice. The Committee is in a position to resolve that confusion by amending the rule in accordance with settled Supreme Court precedent.

Amending Rule 12

In light of the controlling Supreme Court law on both the meaning of a Rule 12 "waiver" and the nature of the "cause" showing required for relief from a waiver, the subcommittee could consider amending Rule 12 so as to make these features of a Rule 12 waiver more explicit and therefore more susceptible to correct application. As for the current proposal to add the claim of failure to state an offense to the other claims required to be raised before trial, the amended rule could state that the failure to state

an offense must also be raised before trial, but that a failure to make that objection would be treated as a forfeiture instead of a waiver, and would be evaluated later under the familiar "plain error" standard of Rule 52(b), which requires the four-pronged analysis of *Olano*.

The amendment we propose would preclude most claims not timely raised before trial, in accord with Supreme Court precedent, while providing a somewhat more relaxed standard for claims of a failure to state an offense. In many such instances, an untimely motion for failure to state an offense should not result in relief because the defendant suffered no prejudice, as, for example, when the jury is correctly instructed and the verdict includes a finding beyond a reasonable doubt on every element. On the other hand, relief may be called for if there are serious concerns about due process, adequate notice of the offense charged, or the ability of the defendant to prepare a defense. Treating untimely motions on this ground as forfeitures instead of waivers, subject to the plain error standard of Rule 52(b), will allow for relief in those extreme circumstances.

These changes would make Rule 12 more straightforward and understandable, and therefore easier to apply. They would also enhance fairness, by making the consequences of defaulting on a claim clear and unambiguous. The Committee Notes could explain that the courts of appeals have lost sight of the proper interpretation of the rule, as construed by the Supreme Court in *Shotwell* and *Davis*; that the text of the rule has been clarified to conform more closely to those precedents; that a new provision has been added to ensure that claims of a failure to state an offense are also raised before trial; and that, when such claims are defaulted, they will be treated as forfeitures, as the Supreme Court did in *Cotton*. The text of the new proposed amendment is set forth below:

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

* * * * *

(3) **Motions That Must Be Made Before Trial.** The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including failure to state an offense – but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction ~~or to state an offense~~;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

* * * * *

(e) Waiver or Forfeiture of a Defense, Objection, or Request.

(1) Waiver. Except as provided in (2), a ~~A~~ party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. ~~For good cause~~ Upon a showing of cause and actual prejudice, the court may grant relief from the waiver. Absent relief from the waiver, a party may not thereafter raise the claim.

(2)Forfeiture. A party forfeits a claim that the indictment or information fails to state an offense not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. A forfeited claim may thereafter be raised only upon a showing of plain error under Rule 52(b).

MEMO TO: **Rule 12 Subcommittee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Proposed Amendments to Rules 12 and 34**

DATE: **January 19, 2010**

BACKGROUND

At the October 2009 meeting, Judge Tallman remanded to this Subcommittee the question whether to recommend an amendment to Rule 12 in light of the Standing Committee's action in June, 2009. This memorandum briefly recaps the history of the proposed amendment and discusses the issues raised by the Standing Committee.

The proposed amendment has been under study for more than two years, and was the subject of extensive discussion by the full committee in October 2008 and April 2009. As noted in the minutes of the April 2009 meeting, the Advisory Committee voted, with four dissents, to recommend that the Standing Committee approve for publication an amendment to Rule 12(b). The proposal was a response to the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which made it clear that an indictment's failure to state an offense does not deprive the court of jurisdiction. This aspect of the decision in *Cotton* undercut the justification for the current rule, which allows such claims to be raised at any time, even on appeal.

The Committee's proposal (1) made the general rule that claims not raised prior to trial are "waived" applicable to claims that an indictment fails to state an offense, and (2) provided for relief from this waiver for good cause or when the defect in the indictment "has prejudiced the substantial rights of the defendant." Finally, the proposal included a conforming amendment to Rule 34.

The following are included at the end of this memorandum:

- The text of the proposed amendment as submitted to the Standing Committee
- Professor King's memo listing the pros and cons of the proposed amendment
- Excerpts of the minutes from the October 2008 and April 2009 minutes

STANDING COMMITTEE ACTION

After discussion, the Standing Committee remanded the proposed amendments to the Advisory Committee for further study. Standing Committee members raised interrelated several issues and concerns.

(1) Discussion focused on the use of the term "waiver" in the Committee's proposal. Some members of the Standing Committee suggested that the term "forfeiture" would be preferable, because it more accurately defines the operation of Rule 12. Others noted that in *Cotton* the Supreme Court had used the word "forfeiture."

(2) A related concern was that the proposal might not be consistent with the Supreme Court's opinion in *Cotton*, which as noted had used the term "forfeiture."

(3) Finally, some questions were raised regarding the relationship between the two clauses of the proposed amendment to Rule 12(e).

DISCUSSION OF ISSUES RAISED AT THE STANDING COMMITTEE

1. Consistency with *Cotton*

In *Cotton* the defendant was convicted of participating in a drug conspiracy under 21 U.S.C. 841 and 846 and sentenced to life in prison based upon the court's finding that he was responsible for 50 grams or more of cocaine base. The indictment did not allege the drug amount or quantity, and those issues had not been not presented to the trial jury. On appeal, he challenged his sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which had been decided after his sentencing. The court of appeals held that the failure to include drug amount and quantity in his indictment was, after *Apprendi*, a jurisdictional error. *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001). Although the issue was first raised on appeal, the Fourth Circuit found this to be plain error and it vacated Cotton's sentence.

The Supreme Court granted review and defined the question presented as "whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court." 535 U.S. at 627. The Court first focused on the question whether the omission from the indictment was a "jurisdictional" error, and concluded that the omission of the drug type and quantity was not jurisdictional. *Id.* at 629-30. Then "[f]reed from the view that indictment omissions deprive a court of jurisdiction," the Court applied the plain error test of Rule 52(b) to what it called the defendant's "forfeited claim." *Id.* at 631. The Court made one other passing reference to forfeiture, noting that the important role of the petit jury had not prevented it from applying "the longstanding rule 'that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right....' " *Id.* at 634 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

The Supreme Court did not mention Rule 12, and the rule received very little attention in the briefs. The defendant mentioned the rule in only one paragraph of this brief, in support of the

argument that the "discretionary nature" of such review is "logically incompatible with jurisdictional error," as reflected in Federal Rule 12's requirement that courts notice at any time an error in an indictment that fails to show the court's jurisdiction or state an offense. The government dealt equally briefly with Rule 12, referring to it in only one paragraph of text and one footnote. It argued that Rule 12(b)–if applicable to failure to allege the facts in question–simply did not address the standard to be applied by a reviewing court, and that Rule 12 and Rule 52 should be read together. *See* Petitioner's Brief at 36 n.11; Petitioner's Reply Brief at 5.

Thus nothing in *Cotton* suggests that the Supreme Court intended to foreclose an amendment that would end Rule 12's exceptional treatment of claims that an indictment fails to state an offense by bringing them within the general rule requiring a variety of claims and defenses to be presented by pretrial motion under Rule 12(b). Indeed, the Court's ruling that such errors are not jurisdictional is fully consistent with treating them similarly to all other nonjurisdictional errors under Rule 12(b)(3).

2. Use of the term "forfeiture" rather than "waiver"

One Standing Committee member suggested that it was time for the rules to stop using the term "waiver" and instead adopt the term "forfeiture," suggesting this would be more consistent with the judicial treatment of the rule. This issue has not previously been discussed by the Advisory Committee, which had intended simply to conform the treatment of one class of errors to the remainder of Rule 12(b)(3).

Rule 12(b)(3) requires certain claims to be made by pretrial motion, and Rule 12(e) states that a party "waives" any defenses or objections not raised as provided by Rule 12(c) unless the court grants relief for "good cause." The rules do not clearly state, however, how these provisions interact with Rule 52. Are claims and defenses not raised in conformity with Rule 12(b)(3) "waived" in the sense that judicial review is entirely foreclosed, or are they nonetheless subject to review if the defendant can show plain error under Rule 52(b)? If the latter, then it might be preferable to refer to "forfeiture" rather than "waiver."

Although nothing in *Cotton* supports the view that it would bar an amendment to Rule 12 requiring claims that an indictment fails to state an offense to be raised before trial, there may be an argument that *Cotton* speaks to the question whether a defendant who does not raise a claim of this nature in a timely fashion has "waived" or "forfeited" his claim. The Supreme Court applied the plain error analysis under Rule 52(b) to the claim asserted in *Cotton*. In so doing, it may be seen to have implicitly accepted the government's argument that Rule 12 did not speak to the standard to be applied to claims that were not raised in the district court, but were nonetheless not barred under Rule 12. Under *Cotton* these claims were not barred, but they warranted relief only if the defendant could show plain error. Since the defendant in *Cotton* was unable to make such a showing, the Court held that he was not entitled to relief.

A memorandum prepared by Professor King for the subcommittee in March 2008 canvassed the circuits and found that they were divided on the question whether errors of any nature not raised in a timely fashion under Rule 12(b)(3) are "waived" if the court does not grant relief for good

cause, or instead are "forfeited" (and thus subject to relief for plain error). The circuits have taken varying approaches, and in some circuits there are precedents going both ways, and. For example, in *United States v. Rose*, 538 F.3d 175, 179-82 (3rd Cir. 2008), the court describes separate lines of authority within the Third Circuit applying "waiver" and "plain error" analysis as well as conflicting precedents from other circuits.

In light of the variety of approaches taken in the various circuits, the Committee proposed to make no fundamental change in Rule 12 itself, and left in place whatever approach each circuit had adopted on the question of "waiver" versus "forfeiture." The Committee was particularly cautious because Rule 12(b)(3) and the waiver provisions of Rule 12(e) govern a variety of different defenses and objections, including defects in the institution of a prosecution, motions to suppress, motions to server, and motions for discovery. Thus any change would affect a wide variety of cases. Many of the appellate cases concern untimely suppression motions, and it is likely that those would far outnumber claims that the indictment failed to state an offense.

My research into the developments subsequent to Professor King's March 2008 memo demonstrates that (1) the relationship between Rule 12 and Rule 52 remains unsettled in the lower courts, and (2) and it varies from circuit to circuit. *See United States v. Hamilton*, 587 F3d 1199, 1215-16 & n. 9 (10th Circ. 2009) (noting that plain error analysis is an option under prior circuit precedent, but not in the present case because it is not applicable when there is a factual dispute), and *United States v. Kirkland*, 567 F.3d 316, 320-21 (7th Circ 2009) (noting "waiver" under Rule 12 encompasses both waiver and forfeiture, briefly recognizing the difference, and deciding that because the defendant had no claim of good cause the claim would be reviewed only if had been raised in a timely fashion).

3. Issues concerning the standard for a relief under Rule 12(e)

The proposed amendment retained the current language in Rule 12(e) stating that the court may grant relief for "good cause" when an objection was not timely raised under Rule 12(b)(3), but it also added a provision allowing relief "when failure to state an offense in the indictment or information has prejudiced the substantial rights of the defendant."

Standing Committee members expressed several concerns about this language. Specifically, how does this language interact with Rule 52(b)? Does it eliminate the last prong of the plain error test, which under *United States v. Olano*, 507 U.S. 725, 731 (1993), requires not only a plain error that has affected "substantial rights," but also a showing that the error seriously affects the fairness, integrity, and public reputation of judicial proceedings. Why not just follow the ordinary standards under Rule 52(b)? Another member expressed concern that the prejudice to substantial rights prong of the proposed amendment would allow sandbagging (perhaps if only by counsel).[3] Is that correct and, if so, is it desirable?

[3]Additionally one member thought that the committee did not intend to allow relief in a case of failure to state an offense if "good cause" alone were shown. This assumption was incorrect. Since the Committee meant to allow relief under either prong of proposed Rule 12(e), his proposed rewording did not reflect the Committee's intent.

The language of proposed Rule 12(e) was the most difficult problem facing the Advisory Committee. The Committee struggled to balance competing concerns. On the one hand, there was considerable sympathy for the government's argument that defendants should not be able to benefit from their failure to raise errors in the indictment before trial, when the errors could be remedied efficiently. The rules should not encourage game playing and sand bagging. On the other hand, if the government makes an error in the indictment, and the defendant would be severely prejudiced at trial by the lack of notice of this element of the government's case, there was concern that the "good cause" standard–as applied in some circuits–might provide no relief.

The Committee recognized that it was not possible to predict precisely how the language it proposed would be applied, particularly given the fact that the considerations might differ if it were raised at different points in the process, from mid-trial to appeal. It intended to leave these issues to judicial development.

CONCLUSION

The Subcommittee has before it the following issues:

- Whether to continue to pursue an amendment to Rule 12 concerning claims that the indictment does not state an offense. The advantages and disadvantages are canvassed briefly in Professor King's memo, and the concerns regarding the consistency with *Cotton* are addressed above.

- If the Subcommittee supports an amendment to Rule 12, whether to retain the proposed language allowing relief "when failure to state an offense in the indictment or information has prejudiced the substantial rights of the defendant." (If the language is retained, the Subcommittee might wish to clarify its expectations in the proposed Committee Note and in the report that would accompany the proposal if it were resubmitted.)

- Whether to propose an amendment to Rule 12(e) adopting the language of "forfeiture" rather than "waiver," for some or all claims not raised in a timely fashion before trial.

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

* * * * *

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including failure to state an offense--but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction ~~or to state an offense~~;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

* * * * *

(e) Waiver of a Defense, Objection, or Request.

(1) Generally. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the

deadline the court sets under Rule 12(c) or by any extension the court provides.

(2) **Relief from Waiver.** ~~For good cause,~~ The court may grant relief from the waiver:

(A) for good cause; or

(B) when a failure to state an offense in the indictment or information has prejudiced a substantial right of the defendant.

* * * * *

Committee Note

Rule 12(b)(3)(B) has been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered "jurisdictional," fatal whenever raised, and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before trial that the charge does not state an offense now "waives" that objection under Rule 12(e). However, Rule 12(e) has also been amended so that even when the objection is untimely, a court may grant relief whenever a failure to state an offense has prejudiced a substantial right of the defendant, such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense.

The amendment is not intended to affect existing law concerning when relief may be granted for other untimely challenges "waived" under Rule 12(e).

Rule 34. Arresting Judgment

(a) **In General.** Upon the defendant's motion or on its own, the court must arrest judgment ~~if: (1) the indictment or information does not charge an offense; or (2)~~ the court does not have jurisdiction of the charged offense.

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

To: Rule 12 Subcommittee
From: Nancy King
Re: Proposed amendment to Rule 12 (dated 12/19) advantages and disadvantages
Date: December 19, 2008

To accompany the latest version of the proposed amendment to Rule 12 I have circulated today, revised following the subcommittee's phone conference on December 17, I have drafted below a brief summary of the advantages and disadvantages of the amendment as it now stands. If I have omitted or misrepresented a concern or argument, or you think of additional items to add to one side or the other, please let me know and I will circulate a revised chart.

ADVANTAGE OF PROPOSED AMENDMENT	DISADVANTAGE OF AMENDMENT
States clearly the expectation that a defendant must raise this problem prior to trial, when it can be remedied most efficiently.	Arguably the defendant should not ever have to bear any cost as a result of the government's error in drafting in this situation; the error here is prosecuting the defendant for conduct that is not a federal crime at all. The amendment reduces the incentive for the government to be scrupulously careful to charge a federal offense.
The amendment eliminates the "waste of judicial resources" required when an reviewing court is required to dismiss a charge and vacate a conviction for this reason, see *United States v. Panarella,* 277 F.3d 678, 686-8 8 (3d Cir. 2002), regardless of whether the error made any difference to anybody.	The cost of the current rule is somewhat mitigated by case law that provides there is no double jeopardy bar to reprosecuting the defendant after dismissal of the charge for this reason, even after trial begins; dismissal is without prejudice to retrial.
The amendment should reduce the frequency with which such errors are raised only after trial begins, or after conviction. DOJ memo attached to 6/10/08 email collects numerous cases, and states, "Unfortunately, there is no data source we are aware of, in either the Executive or Judicial Branches, that captures the number of Rule 12(b)(3)(B) motions filed or granted. However, based on our research of relevant case law and discussions with United States Attorneys' Offices around the country, we believe there are a significant number of such motions granted each year. Whether that number is in the several dozens or few hundreds we are not certain."	Without more certainty about how often this type of error occurs, and how often it surfaces only after trial, or after conviction, we can't be sure that the benefits of the amendment will be worth its potential costs.

By specifying a standard for relief from waiver of this particular error, separate from and more generous to the defendant than the standard provided by Rule 12(e) for all other untimely claims, the amendment both recognizes the unique importance of this sort of error and avoids increasing or influencing ongoing litigation over the standard for relief for other claims under Rule 12(e).	There is no certainty that the amendment will succeed in closing off litigation about its effect on other claims of error under Rule 12(e). For those who would prefer that the Rule be amended to settle these ongoing disputes about other claims, this amendment will not do that.
By specifying that relief is available for prejudice alone, rather than "for good cause," the amendment allows courts to respond whenever the failure to state an offense disadvantages the defendant, regardless of when the objection is raised, even if the defendant is unable to show a good reason for failing to object to the deficient charge prior to trial.	Would this affect collateral review under 2255 and 2241 as well? Providing for relief upon a finding of prejudice alone may be inappropriate for a collateral challenge to the conviction, even if it makes sense when the error is raised for the first time on appeal.
The Note gives an example of what is meant by prejudice to a substantial right (denial of an adequate opportunity to prepare a defense), but indicates there may be additional situations where relief would be appropriate. For example, assume a judge decided that defense counsel should have understood what offense was charged from the surrounding circumstances, and thus the defendant had an adequate opportunity to defend. Relief is still available if defense counsel dropped the ball, prepared to defend against the wrong charge, and had compromised trial strategy as a result. The standard avoids the loaded term "plain error" and questions that may be raised about application of the *Olano* test to this sort of error. "substantial right" is a term well understood in federal courts. See Rule 52, Rule 7. The court has held that the failure to submit an element to a trial jury for proof beyond a reasonable doubt can be harmless, certainly this means that the failure to submit an element to a grand jury can be harmless as well. *Cotton* held that an omitted element should be reviewed for plain error, this standard is even more generous, because it does not require the defendant to meet the fourth prong of the *Olano* test.	The standard for relief under new 12(e)(2) remains somewhat vague, requiring interpretation and likely litigation. What does "prejudiced" mean? What is a "substantial right"? 1) Must the error have made a difference in the outcome (charge or sentence)? How might this be applied following a guilty plea? 2) Who has the burden under 12(e)(2) – must defendant demonstrate prejudice or must the government disprove prejudice? Can prejudice ever be presumed? 3) could the " good cause" concept be imported into the term "prejudice" if courts determine that a defendant whose counsel is aware of the error could never be "prejudiced" thereby? 4) Doesn't it always prejudice a defendant's substantial rights whenever the defendant is denied grand jury review of an essential element? The Court has yet to pass on whether omission of an element can be harmless error under Rule 52.

Rule 7(e) already limits amendments of informations based on a determination of whether a substantial right of the defendant would be "prejudiced" – the application of the prejudice standard in Rule 7 should provide guidance for trial judges considering whether the defendant is prejudiced here. For example, if the defendant would have prepared differently had he known what offense was being charged, Rule 7 would not permit amendment; and the amended rule would require a judge to relieve the defendant from waiver under 12(e).	The analogy to Rule 7 is incomplete – that rule addresses only prejudice to substantial rights that could arise from amendments to informations, it does not address the prejudice that might arise from omitting an essential element from an indictment, including the lack of a grand jury decision on an essential element.
Neither the amendment nor the Note says anything about what options would become available to a trial judge under the amended rule, should this error be raised after trial begins before conviction. This leaves for case development 1) whether a judge who determines midtrial that the defendant has NOT been prejudiced by the error may allow amendment of an indictment, or instruct the jury on an essential element missing from an indictment without running afoul of the Fifth Amendment (constructive amendment); or whether Rule 7(e) would allow the judge to permit amendment of an information 2) whether a judge who determines the defendant HAS been prejudiced by the deficient charge could take any action <u>other</u> than dismissal, say, granting a continuance along with permitting the government to file an amended charge.	These issues do not arise under the present rule, because dismissal of the charge is the only option open whenever it is determined that the charge fails to state an offense – the error is never waived, and perpetually subject to relief. In addition, Rule 7(e) forbids amendment if "an additional or different offense is charged." Arguably substituting an information that charges an offense for an information that does not is charging an "additional" or "different" offense. Would this proposed amendment require a corresponding amendment to Rule 7(e) as well?

Excerpts Minutes Criminal Rules Committee, October 2008

B. Rule 12(b) Challenges for Failure to State an Offense; Rule 34

Judge Wolf presented the Rule 12(b) Subcommittee report. Under Rule 12(b)(3), certain pretrial motions must be raised before trial. All but one subcommittee member agreed with the Department of Justice to add the motion to dismiss for failure to state an offense to the pretrial motions listed in Rule 12(b)(3), particularly given that the Supreme Court has ruled that the defect is non-jurisdictional. However, additional considerations complicate the issue. "Good cause" under Rule 12(e) is generally defined in the case law as both "cause" and "prejudice." In other words, in addition to showing prejudice from being precluded from raising the issue at or after trial, the defendant must also show good cause for not having raised the matter earlier. As a result, a defendant who was prejudiced by errors of counsel might have no redress.

Judge Wolf observed that the bracketed language in the proposed Committee Note (pages 177-78 of the agenda book) says "Good cause may include injury to the substantial rights of the defendant." Preventing a party from raising a tardy motion to dismiss the case for failure to state an offense presumably affects the defendant's substantial rights, satisfying the good-cause requirement and vitiating any waiver. This could affect the definition of "good cause" in *other* Rule 12 contexts.

Judge Wolf also noted that there is a circuit split on whether failure to raise the claim that the indictment fails to state an element of the offense is a "forfeiture" of the issue, subject to plain-error appellate review, or a "waiver" of the issue, not subject to appellate review. The subcommittee proposes leaving this matter to the case law, as explained in the draft Note.

Judge Tallman suggested that the bracketed language modifies the "good cause" requirement of "cause" *and* "prejudice" adopted in circuit case law by changing the conjunctive to the disjunctive. Instead of *both* cause and prejudice being required, only a showing of
"prejudice" would be required. Another member agreed, suggesting that the Committee may want to omit the bracketed language and entrust the definition of "good cause" to case law.

One member asked whether the proposed rule amendment would prohibit a defendant from challenging at trial an indictment that failed, for instance, to charge a nexus with interstate commerce on the ground that this constitutes failure to invoke the court's jurisdiction. Failure to allege an element of the offense is covered by the proposed amendment, which would require the motion to dismiss to be filed *pretrial*, but this would also constitute a failure to allege the court's jurisdiction. Could the rule disallow a motion to dismiss filed during or after trial alleging that the indictment did not establish the court's

jurisdiction? Another member agreed, suggesting that, if a charge fails to allege a crime, it must be dismissible even during or after trial.

Judge Wolf indicated that, if the standard for raising the issue during trial were to be "good cause equals 'cause' plus 'prejudice'," then he would oppose the rule amendment. Defendants should not lose rights simply because their lawyers dropped the ball. If the judge doesn't have discretion to fix a defective indictment where the defendant suffers prejudice, then the amendment is ill-advised.

Another member suggested that the proposed rule change would create a host of new issues while purporting to "solve" what is a rare occurrence, which he has never seen in his career and which the Department of Justice had relatively few reports of, namely, a defendant filing a motion to dismiss for failure to allege an element *during trial.* It was noted that the committee lacked empirical data on how often the issue is raised at trial and on what the defendant's reasons have been when it is raised at trial.

Another member suggested that, in the wake of *United States v. Cotton*, 535 U.S. 625 (2002), there is no reason to treat the failure to include an element of the offense differently from any other Rule 12 issue. If the Committee concludes, however, that it is necessary to recast the cause and prejudice standard to accomplish that objective, the proposed amendment could do more harm than good, all in an effort to solve a relatively small problem. The Department of Justice agreed that the cause and prejudice standard is all over the map and that the Committee should perhaps fix that someday. This amendment, however, tries only to bring consistency, in light of *Cotton*, to how different Rule 12 motions are handled.

Professor Coquillette suggested that the draft Committee Note might not want to refer to the current circuit split, as the split could change, whereas the Note could not unless the rule were subsequently amended and could easily become archaic and misleading.

One member objected that removal of the Note's bracketed language at page 178 would cause the rule to do what the Department of Justice said that it did not want, namely, force a defendant to lose substantial rights because of a bad attorney. Mr. Wroblewski disagreed, stating that in circuits where mistakes are analyzed as to whether they constitute substantial error, the proposed rule amendment might not alter much. Professor Beale observed that the Note could follow the format of the time computation notes and discuss the effect of the amendment in sample fact situations — which she considered a better option than redefining the good cause standard. Judge Tallman suggested that a vote on whether to amend the rule should precede a discussion about the Note.

Judge Jones moved to adopt the amendment as printed on page 176, conditioned upon a rewriting of the draft Committee Note. Judge Tallman said

that the Note would be revised for presentation at the Committee's next meeting. One member argued against amending the rule if it requires both cause *and* prejudice to permit this issue to be raised at trial. Another member recommended leaving that question to the courts of appeals and suggested that the Committee need not resolve that question as a precondition to the rule change.

Concern was raised that, absent resolution of the Note's wording, it was unclear what the Committee was voting on. Judge Tallman clarified that this was a vote on whether, *in principle*, the rule needs amending. He expressed reluctance about creating a new definition of "good cause" strictly for one subsection of Rule 12, which would create a significant potential for mischief, and he warned against attempting to resolve a circuit split in a Committee Note. He then clarified that an affirmative vote would simply indicate a desire to continue the effort to fix the Note, not necessarily a commitment to amending Rule 12. The entire amendment, including the revised Note, would then become the subject of a new vote at the Committee Spring 2009 meeting.

The Committee voted 7 to 5 to continue working on the proposed Rule 12 amendment and accompanying Committee Note.

Judge Tallman appointed Judge England to chair the subcommittee, taking over for Judge Wolf, whose term expired. He welcomed further discussion of the good cause issue. After further discussion about the Note, Judge Tallman thanked Judge Wolf for his leadership on this issue and remarked that unless the subcommittee was able to address the circuit split and the other issues raised in a satisfactory manner, the rule amendment proposal could be rejected altogether.

Excerpt from minutes of Criminal Rules Committee, April 6-7, 2009

III. REPORTS OF SUBCOMMITTEES

A. Subcommittee on Rule 12 – Proposed Amendment to Rule 12(b)

Judge England, Chair of the Subcommittee on Rule 12, provided some background to the amendment under consideration. Rule 12 currently sets forth a general requirement that defects in an indictment must be raised before trial. However, the Rule exempts from this requirement motions based upon an indictment's failure to state an offense. *See* Rule 12(b)(3)(B). In 2002, the Supreme Court held in *United States v. Cotton*, 535 U.S. 625 (2002), that defects in an indictment are not jurisdictional and, accordingly, if a defendant fails to raise such a claim at trial, the claim is not necessarily waived and will be subject to only plain error review. In 2006, the Department of Justice asked the Committee to consider amending Rule 12 to eliminate the exemption for claims of failure to state an offense, thereby requiring such a claim to be raised *before* trial and purportedly bringing it into conformity with *Cotton*. The Department submitted a proposed amendment to this effect. The Federal Defenders oppose the Department's amendment, which they contend imperils rights of defendants, and urge the Committee to let Rule 12 stand.

Since the October 2008 meeting, the Subcommittee on Rule 12 has revised the Department's original proposal and has crafted a compromise that seeks to encourage defendants to raise this issue before trial while preserving a limited option to raise it later, upon a showing that the government's failure to state an offense in the indictment "has prejudiced a substantial right of the defendant."

The Committee discussed the amendment as revised. One member expressed concern that the amendment was unnecessary because the government had not shown that the present Rule was causing problems. The member further expressed concern that the amendment implicated the Fifth and Sixth Amendments. Another member was troubled by the vagueness of the words "prejudice" and "substantial right." However, other members thought that the meaning of these words could be developed through case law and that the amendment was needed to clarify how courts should handle such motions after *Cotton*.

After further discussion, Judge England moved that Rule 12 be amended to require that an indictment's failure to state an offense be raised before trial (as shown on pages 250-251 of the agenda book).

The Committee voted, with four dissents, to send the proposed Rule 12 Amendment to the Standing Committee for publication.

The Committee briefly discussed the proposed amendment to Rule 34 (Arresting Judgment), which conforms the Rule to the amendment approved above to Rule 12(b). It was moved that Rule 34 be amended as shown on page 253.

STANDING COMMITTEE ACTION

After discussion, the Standing Committee remanded the proposed amendments to the Advisory Committee for further study. Standing Committee members raised interrelated several issues and concerns.

(1) Discussion focused on the use of the term "waiver" in the Committee's proposal. Some members of the Standing Committee suggested that the term "forfeiture" would be preferable, because it more accurately defines the operation of Rule 12. Others noted that in *Cotton* the Supreme Court had used the word "forfeiture."

(2) A related concern was that the proposal might not be consistent with the Supreme Court's opinion in *Cotton*, which as noted had used the term "forfeiture."

(3) Finally, some questions were raised regarding the relationship between the two clauses of the proposed amendment to Rule 12(e).

DISCUSSION OF ISSUES RAISED AT THE STANDING COMMITTEE

1. Consistency with *Cotton*

In *Cotton* the defendant was convicted of participating in a drug conspiracy under 21 U.S.C. 841 and 846 and sentenced to life in prison based upon the court's finding that he was responsible for 50 grams or more of cocaine base. The indictment did not allege the drug amount or quantity, and those issues had not been not presented to the trial jury. On appeal, he challenged his sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which had been decided after his sentencing. The court of appeals held that the failure to include drug amount and quantity in his indictment was, after *Apprendi*, a jurisdictional error. *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001). Although the issue was first raised on appeal, the Fourth Circuit found this to be plain error and it vacated Cotton's sentence.

The Supreme Court granted review and defined the question presented as "whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, even though the defendant did not object in the trial court." 535 U.S. at 627. The Court first focused on the question whether the omission from the indictment was a "jurisdictional" error, and concluded that the omission of the drug type and quantity was not jurisdictional. *Id.* at 629-30. Then "[f]reed from the view that indictment omissions deprive a court of jurisdiction," the Court applied the plain error test of Rule 52(b) to what it called the defendant's "forfeited claim." *Id.* at 631. The Court made one other passing reference to forfeiture, noting that the important role of the petit jury had not prevented it from applying "the longstanding rule 'that a constitutional right may be forfeited

in criminal as well as civil cases by the failure to make timely assertion of the right....' " *Id.* at 634 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

The Supreme Court did not mention Rule 12, and the rule received very little attention in the briefs. The defendant mentioned the rule in only one paragraph of this brief, in support of the argument that the "discretionary nature" of such review is "logically incompatible with jurisdictional error," as reflected in Federal Rule 12's requirement that courts notice at any time an error in an indictment that fails to show the court's jurisdiction or state an offense. The government dealt equally briefly with Rule 12, referring to it in only one paragraph of text and one footnote. It argued that Rule 12(b)–if applicable to failure to allege the facts in question–simply did not address the standard to be applied by a reviewing court, and that Rule 12 and Rule 52 should be read together. *See* Petitioner's Brief at 36 n.11; Petitioner's Reply Brief at 5.

Thus nothing in *Cotton* suggests that the Supreme Court intended to foreclose an amendment that would end Rule 12's exceptional treatment of claims that an indictment fails to state an offense by bringing them within the general rule requiring a variety of claims and defenses to be presented by pretrial motion under Rule 12(b). Indeed, the Court's ruling that such errors are not jurisdictional is fully consistent with treating them similarly to all other nonjurisdictional errors under Rule 12(b)(3).

2. Use of the term "forfeiture" rather than "waiver"

One Standing Committee member suggested that it was time for the rules to stop using the term "waiver" and instead adopt the term "forfeiture," suggesting this would be more consistent with the judicial treatment of the rule. This issue has not previously been discussed by the Advisory Committee, which had intended simply to conform the treatment of one class of errors to the remainder of Rule 12(b)(3).

Rule 12(b)(3) requires certain claims to be made by pretrial motion, and Rule 12(e) states that a party "waives" any defenses or objections not raised as provided by Rule 12(c) unless the court grants relief for "good cause." The rules do not clearly state, however, how these provisions interact with Rule 52. Are claims and defenses not raised in conformity with Rule 12(b)(3) "waived" in the sense that judicial review is entirely foreclosed, or are they nonetheless subject to review if the defendant can show plain error under Rule 52(b)? If the latter, then it might be preferable to refer to "forfeiture" rather than "waiver."

Although nothing in *Cotton* supports the view that it would bar an amendment to Rule 12 requiring claims that an indictment fails to state an offense to be raised before trial, there may be an argument that *Cotton* speaks to the question whether a defendant who does not raise a claim of this nature in a timely fashion has "waived" or "forfeited" his claim. The Supreme Court

applied the plain error analysis under Rule 52(b) to the claim asserted in *Cotton*. In so doing, it may be seen to have implicitly accepted the government's argument that Rule 12 did not speak to the standard to be applied to claims that were not raised in the district court, but were nonetheless not barred under Rule 12. Under *Cotton* these claims were not barred, but they warranted relief only if the defendant could show plain error. Since the defendant in *Cotton* was unable to make such a showing, the Court held that he was not entitled to relief.

A memorandum prepared by Professor King for the subcommittee in March 2008 canvassed the circuits and found that they were divided on the question whether errors of any nature not raised in a timely fashion under Rule 12(b)(3) are "waived" if the court does not grant relief for good cause, or instead are "forfeited" (and thus subject to relief for plain error). The circuits have taken varying approaches, and in some circuits there are precedents going both ways, and. For example, in *United States v. Rose*, 538 F.3d 175, 179-82 (3rd Cir. 2008), the court describes separate lines of authority within the Third Circuit applying "waiver" and "plain error" analysis as well as conflicting precedents from other circuits.

In light of the variety of approaches taken in the various circuits, the Committee proposed to make no fundamental change in Rule 12 itself, and left in place whatever approach each circuit had adopted on the question of "waiver" versus "forfeiture." The Committee was particularly cautious because Rule 12(b)(3) and the waiver provisions of Rule 12(e) govern a variety of different defenses and objections, including defects in the institution of a prosecution, motions to suppress, motions to server, and motions for discovery. Thus any change would affect a wide variety of cases. Many of the appellate cases concern untimely suppression motions, and it is likely that those would far outnumber claims that the indictment failed to state an offense.

My research into the developments subsequent to Professor King's March 2008 memo demonstrates that (1) the relationship between Rule 12 and Rule 52 remains unsettled in the lower courts, and (2) and it varies from circuit to circuit. *See United States v. Hamilton*, 587 F3d 1199, 1215-16 & n. 9 (10th Circ. 2009) (noting that plain error analysis is an option under prior circuit precedent, but not in the present case because it is not applicable when there is a factual dispute), and *United States v. Kirkland*, 567 F.3d 316, 320-21 (7th Circ 2009) (noting "waiver" under Rule 12 encompasses both waiver and forfeiture, briefly recognizing the difference, and deciding that because the defendant had no claim of good cause the claim would be reviewed only if had been raised in a timely fashion).

3. Issues concerning the standard for a relief under Rule 12(e)

The proposed amendment retained the current language in Rule 12(e) stating that the court may grant relief for "good cause" when an objection was

not timely raised under Rule 12(b)(3), but it also added a provision allowing relief "when failure to state an offense in the indictment or information has prejudiced the substantial rights of the defendant."

Standing Committee members expressed several concerns about this language. Specifically, how does this language interact with Rule 52(b)? Does it eliminate the last prong of the plain error test, which under *United States v. Olano*, 507 U.S. 725, 731 (1993), requires not only a plain error that has affected "substantial rights," but also a showing that the error seriously affects the fairness, integrity, and public reputation of judicial proceedings. Why not just follow the ordinary standards under Rule 52(b)? Another member expressed concern that the prejudice to substantial rights prong of the proposed amendment would allow sandbagging (perhaps if only by counsel).[4] Is that correct and, if so, is it desirable?

The language of proposed Rule 12(e) was the most difficult problem facing the Advisory Committee. The Committee struggled to balance competing concerns. On the one hand, there was considerable sympathy for the government's argument that defendants should not be able to benefit from their failure to raise errors in the indictment before trial, when the errors could be remedied efficiently. The rules should not encourage game playing and sand bagging. On the other hand, if the government makes an error in the indictment, and the defendant would be severely prejudiced at trial by the lack of notice of this element of the government's case, there was concern that the "good cause" standard–as applied in some circuits–might provide no relief.

The Committee recognized that it was not possible to predict precisely how the language it proposed would be applied, particularly given the fact that the considerations might differ if it were raised at different points in the process, from mid-trial to appeal. It intended to leave these issues to judicial development.

CONCLUSION

The Subcommittee has before it the following issues:

- Whether to continue to pursue an amendment to Rule 12 concerning claims that the indictment does not state an offense. The advantages and disadvantages are canvassed briefly in Professor King's memo, and the concerns regarding the consistency with *Cotton* are addressed above.

---

[4]Additionally one member thought that the committee did not intend to allow relief in a case of failure to state an offense if "good cause" alone were shown. This assumption was incorrect. Since the Committee meant to allow relief under either prong of proposed Rule 12(e), his proposed rewording did not reflect the Committee's intent.

- If the Subcommittee supports an amendment to Rule 12, whether to retain the proposed language allowing relief "when failure to state an offense in the indictment or information has prejudiced the substantial rights of the defendant." (If the language is retained, the Subcommittee might wish to clarify its expectations in the proposed Committee Note and in the report that would accompany the proposal if it were resubmitted.)

- Whether to propose an amendment to Rule 12(e) adopting the language of "forfeiture" rather than "waiver," for some or all claims not raised in a timely fashion before trial.

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

* * * * *

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including failure to state an offense--but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction ~~or to state an offense~~;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

* * * * *

(e) Waiver of a Defense, Objection, or Request.

(1) Generally. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the

deadline the court sets under Rule 12(c) or by any extension the court provides.

(2)Relief from Waiver. ~~For good cause,~~ Tthe court may grant relief from the waiver:

(A) for good cause; or

(B) when a failure to state an offense in the indictment or information has prejudiced a substantial right of the defendant.

* * * * *

Committee Note

Rule 12(b)(3)(B) has been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered "jurisdictional," fatal whenever raised, and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." *Cotton*, 535 U.S. at 631.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before trial that the charge does not state an offense now "waives" that objection under Rule 12(e). However, Rule 12(e) has also been amended so that even when the objection is untimely, a court may grant relief whenever a failure to state an offense has prejudiced a substantial right of the defendant, such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense.

The amendment is not intended to affect existing law concerning when relief may be granted for other untimely challenges "waived" under Rule 12(e).

Rule 34. Arresting Judgment

(a) **In General.** Upon the defendant's motion or on its own, the court must arrest judgment ~~if: (1) the indictment or information does not charge an offense; or (2)~~ the court does not have jurisdiction of the charged offense.

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

TAB IIIC

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Proposed Rule 37, Indicative Rulings

DATE: March 16, 2010

New Appellate Rule 12.1 and Civil Rule 62.1 (which went into effect on December 1, 2009) create a mechanism for obtaining "indicative rulings." At its October 2009 meeting, this Committee voted to approve a new Criminal Rule which would parallel Civil Rule 62.1. The text of proposed Rule 37 appears at the end of this memorandum.

The Committee also approved a Committee Note with the addition of a "floor amendment." Because we had moved through our agenda more rapidly than anticipated, Professor Struve was not able to participate by telephone as we had planned. Accordingly, I noted at the meeting that I would consult her about the new language, and that we could return at the April meeting to any issues she might raise.

I subsequently provided Professor Struve with the new language in the Committee Note. She expressed three concerns,[5] each of which warrant discussion in the Advisory Committee before proposed Rule 37 is forwarded to the Standing Committee. This memorandum discusses the issues raised by the language added to the Committee Note.

---

[5]Although Professor Struve advised the Appellate Rules Committee at its fall meeting that she had conferred with me concerning the Note language, the discussion was quite brief and Committee members expressed no views on the issues discussed in this memorandum.

Judge Tallman also solicited the comments of Ninth Circuit Staff Attorneys Susan Gelmis, Pro Se Motions Supervisor, and Karen Golinski, Motions Attorney. A memorandum from them is attached.

(1) Is the addition to the Committee Note correct in stating that the district courts have "authority" to grant 2255 motions after a notice of appeal has been filed?

The Committee added the following language to the Note:

> This rule applies to motions "that the court lacks authority to grant," and therefore does not apply to motions under 28 U.S.C. § 2255.

This language asserts, in effect, that district courts do have the authority to grant § 2255 motions while an appeal is pending.

Professor Struve expressed two substantive concerns about the new language:

(1) whether the lower court precedents are clear *in all circuits* in holding that the district courts have jurisdiction to grant motions in § 2255 cases during the pendency of an appeal, and

(2) how the new language jibes with the many cases holding that district courts should not ordinarily grant such motions.

My research indicates that Professor Struve's first concern about variation among the circuits is well founded. The Eleventh Circuit presents the clearest case. In *United States v. Dunham*, 240 F.3d 1328, 1329-30 (11th Circ. 2001) (per curiam) (emphasis added), the court held:

> We conclude that the district court lacked jurisdiction to consider and rule on Dunham's § 2255 motion during the pendency of her direct appeal of her sentence, and therefore her appeal of the district court's denial of that motion is dismissed without prejudice and the district court's order denying Dunham's § 2255 motion is vacated without prejudice to Dunham's right to file a § 2255 motion after the disposition of her direct appeal.

Dunham has been followed by a number of district courts (most of which are in the Eleventh Circuit), that have concluded they have no jurisdiction to grant § 2255 motions while an appeal is pending. Even assuming that the Eleventh Circuit is wrong on this issue, the variation in the law among the circuits is something the Advisory Committee did not consider in October, and it raises a question about the categorical statement in the draft Committee Note.

Additionally, there are cases in almost every other circuit holding that the district courts should only entertain § 2255 motions in extraordinary circumstances while a case is on direct appeal. One could argue that even in such circuits, in all but a small number of exceptional cases the district court "lacks authority to grant" the Section 2255 motion while the direct appeal is pending. In Professor Struve's view, such an argument "seems at least plausible," and I agree. (Note that the proposed rule uses the term "authority" rather than "jurisdiction.")

Moreover, it is possible that the indicative-ruling mechanism might even be useful in some 2255 cases. Indeed, both the Appellate Rules and the Standing Committee were quite reluctant to rule out the use of indicative rulings in any category of cases, feeling that the courts should decide this on a case by case basis.

(2) Did the addition create an internal inconsistency within the Committee Note?

The new language was inserted before the statement (based on the current Committee Note to the Civil Rule) that the Rule "does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal." As Professor Struve noted in an e-mail exchange following the meeting, this continues to be true, in the sense that the *Rule* doesn't make such an attempt. But the purpose of the language added to the Committee Note seems to be to define the circumstances in which an appeal "limits ... the district court's authority to act." The Advisory Committee did not focus on this internal conflict when it voted to add the new language.

The language stating that the Rule "does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal" was taken from the Committee Note to the new Civil Rule. It represents the view of the Civil Rules Committee (and perhaps the Standing Committee) that it was preferable to remain silent on such questions. If we retain the language added at the October meeting, it would be desirable to have a fuller discussion of this issue before we have to justify it to the Standing Committee.

(3) Should the Rule or the Note be amended to exclude § 2255 motions?

Both the Standing Committee and the Civil Rules Committee concluded that no categorical restraints should be placed on the new authority for indicative rulings.

At the October meeting, Professor King was a proponent of some change to the proposed amendment that would clarify for federal prisoners that the amendment does not modify the general rule that direct appeal must be completed before filing a motion under § 2255. She argued that it is important to exclude § 2255 cases from the operation of the new rule in order to prevent the wasteful litigation that might result if prisoners routinely pursued their 2255 motions and appeals at the same time. There are more than 6,000 § 2255 motions filed in the district courts every year. These cases are already complex for both pro se prisoners and courts, and she argued it would be undesirable to do anything that makes this situation worse.

If the Committee favors a limitation, it is not clear that this can or should be accomplished by the Note. Ordinarily any substantive matter must be addressed in the Rules, rather than the Committee Notes.

Rule 37. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note*

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while

*Language added at the October meeting shown in bold.

it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. **This rule applies to motions "that the court lacks authority to grant," and therefore does not apply to motions under 28 U.S.C. § 2255.** Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before

decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

M E M O R A N D U M

December 14, 2009

TO: Judge Tallman, Circuit Judge

FROM: Susan V. Gelmis, Supervising Attorney, Motions Unit, (415) 355-8044

RE: Questions about Indicative Rulings in Criminal Appeals

This month, Fed. R. App. P. 12.1 went into effect, establishing procedures for the limited remand of appeals in cases where the district court has indicated a willingness to amend its judgment or entertain a post judgment motion that it otherwise lacks authority to entertain because of the pending appeal. This procedure was already in long standing use in the Ninth Circuit in civil cases, *see Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976), and has been recognized by the Supreme Court in the context of criminal appeals, *see United States v. Cronic*, 466 U.S. 648, 667, n. 42 (1984).

Some questions have arisen about whether it would be useful to have a Fed. R. Cr. P. to specifically adopt this procedure in the criminal appeal context, whether such a rule (and/or the note to the new Fed. R. App. P. 12.1) should expressly limit the circumstances in which such a rule would be applied in criminal appeals, and whether the advisory note as currently written should be changed with respect to section 2255 proceedings.

As written, Fed. R. App. P. 12.1 is not limited to civil appeals. The question is whether its applicability to criminal appeals should be codified in the Federal Rules of Criminal Procedure,

and also whether there should be limitations, either in the rule itself, or in a committee note to the rule, on the circumstances in which such a rule could be used in criminal proceedings.

Staff believes that the application of Rule 12.1 to criminal appeals would be a very useful thing. Although it does not come up often, we have seen instances in which a limited remand has been requested (and granted) to allow the district court to rule on a post judgment motion that it would otherwise lack authority to entertain because of the pending appeal. I do not believe that a rule is necessary, especially in light of the Supreme Court's footnote in *Cronic*, but now that there is a rule that expressly applies to civil appeals, the absence of such a rule in the criminal context might imply the lack of authority to employ such a procedure in those cases, at least outside of the Rule 33(b) procedure discussed in *Cronic*.

Whether such a rule should be limited to the three types of motions referenced by the Solicitor General, however, is another question. I do not believe such a limitation would be necessary and it might in fact prevent courts from using the indicative ruling procedure in situations that might be a useful alternative to vacating and remanding the entire sentence or judgment as we do now, even where the parties stipulate to the remand. While I agree with the Solicitor General that the three named statutory grounds for post judgment relief (Rule 33(b), Rule 35(b) and and section 3582(c) motions) may be the only statutory bases for post judgment relief in the criminal context other than section 2255 proceedings, I do not think it is necessary to limit this process to these contexts. I think we are unlikely to see litigants abusing the process, and the court can always deny motions that are not well taken.

Rather, I think there is room for courts to consider using this process in the situation where the litigants and the district court all agree that an error of some kind was made (in calculating the sentence, for example), where now we are having to vacate and remand to the district court to

correct the error, even if it was not the district court's error. Some of our panels do not like having to vacate a district court judgment even where the parties agree, and they would be much happier if the district court itself indicated a willingness to vacate its own judgment.

Finally, the language added to the committee note that the rule applies to motions "that the court lacks authority to grant, and therefore does not apply" to motions under 28 U.S.C. § 2255, is problematic in my opinion, for the same reasons articulated by Professors Struve and Beale. In *Feldman v. Henman,* 815 F.2d 1318, 1320-21 (9th Cir. 1987), a section 2241 petition, the Ninth Circuit held that:

> "A district court should not entertain a habeas corpus petition while there is an appeal pending in this court or in the Supreme Court. *Black v. United States*, 269 F.2d 38, 41 (9th Cir.1959), cert. denied, 361 U.S. 938, 80 S.Ct. 379, 4 L.Ed.2d 357 (1960); *Nemec v. United States*, 184 F.2d 355 (9th Cir.1950). The reason for this rule is that 'disposition of the appeal may render the [habeas corpus writ] unnecessary.' *Black*, 269 F.2d at 41. This is true if the appeal is still pending in our court, although we may decide to deem the appeal abandoned in order to dispose of the jurisdictional question. Id. It is even more appropriate for the district court to decline to address the merits of a petition when review of the conviction is pending before the Supreme Court, as in *Nemec,* since neither the district court nor this court can treat such petitions for review as abandoned. *Cf. United States v. Wolfson*, 340 F.Supp. 968, 971 (D.Del.1972) (review by district court unwarranted while certiorari is pending before Supreme Court). [] Because the Supreme Court had not yet decided how it would treat Feldman's petition for certiorari prior to the district court's handling of his habeas corpus petition, the district court had no authority to entertain the writ. **Federal prisoners must exhaust their federal appellate review prior to filing a habeas corpus petition in the district court.** *Cf. Martinez v. Roberts*, 804 F.2d 570, 571 (9th Cir.1986) (district court properly dismissed petition since federal prisoners must exhaust their federal administrative remedies prior to bringing a writ of habeas corpus in federal court)."

Therefore, whether or not district courts lack subject matter jurisdiction to entertain a section 2255 motion while a direct appeal is pending, it is clear that they are discouraged from doing so, and in fact in many circuits may lack authority (under exhaustion principles) to do so. I thus agree with Professors Struve and Beale that the language of the note as it stands should be

amended or removed. I would suggest language that provides that the rule applies to motions "that the court otherwise lacks authority to grant."

Please let me know if I can be of any further assistance.

TAB IIID

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Procedures Concerning Crime Victims**

DATE: **March 19, 2010**

The Administrative Office of U.S. Courts has prepared and sent to Congress the fifth annual report on crime victims' rights as required under the Justice for All Act of 2004, § 104(a), 18 U.S.C. § 3771 note (supp. I 2005).

This report is provided for your review in connection with the Advisory Committee's ongoing monitoring of procedural issues concerning the implementation of the Crime Victim's Rights Act.

FILE COPY

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

January 28, 2010

Honorable Joseph R. Biden, Jr.
President
United States Senate
Washington, DC 20510

Dear Mr. President:

This is the fifth annual report to Congress on crime victims' rights as required under the Justice for All Act of 2004, §104(a), 18 U.S.C. § 3771 note (supp. I 2005). Pursuant to that legislation, the Administrative Office of United States Courts (AO) is to report "the number of times that a right established in Chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to Chapter 247 of title 18, and the result reached." *Id.*

In the federal trial courts, there were more than 76,200 criminal cases filed involving more than 97,500 defendants during fiscal year 2009. In the past year, the AO has received reports from the appellate courts on 10 mandamus actions brought per the provisions of the Act and has similarly identified 12 district court cases that meet the statute's reporting criteria. A summary of those mandamus and trial court actions follows, including the reasons provided for the decisions in each of the cases.

United States v. Daniel Riley, et al., 1:07-CR-00189-GZS (D.N.H. July 31, 2008 and Oct. 27, 2008) and *In re: Joseph Haas*, No. 08-2378 (1st Cir. Oct. 30, 2008). Petitioner submitted a victim impact statement in the district court, which orally ruled that he was not a crime victim in this case. Several months later, petitioner tried to file a duplicate copy of the victim impact statement with the district court. The filing was rejected in accordance with a court-issued procedural order to refuse any more motions or filings from petitioner. Petitioner sought a writ of mandamus in the United States Court of Appeals for the First Circuit, pursuant to 18 U.S.C. § 3771(d)(3), asserting that he was a crime victim and should be allowed to participate in the sentencing hearing of defendant. In his filing with the appellate court, petitioner acknowledged that he was not harmed by the defendant, but rather "by the government goons in this case." Finding that the district court did not err in determining that the petitioner was not a crime victim as defined in 18 U.S.C. § 3771(e), the appellate court denied the petition for mandamus relief.

United States v. Diego Fernando Murillo-Berjarano, No. 03-CR-1188 (RMB) (S.D.N.Y. Mar. 4, 2009) and *In re: Alba Ines Rendon Galvis*, No. 09-1576-op (2nd Cir. Apr. 27, 2009). Defendant led a paramilitary group in Colombia that was responsible for the victim's murder. After defendant pled guilty to those offenses in Colombia, he was extradited to the U.S. where he pled guilty to a conspiracy to import and distribute cocaine. The mother of the murder victim sought to enforce her deceased son's rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. In denying her motion to be recognized as a crime victim, the court held that the defendant's offense of conspiring to import and distribute cocaine in the U.S. was not the proximate cause of her son's death in Colombia. Therefore, the mother did not meet the definition of a crime victim under the CVRA. The mother sought a writ of mandamus in the United States Court of Appeals for the Second Circuit pursuant to 18 U.S.C. § 3771(d)(3). The appellate court dismissed the petition for mandamus relief concluding that the district court did not err in determining that defendant's involvement in a drug conspiracy was not the proximate cause of petitioner's son's death.

In re: Local # 46 Metallic Lathers Union and Reinforcing Iron Workers and Its Associated Benefit and Other Funds, No. 09-2113-op (2nd Cir. June 22, 2009). Defendant was charged and convicted of conspiracy to engage in money laundering in the underlying case of *United States v. Charles Doherty*, No. 05-CR-0494 (JS WDW) (E.D.N.Y. May 7, 2009). The union asserted the right to restitution under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A and 3664, claiming that it was a victim because the union lost money when the defendant paid employees in cash and thus avoided paying union obligations required by collective bargaining agreements. Finding that the offense was already complete before the union workers were paid in cash, the district court ruled that the union was not a victim because defendant's conspiracy to convert forged checks into cash was not the direct and proximate cause of the union's losses. Union petitioned for a writ of mandamus in the United States Court of Appeals for the Second Circuit, arguing that it was entitled to certain rights under the MVRA and the CVRA, 18 U.S.C. § 3771(a)(6). The appellate court upheld the district court determination that the union was not a crime victim under the CVRA or the MVRA, and denied the petition for the writ of mandamus.

In re: Saad Dawalibi, No. 09-2658 (3rd Cir. July 23, 2009). Petitioner Dawalibi sought a writ of mandamus in the United States Court of Appeals for the Third Circuit, pursuant to 18 U.S.C. § 3771(d)(3), asserting that the government violated his right to be treated with fairness when it failed to file a motion under Rule 35(b) or the Federal Rules of Criminal Procedure to reduce petitioner's 365-month prison sentence. Although petitioner assisted with the prosecution of another inmate who assaulted him, he did not have a cooperation agreement with the government. Without a cooperation agreement, the court determined that petitioner could not establish "a clear and indisputable right" to the writ and dismissed the petition for mandamus relief. The court further noted that petitioner's attempt to use the CVRA to seek mandamus review was "unavailing" because petitioner had not been denied any rights under 18 U.S.C. § 3771(a) in the assault case.

United States v. Atlantic States Cast Iron Pipe Company et al., No.03-852-MLC (D.N.J. Mar. 23, 2009). Corporate defendant and four employees were convicted of conspiracy to violate environmental laws and obstruct Federal Occupational Safety and Health Administration (OSHA)

proceedings. During sentencing, the government sought to have six employees that suffered serious or fatal injuries at the workplace recognized as crime victims under 18 U.S.C. § 3771 based on violations of the OSHA workplace standards. Finding that defendants were convicted of offenses related to deceiving OSHA and not violations of OSHA workplace standards, the court ruled that the injuries sustained by the six employees were "too factually attenuated" in relation to the defendants' convictions. Thus, the court denied the government's motion to recognize the six employees as crime victims.

United States v. Dion Coxton, No. 3:05-CR-00339-FDW (W.D.N.C. Feb. 24, 2009). Pursuant to 18 U.S.C. § 3771, family members of a deceased victim filed a motion requesting access to portions of a presentence report in order to prepare for the sentencing hearing and seek timely restitution. Citing case law that established a strong presumption of confidentiality for presentence reports, the court found that disclosure of the presentence report was not mandatory under the CVRA. In denying the motion, the court emphasized that the family members of the deceased victims did not need information from the presentence report because they already had sufficient information to prepare for sentencing and seek restitution.

United States v. BP Products of North America, Inc., No. 4:07-CR-00434 (S.D.Tex. Mar. 12, 2009). A previous motion by victims asking the court to reject a proposed plea agreement under the CVRA was denied by the district court in February of 2008, *see* letter from James C. Duff, Director, Administrative Office of the United States Courts, to Honorable Joseph R. Biden, Jr., President, United States Senate (Mar. 3, 2009). The United States Court of Appeals for the Fifth Circuit declined to grant the victims a writ of mandamus, but acknowledged that there was a statutory violation of the victims right to confer during the plea process as set forth in 18 U.S.C. § 3771(a)(5). *Id.* In district court, the victims filed another motion arguing that the proposed plea agreement should be rejected because it was negotiated without their involvement. The court clarified that the purpose of the right to confer was to allow victims to exchange information with the government and express their views in court. The right to confer did not give victims the right to determine if a plea agreement was acceptable or not. In denying the motion, the court ruled that the CVRA violation "does not provide a basis to reject the plea."

In re: Simons, No. 09-3109 (6th Cir. Feb. 5, 2009). Pursuant to 18 U.S.C. § 3771(d)(3), petitioner sought a writ of mandamus in the United States Court of Appeals for the Sixth Circuit compelling the district court to unseal a record so that petitioner could assert his rights as a crime victim in that case. Both the government and the district judge argued that the petitioner's action was premature because the district court judge had not yet ruled upon the petitioner's motion. Although the statute requires a district court to rule on CVRA motions "forthwith," petitioner's motion had been pending in district court for three months. The appellate court held that the district court's failure to rule on petitioner's motion within a three-month period resulted in an "effective denial" of petitioner's rights under the CVRA. In granting the writ, the appellate court directed the district court to rule on petitioner's motion to unseal within two weeks of this order. The district court issued an order within the two-week period granting petitioner's motion to unseal.

In re: Siler, Nos. 08-5215/5280/5364/5366/5367 (6th Cir. July 13, 2009). Defendants pled guilty to conspiracy to violate petitioner's constitutional rights and were sentenced to prison time. Two years later, in a subsequent civil suit, petitioner Siler and his family sought access to the defendants' presentence reports. After the district court denied the motion, the Silers petitioned for a writ of mandamus in the United States Court of Appeals for the Sixth Circuit asserting that the CVRA allowed for the release of defendants' presentence reports. The appellate court denied the writ, ruling that the protections provided by the CVRA apply to criminal proceedings, not civil proceedings. The court further noted that the statute does not confer upon victims the right to access presentence reports.

United States v. William J. Gallion and Shirley A. Cunningham, Jr., No. 2:07-39-S-DCR (E.D.Ky. Aug. 19, 2009). Defendants were convicted of offenses related to wire fraud, and the jury determined that defendants should forfeit $30,000,000 to the federal government. The government in turn suggested that the funds could possibly be used to provide restitution for crime victims. Pursuant to 18 U.S.C. § 3771 (a)(6), a legal representative for the crime victims sought appointment as a trustee to manage and disburse any restitution funds. Although victims have the right to receive restitution under the CVRA, the court observed that the provisions that govern the restitution process are specified in the Mandatory Victims Restitution Act of 1996 (MVRA). The statute directs the court to set a restitution payment schedule, and this authority cannot be delegated because it is a core judicial function. Finding that the MVRA makes no provisions for a private lawyer to act as a trustee in restitution matters, the court denied the crime victims' representative's motion.

United States v. W.R. Grace et al, No. 9:05-CR-00007-DWM (D.Mont. Feb. 13, 2009) and *In re: Parker*, No. 09-70529, 09-70533 (9th Cir. Feb. 27, 2009). In a superseding indictment, defendants were charged with violating the known endangerment provision of the Clean Air Act by placing individuals in imminent danger of death or serious bodily harm through the dangerous release of a hazardous pollutant. Defendants invoked Rule 615 of the Federal Rules of Evidence, and in accordance with that rule, the court excluded lay witnesses from the proceedings. The government filed a motion seeking to recognize 34 witnesses as crime victims and allow them to assert rights under 18 U.S.C. § 3771, including the right not to be excluded from court proceedings. Government witnesses filed a separate motion to assert their rights pursuant to 18 U.S.C. § 3771. The court noted that since the defendants were only charged with placing individuals in imminent danger of harm, the court could not conclude that the witnesses were directly and proximately harmed "as a result of the commission of a federal offense." Petitioners sought two separate writs of mandamus in the United States Court of Appeals for the Ninth Circuit. The appellate court granted both writs, ordering the district court to conduct further proceedings to determine the CVRA status for each of the 34 witnesses. On remand, the petitioners withdrew their demand to be accorded the right to be present throughout the proceedings.

United States v. Sanwal, No. 2:08-CR-00330-EJG-1 (E.D.Cal. Feb. 24, 2009) and *In re: Vicki Zito*, No. 09-70554 (9th Cir. Feb. 26, 2009). In a sex trafficking case, the district court granted defendant's motion to subpoena the crime victim's juvenile records for *in camera* review. Parent for the minor victim sought a two-week stay, asserting that her daughter's CVRA rights under 18 U.S.C. § 3771(a)(8) had been violated. After the district court denied her request

as moot, petitioner sought a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. The appellate court denied the writ because *in camera* review of the subpoenaed materials did not cognizably harm the petitioner. However, the appellate court noted that if any of the material from the *in camera* review was to be turned over to the real parties in interest, the district court should stay the turnover so that petitioner can seek another writ of mandamus.

United States v. MacKenzie Glade Hunter, No. 2:07-CR-307DAK (D.Utah Feb. 10, 2009) and *In re: Antrobus*, No. 08-4010, 09-4024 (10th Cir. Dec. 2, 2008, Feb. 28, 2009 and Apr. 22, 2009). A previous motion by the parents of a deceased woman to have their daughter recognized as a crime victim under the CVRA was denied by the district court in January of 2008, *see* letter from James C. Duff, Director, Administrative Office of the United States Courts, to Honorable Joseph R. Biden, Jr., President, United States Senate (Mar. 3, 2009). After sentencing, parents appealed defendant's conviction and sentence in the United States Court of Appeals for the Tenth Circuit. The court dismissed the appeal, ruling that the only avenue for an alleged crime victim to seek appellate review under the CVRA was through a petition for a writ of mandamus. Subsequently, parents filed a motion requesting another hearing in district court on the CVRA issue, referring to newly discovered evidence. After determining that the evidence was not new, the district court denied the motion. Parents sought a writ of mandamus in the United States Court of Appeals for the Tenth Circuit to compel the district court to hold an evidentiary hearing or grant victim status. Observing that petitioners did not provide a "detailed explanation of how the district court erred," the appellate court denied the application for mandamus relief.

Douglas Stewart Carter v. Steven Turley, No. 2:02-CV-326 TS (D.Utah Oct. 9, 2008). In a capital habeas case, petitioner's counsel sought repeated extensions of time to respond because of illness. Pursuant to 18 U.S.C. § 3771(a)(7), the crime victim's representative opposed the motion and asserted the right for proceedings to be free from unreasonable delay. While the court acknowledged that the delay in this case "has been intractable," it granted the extension because of counsel's health. However, the court also noted that it will not grant any further extensions in this case.

United States v. Philip William Coon, No. 8:08-CR-441-T-17MAP (M.D.Fla. Nov. 14, 2008) and *In re: Janis W. Stewart and Other Borrower Crime-Victims*, No. 08-16753 (11th Cir. Dec. 19, 2009). Defendant colluded with a mortgage originator to charge borrowers a mortgage brokerage fee of two percent, instead of one percent as agreed to by his employer, Coast Bank. Defendant, who pocketed a portion of the excess fees, was charged with conspiracy to commit wire fraud by depriving his employer of honest services. The borrowers, who were responsible for paying the closing costs, filed a motion to be recognized as crime victims under 18 U.S.C. § 3771. They sought access to portions of the presentence report and objected to the report and recommendation. Because the borrowers were not listed in the information filed by the government, the court concluded that only Coast Bank could be recognized as a crime victim. As a result, the court ruled that the borrowers lacked standing to demand portions of the presentence report and object to the report and recommendation. Borrowers petitioned for a writ of mandamus in the United States Court of Appeals for the Eleventh Circuit seeking to be recognized as crime victims. The court clarified that crime victim status under the CVRA is not dependent on whether the crime victims are specified in the information or indictment, but rather

whether they are harmed by the commission of a federal offense. Concluding that petitioners were directly and proximately harmed by the commission of defendant's offense, the appellate court granted the writ ordering the district court to recognize petitioners as victims in accordance with the CVRA.

United States v. Michael L. Cone et al, No. 8:06-CR-43-T-24MAP (M.D.Fla. Aug. 12, 2009). Defendants pled guilty to bankruptcy fraud and agreed to forfeit real property as part of the plea agreement. At sentencing, defendants were directed to pay restitution to the U.S. Bankruptcy Court and St. Paul's Traveler's Insurance Company. The U.S. Bankruptcy Court and St. Paul's Traveler's Insurance Company assigned their interests in the restitution to two other companies, ClearGlass and BRA. After sentencing, the government vacated its preliminary order of forfeiture. ClearGlass, St. Paul's Traveler's Insurance Company, and BRA filed a motion pursuant to 18 U.S.C. § 3771 asserting that their rights to be heard and to receive full and timely restitution had been violated. They also asked the court to deny the government's motion to vacate the preliminary order of forfeiture and hold ancillary proceedings. According to 18 U.S.C. § 3771(e), a crime victim is "a person directly and proximately harmed as a result of the commission of a Federal offense . . . ." The court held that ClearGlass and BRA were not crime victims because they were not harmed as a result of the bankruptcy fraud. With regards to St. Paul's Traveler's Insurance Company, the court determined that no public proceedings were scheduled to take place. However, the court surmised that if a restitution hearing was held, St. Paul's Traveler's Insurance Company "may very well have the right to be heard" as a crime victim.

If we may be of assistance to you in this or any other matter, please do not hesitate to call our Office of Legislative Affairs at 202-502-1700.

Sincerely,

James C. Duff
Director

cc: Honorable Patrick J. Leahy
Honorable Jeff Sessions

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

January 28, 2010

Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

Dear Madam Speaker:

This is the fifth annual report to Congress on crime victims' rights as required under the Justice for All Act of 2004, §104(a), 18 U.S.C. § 3771 note (supp. I 2005). Pursuant to that legislation, the Administrative Office of United States Courts (AO) is to report "the number of times that a right established in Chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to Chapter 247 of title 18, and the result reached." *Id.*

In the federal trial courts, there were more than 76,200 criminal cases filed involving more than 97,500 defendants during fiscal year 2009. In the past year, the AO has received reports from the appellate courts on 10 mandamus actions brought per the provisions of the Act and has similarly identified 12 district court cases that meet the statute's reporting criteria. A summary of those mandamus and trial court actions follows, including the reasons provided for the decisions in each of the cases.

United States v. Daniel Riley, et al., 1:07-CR-00189-GZS (D.N.H. July 31, 2008 and Oct. 27, 2008) and *In re: Joseph Haas*, No. 08-2378 (1st Cir. Oct. 30, 2008). Petitioner submitted a victim impact statement in the district court, which orally ruled that he was not a crime victim in this case. Several months later, petitioner tried to file a duplicate copy of the victim impact statement with the district court. The filing was rejected in accordance with a court-issued procedural order to refuse any more motions or filings from petitioner. Petitioner sought a writ of mandamus in the United States Court of Appeals for the First Circuit, pursuant to 18 U.S.C. § 3771(d)(3), asserting that he was a crime victim and should be allowed to participate in the sentencing hearing of defendant. In his filing with the appellate court, petitioner acknowledged that he was not harmed by the defendant, but rather "by the government goons in this case." Finding that the district court did not err in determining that the petitioner was not a crime victim as defined in 18 U.S.C. § 3771(e), the appellate court denied the petition for mandamus relief.

United States v. Diego Fernando Murillo-Berjarano, No. 03-CR-1188 (RMB) (S.D.N.Y. Mar. 4, 2009) and *In re: Alba Ines Rendon Galvis*, No. 09-1576-op (2nd Cir. Apr. 27, 2009). Defendant led a paramilitary group in Colombia that was responsible for the victim's murder. After defendant pled guilty to those offenses in Colombia, he was extradited to the U.S. where he pled guilty to a conspiracy to import and distribute cocaine. The mother of the murder victim sought to enforce her deceased son's rights under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. In denying her motion to be recognized as a crime victim, the court held that the defendant's offense of conspiring to import and distribute cocaine in the U.S. was not the proximate cause of her son's death in Colombia. Therefore, the mother did not meet the definition of a crime victim under the CVRA. The mother sought a writ of mandamus in the United States Court of Appeals for the Second Circuit pursuant to 18 U.S.C. § 3771(d)(3). The appellate court dismissed the petition for mandamus relief concluding that the district court did not err in determining that defendant's involvement in a drug conspiracy was not the proximate cause of petitioner's son's death.

In re: Local # 46 Metallic Lathers Union and Reinforcing Iron Workers and Its Associated Benefit and Other Funds, No. 09-2113-op (2nd Cir. June 22, 2009). Defendant was charged and convicted of conspiracy to engage in money laundering in the underlying case of *United States v. Charles Doherty*, No. 05-CR-0494 (JS WDW) (E.D.N.Y. May 7, 2009). The union asserted the right to restitution under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A and 3664, claiming that it was a victim because the union lost money when the defendant paid employees in cash and thus avoided paying union obligations required by collective bargaining agreements. Finding that the offense was already complete before the union workers were paid in cash, the district court ruled that the union was not a victim because defendant's conspiracy to convert forged checks into cash was not the direct and proximate cause of the union's losses. Union petitioned for a writ of mandamus in the United States Court of Appeals for the Second Circuit, arguing that it was entitled to certain rights under the MVRA and the CVRA, 18 U.S.C. § 3771(a)(6). The appellate court upheld the district court determination that the union was not a crime victim under the CVRA or the MVRA, and denied the petition for the writ of mandamus.

In re: Saad Dawalibi, No. 09-2658 (3rd Cir. July 23, 2009). Petitioner Dawalibi sought a writ of mandamus in the United States Court of Appeals for the Third Circuit, pursuant to 18 U.S.C. § 3771(d)(3), asserting that the government violated his right to be treated with fairness when it failed to file a motion under Rule 35(b) or the Federal Rules of Criminal Procedure to reduce petitioner's 365-month prison sentence. Although petitioner assisted with the prosecution of another inmate who assaulted him, he did not have a cooperation agreement with the government. Without a cooperation agreement, the court determined that petitioner could not establish "a clear and indisputable right" to the writ and dismissed the petition for mandamus relief. The court further noted that petitioner's attempt to use the CVRA to seek mandamus review was "unavailing" because petitioner had not been denied any rights under 18 U.S.C. § 3771(a) in the assault case.

United States v. Atlantic States Cast Iron Pipe Company et al., No.03-852-MLC (D.N.J. Mar. 23, 2009). Corporate defendant and four employees were convicted of conspiracy to violate environmental laws and obstruct Federal Occupational Safety and Health Administration (OSHA)

proceedings. During sentencing, the government sought to have six employees that suffered serious or fatal injuries at the workplace recognized as crime victims under 18 U.S.C. § 3771 based on violations of the OSHA workplace standards. Finding that defendants were convicted of offenses related to deceiving OSHA and not violations of OSHA workplace standards, the court ruled that the injuries sustained by the six employees were "too factually attenuated" in relation to the defendants' convictions. Thus, the court denied the government's motion to recognize the six employees as crime victims.

United States v. Dion Coxton, No. 3:05-CR-00339-FDW (W.D.N.C. Feb. 24, 2009). Pursuant to 18 U.S.C. § 3771, family members of a deceased victim filed a motion requesting access to portions of a presentence report in order to prepare for the sentencing hearing and seek timely restitution. Citing case law that established a strong presumption of confidentiality for presentence reports, the court found that disclosure of the presentence report was not mandatory under the CVRA. In denying the motion, the court emphasized that the family members of the deceased victims did not need information from the presentence report because they already had sufficient information to prepare for sentencing and seek restitution.

United States v. BP Products of North America, Inc., No. 4:07-CR-00434 (S.D.Tex. Mar. 12, 2009). A previous motion by victims asking the court to reject a proposed plea agreement under the CVRA was denied by the district court in February of 2008, *see* letter from James C. Duff, Director, Administrative Office of the United States Courts, to Honorable Nancy Pelosi, Speaker, United States House of Representatives (Mar. 3, 2009). The United States Court of Appeals for the Fifth Circuit declined to grant the victims a writ of mandamus, but acknowledged that there was a statutory violation of the victims right to confer during the plea process as set forth in 18 U.S.C. § 3771(a)(5). *Id.* In district court, the victims filed another motion arguing that the proposed plea agreement should be rejected because it was negotiated without their involvement. The court clarified that the purpose of the right to confer was to allow victims to exchange information with the government and express their views in court. The right to confer did not give victims the right to determine if a plea agreement was acceptable or not. In denying the motion, the court ruled that the CVRA violation "does not provide a basis to reject the plea."

In re: Simons, No. 09-3109 (6th Cir. Feb. 5, 2009). Pursuant to 18 U.S.C. § 3771(d)(3), petitioner sought a writ of mandamus in the United States Court of Appeals for the Sixth Circuit compelling the district court to unseal a record so that petitioner could assert his rights as a crime victim in that case. Both the government and the district judge argued that the petitioner's action was premature because the district court judge had not yet ruled upon the petitioner's motion. Although the statute requires a district court to rule on CVRA motions "forthwith," petitioner's motion had been pending in district court for three months. The appellate court held that the district court's failure to rule on petitioner's motion within a three-month period resulted in an "effective denial" of petitioner's rights under the CVRA. In granting the writ, the appellate court directed the district court to rule on petitioner's motion to unseal within two weeks of this order. The district court issued an order within the two-week period granting petitioner's motion to unseal.

In re: Siler, Nos. 08-5215/5280/5364/5366/5367 (6th Cir. July 13, 2009). Defendants pled guilty to conspiracy to violate petitioner's constitutional rights and were sentenced to prison time. Two years later, in a subsequent civil suit, petitioner Siler and his family sought access to the defendants' presentence reports. After the district court denied the motion, the Silers petitioned for a writ of mandamus in the United States Court of Appeals for the Sixth Circuit asserting that the CVRA allowed for the release of defendants' presentence reports. The appellate court denied the writ, ruling that the protections provided by the CVRA apply to criminal proceedings, not civil proceedings. The court further noted that the statute does not confer upon victims the right to access presentence reports.

United States v. William J. Gallion and Shirley A. Cunningham, Jr., No. 2:07-39-S-DCR (E.D.Ky. Aug. 19, 2009). Defendants were convicted of offenses related to wire fraud, and the jury determined that defendants should forfeit $30,000,000 to the federal government. The government in turn suggested that the funds could possibly be used to provide restitution for crime victims. Pursuant to 18 U.S.C. § 3771 (a)(6), a legal representative for the crime victims sought appointment as a trustee to manage and disburse any restitution funds. Although victims have the right to receive restitution under the CVRA, the court observed that the provisions that govern the restitution process are specified in the Mandatory Victims Restitution Act of 1996 (MVRA). The statute directs the court to set a restitution payment schedule, and this authority cannot be delegated because it is a core judicial function. Finding that the MVRA makes no provisions for a private lawyer to act as a trustee in restitution matters, the court denied the crime victims' representative's motion.

United States v. W.R. Grace et al, No. 9:05-CR-00007-DWM (D.Mont. Feb. 13, 2009) and *In re: Parker*, No. 09-70529, 09-70533 (9th Cir. Feb. 27, 2009). In a superseding indictment, defendants were charged with violating the known endangerment provision of the Clean Air Act by placing individuals in imminent danger of death or serious bodily harm through the dangerous release of a hazardous pollutant. Defendants invoked Rule 615 of the Federal Rules of Evidence, and in accordance with that rule, the court excluded lay witnesses from the proceedings. The government filed a motion seeking to recognize 34 witnesses as crime victims and allow them to assert rights under 18 U.S.C. § 3771, including the right not to be excluded from court proceedings. Government witnesses filed a separate motion to assert their rights pursuant to 18 U.S.C. § 3771. The court noted that since the defendants were only charged with placing individuals in imminent danger of harm, the court could not conclude that the witnesses were directly and proximately harmed "as a result of the commission of a federal offense." Petitioners sought two separate writs of mandamus in the United States Court of Appeals for the Ninth Circuit. The appellate court granted both writs, ordering the district court to conduct further proceedings to determine the CVRA status for each of the 34 witnesses. On remand, the petitioners withdrew their demand to be accorded the right to be present throughout the proceedings.

United States v. Sanwal, No. 2:08-CR-00330-EJG-1 (E.D.Cal. Feb. 24, 2009) and *In re: Vicki Zito*, No. 09-70554 (9th Cir. Feb. 26, 2009). In a sex trafficking case, the district court granted defendant's motion to subpoena the crime victim's juvenile records for *in camera* review. Parent for the minor victim sought a two-week stay, asserting that her daughter's CVRA rights under 18 U.S.C. § 3771(a)(8) had been violated. After the district court denied her request

as moot, petitioner sought a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. The appellate court denied the writ because *in camera* review of the subpoenaed materials did not cognizably harm the petitioner. However, the appellate court noted that if any of the material from the *in camera* review was to be turned over to the real parties in interest, the district court should stay the turnover so that petitioner can seek another writ of mandamus.

United States v. MacKenzie Glade Hunter, No. 2:07-CR-307DAK (D.Utah Feb. 10, 2009) and *In re: Antrobus*, No. 08-4010, 09-4024 (10th Cir. Dec. 2, 2008, Feb. 28, 2009 and Apr. 22, 2009). A previous motion by the parents of a deceased woman to have their daughter recognized as a crime victim under the CVRA was denied by the district court in January of 2008, *see* letter from James C. Duff, Director, Administrative Office of the United States Courts, to Honorable Nancy Pelosi, Speaker, United States House of Representatives (Mar. 3, 2009). After sentencing, parents appealed defendant's conviction and sentence in the United States Court of Appeals for the Tenth Circuit. The court dismissed the appeal, ruling that the only avenue for an alleged crime victim to seek appellate review under the CVRA was through a petition for a writ of mandamus. Subsequently, parents filed a motion requesting another hearing in district court on the CVRA issue, referring to newly discovered evidence. After determining that the evidence was not new, the district court denied the motion. Parents sought a writ of mandamus in the United States Court of Appeals for the Tenth Circuit to compel the district court to hold an evidentiary hearing or grant victim status. Observing that petitioners did not provide a "detailed explanation of how the district court erred," the appellate court denied the application for mandamus relief.

Douglas Stewart Carter v. Steven Turley, No. 2:02-CV-326 TS (D.Utah Oct. 9, 2008). In a capital habeas case, petitioner's counsel sought repeated extensions of time to respond because of illness. Pursuant to 18 U.S.C. § 3771(a)(7), the crime victim's representative opposed the motion and asserted the right for proceedings to be free from unreasonable delay. While the court acknowledged that the delay in this case "has been intractable," it granted the extension because of counsel's health. However, the court also noted that it will not grant any further extensions in this case.

United States v. Philip William Coon, No. 8:08-CR-441-T-17MAP (M.D.Fla. Nov. 14, 2008) and *In re: Janis W. Stewart and Other Borrower Crime-Victims*, No. 08-16753 (11th Cir. Dec. 19, 2009). Defendant colluded with a mortgage originator to charge borrowers a mortgage brokerage fee of two percent, instead of one percent as agreed to by his employer, Coast Bank. Defendant, who pocketed a portion of the excess fees, was charged with conspiracy to commit wire fraud by depriving his employer of honest services. The borrowers, who were responsible for paying the closing costs, filed a motion to be recognized as crime victims under 18 U.S.C. § 3771. They sought access to portions of the presentence report and objected to the report and recommendation. Because the borrowers were not listed in the information filed by the government, the court concluded that only Coast Bank could be recognized as a crime victim. As a result, the court ruled that the borrowers lacked standing to demand portions of the presentence report and object to the report and recommendation. Borrowers petitioned for a writ of mandamus in the United States Court of Appeals for the Eleventh Circuit seeking to be recognized as crime victims. The court clarified that crime victim status under the CVRA is not dependent on whether the crime victims are specified in the information or indictment, but rather

whether they are harmed by the commission of a federal offense. Concluding that petitioners were directly and proximately harmed by the commission of defendant's offense, the appellate court granted the writ ordering the district court to recognize petitioners as victims in accordance with the CVRA.

United States v. Michael L. Cone et al, No. 8:06-CR-43-T-24MAP (M.D.Fla. Aug. 12, 2009). Defendants pled guilty to bankruptcy fraud and agreed to forfeit real property as part of the plea agreement. At sentencing, defendants were directed to pay restitution to the U.S. Bankruptcy Court and St. Paul's Traveler's Insurance Company. The U.S. Bankruptcy Court and St. Paul's Traveler's Insurance Company assigned their interests in the restitution to two other companies, ClearGlass and BRA. After sentencing, the government vacated its preliminary order of forfeiture. ClearGlass, St. Paul's Traveler's Insurance Company, and BRA filed a motion pursuant to 18 U.S.C. § 3771 asserting that their rights to be heard and to receive full and timely restitution had been violated. They also asked the court to deny the government's motion to vacate the preliminary order of forfeiture and hold ancillary proceedings. According to 18 U.S.C. § 3771(e), a crime victim is "a person directly and proximately harmed as a result of the commission of a Federal offense . . . ." The court held that ClearGlass and BRA were not crime victims because they were not harmed as a result of the bankruptcy fraud. With regards to St. Paul's Traveler's Insurance Company, the court determined that no public proceedings were scheduled to take place. However, the court surmised that if a restitution hearing was held, St. Paul's Traveler's Insurance Company "may very well have the right to be heard" as a crime victim.

If we may be of assistance to you in this or any other matter, please do not hesitate to call our Office of Legislative Affairs at 202-502-1700.

Sincerely,

James C. Duff
Director

cc: Honorable John Conyers, Jr.
Honorable Lamar S. Smith

TAB IVA

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Proposed Amendments to Rule 5

DATE: March 15, 2010

As explained in the February 25, 2010 letter from Assistant Attorney General Lanny Breuer, the Department of Justice proposes consideration of amendments to Rule 5 and Rule 58 designed to (1) deal with unique aspects of the international extradition process and (2) ensure that the treaty obligations of the United States are fulfilled.

The proposed amendment to Rule 5(c) is addressed to the extradition process. It clarifies where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country.

The proposed amendment to Rules 5(d) and 58(b) correspond to certain obligations of the United States under the Vienna Conventions on Consular Relations. They provide that at the initial appearance the district court will advise defendants who are not citizens of the United States that an attorney for the government will, upon their request, notify a consular official from the defendant's country of nationality of his arrest. A related proposal by Professor Linda Malone to amend Rules 4 and 5 was considered by the Advisory Rules Committee at its October 2005 meeting. After discussion, that proposal was tabled indefinitely with the proviso that it could be revisited at a later date if new developments warranted. Professor Malone's proposal differed from the Department's current proposal in several respects. First, Professor Malone included a proposed amendment to Rule 4(c)(3)(A) requiring a defendant to be notified of the right to consular notification at the time of his arrest pursuant to a warrant. Second, her proposal did not address misdemeanor cases under Rule 58. Professor Malone also used different language to describe the warning to be given to defendants.

The Department of Justice memorandum and the relevant portions of the October 2005 Minutes are attached.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 25, 2010

The Honorable Richard C. Tallman
Chair, Advisory Committee
on the Criminal Rules
United States Court of Appeals
902 William K. Nakamura Courthouse
1010 Fifth Avenue
Seattle, WA 98104-1195

Dear Judge Tallman:

The Department of Justice recommends two amendments to Rule 5 of the Federal Rules of Criminal Procedure. We view the proposed amendments to be necessary in order to better equip the federal courts to deal with unique aspects of the international extradition process and to ensure that the treaty obligations of the United States are satisfied.

First, we recommend that Rule 5 be amended to clarify where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. Second, we recommend that Rule 5 (as well as the corresponding Rule 58) also be amended to require federal courts to inform a defendant in custody, at the initial court appearance, that if he is not a citizen of the United States, an attorney for the government or federal law enforcement officer will, upon request, notify a consular officer from his country of nationality of his arrest.[1] The proposed amendments are important to assist federal courts in dealing with unique aspects of the international extradition process and to ensure that foreign defendants arrested pursuant to U.S. charges receive the notifications to which they are entitled pursuant to the obligations of the United States under the multilateral Vienna Convention on Consular Relations ("the Vienna Convention"), or other bilateral agreements.

---

[1] In some cases, pursuant to a bilateral agreement between the United States and a foreign country, consular officials must be notified of the arrest or detention regardless of the national's wishes. Those "mandatory notification" countries are designated in the State Department public website at http://travel.state.gov_notify.html.

1. According to longstanding practice, persons who are charged with criminal offenses in United States federal or state jurisdictions and who are surrendered to the United States following extradition proceedings in a foreign country make their initial appearance in the jurisdiction that sought the person's extradition. Although these individuals are taken into U.S. custody outside the territory of the United States, the onward transportation of such persons to the jurisdiction that sought the extradition is appropriate and authorized by statute. Specifically, Title 18, United States Code, Section 3193 provides that,

> "[a] duly appointed agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the United States, and to convey him to the place of his trial, shall have the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping."

Contrary to the usual practice, recent experience indicates that, occasionally, the extradited person has his Rule 5 initial appearance hearing in the first federal district in which he arrives rather than in the district that sought his extradition. For example, in one federal district bordering Mexico, one judge ordered that the Rule 5 hearing be held in that district for a number of persons extradited and surrendered to the United States simultaneously by Mexico, despite the fact that many of the defendants were sought for prosecution in various other federal jurisdictions. Although the judge may have reacted to a brief delay in the onward transportation of those defendants to their final destinations as a result of delays in connecting flights or other logistical difficulties, requiring the Rule 5 hearing in the district of first arrival only caused additional delay and extended detentions for those defendants whose alleged crimes occurred in different jurisdictions.

We are concerned that interruptions in the transportation of such extradited persons, which occasionally occur due to unforeseen transit delays, not be deemed justification to require that the person's initial appearance occur in the district of first arrival. Such a requirement would build additional delay in the delivery of the person to the jurisdiction where he or she is sought for trial and would not serve well the purposes of Rule 5 – to inform the person of the reason for his arrest. In cases of international extradition, the extradited person is fully informed about the criminal charges and the reason for his arrest. In such cases, the foreign country affords the person various opportunities to contest his or her arrest, extradition, and surrender to the United States. During the foreign extradition proceedings, the person, who is assisted by counsel, is afforded the opportunity to review the United States charging document, the United States arrest warrant, and evidence supporting the criminal charges that the United States presents in support of the extradition request. The person also has the opportunity to contest identity and to challenge the sufficiency of the evidence presented by the United States in support of the extradition request. Consequently, given the nature of the foreign extradition proceeding

(which may have taken many months, or even years, to complete) there is nothing to gain by conducting an initial appearance in the district of first arrival in the United States. Such an approach hinders the defendant in reaching the jurisdiction where the charges are pending and, as a result, impairs his ability to obtain trial counsel and to begin to prepare his or her defense.

While the practice of conducting the Rule 5 initial appearance hearing in the district of first arrival is not widespread, we believe that it occurs often enough, and there exists sufficient doubt about the Rule's proper application to internationally extradited persons, to warrant amendment to the Rule. We propose the following addition:

Rule 5. Initial Appearance

(C) Place of Initial Appearance; Transfer to Another District.

. . .

(4) **Procedure for Persons Extradited to the United States.** If the defendant is surrendered to the United States pursuant to a request by the United States for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

2. The second proposed amendment to Rule 5 corresponds to certain obligations of the United States, with respect to foreign nationals arrested in the United States, which arise pursuant to the Vienna Convention on Consular Relations ("the Vienna Convention"), a multilateral treaty. The Vienna Convention sets forth basic obligations that a country has towards foreign nationals who are arrested within its jurisdiction. In order to facilitate the provision of consular assistance, Article 36 of the Convention provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. Over the past years, there has been much litigation over the manner by which Article 36 is to be implemented, whether the Vienna Convention creates rights that may be invoked by individuals in a judicial proceeding, and whether any possible remedy exists for defendants not appropriately notified of possible consular access at an early stage of a criminal prosecution.

In *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), the Supreme Court rejected a claim that suppression of evidence was the appropriate remedy for failure to inform a non-citizen defendant of his ability to have the consulate from his country of nationality notified of his arrest and detention. The Court, however, did not rule on the preliminary question of whether or not the Vienna Convention creates an individual right, holding that regardless of the answer to that

question, suppression of evidence obtained following a violation of the Vienna Convention is not an appropriate remedy.

Notwithstanding the position of the United States in *Sanchez-Llamas v. Oregon* that the Vienna Convention does not create an enforceable, individual right, the government has created policies and taken substantial measures to ensure that the United States fulfills its international obligation to other signatory states with regard to Article 36 consular provisions. For example, the Justice Department has issued regulations that establish a uniform procedure for consular notification when non-United States citizens are arrested and detained by officers of the Department. *See* 28 CFR 50.5. Additionally, the Department of State has published and placed on a public website, "Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them," including 24-hour contact telephone numbers law enforcement personnel can use to obtain advice and assistance. The Department of State also has published a Consular Notification and Access booklet, a Consular Notification Pocket Card for police use that has a model Vienna Convention consular notice, and a wall poster containing the consular notification in many languages[2] that police can post in their facilities. The State Department regularly provides training and communicates with the States and law enforcement authorities about ensuring compliance with the consular notification requirements of the Convention. Moreover, the United States is committed to ensuring that when a law enforcement authority fails to give notice to the consulate of a detained foreign national, measures will be taken to immediately inform the consulate, address the situation to the extent possible, and prevent a reoccurrence.

We believe in addition to these measures, Rules 5 and 58 of the Federal Rules of Criminal Procedure should be amended to provide an additional assurance that the Vienna Convention obligations are satisfied. The proposed amendments would require federal courts to inform a defendant in custody, at his initial court appearance, that if he is not a citizen of the United States, an attorney for the government will, upon request, notify a consular officer from the defendant's country of nationality of his arrest. We recommend the following amendments to Rules 5 and 58:

Rule 5. Initial Appearance

"(d) Procedure in a Felony Case.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

---

[2] The languages are Arabic, Chinese, Cambodian, Creole, English, Farsi, French, German, Italian, Japanese, Korean, Lao, Polish, Portuguese, Russian, Spanish, Thai, and Vietnamese.

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; ~~and~~

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and

(F) if the defendant is held in custody and is not a citizen of the United States, an attorney for the government or federal law enforcement officer will notify a consular officer from the defendant's country of nationality of his arrest if he so requests, or make such other consular notification as may be required by treaty.

\- - -

Rule 58. Petty Offenses and Other Misdemeanors

"(b) Pretrial Procedure.

. . .

(2) Initial Appearance. At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

. . .

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense; ~~and~~

(G) if the defendant is held in custody and charged with a misdemeanor other than a petty offense, the right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

> (H) if the defendant is held in custody and is not a citizen of the United States, an attorney for the government or federal law enforcement officer will notify a consular officer from the defendant's country of nationality of his arrest if he so requests, or make such other consular notifications as may be required by treaty.

\- - -

The proposed amendments would require federal courts to inform a non-citizen defendant in custody that the government will, upon request, notify a consular officer from his country of nationality of his arrest, or that it will make any other consular notification that may be required by certain bilateral agreements. We believe these amendments are a further step in fully meeting the United States' international obligation under Article 36 of the Vienna Convention. We think the amendments are an appropriate step, notwithstanding the Supreme Court's reservation of important questions surrounding the existence of any individual rights stemming from the Vienna Convention and any possible domestic remedies for a violation of the Convention. The amendments mandate a procedure that is uniformly supported without getting into unresolved questions of the extent of substantive rights or remedies. We believe it is important that should the Committee adopt these amendments, it make clear the questions that remain unanswered and that it is not addressing substantive rights. We further believe that the Committee should make clear that nothing in the proposed amendment is intended to modify in any respect extant Supreme Court case law construing Article 36 of the Vienna Convention. We suggest the following Committee Note to accompany the amendments:

ADVISORY COMMITTEE NOTES

. . .

201_ Amendments

These amendments are part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of The Vienna Convention on Consular Relations, and other bilateral treaties. Article 36 of the Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S.331 (2006). Nothing in these amendments shall be construed as creating any individual justiciable right, authorizing any delay in the investigation or

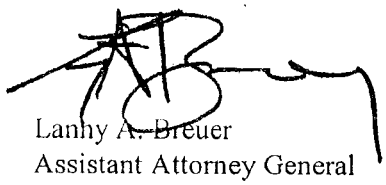
prosecution because of a request for consular assistance, or any basis for the suppression of evidence, dismissal of charges, reversal of judgment, or any other remedy.

- - -

We believe these amendments are responsible procedural means for further fulfilling the obligations of the United States under the Convention, without stepping into important questions of substantive rights that the Court has reserved for a later day.

We appreciate your assistance with this proposal and look forward to working with the Committee on this proposal.

Sincerely,



Lanny A. Breuer
Assistant Attorney General

cc: Professor Sara Sun Beale
Mr. John Rabiej

October 2005 Minutes Pages 17-18
Advisory Committee on Criminal Rules

* * * * *

VI. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES

A. Rules 4 and 5, Professor Malone's Proposal

Judge Bucklew invited the committee's consideration of the proposal by Professor Linda Malone, Marshall-Wythe Professor and Director of Human Rights and National Security Law at William & Mary School of Law that Rules 4 and 5 be amended to provide that foreign citizens be advised of their right to contact the consulate of their country whenever they are either served with an arrest warrant or arraigned, in accordance with Article 36 of the Vienna Convention. The committee had tabled the proposal at its April meeting, given that a case examining the enforceability of the Vienna Convention was then pending before the Supreme Court. The Court later dismissed certiorari as improvidently granted. *Medellin v. Dretke*, 125 S. Ct. 2088 (May 23, 2005). A habeas corpus petition was then filed in a Texas court. The case is still pending.

Mr. Elston stated that the Department of Justice already has internal policies in place advising U.S. attorney's offices of how to proceed and making notification mandatory for defendants from certain countries. Although there are occasional mistakes and omissions, the Department believes that there is no problem that requires a rule, at least not in the federal courts. Judge Bucklew noted that the Texas court had not yet ruled in the *Medellin* case. One member suggested that a rule might indeed be warranted, because the United States had undertaken this obligation in a treaty and yet he had never heard anyone, either in state or federal court, report that they had read a defendant "his Miranda rights and his right to contact the consulate." One member said that he did not believe that the exclusionary rule applies—or should apply—and he did not think that the committee should spend too much time considering this rule, because it would not likely be adopted.

Judge Bucklew said that her district sees a lot of foreign nationals who arrive by boat. She wondered whether agents of the Federal Bureau of Investigation are in fact notifying all of them of their rights under the Vienna Convention. The Justice Department representatives responded that, depending on the country of origin, notification is mandatory. Actually, though, detainees sometimes ask U.S. officials *not* to notify their country of origin. Occasionally, it is not known that a defendant is a foreign national. The Department expressed concern over a federal rule's potential legal ramifications. The Department does not consider such notification discoverable and does not turn it over to defense counsel. One member asked how it would be known whether

notification has taken place. The Department said that it kept a record and that, during counsel's interview through a translator, the client could confirm notification. The Department said that it already had every incentive to honor this right, because many Americans travel abroad and want this right honored by foreign governments.

Following discussion, the committee voted to table the proposal indefinitely. Judge Bucklew noted that the proposed amendments could be re-visited at a later date if new developments warranted.

* * * * *

TAB IVB

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 32 (technical and conforming amendment)

DATE: March 22, 2010

Our style consultant, Professor Kimble, recommends that we revise Rule 32(d)(2)(F) and (G) to remedy two technical problems created by our recent package of forfeiture related rules: (1) a lack of parallelism and (2) the addition of a provision before the catch-all, which must come at the end of the series.

I have consulted the Department of Justice, which confirms that the recommended change has no substantive effect.

The recommended change is attached. It can be accomplished by a technical and conforming amendment, which need not be published for public comment and thus can be completed relatively quickly.

Rule 32. Sentencing and Judgment.

* * * * *

(2) ***Additional Information.*** The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

~~(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a); and~~

~~(G) specify whether the government seeks forfeiture under Rule 32.2 and any other provision of law;~~

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

TAB IVC

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Amendment to 18 U.S.C. § 3060(b)(2)**

DATE: **March 22, 2010**

We have identified a statutory time period that should be amended to conform to the principles of the time computation project and Rule 5.1(c).

18 U.S.C. § 3060(b)(2) provides for a preliminary hearing within 20 days of the initial appearance if a defendant is released from custody for any condition not included in § 3060(b)(1). One of the general principles of the time computation project is to state all time periods of 30 days or less in multiples of 7 days to facilitate the computation of all subsequent deadlines. In the case of § 3060(b)(2), that would require a statutory amendment to increase the time for the preliminary hearing from 20 to 21 days. Amending § 3060(b)(2) would also bring it into conformity with Rule 5(c), which was amended effective December 1, 2009, to provide that a preliminary hearing must be held no later than 21 days after the initial appearance if the defendant is not in custody.

The process for the recommendation of a statutory change begins with the approval of the recommendation by the Criminal Rules Committee, and will also require the approval of the Judicial Conference.

TAB IVD

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Proposal to Amend Multiple Provisions of the Rules Governing Section 2254 Cases**

DATE: **March 21, 2010**

Writing pro se, Sharon Bush Ellison proposes amendments to Rules 1, 2, 3, 4, and 5 of the Rules Governing Section 2254 Cases. (Ms. Bush also proposes amendments to 28 U.S.C. §§ 2241 and 2255. Because these statutory proposals exceed the jurisdiction of the Advisory Committee, they are not discussed here.)

Although the exact nature of several of the proposed changes is not entirely clear, it appears that Ms. Ellison proposes to:

- amend Rule 1 to provide exclusive federal jurisdiction over questions concerning the legality of detention in state and federal mental hospitals and institutions because of mental incompetency;

- amend Rule 2(d) to add provisions concerning use of a prescribed form;

- amend Rules 3 and 4 to provide for "pre-review" by the clerk of court to identify petitions that will not be accepted for filing based upon the return address shown on the envelope; and

- amend Rule 5 to address mandatory answers by respondents where a claim of unlawful detention involving issues of incompetency.

Ms. Ellison's original handwritten letter as well as a typescript prepared by the Administrative Office of U.S. Courts follow at the end of this memorandum.

The matter is on the agenda for the April meeting in Chicago as a discussion item.

Sharon Bush Ellison
Pro'se
13010 Constitution Road, S.E.
Atlanta, Georgia 30316
DA124B

09-CR-C

October 11, 2009

Washington D.C.
Honorable Lee H. Rosenthal
Chairman, Committee on
Rules of Practice and
Procedure

Dear Mr. Chairman: This is to offer my suggestions and recommendation as a pro'se litigant affecting rules and practice or statutes that are in the interest of Habeas Corpus Proceedings.

I would greatly appreciate your assistance in any way to establish by law this formulation of proposed rules upon your most earliest of convenience.

The proposed bill would amend Rule 1 of the Section 2254 Federal Habeas Corpus Rules to give ease meaningfully to the federal courts in their duty of nonstop entertainment of applications for Writ of Habeas Corpus by persons in custody pursuant to a judgment of a state court on a federal level and would thus accomplish a goal the court has yet to reach.

A judicial study has shown that the office of the State Attorney General's increasing workload and limited sums of money allocated require such greater assistance from the worry imposed by its role as respondent's counsel in all habeas corpus actions filed by persons in custody pursuant to a judgment of a state court.

The bill would also amend Rule 1 to permit a petition for writ of habeas corpus by persons in custody pursuant to all other situations except a judgment of a state or federal court. The amendments proposed would permit an exclusive jurisdiction of the federal court over all questions which concern the legality of detention by state or federal mental institutions and/or hospitals because of mental incompetency except those involving a subject of state or federal criminal defense as these will be proportioned within the proper state or federal criminal procedure as already promulgated.

No defensive plea of not guilty by reason of temporary insanity, or guilty but mentally ill and retarded, will be derived from the definition of mental incompetency as will be provided by the new amended Rule 1. Moreover, this proposal would permit the instant transfer of a application that contained the name of a local, state or federal criminal institution as the

Petitioner's current place of detention to the appropriate state court.

Secondly, the proposed bill would amend Rule 2. of the Section 2254 Federal Habeas Corpus Rules to also give ease to the clerks of the federal court, in their duty of nonstop maintenance of Habeas Corpus Forms for their availability to petitioners.

This would increase the budget as allocated for the use of office expenses within the court. The bill would also amend Rule 2. to permit all petitions for a Writ of habeas corpus, submitted by persons in custody under a federal court judgment to substantially follow the form as appended to Section 2255 proceedings entitled "motion attacking sentence." The clerk need not make these forms available as they are appended to Title 28 U.S.C.A. and can be printed or handwritten therefrom. (However the providing of such motion may be within the discretion of clerk.)

Thirdly, the proposed bill would amend Rule 4. of the Section 2254 Federal Habeas Corpus Rules to relieve the clerk and the court's from their unnecessary duty to receive, forward and assign or examine unnecessary petitions for writ of habeas corpus. The amendment would permit a pre-review by the clerk. If it plainly appears from the addressed envelope of the petition that the petitioner is not entitled to habeas relief in that he pled guilty, the petition will not be accepted and the clerk will be relieved of a duty to notify the Petitioner.[1] (Please see footnote 1 pg. 6)

---

[1]I am expecting critics of the pre-review by clerk to argue that pre-review is not an effective method of eliminating the acceptance of unnecessary petitions because there is no way in which it can [be] plainly appear from the addressed envelope of the petition that the petitioner is not entitled to habeas relief in that he pled guilty without the opening of such contents by the clerk.

Thus in my preparation I am simultaneously studying a proposal for new legislation and or amendment of Title 12 of the Georgia Code which would require the defendant to provide information as to rather he pled guilty or not guilty during the trail of the conviction in question–to state officials during the intake orientation questioning process of the Georgia Department of Corrections. The information violates no privacy laws of the Defendant as most criminal trials are public record and the information is pertinent to eliminate excessive abuse of the Habeas Corpus by persons in custody pursuant to a state court judgment. The new legislation and or amendment of title 42 would further provide that the information as received by the State official be placed in a numerical category (i.e. - if [of] the defendant pled guilty the numerical category would be ["0"] :1"; not guilty would be "0" and any other pleas - i.e. - nolo contendere or mental health defenses would have a duty to assign such number to the GDC number of the defendant (i.e. if the GDC # assigned is 000000, then the numerical category would be placed at the end of such assigned # (i.e. 0000000 if not guilty and 0000001 if the offender pled guilty. Upon the assigning of the defendant's offender's/Georgia Department of Corrections identification card such numerical category shall be included in the visible numbers of the GDC # as shown on the face of the identification card. The clerk of state and or federal court will in their pre-review of the envelopes in which the Application is contained will readily be informed if such GDC #of the offender as listed in the return address is information of guilty or not guilty (i.e. if such GDC of any offender ends in "1" the clerks will automatically be informed that such addressee/defendant/offender has pled guilty and the envelope containing the application will not be accepted. It will plainly appear from such pleas that the defendant/offender is not unlawfully detained."

Fourthly, the proposed bill would amend Rule 5. of the section 2254 Federal Habeas Corpus Rules to permit the mandatory answer by respondent in matters where the question of unlawful detention involves a issue of incompetency.

There may be a need to expedite the review of this proposed amendment to Rule 1, 2, 4, and 5 of the Section 2254 Federal Habeas Corpus Rules, given the need to provide prompt relief for the office of the state attorney General, clerks and their appropriate courts in their role as respondent counsel and officer of the court and for more aggressive judicial legislative and executive control, scrutiny and supervision in the matter of habeas abuse.

I trust that you will consult with other members of the appropriate committee who may voice their concern about these proposed amendments.

I am simultaneously sending a copy of this letter and its attachments to the United States Department of Justice - Office of Legislative Affairs.

I hope that a prompt consideration of the proposals will be given by the committee.

In addition to amending Rule 1, 2, 4, and 5 of the Section 2254 Federal Habeas Corpus Rules, I am recommending (a) amendments to Rule 3. of the Section 2254 Federal Habeas Corpus Rules to relieve the clerk from a duty to mandatorily file all petitions for a writ of habeas corpus. The amendment will permit a pre-review in matters where the detention is based on a criminal conviction and a mandatory filing of other petitions where the detention is based on criminal conviction and a mandatory filing of the other petitions where the detention is based on questions of incompetency.

Lastly I am recommending amendments to 28 U.S.C. 2241 changing the manner in which the writ of habeas corpus will be granted also 28 U.S.C. 2254 changing the level of remedy in federal court available to persons in state custody.

Again I urge prompt consideration of these proposals by the appropriate committee.

Sincerely,
Sharon Bush Ellison Pro'se #613083

cc: United States Department of Justice
Office of Legislative Affairs w/ enclosures

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURT

Sharon Bush Ellison-Probe Source
V.
Proposed amendments to Section
2254 of the Federal Rules of
Habeas Corpus.

Re: Rules 1,2,3,4 and 5
Also 28 U.S.C. 2241;
28 U.S.C. 2254.

Proposal

I. The proposed amendment will change Rule 1(a) in the following respects:

In the first clause the amendment substituted the words "a state Court judgement who seeks a determination that the custody violates the constitution, laws, or treaties of the United States and" for the words "the detention of a state or federal mental hospital and/or institution because of alleged mental incompetency"; in the second clause of subdivision (a) the amendment substitute the words "a state court or federal court judgement who seeks a determination that future custody under a state court judgement would violate the constitution, laws, or treatise of the United States" for the words " and other situation of detention except under judgement of a state or federal court"; in the first clause of subdivision (b) the amendment delete the words "other cases. The district court may apply and or all of these rules to a habeas corpus petition not covered by Rule 1 (a)."

2. The proposed amendment will change Rule 2 (a) in the following respects:

In the subdivision (d) clause the amendment will insert in between the words "rule and the" the words "except in matters where the unit of habeas corpus is submitted by a person in custody pursuant to a federal court judgment where the petition must substantially follow the form appended to section 2255 entitled "motion to attack sentence form" prescribed by Title 28 of the United States Code."

3. The proposed amendment will change Rule 3 in the following respects:

In subdivision (b) the amendment will insert between the words "filing and the" the words "except in matters requiring pre-review"; [in the first line of Rule 4's paragraph]

4. The proposed amendment will change Rule 4 in the following respects:

In the caption of Rule 4. Insert in front of "preliminary" the words "pre-review"; in the first line of the Rule 4 paragraph, insert before "the" the words "after the petition has passed pre-review"; the amendment will change line 11 of the Rule 4. Paragraph by substituting the words "every case" for the words "cases which pass preliminary review."

5. The proposed amendment will change Rule 5 in the following respect:

The amendment will insert between the words "required" and "the" of subdivision (a) the words "except in matters where the question of detention involves mental incompetency."

The subdivision (b) of the 2nd line, the amendment that will insert in front of the word "must" the word "solely."

6. The proposed amendment will change 28 U.S.C. 2241 in the following respects:

In subdivision (b) the amendment will insert in front of "habeas corpus" the words "which shows on its face a local, state or federal criminal institution as the current place of detention for the petitioner"; also substitute the words "distinct court" for the words "state court".

In subdivision (c) the amendment will insert behind "prisoner" the words "state" and in the first clause the amendment substitutes the words "he is in custody under or by color of authority of the U.S. or is committed for trial before some court thereof; or "for the words" firstly, the application is filed in the state court."

Clauses (2), (3), (4) and (5) will all be deleted from 28 U.S.C. 2241 Clause (d) subdivision will be deleted in its entirety and a new subdivision (d) will be inserted.

Under subdivision (d) clause (1) will be inserted In the [first] clause of subdivision (d) the amendment will insert the word "The writ of habeas corpus shall not extend to a federal prisoner unless– '; under subdivision (d) clause (1) the amendment will insert after the number "(1)" the words "soly, the application is submitted in the form of a motion attacking sentence, as provided in 28 U.S.C. Appendix of Forms."

In subdivision (e) (i) and clause (2) of subdivision (e), the words will remain the same until further notice of necessary amendment.

The proposed amendment will change 28 U.S.C. 2254 (a) in the follwoing respect: [In 5]

In subdivision (a) the amendment will insert in front of "on" the words "appellate jurisdiction and the ground that he pled not guilty and is." in subdivision (b) (1) the amendment will substitute the word "granted" for the word "accepted for filing"; and inserting in front of"–" the words "he has pled not guilty in the trial courts."

The proposed amendment will change 28 U.S.C. 2254 in the following respects:
In the subdivision (b) (1) clause (B) (i) (ii) will all be deleted in its entirety.

(Legislation concerning state corrective process also processes which are ineffective to protect the rights of the applicant will be proposed as closely her in the near future.

In the subdivision (b) clause (2) and (3) will be deleted in their entirety while in subdivision (c) the amendment will insert in the front of "available" the word "appellate",; in subdivision (d) the amendment will delete the word "not " and insert after the word "proceeding"

the words "and brought up for appellate review "and insert after the word "proceeding" the words "and brought up for appellate review" and delete the remaining words "and brought up for appellate review" and delete the remainging words "unless the adjunction of the claim–"; also in [subc] clause 1 and 2 of subdivision (d) the amendment will delete all words.

In subdivision (e) (I) the amendment will substitute the words "in custody pursuant to the judgement of a state court " for the words" who has pled not guilty"

In clause (2) (A) (I) (ii) (B) (f) (g) (h) (I) the words will all remain the same until further notice of necessary amendment.

Sharon Bush Ellison
Pro'se
1301 Constitution Road, S.E.,
Atlanta Georgia 30316
DA124B

09-CR-C

October 11, 2009

Washington D.C.
Honorable Lee H. Rosenthal
Chairman, Committee on
Rules of Practice and
Procedure.

Dear Mr Chairman: This is to offer my suggestions and recommendation as a pro'se litigant affecting rules and Practice or Statutes that are in the interest of Habeas Corpus Proceedings.

I would greatly appreciate your assistance in any way to establish by law this formulation of proposed rules upon your most earliest of convenience.

The proposed bill would amend Rule 1 of the Section 2254 Federal Habeas Corpus Rules to give ease meaningfully to the federal courts in their duty of nonstop entertainment of applications for Writ of Habeas Corpus by persons in custody pursuant to a judgment of a state court on a federal level and would thus accomplish a goal the court has yet to reach.

A judicial Study has shown that the office of the State Attorney General's increasing workload and limited sums of money allocated require such greater assistance from the worry imposed by its role as respondent's counsel in all habeas corpus actions filed by Persons in custody pursuant to a judgment of a state court.

The bill would also amend Rule 1 to permit a petition for writ of habeas corpus by persons in custody pursuant to all other situations except a judgment of a State or federal court. The amendments proposed would permit an exclusive jurisdiction of the federal Court over all questions which concern the legality of detention by State or federal mental institutions and/or hospitals because of mental incompetency except those involving a subject of state or federal criminal defense as these will be proportioned within the proper State or federal criminal procedure as already promulgated.

No defensive plea of not guilty by reason of temporary insanity, or guilty but Mentally ill and retarded, will be derived from the definition of mental incompetency as will be provided by the new amended Rule 1. Moreover, this proposal would permit the instant transfer of a application that contained the name of a local, State or federal criminal institution as the Petitioner's current place of detention to the appropriate state court.

Secondly, The proposed bill would amend Rule 2. of the Section 2254 Federal Habeas Corpus Rules to also give ease to the clerks of the federal Court, in their duty of nonstop maintenance of Habeas Corpus Forms for their availability to petitioners.

This would increase the budget as allocated for the use of office expenses within the Court. The bill would also amend Rule 2 to permit all Petitions for a

Writ of habeas corpus, submitted by persons in custody under a federal court judgment to substantially follow the form as appended to Section 2255 proceedings entitled "motion attacking sentence". The clerk need not make these forms available as they are appended to Title 28 U.S.C.A. and can be printed or hand written therefrom. (However the providing of such motion may be within the discretion of clerk.)

Thirdly, the proposed bill would amend Rule 4. of the section 2254 Federal Habeas Corpus Rules to relieve the clerk and Court's from their unnecessary duty to receive, forward and assign or examine unnecessary petitions for writ of habeas corpus. The amendment would permit a pre-review by the clerk. If it plainly appears from the addressed envelope of the petition that the petitioner is not entitled to habeas relief in that he pled guilty, the petition will not be accepted and the Clerk will be relieved of a duty to notify the Petitioner.[1] (please see footnote 1) Pg. 6)

Fourthly, the proposed bill would amend Rule 5. of the section 2254 Federal Habeas Corpus Rules to permit mandatory answer by respondent in matters where the question of unlawful detention involves a issue of incompetency.

There may be a need to expedite the review of this proposed amendment to Rule 1, 2, 4, and 5 of the Section 2254 Federal Habeas Corpus Rules, given the need to provide prompt relief for the office of the State attorney General, clerks and their appropriate Courts in their role as respondent counsel and officer of the court and for more aggressive, judicial legislative and executive control, scrutiny and supervision in the matter of habeas abuse.

I trust that you will consult with other members of the appropriate committee who may voice their concern about these proposed amendments.

I am simultaneously sending a copy of this letter and its attachments to the United States Department of Justice - Office of legislative affairs.

I hope that a prompt consideration of the proposals will be given by the Comittee.

In addition to amending Rule 1, 2, 4, and 5 of the Section 2254 Federal Habeas Corpus Rules, I am recommending (a) amendments to Rule 3. of the Section 2254 Federal Habeas Corpus Rules to relieve the Clerk from a duty to mandatorily file all petitions for a writ of habeas corpus. The amendment will permit a pre-review in matters where the detention is based on criminal conviction and a mandatory filing of other petitions where the detention is based on questions of incompetency.

Lastly I am recommending amendments to 28 U.S.C 2241 changing the manner in which the writ of habeas corpus will be granted also 28 U.S.C 2254 changing the level of remedy in federal court available to persons in state custody.

Again I urge prompt consideration of these proposals by the appropriate committees.

Sincerely,

Sharon Bush Ellison Pro se # 613885

cc: United States Department of Justice
Office of Legislative Affairs /w Enclosures.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURT

Sharon Bush Ellison - Probe Source
v.
Proposed amendments to Section 2254 of the Federal Rules of Habeas Corpus.

Re: Rules 1, 2, 3, 4 and 5
also 28 U.S.C 2241;
28 U.S.C 2254.

PROPOSAL

1. The proposed amendment will change Rule 1(a) in the following respects: In the first clause the amendment substituted the words "a State Court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States and" for the words "the detention of a state or federal mental hospital and/or institution because of alleged mental incompetency"; in the second clause of subdivision (a) the amendment substitute the words "a State Court or federal Court judgment who seeks a determination that future custody under a state court judgment would violate the Constitution, laws or treatise of the United States" for the words "any other situation of detention except under judgment of a State or federal court"; in the first clause of subdivision (b) the amendment delete the words "other cases. The distnct court may apply any or all of these rules to a habeas corpus petition not covered by Rule 1(a)."

2. The proposed amendment will change Rule 2(a) in the following respects: In the subdivision (d) clause the amendment will insert in between the words "rule and The" the words "except in matters where the writ of habeas corpus is submitted by a person in custody pursuant to a federal Court judgment where the petition must substantially follow the form appended to section 2255 entitled "Motion to Attack Sentence form" prescribed by Title 28 of the United States Code."

3. The proposed amendment will change Rule 3 in the following respects:
In Subdivision (b) the amendment will insert between the words "filing and the" the words "except in matters requiring pre-review"; [in the first line of Rule 4's paragraph]

4. The proposed amendment will change Rule 4 in the following respects:
In the caption of Rule 4, insert in front of "preliminary" the words "pre-review"; in the first line of the Rule 4 paragraph, insert before "the" the words "after the Petition has passed pre-review"; the amendment will change line 11 of the Rule 4. paragraph by substituting the words "every case" for the words "cases which pass Preliminary review".

5. The proposed amendment will change Rule 5 in the following respect:
The amendment will insert between the words "required" and "the" of Subdivision (a) the words "except in matters where the question of detention involves mental incompetency".
In Subdivision (b) of the 2nd line, the amendment will insert in front of the word "must" the word "solely".

6. The proposed amendment will change 28 U.S.C 2241 in the following respects:

In Subdivision (b) the amendment will insert in front of "habeas Corpus" the words "which shows on its face a local, state or federal criminal institution as the current Place of detention for the Petitioner"; also substitute the words "district court" for the words "State Court".

In Subdivision (c) the amendment will insert behind "prisoner" the words "State" and in the first clause the amendment Substitutes the words "He is in custody under or by color of the authority of the U.S or is committed for trial before some Court thereof; or" for the words "firstly, the application is filed in the State Court".

Clauses (2), (3), (4) and (5) will all be deleted from 28 U.S.C 2241
Clause (d) Subdivision will be deleted in its entirety and a new Subdivision (d) will be inserted.

Under subdivision (d) clause (1) will be inserted. In the [first] clause of subdivision (d) the amendment will insert the word "The writ of habeas corpus shall not extend to a Federal prisoner unless —"; under subdivision (d) clause (1) the amendment will insert after the number "(1)" the words "Solely, the application is submitted in the form of a Motion attacking Sentence, as provided in 28 U.S.C Appendix of Forms."

In subdivision (e) (1) and clause (2) of subdivision (e), the words will remain the same until further notice of necessary amendment.

The proposed amendment will change 28 U.S.C 2254 (a) in the following respect: [In s]

In subdivision (a) the amendmant will insert in front of "on" the words "appellate jurisdiction and the ground that he pled not guilty and is"; in subdivision (b) (1) the amendment will substitute the word "granted" for the word "accepted for filing"; and inserting in front of "—" the words "he has pled not guilty in the trial courts".

The proposed amendment will change 28 U.S.C 2254 in the following respects:

In the subdivison (b)(1) clause (B) (i)(ii) will all be deleted in its entirety.

(legislation concerning State corrective process also processes which are ineffective to protect the rights of the applicant will be proposed as closely herein the near future.)

In the subdivison (b) clause (2) and (3) will be deleted in their entirety while in subdivision (c) the amendment will insert in the front of "available" the word "appellate". ; in subdivision (d) the Amendment will delete the word "not" and insert after the word "proceeding" the words "and brought up for appellate review" and delete the remaining words "unless the adjudication of the claim—"; Also in [subc] clause 1 and 2 of subdivision (d) the amendment will delete all words.

In subdivision (e)(1) the amendment will substitute the words "in Custody pursuant to the judgment of a state court" for the words "who has pled not guilty"

In clause (2) (A) (i)(ii) (B) (f) (g) (h) (i) the words will all remain the same until further notice of necessary amendment.

Footnote 1. I am expecting critics of the pre-review by clerk to argue that pre-review is not an effective method of eliminating the acceptance of unnecessary petitions because there is no way in which it can [be] plainly appear from the addressed envelope of the petition that the petitioner is not entitled to habeas relief in that he pled guilty without the opening of such contents by the clerk.

"Thus in my preparation I am simultaneously studying a proposal for new legislation and or amendment of Title 42 of the Georgia Code which would require the defendant to provide information as to rather he pled guilty or not guilty during the trial of the conviction in question— to state officials during the intake orientation questioning process of the Georgia Department of Corrections. The information violates no privacy laws of the Defendant as most criminal trials are public record. And the information is pertinent to eliminate excessive abuse of the Habeas Corpus by persons in custody pursuant to a State court judgment. The new legislation and or amendment of Title 42 would further provide that the information as received by the State official be placed in a numerical category. (i.e - if [of] the defendant pled guilty the numerical category would be ["0",] "1"; not guilty would be "0" and any other pleas - i.e - nolo contendere or mental health defenses would fall within the numerical category of "1." The State official would then have a duty to assign such number to the GDC number of the defendant (i.e - if the GDC # assigned is 000000, then the numerical category would be placed at the end of such assigned # (i.e 0000000 if not guilty and 0000001 if the offender pled guilty. Upon the assigning of the defendant's Offender's/ Georgia Department of Corrections identification card such numerical catagory shall be included in the visible numbers of the GDC # as shown on the face of the identification card. The Clerk of State and or federal court will in their pre-review of the envelopes in which the Application is contained will readily be informed if such GDC # of the offender as listed in the return address is information of guilty or not guilty (i.e if any such GDC of any offender ends in "1" the clerks will automatically be informed That such addressee / defendant / offender has pled Guilty and the envelope containing the application will not be accepted. It will plainly appear from such plea that the defendant / offender is not unlawfully detained."

Sincerely, Shaun Bush Ellison
6130833 Probe

TAB VA-D

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Rule 45(c) and additional time for certain forms of service of process**

DATE: **March 15, 2010**

Under Civil Rule 5(b) the time in which a party must act after service of process varies depending upon how the service was made. Three days are added if service is made under Rule 5(b)(2)(C), (D), (E), or (F), which include service by mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, or delivering by any other means that the person consented to in writing. Three days are not added if service is made under Rule 5(b)(2)(A) or (B) by handing the paper to the person, or by leaving it at the person's office or "dwelling or usual place of abode." Criminal Rule 45(c) expressly follows Civil Rule 5(b)(2) in this respect.[1]

As described in the attached excerpts from the Civil Rules Committee's October Agenda Book and the draft Minutes of their October meeting, there was some interest on that Committee in reexamining the question whether this disparity is still warranted. The Committee felt, however, that if a change were made the approach in the other rules should be consistent. Accordingly, Judge Kravitz and Professor Cooper sought input from the Criminal Rules Advisory Committee.

The Civil Rules Committee decided, however, that it would be best to allow the bar to digest the new time-computation rules before making another change concerning timing. Accordingly, it is not on the agenda of the Civil Rules Advisory Committee's April 2010 meeting.

---

[1] Rule 45(c) provides:

> **(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 Procedure 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under subdivision (a).

RULE 6(d): "3 DAYS ARE ADDED"

Some questions turn on high theory. Some do not. Experience is likely to prove the best guide in returning to the familiar questions posed by Civil Rule 6(d).

Rule 6(d) now reads:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

Three days are not added if service is made under Rule 5(b)(2)(A) or (B) by handing the paper to the person, or by leaving it at the person's office or "dwelling or usual place of abode." Three days are added if service is made under Rule 5(b)(2)(C), (D), (E), or (F) — mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, or delivering by any other means that the person consented to in writing.

Criminal Rule 45(c) is an almost-verbatim duplicate of Civil Rule 6(d). Appellate Rule 26(c) is similar, but adds a wrinkle. Bankruptcy Rule 9006(f) is a variation. The parallels are no accident — these rules were revised in 2005 to achieve rough uniformity in time calculations. So now, any actual recommendations for change must be coordinated with the other advisory committees, perhaps directly and perhaps through a joint subcommittee or similar device.

The wisdom of the "3-days-are-added" provision has been explored repeatedly. In 1994 it was decided, in response to a question raised at a Standing Committee meeting, that there was no reason to extend the added time to 5 days.

The question next arose in conjunction with the 2001 amendments that added service by electronic means. Discussion focused on the question whether the nearly instantaneous transmission of most e-messages obviates the need for additional time. The decision to treat electronic service the same as postal mail rested in part on doubt whether e-mail is always transmitted immediately. The doubts were most important with respect to attachments — several participants commented that it may take two or three days to establish a mutually compatible system of transmitting attachments. Doubts of this sort are subject to reconsideration as technology marches on. Additional questions were raised about strategic calculations, resting on the perception that some lawyers will select whatever method of service is calculated to minimize the actual time available to respond. Again, questions of this sort are subject to reconsideration in light of changing circumstances, particularly the pressures that may make e-service virtually compulsory in many courts.

The Style Project considered whether this subject should be advanced for more-than-style revision, but nothing has happened yet.

The most recent occasion for discussion arose with the Time Computation Project. One of the potential virtues of the 7, 14, 21, and occasional 28-day periods widely adopted in the Rules is closing the count on the same day of the week as opened the count. Seven days from Monday is Monday, and so on. The added 3 days messes up this calculation, and, when the 3d day lands on a weekend or legal holiday, requires an extension to the end of the weekend-holiday period. Some of the public comments pointed out that Rule 6(d) defeats the desired simplicity.

The questions do not go away.

The case for adding 3 days when service is made by postal mail seems strong, unless we believe that most of the time periods provided by the rules are longer than needed. Mail often is

delivered on the next day, but that ambitious goal is not always met. The problem of delivery time could be addressed by dropping the 3-day extension and also dropping the provision that service by mail is complete on mailing. But there are good reasons to avoid the likely alternative of making service complete on delivery.

Adding 3 days when service is made on the court clerk may be no more than a token gesture — if the person has no known address, an extra 3 days may not mean much in a busy clerk's office. Perhaps the best case for adding this time is the obvious analogy — if extra days are added for mail, surely they should be added here as well.

Service by e-mail continues to be the subject of most discussion. Practical judgment based on experience is called for. Experience, moreover, may indicate the need for considering three separate questions: How often is service still accomplished outside electronic communication? When service is electronic, how often is it accomplished through the court's facilities? How often is it accomplished by counsel to counsel?

Reliance on electronic service is probably pervasive in most courts. Some courts encourage it, and at least a few virtually mandate it. The most notable exceptions are for pro se litigants. The more nearly universal electronic service is, whether as a matter of preference or compulsion, the less reason there is to worry about the influence of denying 3 added days on strategic choices about the mode of service.

Is service through the court's electronic facilities so reliable and instantaneous that there is no plausible argument for adding 3 days to protect against delayed or garbled transmission?

Similarly, is e-mail addressed by counsel to counsel so regularly received soon after transmission, and received in such shape that it can be promptly opened, and tended to with the alacrity likely to be stimulated by personal delivery, that the 3 added days are no more than a windfall extension of time periods that generally do not deserve extension? Will strategic calculation be advanced, impeded, or merely different if 3 days are added for service by mail or leaving with the court clerk, but not otherwise?

One possible outcome of these questions would be to distinguish between e-service through the court's facilities and counsel-to-counsel service. Drafting would likely lead to some change in Rule 5(b)(3), which now describes service through the court's facilities as service "under 5(b)(2)(E)." That will surely provide an occasion for reopening the question whether Rule 5(b)(2)(E) should continue to require the party's consent to e-service, a question that likely will soon be ripe in any event.

Delivery by any other means consented to in writing does not stir obvious passions. A party concerned about adding 3 days under the present rule need not ask others to consent. A party asked to consent under an amended rule that does not add 3 days can refuse consent. But the analogy to mail may offer some support for retaining the 3-day extension, particularly under the Appellate Rule 25(c)(1)(C) provision for service "by third-party commercial carrier for delivery within 3 calendar days." Consent is not required under the Appellate Rule, and the speediest — and most expensive — mode of delivery also is not required.

One final observation. The notes following Rule 6 show that it has been amended in 1948, 1963, 1966, 1968, 1971, 1983, 1985, 1987, 1999, 2001, 2005, and 2007. The Time Computation Project amendments are almost upon us. The steady progression of changes may reflect a need for constant adjustments, large or small, to reflect changed circumstances or better understanding. The persistent fear of missed deadlines may stir lawyers' concerns and rulemaking sensitivity to those concerns. Whenever the Committee acts next, it will be optimistic to hope for long-term repose.

Rule 6(d) Three Days are Added

Judge Kravitz introduced the Rule 6(d) topic. Rule 6(d) adds three days to any time specified to act after service when service is made by any means other than in-hand delivery or leaving the paper at a person's home or office. These other means include mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, and delivery by any other means the person consented to in writing. In the Time Computation Project the Subcommittee and several advisory committees decided to defer the question whether the three added days are appropriate in all the circumstances now provided. It is useful to reconsider the timing question now.

The most questionable instances are those where three days are added after e-service and after service by agreed means. When e-service was first authorized, the three days seemed useful. The CM/ECF system was still in its infancy — it was not clear whether it would work well, nor whether lawyers would seize the opportunity to effect service through the court's system. Lawyers said that it might take as long as three days to accomplish effective receipt of e-messages, particularly with attachments. The attachments to Rule 56 motions may run hundreds of pages, and there were problems with system compatibilities. Service by private carrier is not instantaneous, and only the most expensive means are likely to accomplish next-day delivery.

Despite these questions, lawyers will surely see any reduction of the categories that allow three added days as taking away something they count on. This seems particularly true for e-service, which ordinarily arrives the same day as transmitted. Moreover, the Time Computation Project amendments take effect this December 1. It might we wise to see how they work before undertaking further adjustments. The three-day addition "is a small thing; why not let the bar absorb the new rules" before looking toward further changes?

Laura Briggs has provided great help in explaining how e-service through the court's facilities works. She found that in her court approximately 5,000 notices of electronic filing are received each day. Of them, 20 to 30 are initially undeliverable. The clerks immediately investigate the undeliverable notices and are able to accomplish effective transmission of all but 2 or 3 within the next day. When delivery cannot be accomplished, notice is mailed — triggering the three extra days for mail delivery. In exploring the question with a bar group, however, she found great resistance to deletion of the three added days for e-service.

On an anecdotal level, lawyers still tell stories of as much as three days from docketing in the court to receipt of e-notice, and rather often.

On a more general level, it was observed that this question affects Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(c). Criminal Rule 45(c) is virtually identical to Rule 6(d), but the others introduce variations. Any project to revise Rule 6(d) must be coordinated with the other advisory committees, perhaps directly or perhaps through a joint subcommittee.

The three added days for service by mail seems to make sense; if it were treated the same as direct delivery or e-service, lawyers would do everything possible to serve by mail so as to reduce the effective time available to respond. And pro se litigants, particularly prisoners, are likely to use mail service. When service is made on the court clerk because the person to be served has no known address, the three added days may be more symbolic than useful, but do no apparent harm. Service by other means consented to may not be a real problem, since consent might be conditioned on the most expeditious mode of delivery, and can be withheld in any event.

The question of e-service ties to the question of e-filing. Under Rule 5(d)(3), a local rule may require e-filing, although reasonable exceptions must be allowed. Many courts effectively require e-filing by lawyers. Rule 5(b)(2)(E) requires consent of the person served for e-service, and Rule 5(b)(3) allows e-service through the court's facilities if authorized by local rule. It may prove desirable to reconsider this package in tandem with the three-added day provision. Registering for

e-filing is obviously coupled with consent to receive e-notice of filing from the court. So in the Southern District of Indiana, the local rules require all cases to be e-filed, subject to exceptions. Signing in for e-filing includes consent to e-notice. That might be made mandatory for all e-filing cases, carrying forward the requirement that reasonable exceptions be allowed.

The lawyer members were asked whether the Committee should move promptly to reconsider the three-added days. One said: "Enough already. This is all some of us have left. It is too soon after the Time Computation Project to make further changes." Another agreed, and added that e-service "does not always work that smoothly." A third added that some of the "darndest things" wind up in his junk-mail box; there is a real risk that spam filters will divert an e-notice away from the in-box.

Emery Lee added that the recent discovery survey used e-mail transmission, and that a non-negligible number were bounced back and did not work. And sometimes the system has to try several times to get a good address to go through.

Laura Briggs added to the information about the success of her office in ensuring near-perfect e-transmission the results of a quick look at practices in other districts. Even a quick look showed at least two districts that explicitly refuse to monitor bouncebacks. That is cause for worry about eliminating the three added days.

Judges Kravitz and Rosenthal suggested that the other advisory committees are not likely to be disappointed if this Committee decides to postpone any reconsideration of the three added days. The Bankruptcy Rules Committee might have some regret — there is much greater pressure for fast action in many bankruptcy proceedings than in most civil proceedings. The Bankruptcy Rules Committee is working on the Part 8 appeal rules, seeking a model that approaches closer to the Appellate Rules. Their many conferences lead to questions that come back to e-filing: why is it necessary to adopt rules on the color of brief covers, when all is done electronically anyway? There is considerable pressure to make e-filing the norm. This affects service, filing, and more. E-records are upon us.

Two lawyer members observed that in the e-world they still print out copies, but limit the number and share the paper copies as different lawyers need them.

Judge Rosenthal suggested that it may be appropriate to undertake a project akin to the Style Project as a long-term reconsideration of every rule to remove vestiges of the bygone paper world. But the time has not yet come. E-filing must be allowed to become firmly settled first.

It was agreed that the question should remain on the agenda, and when it is taken up should be approached in a way that avoids any unnecessary differences among the different sets of rules.

TAB VI

Calendar for September–November 2010 (United States)

September

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

October

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

November

Su	Mo	Tu	We	Th	Fr	Sa
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

Holidays and Observances:

Sep 6 Labor Day	Nov 11 Veterans Day
Oct 11 Columbus Day (Most regions)	Nov 25 Thanksgiving Day

Calendar generated on www.timeanddate.com/calendar