ADVISORY COMMITTEE
ON CRIMINAL RULES

San Francisco, CA
April 23-24, 2012

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APRIL 23-24, 2012
SAN FRANCISCO, CALIFORNIA

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2. Rule 58. *Initial Appearance*. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

3. Rule 15. *Depositions*. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

4. Rule 37. *Indicative Rulings*. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant relief because appeal has been docketed.

5. Rule 16. Proposed technical and conforming amendment clarifying protection of government work product.

B. Proposed Amendments Approved By the Standing Committee for Publication in August 2011 (Memos and attachments)

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

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ADVISORY COMMITTEE ON CRIMINAL RULES

Chair, Advisory Committee on Criminal Rules	**Honorable Reena Raggi** United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818
Reporter, Advisory Committee on Criminal Rules	**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, Advisory Committee on Criminal Rules	**Honorable Lanny A. Breuer** Assistant Attorney General Criminal Division (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. - Room 107 Washington, DC 20530-0001 **Rachel Brill, Esq.** 263 Domenech Avenue San Juan, PR 00918 **Carol A. Brook, Esq.** Executive Director Federal Defender Program for the Northern District of Illinois 55 East Monroe Street, Suite 2800 Chicago, IL 60603 **Leo P. Cunningham, Esq.** Wilson Sonsini Goodrich & Rosati, P.C. 650 Page Mill Road Palo Alto, CA 94304-1050 **Honorable Morrison C. England, Jr.** United States District Court 501 I Street – Suite 14-230 Sacramento, CA 95814-7300

Members, Advisory Committee on Criminal Rules *(cont'd.)*	**Kathleen Felton, Esq.** Deputy Chief, Appellate Section – Criminal Division United States Department of Justice 950 Pennsylvania Avenue, N.W. - Room 1264 Washington, DC 20530-0001 **Honorable David E. Gilbertson** Chief Justice Supreme Court of South Dakota 500 E. Capitol Pierre, SD 57501 **Honorable John F. Keenan** United States District Court 1930 Daniel Patrick Moynihan U.S. 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** University of Illinois College of Law 504 E. Pennsylvania Avenue Champaign, IL 61820 **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 **Jonathan Wroblewski, Esq.** Director, Office of Policy & Legislation Criminal Division United States Department of Justice 950 Pennsylvania Avenue, N.W. - Room 7728 Washington, DC 20530-0001

Members, Advisory Committee on Criminal Rules *(cont'd.)*	**Honorable James B. Zagel** United States District Court 2588 Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604
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Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date		End Date
Reena Raggi Chair	C	Second Circuit	2011		2014
Lanny A. Breuer*	DOJ	Washington, DC	----		Open
Rachel Brill	ESQ	Puerto Rico	2006		2012
Carol A. Brook	FPD	Illinois (Northern)	2011		2014
Leo P. Cunningham	ESQ	California	2006		2012
Morrison C. England, Jr.	D	California (Eastern)	2008		2014
David E. Gilbertson	CJUST	South Dakota	2010		2013
John F. Keenan	D	New York (Southern)	2007		2013
David M. Lawson	D	Michigan (Eastern)	2009		2012
Andrew Leipold	ACAD	Illinois	2007		2013
Donald W. Molloy	D	Montana	2007		2013
Timothy R. Rice	M	Pennsylvania (Eastern)	2009		2012
James B. Zagel	D	Illinois (Northern)	2007		2013
Sara Sun Beale Reporter	ACAD	North Carolina	2005		Open
Principal Staff: Jonathan C. Rose 202-502-1820					
* Ex-officio					

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Dean C. Colson**	***(Standing)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1A

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 31, 2011, St. Louis, Missouri

I. ATTENDANCE AND PRELIMINARY MATTERS

The Criminal Rules Advisory Committee ("Committee") met in St. Louis, Missouri on October 31, 2011. The following persons were in attendance:

Judge Reena Raggi, Chair
Judge Richard C. Tallman, Outgoing Chair
Rachel Brill, Esq.
Carol A. Brook, Esq.
Leo P. Cunningham, Esq.
Kathleen Felton, Esq.
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Mark R. Kravitz, Standing Committee Incoming Chair (by telephone)
Judge Marilyn L. Huff, Standing Committee Liaison

The following persons were absent:

Judge Morrison C. England, Jr.
Judge Timothy R. Rice
Assistant Attorney General Lanny A. Breuer

The following persons were present to support the Committee:

Andrea L. Kuperman, Esq. (by telephone)
Laural L. Hooper, Esq.
Peter G. McCabe, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

The following invited observer was present:

Peter Goldberger, Esq.
(on behalf of the National Association of Criminal Defense Lawyers).

II. REVIEW AND APPROVAL OF MINUTES OF APRIL 2011 MEETING

A motion to approve the minutes of the April 2011 Committee meeting in Portland, Oregon, having been moved and seconded,

The Committee unanimously approved the April 2011 meeting minutes by voice vote.

III. CHAIR'S REMARKS

Judge Raggi introduced (1) new member Carol Brook, the Executive Director of the Federal Defender Program for the Northern District of Illinois; (2) new Standing Committee liaison, Judge Marilyn Huff, of the Southern District of California; (3) new clerk representative, James Hatten, Clerk of Court for the Northern District of Georgia; and (4) invited observer Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers. Judge Raggi noted that, at the suggestion of Standing Committee Chair, Judge Lee Rosenthal, and following the practice of the Civil Rules Committee, the Committee had extended invitations to various criminal defense organizations to send observers to Committee meetings.

On behalf of the entire Committee, Judge Raggi thanked Judge Richard C. Tallman, the outgoing Chair, for his outstanding leadership over four years that had brought many challenging issues before the Committee requiring a number of amendments to the Criminal Rules.

Judge Raggi noted that Committee member, Judge Keenan, had recently been honored by the New York County Lawyers Association with the Edward Weinfeld Award for his outstanding service on the bench.

Judge Raggi reported on cost containment efforts by the Judicial Conference of the United States, noting that few affected the Committee, whose mandate did not involve making decisions about the expenditure of public monies.

Judge Raggi also reported on her communications with members of the Federal Judicial Center's Benchbook Committee, and particularly with Benchbook Committee Chair Judge Irma Gonzalez, and member, Judge Paul Friedman, regarding the Criminal Rules Committee's referral to the Benchbook Committee of the question of "best practices" regarding the government's *Brady/Giglio* disclosure obligations. Judge Raggi advised that the Benchbook Committee has invited her continued participation as it pursues the matter.

IV. CRIMINAL RULES ACTIONS

A. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Judge Raggi reported that the following proposed amendments, approved by the Supreme Court and transmitted to Congress, will take effect on December 1, 2011, unless Congress acts to the contrary:

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 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.

6. 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.

7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.

8. 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.

9. 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, and proposed technical and conforming amendment deleting obsolescent references to calendar days.

10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.

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

B. Proposed Amendments Approved by the Judicial Conference

Judge Raggi reported that the following amendments were approved by the Judicial Conference at its September 2011 meeting, and will be transmitted to the Supreme Court for review:

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

3. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

4. Rule 37, Indicative Rulings: Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant belief because appeal has been docketed.

With respect to Rule 15, Professor Beale reminded the Committee that, to the extent the Supreme Court's return of an earlier version of the amended rule without comment signaled possible Sixth Amendment concerns about the admissibility of evidence obtained under the rule, the amendment had been revised so that Subsection (f) now stated explicitly that an order authorizing a deposition to be taken under the rule does not determine its admissibility.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2011

Judge Raggi reported that the following proposed amendments had been approved by the Standing Committee for publication:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

3. Rule 34, Arresting Judgment: Conforming Changes To Implement Amendment to Rule 12.

With respect to Rule 12(b), Judge Raggi advised that questions had been raised in the Standing Committee regarding the rule's treatment of double jeopardy claims and its possible diminution of district court discretion to entertain late motions before trial. The Standing Committee approved publication, concluding that it would be useful to learn whether such concerns were expressed in public comments.

V. NEW PROPOSALS FOR DISCUSSION

A. Rule 16(a)(2), Pretrial Disclosure of Government Work Product

Judge Raggi reported that Standing Committee Chair, Judge Lee Rosenthal, had called attention to *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), which identified "scrivener's error" in Rule 16(a)(2), in that restyled language could be construed to eliminate protection from discovery expressly provided to government work product under the predecessor rule. A report prepared by Professors Beale and King agreed with *Rudolph*'s assessment and noted that a total of four courts had now concluded that the revised rule contained a scrivener's error. The reporters provided the Committee with language for a possible amendment.

Judge Raggi invited discussion, noting that the matter did not require subcommittee consideration but could be addressed by the Committee as a whole. There was general agreement with one member's observation that the error "is an embarrassment to the Committee" and warranted prompt correction. A motion being made and seconded to correct the scrivener's error by amending the rule as recommended by the reporters,

The Committee unanimously voted to amend Rule 16(a)(2) by adopting the language suggested by the reporters and to transmit the matter to the Standing Committee.

Judge Raggi asked Professors Beale and King to draft a Committee Note to accompany the rule amendment, which Committee members would review by email. Mr. McCabe observed that because the proposed amendment only corrected scrivener's error, it could probably be reviewed under the Standing Committee's expedited procedures, which permit technical and conforming changes to rules to be adopted without a hearing period and public comment.

B. Rule 17, Seal of Court on Subpoenas

The Administrative Office's "Forms Working Group" asked the Committee to consider amending Rule 17(a) to eliminate the requirement that criminal subpoenas bear the seal of the issuing court. The Working Group noted the elimination of a parallel sealing requirement in the civil rules.

Judge Raggi and Judge Kravitz observed that there may be reasons for treating civil and criminal subpoenas differently to ensure compliance with the latter.

Judge Raggi asked Mr. Hatten to comment on the burden for clerks' offices in having to place seals on criminal subpoenas. Mr. Hatten stated that the seal requirement imposes no burden.

Discussion revealed the Committee's agreement that the seal of the court on a criminal subpoena served the useful purpose of ensuring compliance.

A motion having been made and seconded,

The Committee unanimously decided by voice vote not to amend Rule 17(a).

C. Rule 6, Grand Jury Oaths

A citizen request from Eric DeLeon asked the Committee to amend Rule 6(c) to state the oath required in grand jury proceedings or to provide a cross-reference to the text of that oath. Judge Raggi and the Committee reporters recommended no action but invited discussion. The Committee agreed that there was no problem requiring rule amendment. A motion having been made and seconded,

The Committee unanimously decided by voice vote not to pursue an amendment to Rule 6(c).

D. Rule 24(b), Peremptory Challenges

Judge Raggi reported that Judge Robert E. Jones of the District of Oregon suggested that an amendment to Rule 24(b) to eliminate or reduce peremptory challenges would reduce costs for the judiciary. Members generally agreed that any cost reduction from such an amendment would be minimal. Such a significant change in the jury selection process would, however, undoubtedly prompt strong opposition from the bar. No member of the Committee voicing support for the proposal, and a motion having been made and seconded,

The Committee unanimously decided by voice vote not to amend Rule 24(b).

E. Rule 29, Summary Judgment Prior to Trial

The Committee considered a proposal from Assistant Professor Carrie Leonetti of the University of Oregon School of Law to amend the criminal rules to authorize pre-trial awards of summary judgment to the defense. Upon review of a report prepared by Professor King that recommended against the proposal, no member of the Committee voiced support for an amendment. A motion having been made and seconded,

The Committee unanimously decided by voice vote not to amend Rule 29.

F. Rule 6(e), Historically Significant Grand Jury Materials

After the October agenda materials were distributed, the Committee received a proposal from Attorney General Eric H. Holder, Jr. to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials, which some courts have done by invoking "inherent authority." At Judge Raggi's request, Kathleen Felton summarized the views expressed in the Attorney General's letter.

Judge Raggi formed a subcommittee to study the matter and report to the full Committee at its April meeting. Judge Keenan agreed to chair the subcommittee. Judges Malloy and Zagel, Professor Leipold, Ms. Brook, Ms. Felton, Mr. Wroblewski and Mr. Hatten will also serve, with Professors Beale and King providing legal support.

G. Rule 17.1, Pretrial Procedures

Judge Lawson noted that, at the Portland meeting, he had suggested that Rule 17.1 be amended to provide for certain matters, notably *Brady/Giglio* compliance, to be discussed at a pre-trial conference. He indicated that he had sent a draft proposal to Judge Tallman and wished to have the matter put on the next meeting agenda. In response to Judge Raggi's inquiry as to whether the content of pre-trial conferences should really be the subject of a rule (rather than best practices), Judge Lawson indicated that the Committee's recent *Brady/Giglio* discussions persuaded him that the matter was important enough to deserve a rule. Judge Raggi asked Professors Beale and King to secure a copy of Judge Lawson's proposal and to prepare a report for the Committee so that the matter could be discussed at the next meeting.

VI. INFORMATION ITEMS

A. Status Report on Legislation Affecting Criminal Rules

Mr. Rose reported that no legislation was anticipated that would affect the Criminal Rules.

B. Electronic Discovery

Judge Raggi observed that district courts were increasingly confronting questions about electronic discovery in criminal cases, a matter that might merit future Committee consideration. Because the Civil Rules Committee has already done considerable work in the area, Judge Raggi stated that she would discuss the subject with Judge Kravitz and Ed Cooper, the Civil Rules Committee reporter, to benefit from their experience.

Mr. Wroblewski advised that the Justice Department was working with Federal Defenders, the Administrative Office, and the Federal Judicial Center to develop protocols for discovery of electronically stored information and drafts were expected in six to eight months. Judge Raggi asked if these protocols might be shared with the Committee for possible discussion as an information item.

C. Inter-Committee Forms Subcommittee

Judge Lawson and Professor King, the Committee's representatives to the Inter-Committee Forms Subcommittee, reported that the Subcommittee was exploring the possibility of a unified approach to forms among the five advisory rules committees and, thus, sought information as to each advisory committee's practices.

Professor King advised that until 1983, Criminal Rule 58 encouraged the use of some 27 appended forms pertaining to complaints, indictments, informations, etc. In 1983, Rule 58 and the appended forms were abrogated, so that no mention of forms is made in the criminal rules. (There are, however, forms appended to the rules governing habeas procedures under 28 U.S.C. §§ 2254 and 2255.) Rather, a Forms Working Group in the Administrative Office develops forms for use in criminal proceedings. Judge Lawson asked whether this Forms Working Group should be added to the Inter-Committee Forms Subcommittee. Judge Raggi stated that, because there have been no complaints about forms produced by the AO's Forms Working Group, there appeared to be no reason for the Committee to seek to reassume a role in that area. Accordingly, Judge Lawson and Professor King will report to the Forms Subcommittee that the Criminal Rules Committee, in contrast to other advisory committees, has played little role in the process of developing and revising criminal forms and that the assignment of that responsibility to the AO Forms Working Group seems satisfactory.

VII. SUBCOMMITTEE ASSIGNMENTS

Judge Raggi identified the Committee's active subcommittees as follows:

A. Rule 12 Subcommittee

Judge England, Chair
Judge Lawson
Professor Leipold
Ms. Brook
Ms. Felton
Mr. Wroblewski

B. Rule 11 Subcommittee

Judge Rice, Chair
Judge Lawson
Judge Malloy
Professor Leipold
Mr. Cunningham
Ms. Felton
Mr. Wroblewski

C. Rule 6(e) Subcommittee

Judge Keenan, Chair
Judge Malloy

Judge Zagel
Professor Leipold
Ms. Brook
Ms. Felton
Mr. Wroblewski
Mr. Hatten

All other subcommittees having completed their work, Judge Raggi declared them dissolved.

VIII. FUTURE MEETINGS AND HEARINGS

Judge Raggi announced that the Committee will next meet on Monday and Tuesday, April 23-24, 2012, at the Federal Courthouse in San Francisco, California. The autumn 2012 meeting will be held on Thursday and Friday, October 18-19, 2012, at the Administrative Office in Washington, D.C.

Hearing dates on criminal rules published for public comment are scheduled for January 6, 2012, in Phoenix, Arizona, in conjunction with the Standing Committee meeting; and February 12, 2012, in Washington, D.C. Members will be advised in advance as to whether public comments are received necessitating one or both of these hearings.

Before the Committee adjourned, Judge Tallman expressed his thanks to all members and staff for the honor of serving as chair, congratulated Judge Raggi on her appointment, and promised his continued support for the work of the Committee.

All business being concluded, Judge Raggi adjourned the meeting.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5-6, 2012
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 5 and 6, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole and Larry D. Thompson, Esquire were unable to attend, but Mr. Thompson participated by telephone. The Department of Justice was represented at the meeting by Elizabeth J. Shapiro, Esquire.

Also participating were the committee's former chair, Judge Lee H. Rosenthal, former lawyer members Douglas R. Cox and William J. Maledon, and the committee's style consultant, Professor R. Joseph Kimble.

Judge Rosenthal chaired a discussion on class action issues with the following panelists: Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules; Daniel C. Girard, Esquire, a former member of the advisory committee; and John H. Beisner, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Rules Committee Officer
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center
Bernida Evans	Rules Office Management Analyst

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 Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Membership Changes

Judge Kravitz announced with regret that the terms of Messrs. Cox and Maledon had expired on October 1, 2011, and both were attending their last Standing Committee meeting. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work and the rules program, and presented each with a plaque signed by Chief Justice John Roberts, Jr. and Judge Thomas F. Hogan, Director of the Administrative Office.

Judge Kravitz introduced the new committee members, Judge Wesley and Mr. Garre, and he summarized their impressive legal backgrounds. He reported that Mr. Thompson was also a newly appointed member of the committee, but was unable to attend the meeting.

Meeting with Supreme Court Justices

Judge Rosenthal reported on a recent meeting held at the Supreme Court that she had attended with Judge Kravitz, Dean Levi, Professor Coquillette, and former committee chair Judge Anthony J. Scirica. They had an extensive and candid exchange with the Chief Justice and other justices on the rules program. The discussion, she said, touched upon such matters as the openness of the rules process, the procedures followed by the rules committees, the effective use of empirical research to support proposed rule amendments, and the rules committees' ongoing relationships with Congress, the bar, and the academy. The meeting, she said, had been very beneficial and met all the committee's objectives. She added that it would make sense to pursue similar dialogues with the Court every five years or so.

Judicial Conference Report

Judge Kravitz reported that the Judicial Conference at its September 2011 session had approved all the proposed amendments to the rules and forms presented by the committee.

Rules Taking Effect on December 1, 2011

Judge Kravitz referred to the amendments to the appellate, criminal, and evidence rules and the bankruptcy rules and forms that took effect by operation of law on December 1, 2011.

Pending Rule Amendments

Judge Kravitz reported that proposed amendments to the appellate, bankruptcy, civil, criminal, and evidence rules had been published for comment in August 2011. Although public hearings had been scheduled, few requests had been submitted by bench and bar to date to testify on the proposals.

Lawsuit Abuse Reduction Act

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 (H.R. 966) would restore the mandatory-sanctions provision of FED. R. CIV. P. 11 (sanctions). Adopted in 1983, she said, the provision simply did not work and was later repealed in 1993. In addition, she said, the proposed legislation would eliminate the beneficial safe-harbor provision of Rule 11(c)(2), added in 1993. It gives a party 21 days to withdraw challenged assertions on a voluntary basis.

She pointed out that Judges Rosenthal and Kravitz had written to the chair of the House Judiciary Committee to oppose the bill. Their letter emphasized that the Federal Judicial Center's empirical research had demonstrated that the 1983 version of Rule 11 had produced wasteful satellite litigation and increased the time and costs of civil litigation. She added that the American Bar Association and other organizations had also sent letters to Congress opposing the legislation.

She noted that the House Judiciary Committee had held a hearing on H.R. 966 in March 2011 and then reported out the bill. But there was no further action in the House, although a companion bill (S. 533) was introduced in the Senate.

Sunshine in Litigation Act

Ms. Kuperman reported that Judges Rosenthal and Kravitz had written to the chair of the Senate Judiciary Committee to oppose the proposed Sunshine in Litigation Act of 2011 (S. 623). The bill would prevent a court from issuing a discovery protective order unless it first makes particularized findings of fact that the order would not restrict the disclosure of information relevant to protecting public health or safety. She noted that the bill, similar to others introduced in past Congresses, had been favorably reported out of committee in May 2011, but there had been no further action on it.

Pleading Standards

Ms. Kuperman reported that no legislation was currently pending in Congress to address civil pleading standards in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Consent Decrees

Ms. Kuperman noted that legislation (H.R. 3041) had been introduced to limit the duration of consent decrees issued by federal courts that impose injunctive or other prospective relief against state or local programs or officials. The bill, she said, was being monitored closely by the Judicial Conference's Federal-State Jurisdiction Committee. It would not amend the federal rules directly, but could impact the rules in procedural ways. The legislation, she said, had been referred to Congressional committee, but no further action had taken place on it.

Costs and Burdens of Civil Discovery

Ms. Kuperman reported that the House Judiciary Committee Subcommittee on the Constitution had held a hearing in December 2011 on "the costs and burdens of civil discovery." She noted that Judges Kravitz and Campbell had sent a letter to the subcommittee chair providing an update on the advisory committee's various efforts to reduce discovery costs, burdens, and delays. The letter, she said, urged Congress to allow the Advisory Committee on Civil Rules to continue pursuing these issues under the thorough and deliberate process that Congress created in the Rules Enabling Act. She added that Congressional staff had been invited to, and had attended, the advisory committee's recent meeting in Washington. The committee, she added, will continue to keep members and staff of Congress informed of pertinent developments.

Time to File a Notice of Appeal When a Federal Officer or Employee is a Party

Ms. Kuperman reported that the Congress had enacted legislation amending 28 U.S.C. § 2107 to conform it to the December 2011 change in FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). The statute mirrors the amended rule and clarifies the time for parties to appeal in a civil case when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Bankruptcy Legislation

Ms. Kuperman reported that legislation (Pub. L. No. 112-64) had been enacted in December 2011 to extend for another four years the exemption given to qualified reservists and members of the National Guard from application of the means-test presumption of abuse in Chapter 7 bankruptcy cases. She noted that a footnote in an interim bankruptcy rule would have to be updated to incorporate the number of the new public law. In addition, she said, legislation was pending to add some bankruptcy judgeships and increase the filing fee for chapter 11 cases. If enacted, it would require conforming changes to the bankruptcy forms to reflect the higher fee.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose reported that Judge Thomas F. Hogan had assumed his duties as the new Director of the Administrative Office.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that Judge Jeremy D. Fogel, the new Director of the Federal Judicial Center, had decided to undertake a comprehensive study of case-dispositive motions in civil cases. To that end, he said, the Center was seeking assistance from several law professors to participate in the study and provide law students to help in the research. The Center, he added, was conducting pilot efforts for the project and would present proposals for consideration by the Advisory Committee on Civil Rules at its March 2012 meeting. He suggested that the project would likely be ready to proceed at the start of the next academic year.

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 2-3, 2011.

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, 2011 (Agenda Item 10). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

Judge Sutton thanked the members, reporters, and committee staff for working with congressional staff on the amendment of 28 U.S.C. § 2107 to make it consistent with FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). Even though it involved a relatively minor, technical change, he said, it had taken enormous effort and skill to accomplish the legislative action.

He reported that only one comment had been received to date on the advisory committee's proposed amendment to FED. R. APP. P. 28 (briefs) that would remove the requirement that a brief set forth separate statements of the case and of the facts. The comment, from a prominent appellate judge, opposed combining the two statements.

But, he said, the advisory committee believed that the current requirement of separate statements had generated confusion and redundancy. Combining them would provide lawyers with greater flexibility in making their presentations.

Judge Sutton reported that the advisory committee had not reached a consensus on whether to treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs under FED. R. APP. P. 29(a) (amicus briefs). The committee, though, did reach a consensus that municipalities should be included with Indian tribes if a Rule 29 amendment were pursued. Judge Sutton added that he had sent a letter to the chief judges of all the courts of appeals soliciting their views on the matter.

Judge Sutton reported that Professor Richard D. Freer of Emory Law School, a guest speaker at the advisory committee's recent meeting had complained about the frequency of federal rule changes. Professor Freer argued that frequent changes increase costs, add confusion for lawyers, complicate electronic searches, and may lead to unintended consequences. He suggested that if rule changes were made less often – such as once every several years – the bar would pay more attention to the rules and submit more and better comments. Judge Sutton noted that the advisory committee was taking the criticism to heart and generally supports deferring and bundling amendments where feasible.

A member endorsed the suggestion generally and added that lawyers often complain about the committees "tinkering" with the rules. Other participants pointed out that the advisory committees do in fact bundle rule amendments where possible. Nevertheless, many rule changes are required by legislation, case law developments, and other factors beyond the committees' control.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 12, 2011 (Agenda Item 8).

Amendments for Publication

FED. R. BANKR. P. 7054(b) and 7008(b)

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 7054 (judgments and costs) and FED. R. BANKR. P. 7008(b) (attorney's fees) would clarify the procedure for seeking the award of attorney's fees in adversary proceedings. Bankruptcy procedures, he explained, are different from those in civil actions in the district courts.

Civil practice is governed by FED. R. CIV. P. 54(d)(2) (attorney's fees), which specifies that a claim for attorney fees be made by motion unless the substantive law requires proving the fees at trial as an element of damages. The bankruptcy rules, though, have no analog to FED. R. CIV. P. 54(d)(2). Instead, attorney's fees are governed by FED. R. BANKR. P. 7008(b), which specifies that a request for the award of attorney's fees be pleaded as a claim in a complaint or other pleading.

The difference between the civil and bankruptcy rules, he said, creates a trap for the unwary, especially for lawyers who practice regularly in the district courts. Moreover, the difference between bankruptcy practice and civil practice has led bankruptcy courts to adopt different, non-uniform approaches to handling fee applications. The largest bankruptcy court in the country, for example, has adopted the civil practice by local rule.

In a recent decision, the Ninth Circuit bankruptcy appellate panel pointed to a gap in the current bankruptcy rules. It noted that when a party follows FED. R. BANKR. P. 7008(b) and pleads its demand for attorney's fees in the complaint, the bankruptcy rules specify no procedure for awarding them. The panel's opinion expressly invited the advisory committee to close the gap by amending FED. R. BANKR. P. 7054. That rule currently incorporates FED. R. CIV. P. 54(a)-(c) and has its own provision governing recovery of costs by a prevailing party. But it has no provision like FED. R. CIV. P. 54(d)(2) governing recovery of attorney's fees.

Judge Wedoff explained that the advisory committee agreed with the bankruptcy appellate panel and decided to conform the bankruptcy rules to the civil rules – thus requiring that a claim for the award of attorney's fees in an adversary proceeding be made by motion. To do so, the proposed amendments incorporate much of FED. R. CIV. P. 54(d)(2) into a new FED. R. BANKR. P. 7054(b)(2) prescribing the procedure for seeking attorney fees. Current FED. R. BANKR. P. 7008(b), requiring that the demand be pleaded in a complaint or other pleading, would be deleted. Judge Wedoff added that FED. R. CIV. P. 54(d)(2)(D), dealing with referral of matters to a master or magistrate judge, would not be incorporated because it is not relevant to the bankruptcy courts.

Judge Wedoff reported that the advisory committee would also correct a long-standing grammatical error in the first sentence of FED. R. BANKR. P. 7054(b) by changing the verb "provides" to "provide."

The committee without objection by voice vote approved publication of the proposed amendments to FED. R. BANKR. P. 7054(b) and the proposed deletion of FED. R. BANKR. P. 7008(b).

Information Items

PART VIII – THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee had been engaged for several years in a major project to revise the Part VIII rules. The principal objectives of the project, he said, are: (1) to align Part VIII more closely with the Federal Rules of Appellate Procedure; and (2) to adjust the rules to the reality that bankruptcy court records today are filed, stored, and transmitted electronically, rather than in paper form.

He explained that the advisory committee had made substantial progress and would return to the Standing Committee in June 2012 seeking permission to publish the revised Part VIII rules for public comment. At this point, the advisory committee just wanted to give the Standing Committee a preliminary look at the first half of the rules, explain the principal changes from the current rules, and address any concerns that members might have. He invited the members to bring any suggestions to the advisory committee's attention.

Professor Gibson noted that Part VIII deals primarily with appeals from a bankruptcy court to a district court or bankruptcy appellate panel. If a case proceeds from there to the court of appeals, the Federal Rules of Appellate Procedure take over. In addition, in 2005 Congress authorized direct appeals from a bankruptcy court to a court of appeals in limited circumstances. Accordingly, the new Part VIII rules also contain provisions dealing with permissive direct appeals.

She noted that Part VIII had largely been neglected since 1983, even though the Federal Rules of Appellate Procedure have since been amended on several occasions and completely restyled in 1998. She pointed out that Part VIII was difficult to follow and needs to be reorganized and rewritten for greater ease of use. In addition, it needs to be updated and made more consistent with the current Federal Rules of Appellate Procedure. She emphasized that the proposed revisions were comprehensive in nature. Some rules would be combined, some deleted, and some moved to new locations.

Professor Gibson explained that the advisory committee had conducted two mini-conferences on the proposed rules with members of the bench and bar. The participants, she said, expressed substantial support for the proposed revisions, but several recommended that additional changes be made to take account of the widespread use of technology in the federal courts. They urged the committee to revise the rules to recognize explicitly that court records in bankruptcy cases now are filed and maintained in electronic form.

Judge Wedoff and Professor Gibson noted that the proposed new Part VIII rules largely adopt the style conventions of the other, restyled federal rules. For example, they

consistently use the word "must" to denote an affirmative obligation to act, even though the other parts of the bankruptcy rules still use the word "shall." He pointed out that the Part VIII rules are largely distinct from the rest of the bankruptcy rules. As a result, there should be no problem with using the modern terminology only in Part VIII and not in other bankruptcy rules.

Professor Gibson noted that the advisory committee had revised and reorganized Part VIII so thoroughly that it would not be meaningful to produce a redlined or side-by-side version comparing the old and new rules. Rather, she said, the committee was using the committee notes to specify where particular provisions in the new rules are located in the current rules.

A participant suggested that it would be helpful to produce a chart showing readers where each provision in the current rules has been relocated. Professor Gibson agreed, but explained that some provisions had been broken up and relocated in several different places. Judge Wedoff agreed to work on producing a chart, but added that it might be of limited value because readers will need to examine the new rules as a whole.

FED. R. BANKR. P. 8001

Professor Gibson noted that proposed FED. R. BANKR. P. 8001 (scope and definitions) was new and had no counterpart in the existing rules. Similar to FED. R. APP. P. 1, it sets forth the scope of the Part VIII rules and contains three definitions: (1) "BAP" to mean a bankruptcy appellate panel; (2) "appellate court" to mean either the district court or the BAP to which an appeal is taken; and (3) "transmit" to mean sending documents electronically (unless a document is sent by or to a pro se litigant, or a local court rule requires a different means of delivering the document).

She explained that the advisory committee had deliberately selected the term "transmit" to highlight a specific process with a strong presumption in favor of electronic transfer of a document or record. A member suggested, though, that the proposed definition of "transmit" was not sufficiently forceful and suggested including a stronger affirmative statement that electronic transmission is to be the norm. Judge Wedoff agreed and added that electronic transmission was already universal in the bankruptcy courts except for pro se litigants. Another member cautioned that it is problematic to use a word like "transmit," which has a much broader common meaning, and ascribe to it an intentionally narrower meaning. Perhaps a unique new term could be devised, such as "e-transmit."

Some members questioned the proposed definition of "appellate court" because it contradicted the ordinary meaning of the term, which normally refers to the courts of appeals. Judge Wedoff and Professor Gibson agreed to have the advisory committee reconsider the definition.

FED. R. BANKR. P. 8002

Professor Gibson reported that proposed FED. R. BANKR. P. 8002 (time to file a notice of appeal) must remain in its current place because 28 U.S.C. § 158(c)(2) refers to it by number. She said that the committee had essentially restyled the existing rule and added a provision to cover inmates confined in institutions.

FED. R. BANKR. P. 8003 and 8004

Professor Gibson explained that proposed Rules 8003 (appeal as of right) and 8004 (appeal by leave) would set forth in two separate rules the provisions governing appeals as of right and appeals by leave. The two are combined in the current FED. R. BANKR. P. 8001 (manner of taking an appeal). The proposed revisions, she said, will conform Part VIII to the Federal Rules of Appellate Procedure.

She noted that under the current bankruptcy appellate rules, an appeal is not docketed in the appellate court until the record is complete and received from the bankruptcy clerk. Proposed FED. R. BANKR. P. 8003(d)(2), however, conforms to the Federal Rules of Appellate Procedure and requires the clerk of the appellate court to docket the appeal earlier, as soon as a notice of appeal is received. Proposed FED. R. BANKR. P. 8004 would continue the current bankruptcy practice of requiring an appellant to file both a notice of appeal and a motion for leave to appeal.

FED. R. BANKR. P. 8005

Professor Gibson explained that proposed FED. R. BANKR. P. 8005 (election to have an appeal heard by the district court) governs appeals in those circuits that have a BAP. Under 28 U.S.C. § 158(c)(1), an appeal in those circuits is heard by the BAP unless a party to the appeal elects to have it heard by the district court. The proposed rule provides the procedure for exercising that election, and it eliminates the current requirement that the election be made on a separate document. Instead, a new Official Form will be devised for the election. Proposed Rule 8005(c) specifies that a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

FED. R. BANKR. P. 8006

Professor Gibson noted that proposed FED. R. BANKR. P. 8006 (certification of a direct appeal to the court of appeals) overlaps substantially with the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 158(d)(2), a case may be certified for direct appeal from a bankruptcy court in three ways. First, the bankruptcy court, the district court, or the BAP may make the certification itself based on one of the direct appeal criteria specified in 28 U.S.C. § 158(d)(2)(A). Second, the certification may be made by all the parties to the appeal. Third, the bankruptcy court, district court, or BAP must make the certification if a majority of the parties on both sides of the appeal ask the court to make it.

Judge Wedoff explained that the proposed rule provides the procedures for implementing each of the three options. Since the bankruptcy court is likely to have the most knowledge about a case, proposed Rule 8006(b) specifies that a case will remain pending in the bankruptcy court, for purposes of certification only, for 30 days after the effective date of the first notice of appeal. The 30-day hold gives the bankruptcy court time to make a certification. Once the certification has been made, the case is in the court of appeals, and the request for permission to take a direct appeal must be filed with the circuit clerk within 30 days. The court of appeals has discretion to take the direct appeal, and the procedure is similar to that under 28 U.S.C. § 1292(b).

Judge Sutton reported that the Advisory Committee on Appellate Rules was working closely with the bankruptcy advisory committee on revising the Part VIII rules, with Professor Struve and Professor Amy Barrett serving as liaisons to the project. He noted that the appellate advisory committee had drafted corresponding changes in FED. R. APP. P. 6 (appeal in a bankruptcy case) by adding a new subdivision 6(c) to address permissive direct appeals from a bankruptcy court.

He reported that appellate advisory committee members had questioned the choice of the verb "transmit" in FED. R. APP. P. 6 and debated several other potential terms. In addition, he said, concern had been voiced over the wisdom of introducing a new term, such as "transmit,""provide," or "furnish," but only in FED. R. APP. P. 6. It would be inconsistent with the terminology used in the other appellate rules. The appellate courts, moreover, are not as far advanced with electronic filing as the bankruptcy courts and may not be ready to receive other types of appeals in the same manner as bankruptcy appeals. But, he added, it may well be acceptable as a practical matter to live with two different verbs in the rules for a while. A member suggested using the term "send," but Judge Sutton pointed out that in the electronic environment, the clerk of the bankruptcy court may merely provide the appellate court with links to the bankruptcy court record, rather than actually send or transmit the record to the appellate court.

Judge Sutton suggested convening an ad hoc subcommittee, comprised of at least one person from each advisory committee, to consider a uniform way of describing the transmission of records throughout the federal rules. Several participants endorsed the concept and emphasized the desirability of using the same language across all the rules. Others warned, though, that the project could be very complicated because many other provisions in the rules also need to be amended to take account of technology, and they cited several examples. A member cautioned that whatever terminology is selected must accommodate the continuing need for paper records and paper copies.

Professor Gibson said that the new bankruptcy appellate rules, scheduled to be published in August 2012, will be the test case for the new terminology. Judge Sutton added that eventually all the federal rules will have to be accommodated to the electronic world. But that project, he said, will take considerable time to accomplish. He emphasized that the immediate problem facing the advisory committees was to decide before publication on the right terminology for the proposed new Part VIII bankruptcy rules and the amendments to FED. R. APP. P. 6.

Judge Kravitz appointed Judge Gorsuch to chair an ad hoc subcommittee to consider devising a standard way of describing electronic filing and transmission throughout the rules. He asked the chairs of the appellate, bankruptcy, civil, and criminal advisory committees to provide at least one representative each.

FED. R. BANKR. P. 8007

Professor Gibson noted that proposed FED. R. BANKR. P. 8007 (stay pending appeal) would continue the practice of current FED. R. BANKR. P. 8005 that requires a party ordinarily to seek relief pending an appeal in the bankruptcy court first.

A member pointed out that proposed Rule 8007(b)(2) did not provide for the situation in which a bankruptcy court fails to issue a timely ruling. He said that the Federal Rules of Appellate Procedure in that circumstance authorize a party to ask the court of appeals for relief. Professor Gibson replied that the advisory committee will consider the matter.

FED. R. BANKR. P. 8008

Professor Gibson explained that proposed FED. R. BANKR. P. 8008 (indicative rulings) had been adapted from the new indicative ruling provisions in the civil and appellate rules. Proposed FED. R. BANKR. P. 8008(a) is parallel to FED. R. CIV. P. 62.1. It specifies what action a bankruptcy court may take on a motion for relief that it lacks authority to grant because an appeal has been docketed and is pending. The moving party must notify the appellate court if the bankruptcy court states either that it would grant the motion or the motion raises a substantial issue.

She pointed out that the rule is complicated because an appeal may be pending in the district court, the BAP, or the court of appeals. Proposed FED. R. BANKR. P. 8008(c) governs the indicative ruling procedure in the district court and the BAP, while FED. R. APP. P. 12.1 takes over if the appeal is pending in the court of appeals.

FED. R. BANKR. P. 8009 and 8010

Professor Gibson reported that proposed FED. R. BANKR. P. 8009 (record and issues on appeal) and FED. R. BANKR. P. 8010 (completing and transmitting the record) would govern the record on appeal. They apply to direct appeals to the court of appeals, as well as to appeals to the district court or BAP.

Rule 8009 differs from the Federal Rule of Appellate Procedure because it continues the current bankruptcy practice of requiring the parties to designate the record on appeal. That procedure is necessary because a bankruptcy case is a large umbrella that may cover thousands of documents, of which only a few may be at issue on appeal.

Proposed FED. R. BANKR. P. 8009(f) would govern sealed documents. If a party designates a sealed document as part of the record, it must identify the document without revealing secret information and file a motion with the appellate court to accept it under seal. If the motion is granted, the bankruptcy clerk transmits the sealed document to the appellate court.

Professor Gibson noted that the advisory committee was still refining proposed FED. R. BANKR. P. 8010 to specify a court reporter's duty to provide a transcript and file it with the appellate court. The majority of bankruptcy courts, she said, record proceedings by machine. A transcript is prepared by a transcription service when ordered through the clerk. She suggested that the court reporters may not always know in which court an appeal is pending and where they must file the transcript.

FED. R. BANKR. P. 8011

Professor Gibson reported that proposed FED. R. BANKR. P. 8011 (filing, service, and signature) had been derived from current FED. R. BANKR. P. 8008 (filing and service) and FED. R. APP. P. 25 (filing and service). She noted that it followed the format, style, and some of the detail of FED. R. APP. P. 25, but placed more emphasis on electronic filing and service.

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

STERN V. MARSHALL

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in "non-core" proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is "core" or "non-core" and, if "non-core," whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term "core" now is ambiguous. As a result of *Stern v. Marshall*, he suggested, there are now statutory "core" proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional "core" proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a "core" proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall*, some statutory "core" proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in "a matter that is not a core proceeding," refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not "core" under the Constitution.

If § 157(c) refers only to matters that are not "core" under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as "core" matters. And for some of these statutory "core" matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the advisory committee's forms modernization project was making substantial progress and was linked ultimately to the Administrative Office's development of the Next Generation electronic system to supersede CM/ECF. He said that the new forms produced by the committee had been designed in large measure to take advantage of electronic filing and reporting. They are clearer, easier to read, and have instructions integrated into the questions. As a result, though, some attorneys have complained that the new forms are appreciably longer than the current versions and will require more time to complete.

The advisory committee, he said, was very sensitive to these concerns and was trying to shorten the forms where possible, while still eliciting more accurate information. Moreover, he said, the length of the forms will be substantially reduced by not having separate instructions filed.

He added that the advisory committee would like to expedite implementation of the new forms, especially consumer forms that deal with debtor income and expenses. The committee, he said, was planning to bring some of the forms to the Standing Committee at its next meeting and seek authority to publish them for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 2, 2011 (Agenda Item 6). Judge Campbell reported that the advisory committee had no action items to present.

Information Items

POTENTIAL RULE ON PRESERVATION FOR FUTURE LITIGATION

Judge Campbell reported that a panel at the May 2010 Duke Law School conference on civil litigation had urged the advisory committee to adopt a new national rule governing preservation of evidence in civil cases. The panel, he said, presented the outline of a proposed preservation rule, including eight specific elements that it said needed to be addressed in order to provide appropriate guidance to bench and bar. The proposal, he said, had been referred to the committee's discovery subcommittee, and Ms. Kuperman was asked to prepare a memorandum on the state of the law regarding preservation obligations and sanctions.

Judge Campbell pointed out that the committee's research revealed that federal case law is unanimous in holding that the duty to preserve discoverable information is triggered when a party reasonably anticipates being a party to litigation. But, he said, no consensus exists in the case law regarding: (1) when a party should reasonably anticipate being brought into litigation; and (2) the extent of the preservation duty. Rather, the law is fact-driven and left to resolution on a case-by-case basis.

As for the law on sanctions for failure to preserve, the courts of appeals are in disagreement. Some circuits hold that mere negligence is sufficient for a court to invoke sanctions, while others require some form of willfulness or bad faith before sanctions may be imposed. Some courts, moreover, have tried to specify what kinds of conduct may result in what kinds of sanctions.

Judge Campbell reported that the advisory committee wanted to ascertain the extent of preservation problems, and it asked the Federal Judicial Center to study the frequency of spoliation motions in the federal courts. That study, conducted by Emery Lee, reviewed over 131,000 cases filed in 19 district courts in 2007 and 2008. It found that spoliation motions had been filed in only 209 cases, or 0.15% of the total. About half those motions related to electronically stored information. The study revealed, moreover, that sanctions had been imposed against both plaintiffs and defendants.

In addition, the committee examined the existing laws that impose preservation obligations. It found that there is a substantial body of statutes that deal with preservation, covering many different subjects. But no coherent pattern emerges from them.

Judge Campbell reported that the discovery subcommittee had focused on what elements should be included in a proposed rule, and Professor Marcus produced initial discussion drafts to show three different possible approaches to a rule. The first was a very detailed rule, as proposed by the Duke panel. It included specific provisions giving examples of the types of events that constitute reasonable anticipation of litigation and trigger a duty to preserve. It addressed the scope of the duty to preserve, including the subject matter, the sources of information, the types of information, and the form of preservation. It also laid out time limits on the scope of the duty, such as how far back a custodian must retain information and how long the obligation to preserve continues. It contained a presumptive number of record custodians who must be identified and instructed to preserve information. The rule was also detailed on sanctions, specifying what kinds of conduct will lead to what kinds of sanctions.

The second proposed rule, he said, was substantially more general, addressing the trigger, scope, and duration of the duty to preserve and the selection of sanctions, but in less detail. Essentially, it directed parties to behave reasonably in all dimensions.

The third proposed rule addressed only sanctions and did not specify the trigger, scope, or duration of preservation obligations. Instead, it focused exclusively on the area of greatest concern to lawyers and their clients – the area, moreover, where there is the greatest disagreement and uncertainty in the law. The expectation was that by addressing the key problem of sanctions, the rule would give guidance to the people who make preservation decisions and relieve much of the uncertainty about the trigger and scope of the duty to preserve.

The third rule also distinguished between sanctions and curative measures. The latter consist of targeted actions designed to cure the consequences flowing from a failure to preserve information, such as allowing extra time for discovery or requiring the party who failed to preserve to pay the costs of seeking substitutes for the missing information. Under the proposed rule, remedial measures could be imposed if a preservation duty were not followed.

Imposition of more serious sanctions – such as an adverse inference instruction, claim preclusion, dismissal, or entry of judgment – would require something more than a mere failure to preserve. A showing would have to be made of some kind of knowing conduct, such as willfulness or bad faith. The rule also laid out the factors that a judge should consider in imposing sanctions, including the level of notice given the custodians, the reasonableness and proportionality of the efforts, whether there was good faith consultation, the sophistication of the parties, the actual demands made for preservation, and whether a party sought quick guidance from a judge.

Judge Campbell reported that the three rules had been discussed at a one-day mini-conference in Dallas in September with invited attorneys, judges, law professors, and technical experts. The committee, he said, heard very thoughtful, competing views from the participants. The discussions were very helpful, and several participants submitted papers elaborating on their positions.

In essence, he said, corporate representatives argued that the sheer cost of preserving information in anticipation of litigation is an urgent problem that calls for a strong, detailed rule providing clear guidance to record custodians. In particular, they complained about the uncertainty that corporations face in not knowing where and when a suit will be filed against them, what the claims will be, and what information may be relevant in each case. They are concerned about the heavy costs of over-preserving information. But, more importantly, they fear the harm to their reputation that may result from accusations of spoliation.

On the other hand, plaintiffs' lawyers argued that a detailed national rule would lead to greater destruction of information because of its negative implications. It would encourage custodians to destroy information not explicitly spelled out in the rule. They emphasized that there will always be information that simply does not fit within the details of a rule, but must nevertheless be preserved.

Department of Justice representatives argued that case law should be allowed to continue running its course, and no preservation rule should be adopted at this time. They argued, in particular, that the first of the three proposed rules would lead to over-preservation by government agencies, as they would be forced to preserve records whenever there is a dispute over a claim with the government.

Judge Campbell noted that the discovery subcommittee met at the close of the mini-conference and later by telephone. It then reported in detail on the mini-conference at the full advisory committee's November 2011 meeting. After lengthy discussion, the committee decided that the subcommittee needed to continue to receive input and explore the three potential options. Under its new chair, Judge Paul W. Grimm, the subcommittee will continue to consider all the issues as open and report back at the advisory committee's March 2012 meeting.

Several members suggested that the first of the three proposed rules, the detailed option, would not be workable because of the endless variety of possible situations that may arise. A detailed new national rule, moreover, could lead to satellite litigation, as with the 1983 amendments to FED. R. CIV. P. 11 (sanctions). A sanctions-only rule, on the other hand, such as the third proposal, would resolve the serious split among the circuits on the law of sanctions, and it might well be effective in sending strong signals regarding pre-litigation conduct.

Judge Campbell suggested that even if the committee were to adopt a new federal rule on spoliation, a myriad of different rules will still exist in the state courts. Accordingly, there will not be national uniformity in any event. The problems of uncertainty will continue because state law often governs preservation obligations. A participant added that the rules on preservation are largely rules of attorney conduct, which lie within the traditional province of the states. Because of the relevance of state law, the federal courts would be on stronger jurisdictional grounds if the rule were limited to sanctions.

A member added that in most cases no federal proceeding is pending when the duty to preserve first attaches. It was suggested that the advisory committee take a limited focus because it may lack authority under the Rules Enabling Act to adopt pre-litigation preservation standards.

A participant pointed out that the scope of the obligation to preserve before trial is related to the scope of discovery under FED. R. CIV. P. 26(b)(1). Therefore, it may not be possible to have a rule that narrows the scope of what information must be preserved before a case is filed if that provision is at odds with what information must be produced in discovery after a case is filed. Moreover, apart from the duty to preserve certain records and information, substantial additional cost is incurred in searching the

information. Thus, even if it were inexpensive just to preserve information, it would still be expensive for the parties to search through it. Therefore, it might be necessary to reconsider the scope of discovery under Rule 26(b)(1).

FED. R. CIV. P. 45

Judge Campbell reported that the proposed amendments to Rule 45 (subpoena) had been published in August 2011. They make four basic changes: (1) simplifying the rule by having a subpoena issued in the name of the presiding court, authorizing nationwide service, and having local enforcement in the district where the witness is; (2) allowing the court where discovery is taken in appropriate instances to send disputes back to the court presiding over the case; (3) overruling the *Vioxx* line of cases that authorize subpoenas for out-of-state parties and a party's corporate officers to testify at trial from a distance of over 100 miles; and (4) clarifying the obligation of a serving party to provide notice.

He said that a public hearing had been scheduled for January 27, 2012, but the committee had received only two requests to testify. As a result, the hearing may be canceled and the requesting parties asked to put their views in writing or participate in a teleconference.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell reported that a subcommittee chaired by Judge John G. Koeltl was studying the many recommendations for improvements in civil litigation made by participants at the May 2010 Duke Law School conference. He noted that the subcommittee was focusing on five categories of proposals to implement suggestions made at the conference.

First, one of the common themes voiced by lawyers at the conference was that judges need to be more active in case management. But merely promulgating additional rules will not produce better managers. Therefore, the subcommittee was coordinating with the Federal Judicial Center to improve judicial education programs and enhance informational resources. Among other things, a new civil case-management section of the *Benchbook for U.S. District Court Judges* had been drafted.

Second, Judge Campbell noted that efforts were being made to tap into local efforts around the country to test new procedures for managing litigation. A number of case-management pilot programs were underway, and the committee was working with the Federal Judicial Center to identify and monitor them. In addition, the committee would ask chief judges around the country to keep it informed about pertinent local developments.

Judge Campbell reported that one of the initiatives that the committee was encouraging was a project to develop a standard protocol for initial discovery in employment discrimination cases. Drafted jointly by lawyers representing both plaintiffs and defendants, the protocol identifies the information that each side must exchange at the outset of an employment case, without the need for depositions or interrogatories. No objections are allowed except for attorney-client privilege. The protocol, he said, will be made available to all federal courts, and all the judges on the advisory committee will adopt it and encourage their colleagues to do the same.

Third, the advisory committee had encouraged additional empirical work, especially by the Federal Judicial Center, on how federal courts are actually handling their cases on a daily basis. One study by the Center was focusing on the early stages of a civil case, including initial scheduling orders, Rule 26(f) planning conferences, and Rule 16(b) initial pretrial conferences. The study revealed that court dockets show that the initial scheduling orders required by FED. R. CIV. P. 16(b)(1) are issued in only about half the civil cases in the district courts. But, he cautioned, docket information may not be sufficiently reliable because there are no uniform ways of recording the pertinent data, and the absence of public records may be the result of inadequate docketing practices. In addition to reviewing the docket sheets, the Center will conduct a survey of lawyers to ascertain what events occurred early in their cases.

Fourth, Judge Campbell noted that the committee had invited judges and lawyers from the Alexandria Division of the Eastern District of Virginia to discuss their experiences with that court's "rocket docket." He added that all the judges on the court share a common philosophy that cases must be handled promptly, and the bar works very well within that court culture.

Fifth, Judge Campbell said that several specific rule amendments were being considered in light of the Duke Conference, including: reducing the time to hold an initial case management conference from 120 to 60 days; eliminating the moratorium on discovery until after the Rule 26(f) conference is held; requiring parties to talk to the court about discovery problems before filing motions; amending Rule 26 to emphasize the importance of proportionality; reducing obstructive objections; limiting the presumed number of depositions in a case to five and the presumptive maximum time of a deposition from seven hours to four; reducing the presumptive number of interrogatories below the current 25; postponing contention interrogatories until later in a case; reducing service time; mandating that judges hold a scheduling conference; and emphasizing in Rule 1 that lawyers must cooperate with each other. He added that rules language was being drafted to help in considering these various ideas.

Professor Cooper added that another area for potential rulemaking was the relationship between pleading motions and discovery. Two competing proposals had been offered. One would suspend discovery until the court rules on a motion to dismiss

for failure to state a claim. The other would create a presumption in favor of ruling on a motion to dismiss only after some discovery has occurred.

Judge Campbell said that the central theme at the Duke conference had been that parties generally believe that civil litigation takes too long and costs too much. The advisory committee, he said, was contemplating conducting a "Duke II" conference, but had not yet made a decision on the matter.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee had no immediate plans to propose rule amendments dealing with pleading standards. The committee was actively reviewing the developing case law, and the Federal Judicial Center was continuing to conduct empirical research on the frequency of motions to dismiss and their disposition.

The Center's research had found a statistically significant increase in the number of motions filed, but not in the rate of granting motions. It was not possible to tell whether more cases were being dismissed out of the system because courts often grant motions to dismiss with leave to amend. A follow-up study by the Center had shown no statistically significant increase in plaintiffs excluded from the system by motions to dismiss or cases terminated by motions to dismiss, other than in financial instrument cases. On the other hand, some law professors have conducted their own research and claim that there has in fact been an increase in dismissals from the system.

Professor Cooper noted that the advisory committee had been presented with a large number of suggested changes in pleading standards and various suggestions for integrating pleading practice with discovery practice. He noted that there were many opportunities and possibilities for rule changes, but the committee was not contemplating proposing any rule for publication in the coming year.

PLEADING FORMS

Professor Cooper pointed out that FED. R. CIV. P. 84 (forms) specifies that the illustrative civil forms in the appendix "suffice" under the rules. He noted specifically that the form for pleading negligence had been approved by the Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 565 n.10 (2007). But lower federal courts have found a tension between Supreme Court cases and the current pleading forms, especially Form 18 (complaint for patent infringement).

The larger question, he said, was why the committee was still in the forms business. There was a clear need for illustrative forms in 1938 to show the bar how the new federal rules would work in practice. That objective, however, may no longer be important. Moreover, the committee has generally not paid a great deal of attention to

the forms over the years. Although some, such as Form 5 (notice of a lawsuit) and Form 6 (waiver of service of a summons) had been very carefully coordinated with FED. R. CIV. P. 4(d) (waiver of service), most forms do not receive much attention.

He noted that the advisory committees have adopted different approaches towards drafting forms, and the forms are used in different ways for different purposes. The civil and appellate forms, for example, are promulgated through the full Rules Enabling Act process. The official bankruptcy forms, on the other hand, follow the first several steps of that process, but are prescribed by the Judicial Conference. The criminal forms do not go through the Rules Enabling Act process at all. They are drafted by the Administrative Office with some consultation with the criminal advisory committee..

The Standing Committee, he said, had appointed an ad hoc subcommittee on forms, composed of members of the advisory committees, to consider the appropriate role of the committees in preparing forms. Among other things, the subcommittee will consider whether the current variety of approaches is appropriate or whether there is a need for more uniformity. There appears to be little support for adopting a uniform approach, as sufficient coordination may be achieved through the Standing Committee's review of the advisory committees' recommendations. The subcommittee will also consider whether it is advisable for any of the forms to continue to follow all the steps of the full Rules Enabling Act process. He added that there was no urgency in making those decisions.

CLASS ACTIONS

Judge Campbell reported that the advisory committee had recently formed a subcommittee on class actions, chaired by Judge Michael W. Mosman, and it had begun to identify issues that might possibly warrant future rulemaking.

Professor Marcus provided background on the development of Rule 23. He explained that after the important 1966 amendments to FED. R. CIV. P. 23 (class actions), the advisory committee took no action on class actions for 25 years. In 1991, the Judicial Conference, on the recommendation of its ad hoc committee on asbestos litigation, directed the committee to study whether Rule 23 should be amended to improve the disposition of mass tort cases.

In response, the committee considered a wide range of different possible changes in the rule and sought extensive input from the bench and bar. In 1996, it published a limited number of significant amendments. They would have required a court to consider whether a class claim is sufficiently mature and whether the probable relief to individual class members justifies the costs and burdens of class litigation (commonly referred to as the "just ain't worth it" test). They would also have explicitly permitted certification of settlement classes and a discretionary interlocutory appeal from certification decisions.

During the publication period, the proposed amendments to revise the certification process proved to be very controversial. Moreover, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), dealing with settlement certification. As a result, the committee decided to proceed only with the proposed addition of Rule 23(f) authorizing a discretionary interlocutory appeal. That provision took effect in 1998 and has proved successful.

In 2000, the committee continued working on the rule. Its additional efforts resulted in several amendments that took effect in 2003, including improving the timing of the court's certification decision, strengthening the process for reviewing proposed class-action settlements, and authorizing a second opt-out opportunity for certain class members to seek exclusion from the settlement. It also added Rule 23(g) governing the appointment of class counsel, including interim class counsel, and Rule 23(h) governing the award of attorney's fees.

Judge Campbell pointed out that the amendments pursued by the advisory committee did not address the problems of overlapping classes, recurrent efforts to certify a class through judge-shopping, or recurrent efforts to approve a settlement. Professor Cooper, he noted, had devised creative ideas on addressing those issues by rule, but they attracted too much controversy.

Judge Campbell reported that the advisory committee was considering whether Rule 23 needs to be amended to take account of several recent developments, including enactment of the Class Action Fairness Act and recent class-action case law. The committee, he said, had compiled a list of potential issues that might be addressed and was considering whether the time was ripe to give further consideration to Rule 23. On the other hand, he said, any significant change in the rule would likely be controversial, and the committee has several other, more important projects on its agenda.

INTERLOCUTORY APPEAL FROM ATTORNEY-CLIENT PRIVILEGE DECISION

Professor Cooper reported that a suggestion had been referred to the advisory committee for a rule amendment that would allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. Although referred to the civil committee, he said, the matter should also be considered by the other advisory committees.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of December 12, 2011 (Agenda Item 9).

Amendments for Final Approval

FED. R. CRIM. P. 16(a)(2)

Judge Raggi reported that the advisory committee was proposing an amendment to FED. R. CRIM. P. 16(a)(2) (discovery and inspection) that would clarify an ambiguity introduced during the 2002 restyling of the criminal rules. The change would make it clear that the restyling of the rule had made no change in the protection given to government work product.

She explained that Rule 16(a) allows a defendant to inspect papers and materials held by the government. Before restyling, Rule 16(a)(1)(C) had contained enumerated exceptions to that access, including one for the government's work product. The restyled rule, however, eliminated the exceptions.

The district courts, she said, have rejected claims that the 2002 amendments had changed the substance of the rule, using the doctrine of a "scrivener's error" to deny access by the defendant to the government's work product. As a result, there appear to be no serious practical problems and no urgency to make a correction. Nevertheless, she said, the advisory committee agreed unanimously that it was inappropriate to have an ambiguous restyled rule and decided to pursue an amendment.

The committee, she pointed out, believed that the proposed change was technical and could be made without publication. Nevertheless, it recognized that the Standing Committee needed to make that policy decision.

The committee without objection by voice vote approved the proposed technical and conforming amendment for final approval by the Judicial Conference without publication.

Information Items

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee was considering the Attorney General's recommendation to amend FED. R. CRIM. P. 6(e) (recording and disclosing grand jury proceedings). The amendment would provide procedures for authorizing disclosure of historically significant grand jury materials after a suitable period of years.

The proposal, she said, was in response to a district court decision that ordered the release of grand jury materials dealing with President Nixon's testimony before the Watergate grand jury. The district court issued the release order relying on its inherent

authority, even though FED. R. CRIM. P. 6(e) contains no provision expressly authorizing release of the materials.

She noted that the Department of Justice did not agree that the court had inherent authority to order disclosure, but it did not appeal the decision. Instead, it asked the advisory committee to amend Rule 6 to allow disclosure after a specified period of years. The proposal, she said, was being studied by a subcommittee chaired by Judge John F. Keenan.

FED. R. CRIM. P. 16

Judge Raggi reported that the advisory committee – after extensive study and debate – had decided not to pursue amendments to FED. R. CRIM. P. 16 (discovery and inspection) to codify the duty of prosecutors to turn over exculpatory information to the defendant. The committee, however, agreed to address the matter in a "best practices" section of the *Benchbook for U.S. District Court Judges.* She said that she had met with Judge Paul L. Friedman, chairman of the Federal Judicial Center's Benchbook Committee, and a draft section had been prepared.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 28, 2011 (Agenda Item 11). Judge Fitzwater noted that the advisory committee had no action items to present.

Information Items

SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the restyled Federal Rules of Evidence had taken effect on December 1, 2011. The advisory committee, he said, had held its October 2011 meeting in Williamsburg, Virginia, at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a symposium on the restyled rules, hosted by William and Mary at the committee's request.

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater noted that the advisory committee was considering a proposal to amend Rule 801(d)(1)(B) (hearsay exemption for certain prior consistent statements). It would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment, he said, was based on the premise that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The needed jury instruction, moreover, is almost impossible for jurors to understand.

He noted that there was a difference of opinion in the advisory committee on whether to pursue a change in the rule, and the members would appreciate receiving any further advice from the Standing Committee on the matter. He also noted that the committee, with the help of the Federal Judicial Center, was planning to send a questionnaire to all district judges soliciting their views on the advisability of the proposed amendment.

A member supported making the proposed change in Rule 801, but cautioned against sending out questionnaires to all judges on potential rule changes, especially where a proposed rule is not particularly significant. He said that it could set a bad precedent for other committees to send out surveys on a regular basis.

PRIVILEGES PROJECT

Judge Fitzwater reported that the advisory committee undertook a project several years ago to compile the federal common law on evidentiary privileges. The initiative, he said, was not intended to result in a codification of the evidentiary privileges or in new federal rules. Rather, it was expected to lead to a Federal Judicial Center monograph providing a restatement of the federal common law. Because of the potential sensitivity of the project, however, the committee decided not to proceed further without Standing Committee guidance and approval.

Professor Capra explained that the committee had undertaken similar types of projects in the past. For example, when Congress enacted the evidence rules in 1975, it made several changes in the rules proposed by the judiciary, but it did not change the accompanying committee notes. As a result, some of the notes are inconsistent with the text of the rules. At the committee's request, he compiled the inconsistencies and produced a Federal Judicial Center monograph under his own name. Later, the advisory committee authorized him to write a monograph on the discordance between some of the rules and the prevailing case law. Both publications were very helpful to the bar.

Professor Capra said that the law of privileges is very important, but it is not codified. The advisory committee began developing a set of privilege rules to reflect the federal common law. After initial efforts, the project, under the leadership of Professor Kenneth S. Broun, was deferred because of the committee's other priorities, such as restyling the rules. He added that the project was a low priority for the committee and would be put aside if other matters need attention. After having completed the restyling project, however, the committee now has a light pending agenda.

Members asked whether the advisory committee itself was planning to approve the work and whether the project was the best use of the committee's time and the judiciary's limited resources. Several agreed that it would be a beneficial project, but it should have a relatively low priority. Judge Kravitz added that it was fine to produce the paper, but he would not recommend giving it official advisory committee approval.

A participant recommended that the project continue because there has been recurring interest by Congress over the years in enacting privileges by law. Professor Capra added that since 1996, the advisory committee had been asked to comment on six different proposals dealing with privileges.

A member said that the Standing Committee should defer to the advisory committee's best judgment on the matter. If the advisory committee finds the project useful, especially since Congress may ask for input on privileges, it should continue.

Judge Fitzwater and Professor Capra suggested allowing Professor Broun to continue on the work on the matter and report to the advisory committee as needed at its meetings. A committee consensus developed to adopt their suggestion.

COMMITTEE JURISDICTIONAL REVIEW

The committee authorized Judge Kravitz and Professor Coquillette to complete for the committee a self-evaluation questionnaire for the Judicial Conference's Executive Committee on the need for the committee's continued existence, the scope of its jurisdiction, and its workload, composition, and operating processes.

PANEL DISCUSSION ON CLASS ACTIONS

Judge Rosenthal presided over a panel discussion on class actions with Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules, Daniel C. Girard, Esquire, a former member of the advisory committee, and John H. Beisner, Esquire.

Judge Rosenthal noted that the discussion was in accord with the committee's tradition of spending time at its January meetings in examining long-term trends and issues that may affect the rules process in the future, but do not require immediate changes in the rules. She explained that the Class Action Fairness Act of 2005 (CAFA) had now been in place for seven years and the courts have issued several important class-action decisions in the last few years. In light of the committee's statutory obligation to monitor the continuing operation and effect of the federal rules, she said, it was an opportune time to start thinking about whether any changes in FED. R. CIV. P. 23 might be needed in the future. Class actions, she added, are a high profile area of the law and involve a great deal of money and interest.

The panel, she pointed out, consisted of an attorney who primarily represents plaintiffs and a lawyer and a law professor who normally have represented defendants. She asked them to focus on the impact of the recent cases on class-action practice and to identify any potential rule changes that might have a beneficial impact on class-action litigation.

The panel discussed a wide range of issues, but the exchange can be categorized as falling into the following four broad topics:

1. Front-loading of cases;
2. Class definition;
3. Settlement classes; and
4. Competing classes and counsel.

1. FRONT-LOADING OF CASES

In re Hydrogen Peroxide

The panel discussed the impact of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009). In the case, the Third Circuit held that the district court was obligated at the certification phase of a class action to apply a rigorous analysis of the available evidence and make findings supported by a preponderance of the evidence (rather than a mere threshold showing) that each element of Rule 23 has been met.

The district court was required to resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits. Specifically, it should have resolved the battle of the experts over whether the alleged injury could be demonstrated by proof common to the class, rather than individual to its members. The decision, moreover, expressed concern that the district court's order certifying the class would place unwarranted pressure on the defendant to settle non-meritorious claims – elevating that concern, in effect, into a policy factor to consider in the certification process.

Although not all courts follow *Hydrogen Peroxide*, it was suggested that the practical impact of the case has been that plaintiffs are now confronted with an early merits-screening test. They must present their evidence at the certification stage or risk losing the case if the court denies certification. That conclusion, moreover, was seen as bolstered by several other cases, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

In *Wal-Mart*, the Supreme Court ruled that if the plaintiffs had evidence of company-wide employment discrimination, they had to present it by the time of the certification hearing. A key question, therefore, is whether the courts will now impose a higher standard of "commonality," as in *Wal-Mart*, which would necessitate more expansive discovery, or whether they will read *Wal-Mart* as limited to the unique employment setting and continue the traditional concept of commonality.

Discovery at certification

A panelist argued that *Hydrogen Peroxide* has created a much more expensive class-certification process, particularly in complex cases. He said that there is considerable uncertainty for the lawyers on how discovery is to take place after the pleading stage. Discovery may have to be conducted before certification is heard and expert witnesses may be subjected to a full *Daubert* analysis.

It was noted that expert testimony now is often a central feature at the certification stage, and extensive case law is developing on the subject, including whether *Daubert* applies at the class-certification stage. In *Wal-Mart*, the treatment of expert witnesses at certification was an important factor in the majority opinion, and *Hydrogen Peroxide* was largely a battle of the experts.

It was suggested that plaintiffs' lawyers often feel disadvantaged by the front-loading of discovery. At the same time, defendants traditionally have preferred to bifurcate discovery and avoid excessive costs by limiting discovery at certification and deferring full-blown discovery on the merits until later.

In front-loading the discovery, though, the recent decisions have raised questions about how much merits discovery is actually required up front and whether the discovery

can continue to be bifurcated if plaintiffs are now required to prove the merits of the certification issues. The discovery problems are complicated, moreover, because discovery is now largely electronic and does not lend itself very well to phasing.

A panelist said that the recent decisions have caused additional work and difficulties for the parties but have not created a crisis situation. It appears, for example, that meritorious class actions are not being killed in the cradle, as plaintiffs are afforded a fair chance to explain to the court why they believe that their class can be certified.

One panelist argued that what information both sides should put forward in class certification briefing is becoming much clearer. The information necessarily will vary from case to case, but much of the discovery is simply not relevant for certification purposes. The judges, he said, are closely managing the cases and overseeing the discovery.

The focus now for the parties, he said, is on providing useful information that a court needs to make the certification decision. Judges, for example, often ask the lawyers whether particular discovery is really needed for certification or can be deferred until later in order to meet the schedule for class certification. Some judges also indicate to the parties what sort of discovery will be needed for certification and set a time for certification briefing, leaving it up to the lawyers to figure out the details of what discovery must be exchanged for certification.

A panelist noted that *Hydrogen Peroxide* cited the advisory committee note to the 2003 amendments to Rule 23, which sets forth the concept of a "trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." The recent cases, he said, have been sending a uniform message that the district court should instruct the parties to gather their available information and figure out what a class trial would look like. The court, thus, exercises the gateway function of deciding whether the jury will have the evidence it needs to make a decision that the entire class is entitled to relief. The key issue is whether the evidence varies so much among the individual plaintiffs that the jury is unable to decide that the defendant is liable to all members of the class.

Early practicable time for making the certification decision

In light of the additional information that now has to be gathered for certification, the panel discussed whether courts are being more flexible in applying Rule 23(c)(1)(A)'s requirement that certification occur at "an early practicable time." There appears to be little uniformity among the courts, however, as courts cite the language of the rule to support every conceivable outcome. Some make the certification decision very early in the case, while others defer it until much later. A few districts specify

categorically that a class certification motion be made within 90 days, while in others, the certification process occurs at the close of discovery.

Early dispositive motions

It was reported that the trend towards front-loading of class-action litigation has led to an increasing tendency to find ways to dispose of cases at an early stage. As a matter of good practice, therefore, a defendant who believes that a national class action cannot be certified under any circumstances should force the plaintiffs to come forward at an early stage and move for class certification.

Since CAFA, many more class-action cases are being brought in the federal courts that involve state laws, and more motions are being filed that challenge jurisdiction. Some state laws, moreover, appear to grant relief for class members in circumstances that may not meet the criteria for standing in the Article III federal courts.

It was suggested that there has been some drift away from analyzing class membership questions under the criteria specified in Rule 23(a) and (b) and framing them instead as matters of standing. A defendant, thus, moves to strike class allegations at the pleading stage, challenging the definition of the class through a dispositive motion, claiming that the class includes members who do not have standing. The trend may be a reaction to the sheer complexity of the issues in a multi-state post-CAFA class action, the high costs of conducting discovery, and a lack of clear guidance. In essence, the dispositive motions assert that there is some fundamental flaw in a particular class and, therefore, no need to go through the expense of discovery and the certification process.

In addition, there is some confusion over the ability of an individual plaintiff to act in a representative capacity. Some defendants claim that unless a plaintiff's claim is a mirror image of the claim of every other person in the class, in ways that do not necessarily relate to the presentation of common proof, the plaintiff does not have standing to act on behalf of others in a representative capacity.

2. CLASS DEFINITION

Preponderance and Commonality

It was suggested that there is uncertainty over what is meant by "preponderance" in Rule 23(b)(3). Under the current language of the rule, it was argued, plaintiffs are faced with a "winner take all" proposition. The court has to decide whether common issues of law and fact predominate. If they do, the court will certify the class. If they do not, certification will be denied.

It was noted that if common issues of law and fact do not predominate under Rule 23(b)(3), a court may still certify a class action under Rule 23(c)(4) for particular common issues. There is, however, very little guidance as to when a court may certify an issues class. Although a body of case law is developing on issues classes, it varies from circuit to circuit.

Recent cases show that the courts are sharply divided on Rule 23(c)(4). One circuit has ruled that an issues class is a housekeeping remedy, and predominance still must be shown. Another has held that predominance need not be shown, and a court only has to consider whether resolution of the issue will materially advance the case.

A panelist said that issues classes are not commonly invoked by counsel because lawyers prefer a more complete outcome to their litigation. They are not normally interested in litigating on a piece-meal basis. As a practical matter, there are too many complications in issues-class litigation, and it is generally not worth it for them. Another panelist disagreed, however, and suggested that issues classes are quite important and have been used effectively in environmental tort cases and employment cases.

It was recommended that the Advisory Committee on Civil Rules monitor the developing case law and ultimately evaluate whether to consider a rule amendment that adjusts the standards of Rule 23(c)(4) to give the courts greater guidance on when a class may be certified that has both common issues and individual issues. The panelists pointed out that courts that have wrestled with the rule have said that the matter is unclear. It was also noted that the ALI had spent a great deal of time on issues classes as part of its recent restatement project. If properly defined, it was argued, an amended federal rule on issues classes could be beneficial to the mass adjudication of cases.

It was pointed out that there is a mechanism for dealing with predominance issues arising from state-law variations, especially in post-CAFA cases involving consumer claims arising under the laws of multiple states. In these cases, defendants generally argue that the claims have to be considered individually under different state consumer protection laws. Although a national class action may still be maintained, as in the *De Beers* litigation in the Third Circuit, a case may effectively be divided into sub-classes on a state-by-state basis for litigation purposes. In the settlement context, the analysis of state law variations historically was an issue of "manageability." Defense counsel would argue that the court cannot litigate the case on a manageable basis because the jury would have to be charged on the law of 50 states.

It was pointed out that one factor that has increased the number of class-action cases in the federal courts is the strategy of plaintiffs – reinforced by a general skepticism of federal courts towards nationwide classes – to break down a class into several subclasses, such as a separate class action for each state. That tendency will continue to occur in employment cases, as classes are broken down into smaller class actions,

especially after *Wal-Mart v. Dukes*. The trend will result in more class actions, and multiple class actions on the same subject. The Judicial Panel on Multidistrict Litigation will routinely draw the federal cases together to conduct the discovery on a common basis. In the end, though, separate certification determinations will have to be made in each class action.

In the past, commonality was not an important issue and was often stipulated. The real issue, rather, was predominance. But the Supreme Court has now said that the common issue has to be central to the validity of each of the claims. It has to be a central, dispositive issue to class certification. Commonality, moreover, is used in other rules, such as Rule 20 (joinder), which contains the exact same language. So one issue for the future will be whether *Wal-Mart* will have an impact on joinder.

Rule 23(b)(2) classes

It was suggested that *Wal-Mart v. Dukes* represents a potential sea change, not only regarding "commonality" under Rule 23(a), but also for classes under Rule 23(b)(2). A panelist said that the most remarkable aspect of the *Wal-Mart* decision, and potentially the most important aspect, was the section dealing with Rule 23(b)(2). The Court's statements that back pay could not be brought as part of a (b)(2) action because it was not "incidental" were a major departure from the decisions of the courts of appeals. Moreover, the Supreme Court suggested that there may be a due process problem with any monetary claim in a (b)(2) action, even a claim for statutory damages or incidental damages.

Accordingly, many difficult questions arise as to the scope of Rule 23(b)(2) after *Wal-Mart*, and there will be a great deal of analysis of the decision and the ensuing case law. Questions will arise, for example, on whether some problems can be dealt with by allowing opt-out classes under (b)(2) or hybrid classes under (b)(2) and (b)(3).

Arbitration Clause Cases

It was argued that *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), may have the most important impact of any of the recent class-action cases, for it has been seen as effectively eviscerating many small claims cases. Although the Supreme Court noted in *Amchem* (which dealt with mass torts) that class actions are really about small claims cases, rather than mass torts, it later dealt a virtual death knell to many small claims cases in *Concepcion.*

It was suggested that one of the issues that plaintiffs thought was left open in *Concepcion* was whether a "no class-arbitration" clause may be invalidated if the plaintiffs can show that it is impossible to vindicate their rights other than through class

arbitration. One court of appeals ruled recently, however, that the argument could not survive after *Concepcion*.

3. SETTLEMENT CLASSES

The need for a Rule 23 amendment on settlement classes

A panelist said that many of the court decisions since *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), have wrestled with what must be shown in the context of certifying a settlement class. Although *Amchem* said that the district court does not have to worry about "manageability" in a settlement case under Rule 23(b)(3), the class must still meet the tests of preponderance, commonality, and adequacy, and the case has to be treated as if it were going to trial. In the Third Circuit's *De Beers* litigation, for example, the court's opinion noted that "(e)ver since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law."

Judge Kravitz asked the panel whether FED. R. CIV. P. 23 should be amended to deal specifically with settlement classes.

The panelists agreed that the absence of a settlement-class provision has created problems and has tended to push settlements, especially in mass-tort cases, outside the court system. Since *Amchem*, the parties in these cases have had to construct work-around solutions to achieve settlements, often a settlement that lies outside judicial supervision under Rule 23(e).

The absence of a workable settlement-class device is seen as a major problem in mass torts because there is no supervision of the parties' actions or the attorney's fees. Defendants, moreover, are concerned about engaging in settlements outside the courts because they are left to their own devices. They must hope that the terms of the settlement stick because they have not been sanctioned by a court.

A panelist summarized three specific impacts of *Amchem*. First, he said, more cases are now proceeding to non-class settlements, where there are no criteria and no supervision. Second, several cases have struck down non-judicial settlements, forcing the parties to go back to the court and try cases that all the parties wanted to settle. Third, the requirements for a litigation class place defendants in an awkward position. If they claim under *Amchem* that the case is suitable for class certification and trial, and then fail to settle, they may have stipulated to something that will harm them for litigation purposes. The internal problem for the defendants is what they must do to support and

enforce a settlement after they have asserted to the court that the case is suitable for certification as a litigation class.

A panelist added that the absence of a clearly defined standard for certification of a settlement class is exploited by tactical, professional objectors. In essence, they want a financial reward in return for dropping their objections. Greater clarity in the rule, he said, would not solve the problem of non-meritorious objections entirely, but it would take an argument away from nuisance objectors.

Approval of Settlements

Judge Rosenthal reported that the rules committees retreated in the 1990s from the decision to seek approval of a separate provision for settlement classes because *Amchem* and *Ortiz* were pending in the Supreme Court. But there was also strong and negative reaction to the committee's published rule, especially from law professors who argued that it would unleash the forces of collusion and lead to rampant reverse auctions.

At the same time, defendants feared that loosening the standards for certification of settlement classes would bleed over inevitably to loosen the standards for litigation class actions. They warned that the proposal would invite more class actions because it would be easier for potential plaintiffs to obtain settlement awards. In light of these concerns, she said, there was no consensus for the committee to proceed with the proposal.

She added that the 2003 amendments to Rule 23 were designed to put rigor into the evaluation of a settlement's fairness, reasonableness and adequacy and to strengthen the oversight of attorney's fees. The amendments, though, deliberately did not address whether the standards for certifying a settlement class should be different from those for certifying a trial class. She asked whether conditions have changed since 2003 and whether the absence of a settlement class certification standard in Rule 23, coupled with other concerns raised by the panelists, are sufficiently acute to warrant pursuing rule amendments.

A panelist explained that effective brakes are currently in place to deal with abusive settlements. Most class actions, moreover, are litigated in a relatively small number of district courts. The judges are sophisticated and experienced and know how to deal with issues of fairness and compensation.

A panelist urged pursuing a distinct rule addressing settlement classes. He noted that the current requirements for certification are clear, perhaps too clear, and are inconsistent with the realities of the settlement process. The defendants, in reality, are waiving their defenses and do not have a trial plan because their objective is a settlement without a trial. Nevertheless, *Amchem* requires them to go through a certification process

that does not make a lot of sense for them. Another panelist did not see a pressing need for a settlement-class rule in anti-trust, securities, and financial services cases, but agreed that it could be helpful in mass-tort cases.

A panelist argued that the primary focus of a proposed settlement-class rule should not be on the class-certification process. He pointed out that settlements in mass-tort cases do not reach the stage of court approval under Rule 23(e)(2) because the plaintiffs cannot meet the certification requirements of Rule 23(a) and (b).

Rather, an amended rule should build on Rule 23(e)(2), which specifies that a settlement must be "fair, reasonable, and adequate." The rule would alter *AmChem's* statement that Rule 23(e) is not a substitute for Rule 23(a) and (b). Instead, the inquiry in a settlement-class case would proceed directly to Rule 23(e), essentially skipping over Rule 23(a) and (b).

The amendment could augment the court's inquiry under Rule 23(e)(2) by requiring it to examine the fairness of compensation among the different members of the class and determine whether variations in individual entitlement are adequately reflected in the proposed settlement. Injuries of class members, for example, may well range from mere fear of injury to permanent disability. It was pointed out that most mass-tort settlements do in fact consider those distinctions and typically provide a grid of different compensation levels for different levels of injury. They also establish some sort of due process arrangements for making the awards.

The recent ALI principles of aggregate litigation deal with certification of a settlement class and provide that a settlement class does not have to meet the standards for a litigation class. They specify the various fairness factors that must be applied to settlements and address second opt-outs and objectors. It was recommended that the civil advisory rules committee review the ALI deliberations to see whether any of the proposals it considered would be suitable for a federal rule change.

It was reported that the ALI also had taken a hard look at cy-près cases. Its principles of aggregate litigation create a presumption that undistributed money is given to the class. If there is a cy-près issue, it is normally because it is difficult to distribute the money, and a recipient or recipients must be selected that mirrors the purpose of the class.

Although just one part of the larger ALI project to address settlement classes, the cy-près portion of the new principles has been cited more often than all other provisions of the principles combined. It has recently been adopted as the law of a federal circuit and cited by two other circuits. A panelist recommended that if the advisory committee decides to proceed with amendments to address settlement classes, cy-près should be an important component of them.

Role of the state attorneys general in class settlements

It was pointed out that the attorneys general of the states review class-action settlements carefully and play a useful and appropriate role. The attorneys general have a sharing arrangement and work well together in reviewing settlements and taking action where appropriate.

Under CAFA a defendant has to give notice of a settlement to the attorneys general of the affected states within 90 days. After the notice, the lawyers may receive calls from a group of attorneys general inquiring into the facts and details of the case and the settlement. They are also often asked to present supporting information to justify their fees. In addition, when a truly abusive settlement is announced, law professors, concerned lawyers who may have had competing cases, as well as the attorneys general, normally come forward to object.

It was agreed that the impact of the efforts of the attorneys general has been to raise the bar generally for negotiating and presenting settlements. Courts, moreover, are very conscious in overseeing how much money is distributed to the class, how soon it is distributed, and how much the lawyers receive in fees.

In light of the effectiveness of the review of settlements by the attorneys general, the panel was asked whether there is still a need for Rule 23(e)'s requirement that the presiding judge review and approve all settlements. The panelists replied that judicial supervision is still appropriate and pointed out that the attorneys general do not intervene in every case.

4. COMPETING CLASSES AND COUNSEL

Duplication of efforts

A panelist pointed to the problems arising when many different counsel file similar class actions, as often occurs under the federal anti-trust laws. Historically, the cases have been coordinated by having the Multidistrict Litigation Panel sweep them into a single proceeding for pretrial purposes. Recently, though, lawyers for both plaintiffs and defendants have been invoking the "first-filed" rule. Thus, if the defendants have no objection to the location of the first-filed case, their lawyers file motions to stay or dismiss all other class actions, and the matter never reaches the MDL panel. Likewise, plaintiffs who file the first case defend their turf by filing motions to stay or dismiss all later cases.

It was reported that law firms filing class-action cases have a significant problem in controlling the work of other, competing lawyers. When a law firm representing a class of plaintiffs reaches the point of resolving the case with the defendants, it is often

confronted with other lawyers seeking fees for having performed unnecessary or counter-productive services. The lawyers were not asked to perform the work for the class, and their intervention may in fact be an impediment to resolution of the case. Defendants should not have to pay for the unnecessary services, nor should fees be diverted from the lawyers who actually handled the important work on the case.

It was pointed out that the Southern District of New York has developed a body of case law specifying that before class counsel is appointed, services that duplicate the work rendered by other counsel are not compensable. And after the appointment of counsel, only services performed at the direction of lead counsel are compensable. That process was said to be working effectively and might be considered for inclusion in an amended rule.

Appointment of Counsel

It was reported that Rule 23(g), part of the 2003 rule amendments, has worked very well and is beneficial for practitioners. It allows the court to appoint interim class counsel after a case has been filed to represent the class up through certification. Then at certification the court decides whom to appoint as class counsel. There is some question, though, as to whether the rule applies when there is just one case.

A panelist said that Rule 23(g) should be applied early and often, for it is essential for the courts to control the appointment of counsel and the payment of attorney fees. In many CAFA cases, for example, a lawyer must negotiate with other lawyers who have filed duplicative cases in order to reach agreement on the hard policy decisions on how best to frame the case to achieve court certification. It leads to a good deal of tactical behavior among counsel that has little to do with the presentation of the case for certification. To make those hard policy decisions, he said, it is important to have only one lead lawyer, or maybe two lawyers, in charge of the case. Better outcomes are reached when a court asserts strong control at the front end of a case, and Rule 23(g) is the perfect vehicle to achieve that control.

A panelist said that when there is an MDL proceeding, which brings many class actions together, some courts forgo Rule 23(g) and rely on their inherent authority and do one of two things. On the one hand, they may instruct the counsel of all the many overlapping cases that they should get together and file a consolidated complaint that is, in effect, an amalgam of all the actions. Usually, as a part of that process, a management team emerges to take responsibility for the new complaint, which essentially initiates a new action. On the other hand, where there are many single-state actions in the MDL proceeding, the cases will not be combined because each state wants to stand on its own. Typically a liaison counsel is appointed by the court to bring all the counsel together. He added that counsel are not usually brought together for fee-sharing purposes, although they generally have made some arrangements on their own.

Federal-State coordination

Judge Rosenthal noted that CAFA has increased the number of federal class actions and affected the nature and extent of federal-state issues. She asked whether the pre-CAFA problems have abated and whether Rule 23 is adequate in dealing with current federal-state coordination issues.

It was agreed that CAFA is working much as its proponents intended. Cases with interstate implications are migrating to the federal courts, while those involving local controversies remain in the state courts.

A panelist said that the remaining coordination problems arise mostly in one state. When there is a multi-state controversy after CAFA, most class actions will be filed in the federal courts. But if a group of plaintiffs live in the same state as the defendant, their class action will be heard in the state courts. He said that it is common to have a national MDL proceeding that consolidates class actions proceedings for all the federal cases, except those in one state. In that state, there will be a parallel class action in the state courts for local residents. Despite the separate proceedings, coordination normally occurs among counsel and the courts.

The panelists noted that the federal MDL judges have become very proficient in handling MDL proceedings and in reaching out to work cooperatively with the state courts in mass-tort cases. They added that state court judges have their own difficult issues to resolve, and coordination with their federal colleagues has been very beneficial.

CONCLUSIONS

Judge Rosenthal summarized the various concerns voiced by the panelists and asked each to pick the single most promising potential rule amendment that would have a beneficial impact on class-action practice.

Front-loading of cases

One panelist cited the front-loading of cases after *Hydrogen Peroxide* as an important issue that needs to be addressed. He suggested drafting a rule to give the parties and the courts more guidance on exactly what information a plaintiff must produce for class certification. The parties, he said, are uncertain about the impact of all the recent cases. They want an early ruling on class certification, but they also want to avoid discovery costs and prefer to continue with some form of bifurcated discovery.

Class definition

Another panelist suggested a rule that revisits the issue of predominance and acknowledges that most cases appropriate for class adjudication in fact have individual issues. To pretend that such is not the case, he said, results in a waste of time and much unproductive behavior. There is, moreover, a difficult intersection among several class-definition issues, including the current ambiguity over issues classes under Rule 23(c)(4), the use of (b)(2)-(b)(3) hybrid classes, certification of settlement-only classes, and handling (b)(3) classes that have some individual issues with bifurcated liability and damages.

Rather than having an "all or nothing" approach to certification based on whether common issues predominate or not, the committee might prepare a rule that gives the courts direction and discretion in class-actions that have individual issues. As a starting point, he suggested examining the case law on issues-classes under Rule 23(c)(4). A wide variety of cases, he said, can be adjudicated very effectively on a class basis. But many of the most important – those where group adjudication will confer the most social benefit – will likely have individual issues as well as common issues. He also suggested developing a rule that is flexible enough to accommodate a lower bar for certification of classes for settlement purposes.

Settlement classes

Another panelist's choice was for a distinct settlement-class rule. It might be similar to the advisory committee's proposed amendments to Rule 23(b)(4) in the 1990s. Regardless of the details of the rule, though, it should contain a specific provision that creates a clear basis for a district court to approve and supervise mass-tort settlements under Rule 23.

NEXT MEETING

The committee will hold its next meeting on Monday and Tuesday, June 11 and 12, 2012, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

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REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 13, 2011

The Judicial Conference of the United States convened in Washington, D.C., on September 13, 2011, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge Carol Bagley Amon,
Eastern District of New York

Third Circuit:

Chief Judge Theodore A. McKee
Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Chief Judge Sarah S. Vance,
Eastern District of Louisiana

Sixth Circuit:

Chief Judge Alice M. Batchelder
Judge Thomas A. Varlan,
Eastern District of Tennessee

Seventh Circuit:

Chief Judge Frank H. Easterbrook
Chief Judge Richard L. Young,
Southern District of Indiana

Eighth Circuit:

Chief Judge William Jay Riley
Judge Rodney W. Sippel,
Eastern District of Missouri

Ninth Circuit:

Chief Judge Alex Kozinski
Judge Robert S. Lasnik,
Western District of Washington

Tenth Circuit:

Chief Judge Mary Beck Briscoe
Judge Robin J. Cauthron,
Western District of Oklahoma

Eleventh Circuit:

Chief Judge Joel F. Dubina
Judge Myron H. Thompson,
Middle District of Alabama

District of Columbia Circuit:

Chief Judge David Bryan Sentelle
Chief Judge Royce C. Lamberth,
District of Columbia

Federal Circuit:

Chief Judge Randall R. Rader

Court of International Trade:

Chief Judge Donald C. Pogue

The following Judicial Conference committee chairs attended the Conference session: Circuit Judges Julia Smith Gibbons, Michael S. Kanne, Diarmuid F. O'Scannlain, Reena Raggi (incoming chair), Jeffrey S. Sutton, and John Walker, Jr.; District Judges Robert Holmes Bell, Rosemary M. Collyer, Joy Flowers Conti, Claire V. Eagan, Sidney A. Fitzwater, Janet C. Hall, D. Brock Hornby, George H. King, Mark R. Kravitz, J. Frederick Motz, Julie A. Robinson, Lee H. Rosenthal, and George Z. Singal; and Bankruptcy Judge Eugene R. Wedoff. Bankruptcy Judge Rosemary Gambardella and Magistrate Judge Thomas C. Mummert, III, were also in attendance, and Cathy Catterson of the Ninth Circuit represented the circuit executives.

James C. Duff, Director of the Administrative Office of the United States Courts, attended the session of the Conference, as did Jill C. Sayenga, Deputy Director; William R. Burchill, Jr., Associate Director and General Counsel; Laura C. Minor, Assistant Director, and Wendy Jennis, Deputy Assistant Director, Judicial Conference Executive Secretariat; Cordia A. Strom, Assistant Director, Legislative Affairs; and David A. Sellers, Assistant Director, Public Affairs. District Judge Barbara Jacobs Rothstein, Director, and John S. Cooke, Deputy Director, as well as District Judge Jeremy D. Fogel, incoming Director, Federal Judicial Center, and District Judge Patti B. Saris, Chairman, and Judith W. Sheon, Staff Director, United States Sentencing Commission, were in attendance at the session of the Conference, as was Jeffrey P. Minear, Counselor to the Chief Justice. Scott Harris, Supreme Court Counsel, and the 2011-2012 Supreme Court Fellows also observed the Conference proceedings.

Attorney General Eric H. Holder, Jr., addressed the Conference on matters of mutual interest to the judiciary and the Department of Justice. Senators Patrick J. Leahy, Amy Klobuchar, and Jeff Sessions, and Representatives Lamar S. Smith, John S. Conyers, Jr., Howard Coble, and Steve Cohen spoke on matters pending in Congress of interest to the Conference.

REPORTS

Mr. Duff reported to the Conference on the judicial business of the courts and on matters relating to the Administrative Office (AO). Judge Rothstein spoke to the Conference about Federal Judicial Center (FJC) programs, and Judge Saris reported on Sentencing Commission activities. Judge Gibbons, Chair of the Committee on the Budget, presented a special report on the budget outlook.

EXECUTIVE COMMITTEE

RESOLUTIONS

Outgoing chairs. The Judicial Conference approved a recommendation of the Executive Committee to adopt the following resolution recognizing the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2011:

> The Judicial Conference of the United States recognizes with appreciation, respect, and admiration the following judicial officers:
>
> **HONORABLE M. MARGARET MCKEOWN**
> Committee on Codes of Conduct
>
> **HONORABLE JANET C. HALL**
> Committee on Federal-State Jurisdiction
>
> **HONORABLE BOBBY R. BALDOCK**
> Committee on Financial Disclosure
>
> **HONORABLE GEORGE Z. SINGAL**
> Committee on Judicial Resources
>
> **HONORABLE MICHAEL S. KANNE**
> Committee on Judicial Security
>
> **HONORABLE LEE H. ROSENTHAL**
> Committee on Rules of Practice and Procedure

HONORABLE MARK R. KRAVITZ
Advisory Committee on Civil Rules

HONORABLE RICHARD C. TALLMAN
Advisory Committee on Criminal Rules

Appointed as committee chairs by the Chief Justice of the United States, these outstanding jurists have played a vital role in the administration of the federal court system. These judges served with distinction as leaders of their Judicial Conference committees while, at the same time, continuing to perform their duties as judges in their own courts. They have set a standard of skilled leadership and earned our deep respect and sincere gratitude for their innumerable contributions. We acknowledge with appreciation their commitment and dedicated service to the Judicial Conference and to the entire federal judiciary.

Director of the Administrative Office. The Judicial Conference approved a recommendation of the Executive Committee to adopt the following resolution to mark the departure of James C. Duff from the position of Director of the Administrative Office of the United States Courts:

The Judicial Conference of the United States recognizes with appreciation, admiration, and respect

JAMES C. DUFF
Director of the Administrative Office
2006-2011

James C. Duff's service as the Director of the Administrative Office (AO) over the last five years is the culmination of many years of distinguished service to the federal judiciary. He began his career in the judiciary as an assistant to Chief Justice Warren E. Burger, serving from 1975-1979, while also attending law school. He returned to the judiciary in 1996 to serve for four years as the Administrative Assistant to Chief Justice William H. Rehnquist, and then again in July 2006, when he was appointed Director of the Administrative Office by Chief Justice John G. Roberts, Jr. As Director of the Administrative Office, Jim Duff has proven to be a tenacious

advocate for the judiciary and for ensuring that the American judicial system maintains its reputation for excellence.

Jim Duff devoted his tenure at the Administrative Office to his goal of making the AO the most effective service organization in government. He worked to strengthen the ties between the AO and the courts it serves by creating exchanges between AO and court staff and by ensuring that the courts have a strong voice on the AO's advisory councils and groups. He focused on teamwork and collaboration both within the AO and between the AO and the agencies with which it partners to administer the nation's judicial system. Under his leadership, the judiciary forged strong working relationships with the General Services Administration and the United States Marshals Service to ensure that the judiciary had adequate facilities to carry out its mission and to secure the safety of the judicial community.

Jim Duff has also been a powerful voice for the judiciary before Congress. By partnering strong advocacy for the judiciary's budgetary and legislative needs with equally strong emphasis on good stewardship in managing the judiciary's resources, he has made sure that the judiciary's requests to Congress are heard. He has also been a champion for maintaining the independence of the Third Branch and preserving the unique aspects of service in the federal judiciary that guarantee its ability to administer fair and impartial justice. As a key part of this effort, he has worked tirelessly to obtain fair compensation for members of the judiciary so that the courts can continue to attract the highest caliber of judges and staff. As a further part of this effort, he has worked to strengthen the judiciary's internal oversight program to ensure the public's continued confidence in the integrity of the judiciary. Under his leadership, the Committee on the Administrative Office was renamed the Committee on Audits and Administrative Office Accountability and restructured to focus on the significant areas of audit, review, and investigative assistance.

Jim Duff has led the Administrative Office during a period of great challenges – workload and security risks in the border

courts, mammoth bankruptcy cases in the wake of the 2008-2009 financial crisis, and an increasingly austere fiscal environment. His great gift as a leader is that he has faced these challenges with grace and optimism, as a consensus builder, a mediator, and a motivator. His warm personal qualities, including his humility, approachability, and sense of humor make working with Jim a true pleasure. His sharp intellect, excellent judgment, and devotion to cause make working with him an honor.

The Judicial Conference expresses its great appreciation to Jim Duff for his strong leadership and dedicated service and wishes the best to him and his family in his new undertakings.

PROFESSIONAL LIABILITY INSURANCE

The Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Public Law No. 105-277, as amended by Public Law No. 106-58, requires the judiciary to provide reimbursement for up to one half of the cost of professional liability insurance to certain groups within the judiciary, including supervisors and managers as authorized by the Judicial Conference. In September 1999, the Conference delegated authority to court unit executives and federal public defenders to designate eligible positions in their respective units, consistent with Conference guidelines (JCUS-SEP 99, pp. 61-62, 66-67). At this session, the Conference delegated to the Director of the Administrative Office of the United States Courts, the Director of the Federal Judicial Center, and the Chair of the United States Sentencing Commission the authority to designate supervisors and managers of their respective agencies with regard to eligibility for professional liability insurance reimbursement, and provided that the authority may be re-delegated to executives or human resources officials of the respective judicial branch agencies.

JUDICIAL CONDUCT AND DISABILITY ACT

The Department of Justice has proposed legislation that would loosen the confidentiality requirements of the Judicial Conduct and Disability Act so that information developed in complaint proceedings under the Act could be disclosed to law enforcement officials if it relates to a potential criminal

offense. In July 2011, the Committee on Judicial Conduct and Disability endorsed a recommendation that the Conference support the proposal if it were modified to include protections drawn from the concept of a "reporter's privilege." Because the legislation was moving quickly through Congress, the Executive Committee was asked to consider the matter. On recommendation of the Committee on Judicial Conduct and Disability, the Executive Committee adopted the following position on behalf of the Conference:

> The Judicial Conference supports amending the confidentiality provisions of the Judicial Conduct and Disability Act to recognize that the judiciary controls the disclosure of information developed in connection with proceedings under the Act ("Act information") and to permit the disclosure of Act information to a law enforcement agency (a) as pertaining only to possible criminal activity and (b) subject to requirements paralleling those described in the Department of Justice's "Policy with regard to issuance of subpoenas to members of the news media," 28 C.F.R. § 50.10. Those requirements include that (1) there must be a compelling need for the Act information for the investigation of a crime reasonably believed to have occurred; (2) the substance of the Act information must be unavailable from other sources; (3) the requester must give reasonable and timely notice of the request and negotiate with the judiciary over the disclosure's scope, timing, and manner; (4) the Attorney General of the United States or of the applicable state must give permission for the request; and (5) the requester must take effective precautions to prevent the disclosed Act information from being disseminated to unauthorized persons or for improper purposes.

FISCAL YEAR 2012 INTERIM FINANCIAL PLANS

Pending final congressional action on the judiciary's appropriations for the 2012 fiscal year, the Executive Committee approved fiscal year 2012 interim financial plans for the Salaries and Expenses, Defender Services, Court Security, and Fees of Jurors and Commissioners accounts. The plans reflect many "quick hit" cost-containment items, suggested by Conference committees and others, that will significantly reduce fiscal year 2012 requirements. In approving the interim plan for the Salaries and Expenses

account, the Committee also endorsed a strategy for distributing court allotments among the court programs. In addition, the Committee affirmed that its approval of the interim plans included a determination not to allow step increases and routine promotions, and to allow other promotions only in extraordinary circumstances with approval of the Administrative Office Director, for all circuit unit, court, chambers, and defender organization staff.

MISCELLANEOUS ACTIONS

The Executive Committee —

- On recommendation of the Committee on Rules of Practice and Procedure and on behalf of the Conference, with regard to a proposed package of style amendments to the Federal Rules of Evidence approved by the Conference in September 2010 and pending before the Supreme Court, restored certain language to Rule 408(a)(1) to avoid a risk that the amendment might be interpreted as substantive, and to Rule 804(b)(4) for clarity and completeness;

- Approved final fiscal year 2011 financial plans for the Salaries and Expenses, Defender Services, Court Security, and Fees of Jurors and Commissioners accounts, as well as an allotment distribution strategy for the Salaries and Expenses account;

- Revised the policy related to the locations for Judicial Conference committee meetings to provide that meetings should be held only in hub cities and that committees that meet semi-annually must hold one of those meetings in Washington, D.C.;

- Agreed to ask every circuit to ensure that they have an up-to-date written policy in place for providing staff to senior judges and that the policy is being enforced; and

- Approved on behalf of the Conference resolutions in honor of Judge Barbara Jacobs Rothstein, who is ending her eight-year tenure as Director of the Federal Judicial Center, and William R. Burchill, Jr., who has served the judiciary for 38 years and is retiring from his position as Administrative Office Associate Director and General Counsel.

COMMITTEE ON AUDITS AND ADMINISTRATIVE OFFICE ACCOUNTABILITY

COMMITTEE ACTIVITIES

The Committee on Audits and Administrative Office Accountability reported that it received detailed briefings from three of the judiciary's independent audit firms regarding the following: cyclical financial audits of the courts and federal defender offices, audits of community defender organization grantees, audits of Chapter 7 bankruptcy trustees in bankruptcy administrator districts, and audits of debtors in Chapter 7 and Chapter 11 filings in bankruptcy administrator districts. The Committee considered ways in which the judiciary can ensure that audit issues are addressed and resolved in a timely manner, and it emphasized the importance of appropriate actions by court unit executives, chief judges and circuit judicial councils to address audit findings and recommendations. The Committee also asked the AO to focus on its follow-up efforts and to provide assistance to the courts and federal defender offices when needed. The Committee passed a resolution honoring the service of AO Director James C. Duff.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

OFFICIAL DUTY STATIONS

On recommendation of the Bankruptcy Committee, and in accordance with 28 U.S.C. 152(b)(1), the Conference took the following actions with regard to official duty stations of bankruptcy judges:

a. Approved a request from the Central District of California and the Ninth Circuit Judicial Council to designate Los Angeles as the official duty station for a vacant bankruptcy judgeship in that district; and

b. Approved a request from the District of South Carolina and the Fourth Circuit Judicial Council to transfer the official duty station for Chief Judge John E. Waites from Columbia to Charleston.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Bankruptcy System reported that it is exploring ways to more effectively use existing bankruptcy judicial resources to address severe judicial workload pressures occurring in several districts. To assist the judiciary in weathering the projected budgetary shortfall, the Committee examined multiple short- and long-term cost-containment ideas, and provided its views to the Budget Committee. In addition, the Committee informed the Committee on Court Administration and Case Management that it (a) endorses, with several qualifications, recommendations for certain inflationary fee increases; (b) recommends that the two committees work together, with assistance from the Federal Judicial Center, to study the impact and feasibility of implementing additional fees for claims transfers in bankruptcy cases and for filing publicly traded and/or mega cases; and (c) recommends approval of a proposed policy on courtroom sharing in the bankruptcy courts. The Committee also recommended that the Director approve certain reports required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law No. 111-203.

COMMITTEE ON THE BUDGET

FISCAL YEAR 2013 BUDGET REQUEST

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Noting the limited funding that Congress is likely to have available in 2013 and after considering the funding levels proposed by the program committees, the Committee on the Budget recommended to the Judicial Conference a fiscal year 2013 budget request that is 3.3 percent over assumed fiscal year 2012 appropriations. This request is $118.6 million below the funding requested by the program committees. The Conference approved the budget request subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

BUDGET DECENTRALIZATION RULES

Under existing budget decentralization rules, courts can reprogram funds among court operating funds within their own units, among court units within a judicial district, and among circuit and court of appeals units within a

judicial circuit, which allows these units to share administrative services and maximize resource utilization. However the rules do not permit reprogramming across districts or circuits or even between appellate and district units within a circuit. To achieve additional efficiencies, the Committee recommended expansion of reprogramming authority so that local funds can be reprogrammed among court units regardless of type, geographical location, or judicial district or circuit for voluntary shared services arrangements. The new reprogramming authority would be subject to the approval of the Administrative Office, with semi-annual reports provided to the Budget Committee. The Conference approved the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on the Budget reported that it reviewed over 100 cost-containment ideas that had been generated through the Administrative Office's court advisory process as well as ideas that various Judicial Conference committees are pursuing. The Committee participated in a "summit" of committee chairs held on September 12, 2011 to discuss the significant cost-containment ideas the judiciary must consider as it faces a serious budget crisis. In addition, the Committee discussed efforts to focus its congressional outreach program on key members of the judiciary's appropriations subcommittees and to provide court-specific impacts of the fiscal year 2012 House of Representatives mark to judges and members of Congress.

COMMITTEE ON CODES OF CONDUCT

MODEL FORMS FOR WAIVER OF JUDICIAL DISQUALIFICATION

On recommendation of the Committee on Codes of Conduct, the Judicial Conference approved three versions of a Model Form for Waiver of Judicial Disqualification: one for civil pro se cases, one for other civil cases, and one for criminal cases. These forms replace a form originally adopted in September 1985, commonly known as the "remittal" form, which was used by judges to request a waiver of disqualification under Canon 3D of the Code of Conduct for United States Judges. The Conference delegated to the

Committee the authority to make technical, conforming, and non-controversial changes to the forms, as necessary.

MODEL CONFIDENTIALITY STATEMENT

The Model Confidentiality Statement (Form AO-306) is intended for use by courts and judges to promote awareness among judicial employees of their confidentiality obligations under Canon 3D of the Code of Conduct for Judicial Employees. On recommendation of the Committee, the Judicial Conference approved revisions to the Model Confidentiality Statement to reflect new developments, such as the use by judicial employees of electronic social media, and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

FORM FOR APPROVAL OF COMPENSATED TEACHING

Judges who wish to engage in compensated teaching are required to obtain approval from their circuit chief judge, using Form AO-304, Application for Approval of Compensated Teaching Activities. On recommendation of the Committee, the Conference approved a revised Form AO-304 to clarify that a judge may be compensated for time spent grading examinations and term papers. The Conference also delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes to the form, as necessary.

COMMITTEE ACTIVITIES

The Committee on Codes of Conduct reported that since its last report to the Judicial Conference in March 2011, the Committee received 19 new written inquiries and issued 19 written advisory responses. During this period, the average response time for requests was 13 days. In addition, the Committee chair responded to 135 informal inquiries, individual Committee members responded to 99 informal inquiries, and Committee counsel responded to 381 informal inquiries.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

FEES

Miscellaneous Fees. The Judicial Conference prescribes miscellaneous fees for the courts of appeals, district courts, United States Court of Federal Claims, bankruptcy courts, and Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. §§ 1913, 1914, 1926, 1930, and 1932, respectively. On recommendation of the Court Administration and Case Management Committee, the Conference determined to raise many of these fees to account for inflation, as set forth below, effective November 1, 2011. These fees have not been adjusted for inflation since 2003.

Court of Appeals Miscellaneous Fee Schedule

Item	Current Fee	New Fee
2. Record Search	$26	$30
3. Certification	$9	$11
5. Audio Recording	$26	$30
6. Record Reproduction	$71	$83
7. Record Retrieval	$45	$53
8. Returned Check Fee	$45	$53
13. Attorney Admission Fee	$150	$176
Certificate of Good Standing	$15	$18

District Court Miscellaneous Fee Schedule

Item	Current Fee	New Fee
1. Document Filing/Indexing	$39	$46
2. Record Search	$26	$30
3. Certification	$9	$11
5. Reproduction of Proceedings	$26	$30
6. Microfiche	$5	$6

7. Record Retrieval	$45	$53
8. Returned Check Fee	$45	$53
9. Misdemeanor Appeal	$32	$37
10. Attorney Admission Fee Certificate of Good Standing	$150 $15	$176 $18
13. Cuban Liberation Civil Filing Fee	$5431	$6355

Bankruptcy Court Miscellaneous Fee Schedule

Item	Current Fee	New Fee
2. Certification Exemplification	$9 $18	$11 $21
3. Audio Recording	$26	$30
4. Amended Bankruptcy Schedules	$26	$30
5. Record Search	$26	$30
6. Adversary Proceeding Fee	$250	$293
7. Document Filing/Indexing	$39	$46
8. Title 11 Administrative Fee	$39	$46
12. Record Retrieval Fee	$45	$53
13. Returned Check Fee	$45	$53
14. Notice of Appeal Fee	$250	$293
19. Lift/Stay Fee	$150	$176

United States Court of Federal Claims Miscellaneous Fee Schedule

Item	Current Fee	New Fee
3. Certification	$9	$11
4. Attorney Admission Fee Certificate of Good Standing	$150 $15	$176 $18

5. Sale of Monthly Listing of Court Orders and Opinions	$19	$22
7. Returned Check Fee	$45	$53
9. Audio Recording	$26	$30
10. Document Filing/Indexing	$39	$46
11. Record Retrieval Fee	$45	$53

Judicial Panel on Multidistrict Litigation Miscellaneous Fee Schedule

Item	Current Fee	New Fee
1. Record Search	$26	$30
2. Certification	$9	$11
4. Record Retrieval Fee	$45	$53
5. Returned Check Fee	$45	$53

Electronic Public Access Fees. Pursuant to statute and Judicial Conference policy, the electronic public access (EPA) fee is set to be commensurate with the costs of providing existing services and developing enhanced services. Noting that the current fee has not increased since 2005 and that for the past three fiscal years the EPA program's obligations have exceeded its revenue, the Committee recommended that the EPA fee be increased from $.08 to $.10 per page. The Committee also recommended that the current waiver of fees of $10 or less in a quarterly billing cycle be changed to $15 or less per quarter so that 75 to 80 percent of all users would still receive fee waivers. Finally, in recognition of the current fiscal austerity for government agencies, the Committee recommended that the fee increase be suspended for local, state, and federal and government entities for a period of three years. The Conference adopted the Committee's recommendations.

COURTROOM SHARING

Based on a comprehensive study of district courtroom usage conducted by the FJC at the Committee's request, the Judicial Conference adopted courtroom sharing policies for senior district judges and magistrate judges in new courthouse and/or courtroom construction (JCUS-SEP 08,

pp. 10-11; JCUS-MAR 09, pp. 14-16; JCUS-SEP 09, pp. 9-11). It also asked the Committee to study the usage of bankruptcy courtrooms, and if usage levels so indicated, to develop an appropriate sharing policy for bankruptcy courtrooms (JCUS-SEP 08, pp. 10-11). At this session, following completion of the bankruptcy study, conducted for the Committee by the FJC, the Court Administration and Case Management Committee in consultation with the Bankruptcy and Space and Facilities Committees recommended a courtroom sharing policy for bankruptcy judges in new courthouse and courtroom construction, for inclusion in the *U.S. Courts Design Guide*. The Conference approved the policy as follows:

SHARING POLICY FOR BANKRUPTCY JUDGES IN NEW COURTHOUSE AND COURTROOM CONSTRUCTION

New courtrooms for bankruptcy judges will be provided as follows:

a. In court facilities with one or two bankruptcy judges, one courtroom will be provided for each bankruptcy judge.

b. In court facilities with three or more bankruptcy judges, one courtroom will be provided for every two bankruptcy judges. In court facilities where the application of this formula will result in a fraction (i.e., those with an odd number of bankruptcy judges), the number of courtrooms allocated will remain at the next lower whole number. In addition, one courtroom will be provided for emergency matters, such as Chapter 11 first-day hearings.

Exemption Policy

In the event this sharing arrangement would cause substantial difficulty in the secure, effective and efficient disposition of cases, a court, as a whole, with the approval of its circuit judicial council, may seek an individual exemption to this sharing policy from the Judicial Conference's Space and Facilities Committee. Such exemptions should be considered the exception and not the rule.

In order to be considered for an exemption, a court must first show that the bankruptcy judge's courtroom is in use over 75 percent of the work day for case-related purposes. Thereafter, a court should demonstrate that deviation from the basic sharing policy is necessary, based on the following:

a. An assessment of the number and type of courtroom events anticipated to be handled by the bankruptcy judge that would indicate that sharing a courtroom would pose a significant burden on the secure, effective and efficient management of that judge's docket.

b. An assessment of the current complement of courtrooms and their projected use in the facility and throughout the district, to reaffirm the necessity of constructing an additional courtroom.

c. Whether a special proceedings, visiting judge, or other courtroom is available for the bankruptcy judge's use in the facility.

Many bankruptcy judges are housed in leased facilities where security concerns may arise due to the configuration of the space. Because of this unique situation, an alternative exemption to the sharing policy, notwithstanding the exemption requirements of the previous paragraph, may be considered for bankruptcy judges in leased facilities based on an assessment of the security of a bankruptcy judge's access from chambers to a shared courtroom.

RECORDS DISPOSITION SCHEDULES

Electronic records. The district court records disposition schedule for civil and criminal case files provides for the transfer of electronic records to the National Archives and Records Administration (NARA) three years after case closing. Noting that this is an inadequate amount of time to maintain the records at the court and that further study on disposition of electronic records was needed, the Committee recommended that the three-year transfer reference be removed from the schedule for civil and criminal case files. Once removed, electronic records will be considered unscheduled and can not

be disposed of until a new disposition schedule is adopted. The Conference approved the Committee's recommendation, and the schedule will be transmitted to NARA for acceptance of the change.

Criminal cases. In March 2011, the Judicial Conference approved a revised district court records disposition schedule for criminal cases that, like the schedule for civil cases, sets retention periods largely by case type (JCUS-MAR 11, p. 10). NARA published this proposed schedule for public comment. On recommendation of the Committee, which considered the public comments, the Judicial Conference approved amending the disposition schedule for criminal case files to designate additional non-trial case types – those pertaining to embezzlement, fraud, or bribery by a public official – as permanent. The schedule will be transmitted to NARA for acceptance of the change.

Bankruptcy cases. Similarly, amendments to the bankruptcy court records disposition schedule approved by the Conference in March 2011 were published by NARA for public comment. After consideration of those comments, the Committee recommended that the Judicial Conference approve amending the schedule to classify as permanent a sample of 2.5 percent of non-trial bankruptcy cases[1] and 2.5 percent of temporary adversary proceedings cases retired by each district each year. The amendments would also reduce the retention period for temporary non-trial adversary proceedings cases from 20 to 15 years after case closing. The Conference approved the Committee's recommendation, and the schedule will be transmitted to NARA for acceptance of the change.

PACER ACCESS TO CERTAIN BANKRUPTCY FILINGS

In September 2010, the Judicial Conference adopted a policy limiting public electronic access to bankruptcy records filed before December 1, 2003 that had been closed for more than one year. The policy was intended to prevent the dissemination of personal information that might be contained in documents that were filed before the judiciary's privacy policy for bankruptcy cases was fully implemented. Under the September 2010 policy, the public could access docket sheets through PACER for these older cases, but full

[1]This would replace a provision in the existing schedule that designates as permanent 25 percent of non-trial bankruptcy cases retired by nine judicial districts, selected each year on a rotational basis.

documents would be available only at clerks' offices (JCUS-SEP 10, pp. 12-13). At this session, on recommendation of the Committee, the Conference adopted an exception to that policy for counsel or parties who are developing potential class actions, as follows:

> Access may be granted pursuant to a judicial finding that such access is necessary for determining class member certification, subject to the following limitations to be set forth in the judge's order:
>
> a. Access is limited to a particular identified list of cases or a specified universe of cases (e.g., lift stay motions filed by a specified lender in a limited period of time);
>
> b. Time limitations on the period of access (corresponding to the scope and number of potential cases involved);
>
> c. Inclusion of a verified statement of counsel that access would be solely for the purpose of determining class member status and that counsel is aware that unauthorized use is prohibited and may result in sanctions; and
>
> d. Any other conditions, limitations, or direction that the judge deems necessary under the specific circumstances of the request.

SEALING AN ENTIRE CIVIL CASE FILE

On recommendation of the Committee on Court Administration and Case Management, in consultation with the Committee on Rules of Practice and Procedure, the Judicial Conference adopted the following standards for sealing an entire civil case:

> An entire civil case file should only be sealed consistent with the following criteria:
>
> a. Sealing the entire civil case file is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and

effective alternatives (such as sealing discrete documents or redacting information), so that sealing an entire case file is a last resort;

b. A judge makes or promptly reviews the decision to seal a civil case;

c. Any order sealing a civil case contains findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule; and

d. The seal is lifted when the reason for sealing has ended.

COMMITTEE ACTIVITIES

The Committee on Court Administration and Case Management reported that it devoted a significant amount of its June 2011 meeting to cost-containment initiatives for fiscal year 2012 and beyond, and considered more than 40 different ideas and proposals. The Committee also discussed several policy issues related to the development of the Next Generation CM/ECF system to ensure that the system's requirements are synchronized across various court units and court types. The Committee endorsed 14 courts to participate in the pilot project on cameras in the courtroom, which began on July 18, 2011 and selected 14 courts to participate in a 10-year, statutorily required pilot project regarding the assignment of patent cases in U.S. district courts, to begin on September 19, 2011.

COMMITTEE ON CRIMINAL LAW

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

A judgment in a criminal case as well as other national forms contains a set of standard conditions that are automatically imposed in probation and supervised release sentences, including one condition that requires offenders to submit a written report to the probation officer within the first five days of each month. However, such reports may not be necessary in all cases because the information is available from other means, and in those cases in which reports are needed, spreading out the submission dates would provide officers with

greater flexibility to manage their caseloads. Noting this, the Committee recommended that the condition be amended in national forms (AO forms 7A, 7A-S, 245, 245B-D, 245I and 246) to state that the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer. The Conference adopted the Committee's recommendation.

RESEARCH AND DATA SHARING

The Administrative Office collects statistical and other information concerning the work of probation officers pursuant to statute and Judicial Conference policy. Criminal justice researchers frequently request this information, as do executive branch agencies such as the Bureau of Prisons. On recommendation of the Committee, the Conference authorized the Director of the AO to adopt proposed regulations governing the disclosure of federal probation system data to outside entities that establish procedures for handling requests for such data, including factors to consider in evaluating the merits of a request and conditions to be imposed to ensure the continued confidentiality of information released.

SUPERVISION OF CONDITIONALLY RELEASED SEXUALLY DANGEROUS PERSONS

The Committee recommended that the Judicial Conference seek legislation that would amend 18 U.S.C. § 3154 (Functions and powers relating to pretrial services) and § 3603 (Duties of probation officers) to specifically authorize probation and pretrial services officers to supervise sexually dangerous persons who have been conditionally released following a period of civil commitment pursuant to 18 U.S.C. § 4248. While §§ 3154 and 3603 both contain a general provision authorizing officers to perform other duties as assigned by the courts, providing explicit authorization will remove any ambiguity about an officer's role and allow for the development of standardized policies and procedures specifically designed for this population. The Conference adopted the Committee's recommendation.

COMMITTEE ACTIVITIES

The Committee on Criminal Law reported that it reviewed and endorsed a new sex offender management procedures manual for probation and pretrial services officers. The manual provides detailed instructions on how officers should investigate and supervise persons charged with or convicted of a sex offense. The Committee also considered the U.S. Sentencing Commission's proposed amendments to the sentencing guidelines manual and submitted testimony supporting the Commission's proposal to apply retroactively the amendments to the drug quantity table that implement the Fair Sentencing Act of 2010. In addition, the Committee discussed and submitted recommendations on various cost-containment proposals under consideration for fiscal years 2012 and 2013.

COMMITTEE ON DEFENDER SERVICES

CRIMINAL JUSTICE ACT GUIDELINES

The Committee on Defender Services recommended revisions to chapters 2 and 3 of the Criminal Justice Act Guidelines (*Guide to Judiciary Policy*, Vol. 7A) to provide principles and procedures on the proration of claims by attorneys and other service providers and on the billing of interpreting services. The Judicial Conference approved the recommendation.

COMMITTEE ACTIVITIES

The Committee on Defender Services reviewed the status of its long-range cost-containment initiatives (including the recently completed circuit case-budgeting pilot project and the ongoing federal defender organization staffing study) and received a report on the shorter-term cost-reduction efforts undertaken over the past six months by strategic planning groups and by program administrators. The Committee reviewed additional short- and longer-term cost-containment ideas that were suggested for its consideration and identified possible new areas to explore. It approved a reduced training plan for FY 2012, which is limited to the FY 2010 Committee-authorized level.

COMMITTEE ON FEDERAL-STATE JURISDICTION

COMMITTEE ACTIVITIES

The Committee on Federal-State Jurisdiction reported that it was updated on the progress of patent reform legislation and discussed jurisdictional provisions in the proposed legislation. The Committee also considered a proposal to amend 28 U.S.C. § 1447(d) to provide for a right of appeal from any order remanding an action to state court and determined not to support a change to existing law. The Committee received a report on discussions involving the Judicial Panel on Multidistrict Litigation, the Federal Judicial Center, the Conference of Chief Justices, and the National Center for State Courts concerning means of promoting cooperation between federal and state judges presiding over related cases filed in multiple jurisdictions.

COMMITTEE ON FINANCIAL DISCLOSURE

COMMITTEE ACTIVITIES

The Committee on Financial Disclosure reported that on March 29, 2011, it launched the Financial Disclosure Online Reporting System (FiDO). This transition from paper to an exclusively electronic format should significantly reduce judiciary expenses related to the printing, mailing, processing, and records management of financial disclosure reports. As of July 8, 2011, the Committee had received 3,990 financial disclosure reports and certifications for calendar year 2010, including 1,246 reports and certifications from Supreme Court justices, Article III judges, and judicial officers of special courts; 327 reports from bankruptcy judges; 534 reports from magistrate judges; and 1,883 reports from judicial employees.

COMMITTEE ON INFORMATION TECHNOLOGY

LONG RANGE PLAN FOR INFORMATION TECHNOLOGY

Pursuant to 28 U.S.C. § 612 and on recommendation of the Committee on Information Technology, the Judicial Conference approved the fiscal year 2012 update to the *Long Range Plan for Information Technology in the*

Federal Judiciary. Funds for the judiciary's information technology program will be spent in accordance with this plan.

COMMITTEE ACTIVITIES

The Committee on Information Technology reported that it endorsed the Judiciary Information Security Framework, which provides a high-level approach to information security risk management, and strongly encourages its use by all courts. The Committee concurred in the recommendation of the Committee on Court Administration and Case Management to raise the judiciary's electronic public access user fee (*see* "Miscellaneous Fees, " p. 16). The Committee also discussed a number of initiatives that both strengthen the judiciary's information technology program and promote cost containment, such as the national telephone service on the judiciary's new communications network.

COMMITTEE ON INTERCIRCUIT ASSIGNMENTS

COMMITTEE ACTIVITIES

The Committee on Intercircuit Assignments reported that 117 intercircuit assignments were undertaken by 90 Article III judges from January 1, 2011, to June 30, 2011. During this time, the Committee continued to disseminate information about intercircuit assignments and aided courts requesting assistance by identifying and obtaining the assistance of judges willing to take assignments.

COMMITTEE ON INTERNATIONAL JUDICIAL RELATIONS

COMMITTEE ACTIVITIES

The Committee on International Judicial Relations reported on its involvement in rule of law and judicial reform programs throughout the world. The Committee also reported on its continued participation in the rule of law component of the legislative branch's Open World Program for jurists from Russia, Ukraine, Georgia, Kazakhstan, and Moldova. The Committee received briefings about international rule of law activities involving federal public

defenders, U.S. court administrators, the Federal Judicial Center, the U.S. Department of State, officials from several embassies, the U.S. Department of Justice, the U.S. Agency for International Development, the U.S. Patent and Trademark Office, the World Bank, and the International Association of Judges. In addition, the Committee reported on foreign delegations of jurists and judicial personnel briefed at the Administrative Office.

COMMITTEE ON THE JUDICIAL BRANCH

JUDGES' TRAVEL REGULATIONS

Senior Judges on National Courts. The Committee on the Judicial Branch recommended that the Judicial Conference amend section 220.30.10(g)(3)(B) of the Travel Regulations for United States Justices and Judges, *Guide to Judiciary Policy* (*Guide*), Vol. 19, to provide that if a senior judge is commissioned to a court of national jurisdiction and the judge intends to travel a distance of more than 75 miles from his or her residence to hold court or to transact official business for that court and to claim reimbursement for any expenses associated with that travel, such travel must be authorized by the chief judge of the court. The Conference adopted the Committee's recommendation.

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Senior Judges' Commuting-Type Expenses. To make consistent certain travel authorization procedures for senior judges, the Committee recommended, and the Conference approved, an amendment to section 220.30.10(g)(3)(A) of the judges' travel regulations, *Guide*, Vol. 19, to require the authorization of the circuit judicial council rather than the chief circuit judge when a senior judge relocates his or her residence outside the district or circuit of the judge's original commission and intends to seek reimbursement for travel back to the court for official business.

Actual Expense Reimbursement for Meals. On recommendation of the Committee and after discussion, the Judicial Conference approved amendments to sections 250.20.20, 250.20.30, 250.20.50, 250.20.60, and 250.40.20 of the judges' travel regulations, *Guide*, Vol. 19, to limit judges' actual expense reimbursement for meals in connection with official travel, and provided that the limits will be subject to annual and automatic adjustment for inflation in the same manner as the judges' alternative maximum subsistence allowance.

COMMITTEE ACTIVITIES

The Committee on the Judicial Branch reported that it discussed in detail the problem of the recruitment and retention of federal judges. Salary stagnation and salary inversion continue to threaten the federal judiciary's ability to recruit and retain judges. The Committee also reported that it is organizing a program with the Freedom Forum and its First Amendment Center that will bring together a small group of judges and journalism educators to support continued and enhanced education on the coverage of the courts in journalism schools.

COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

COMMITTEE ACTIVITIES

The Committee on Judicial Conduct and Disability reported that it asked the Executive Committee to act on behalf of the Conference with regard to pending legislation proposed by the Department of Justice that would loosen the confidentiality requirements of the Judicial Conduct and Disability Act so that information developed in proceedings under the Act could be disclosed to law enforcement officers if it related to a potential criminal offense (*see supra*, "Judicial Conduct and Disability Act," pp. 7-8).

COMMITTEE ON JUDICIAL RESOURCES

EXECUTIVE GRADING PROCESS

Court-sizing formulas are used to determine the appropriate grades and salaries of district and bankruptcy clerks of court and chief probation and pretrial services officers. On recommendation of the Committee on Judicial Resources, the Conference agreed to approve a new grading process for determining the target grades for these executives. The new executive grading process consists of two steps: a) applying a formula that includes a constant factor for core competencies that accounts for 70 percent of the formula and

weighted factors that account for 30 percent of the formula;[2] and b) assigning target grades for these executive positions in Judiciary Salary Plan (JSP) grades 16, 17, and 18, using the 2011 distribution of JSP target grades.

SAVED PAY

The saved pay policy provides salary protection to court employees downgraded through no fault of their own, e.g., when a chambers staff member takes a lower graded position within the judiciary as result of the death of a federal judge. The employee receives the same rate of basic pay that was payable immediately before the reduction to the lower grade or classification level, 50 percent of each employment cost index (ECI) adjustment, and 100 percent of any applicable locality pay increase until the employee's saved rate of pay can be matched in the lower grade or classification level. Noting that the policy can have a negative effect on morale when two employees performing the same job earn different rates of pay and that elimination of the policy would help to contain costs, the Committee recommended that the Judicial Conference eliminate the saved pay policy for the courts, but grandfather for two years any employees currently in a saved pay status under the policy. After two years, the Administrative Office would place those employees who remained in a saved pay status at the top step of their respective grade or classification level. The Conference adopted the Committee's recommendation. The saved pay policy for federal public defender organization personnel is not affected by this change.

TEMPORARY PAY ADJUSTMENTS

An appointing authority may grant a temporary pay adjustment to a non-supervisory Court Personnel System (CPS) employee temporarily assigned leadership responsibilities. Currently, that pay adjustment is set at the lowest step in the employee's current classification level that exceeds the employee's existing rate of pay by three percent. At the time this pay rate was established,

[2]For district and bankruptcy court clerks' offices, the weighted factors include the number of authorized judgeships (15 percent), the number of authorized staff at 100 percent of formula (10 percent), and total allotments (5 percent). For probation and pretrial services offices, the weighted factors include the number of authorized staff at 100 percent of formula (15 percent) and total allotments (15 percent).

the CPS promotion rate was a flat rate of six percent. Since that time, the CPS promotion rate has been changed to be a range from not less than one percent to not more than six percent, to be applied on a uniform, unit-wide basis. On recommendation of the Committee, the Conference agreed to amend the pay rate for CPS temporary pay adjustments from a flat rate of three percent to a range from one to three percent, to be determined by the appointing authority on a case-by-case basis as set forth below:

> An appointing officer may provide a temporary pay adjustment in the full performance range to a Court Personnel System employee who is temporarily in charge of a work project with other employees. A temporary pay adjustment provides for a temporary pay increase within the employee's existing classification level at the lowest step which equals or exceeds the employee's existing rate of pay by anywhere from one to three percent, at the appointing officer's discretion. A temporary pay adjustment may not exceed 52 weeks without re-authorization.

TIME-OFF AWARDS

Time-off awards allow excused absences with pay (*Guide*, Vol. 12, Ch. 8, § 830.35(c)). Considering that the judiciary bases an intermittent employee's pay on hours actually worked with no provision for paid time off, the Committee recommended that the Judicial Conference approve a clarification to the policy for granting awards to court employees to prohibit time-off awards for intermittent employees. The Conference adopted the Committee's recommendation.

TELEWORK

In March 1999, the Judicial Conference adopted a telework policy for the courts that provided for voluntary employee participation in telework (JCUS-MAR 99, p. 28). In 2004, that policy was extended to federal public defender organizations (JCUS-SEP 04, p. 8). In order for courts and federal public defender organizations to have employees available to telework during a continuity of operations (COOP) event or similar emergency situation, on recommendation of the Committee, the Judicial Conference approved a revision to the telework policy to state that a court or federal public defender

organization, at its discretion, may require eligible employees to telework as needed during a continuity of operations event, inclement weather, or similar situation (*Guide*, Vol. 12, Ch. 10, § 1020.20(a)).

TYPE II CHIEF DEPUTY CLERK

In September 2004, the Judicial Conference authorized any unit in a district or bankruptcy court with ten or more authorized judgeships to establish a second JSP-16 Type II deputy position upon notification to the Administrative Office, to be funded with the court's decentralized funds (JCUS-SEP 04, p. 23). The District of Idaho has requested a JSP-16 Type II chief deputy clerk for its consolidated bankruptcy and district court clerk's office even though it does not qualify for one under the policy, citing special circumstances, including the broad span of operational knowledge required in a consolidated court and geographic challenges. The court requested funding, noting that as a small court it does not have the salary flexibility to pay for an additional executive salary. On recommendation of the Committee, the Judicial Conference authorized a second fully funded JSP-16 Type II chief deputy clerk position for the District of Idaho, subject to any budget-balancing reductions.

COURT INTERPRETER POSITION

Using established criteria, the Committee recommended, and the Conference approved, one additional Spanish staff court interpreter position beginning in fiscal year 2013 for the District of Arizona based on the Spanish language interpreting workload in this court. The Conference also approved accelerated funding in fiscal year 2012 for that position.

REALTIME TRANSCRIPT FEES

In March 1999, the Judicial Conference amended the maximum realtime transcript rate policy to include a requirement that a litigant who orders realtime services in the courtroom must also purchase, at the regular rates, a certified transcript (original or copy) of the same pages that were received as realtime unedited transcript (JCUS-MAR 99, p. 25). The policy was adopted to address concerns about the unprofitability of providing realtime services and about the circulation of unedited transcripts that are not backed up

by certified transcripts. At this session, the Committee noted that the requirement has resulted in an increased administrative burden to litigants and court staff, and serves as a disincentive for litigants to use realtime services. Moreover the concerns which led to development of the policy can be addressed through other means. On recommendation of the Committee, the Judicial Conference agreed to eliminate the requirement effective January 1, 2012.

COMMITTEE ACTIVITIES

The Committee on Judicial Resources reported that it submitted to the Committee on the Budget a fiscal year 2013 budget request derived from existing work measurement data using alternative staffing formulas calculated at the 70 percent level, which would result in a 3.9 percent increase over the assumed 2012 funding levels. The Committee considered short-term and longer-term cost-containment ideas and provided its recommendations to the Budget Committee. The Committee supported requests from the Administrative Office's Bankruptcy and District Clerks Advisory Groups to accelerate by one year the delivery dates of the staffing formula updates for bankruptcy and district clerks' offices. Those updates will now be due to the Committee in June 2012 and June 2013, respectively.

COMMITTEE ON JUDICIAL SECURITY

COMMITTEE ACTIVITIES

The Committee on Judicial Security reported that it decided to convene a cost-containment task force comprised of members of the Committee and the U.S. Marshals Service (USMS) staff to gather data and identify cost-containment initiatives in the short, medium, and long term based on the projected budgetary shortfalls in FY 2012 and beyond. The Committee was also briefed on the status of the perimeter security pilot program at seven courthouses where the USMS has assumed responsibility for perimeter security guarding and equipment. The Committee was informed that a follow-up report on the program would be sent to Congress, and was advised that further congressional direction is required to define the future of the program.

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

CHANGES IN MAGISTRATE JUDGE POSITIONS

After consideration of the report of the Committee on the Administration of the Magistrate Judges System and the recommendations of the Director of the Administrative Office, the district courts, and the judicial councils of the circuits, and after discussion on the Conference floor on whether to authorize three new full-time magistrate judge positions, the Judicial Conference approved the following recommendations that involved courts that had requested new magistrate judge positions. Changes with a budgetary impact are to be effective when appropriated funds are available.

THIRD CIRCUIT

District of Delaware

1. Authorized an additional full-time magistrate judge position at Wilmington; and

2. Made no other change in the number, location, or arrangements of the magistrate judge positions in the district.

FOURTH CIRCUIT

Middle District of North Carolina

1. Authorized an additional full-time magistrate judge position for the district, to be located at Durham; and

2. Made no other change in the number, locations, or arrangements of the magistrate judge positions in the district.

ELEVENTH CIRCUIT

Middle District of Florida

1. Authorized an additional full-time magistrate judge position at Orlando or Tampa; and

2. Made no other change in the number, locations, or arrangements of the magistrate judge positions in the district.

Southern District of Georgia

Made no change in the number, locations, or arrangements of the magistrate judge positions in the district.

The Conference also agreed to make no change in the number, locations, salaries, or arrangements of the magistrate judge positions in the Western District of North Carolina; Middle District of Louisiana; Eastern District of Michigan; District of Alaska; District of Idaho; and Northern District of Alabama.

ACCELERATED FUNDING

On recommendation of the Committee and after discussion on the Conference floor, the Judicial Conference agreed to designate for accelerated funding, effective April 1, 2012, the new full-time magistrate judge positions at Wilmington in the District of Delaware, Durham in the Middle District of North Carolina, and Orlando or Tampa in the Middle District of Florida.

MAGISTRATE JUDGE POSITION VACANCY

The Middle District of Louisiana requested permission to fill an upcoming magistrate judge position vacancy at Baton Rouge. Noting the decline in the court's per judgeship caseload since a third magistrate judge was appointed, the Committee recommended that the Conference not authorize the district to fill the position when it becomes vacant in May 2012. The Conference adopted the Committee's recommendation and declined to approve filling the vacancy.

COMMITTEE ACTIVITIES

The Committee on the Administration of the Magistrate Judges System reported that it considered short-term and longer-term cost-containment ideas. In response to one short-term idea identified for its consideration, involving reducing or discontinuing staff travel to conduct magistrate judge surveys, the

Committee confirmed the value of staff visits to the courts and agreed that the benefits from visits to the courts exceed the relatively small cost. For the longer term, the Committee agreed to explore cost-containment ideas for the magistrate judge recall program and to work with other committees on various other initiatives.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits), 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status), 3001 (Proof of Claim), 7054 (Judgments; Costs), and 7056 (Summary Judgment), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and authorized their transmission to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The Committee also submitted to the Judicial Conference proposed revisions to Official Forms 1 (Voluntary Petition), 9A–9I (Notices of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Deadlines), 10 (Proof of Claim), and 25A (Plan of Reorganization in Small Business Case Under Chapter 11) and new Official Forms 10, Attachment A (Mortgage Proof of Claim), 10, Supplement 1 (Notice of Mortgage Payment Change), and 10, Supplement 2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges). The Judicial Conference approved the revised forms to take effect on December 1, 2011.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Criminal Rules 5 (Initial Appearance), 15 (Depositions), and 58 (Petty Offenses and Other Misdemeanors), and proposed new Rule 37 (Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal), together with committee notes explaining their purpose and intent. The Judicial Conference approved the

proposed rules amendments and new rule and authorized their transmission to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

PROCEDURES GOVERNING THE WORK OF THE RULES COMMITTEE

On recommendation of the Committee, the Judicial Conference approved revised *Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees*. The revised procedures take into account the impact of the internet on committee functions, propose ways to make the rules process more efficient, and follow the style protocols used in drafting the rules.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that it approved publishing for public comment proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and Form 4; Bankruptcy Rules 1007, 3007, 5009, and 9006, and Forms 6C, 7, 22A, and 22C; Civil Rules 37 and 45; Criminal Rules 11, 12, and 34; and Evidence Rule 803. Among the proposals is an amendment to Civil Rule 45, governing both trial and discovery subpoenas, to make the rule clearer and easier to apply; and a proposed amendment to Criminal Rule 12 to address motions that must be raised before trial and the consequences of untimely motions. The proposals were published in August 2011; the comment period closes on February 15, 2012.

COMMITTEE ON SPACE AND FACILITIES

FIVE-YEAR COURTHOUSE PROJECT PLAN

The Committee on Space and Facilities recommended that the Judicial Conference approve the *Five-Year Courthouse Project Plan for Fiscal Years* 2013-2017 and grant the Committee authority to remove the Los Angeles project from the *Plan* when appropriate. The Committee indicated that the Los Angeles project requires no additional funding and therefore should be removed from the *Plan* once a contract for design and construction has been awarded. The Conference approved the Committee's recommendation.

FEASIBILITY STUDY

A new courthouse project has been authorized and is underway in Salt Lake City, Utah. The Committee recommended, and the Conference approved, requesting a General Services Administration (GSA) feasibility study for the backfill of the existing Moss Courthouse in Salt Lake City, contingent upon final court approval of the District of Utah long-range facilities plan.

U.S. COURTS DESIGN GUIDE

Over the last several years, the Judicial Conference has adopted a number of policies that affect the planning and design of new courthouses and courtrooms, including asset management planning (a new long-range facilities planning methodology), the circuit rent budget (CRB) program, and courtroom sharing policies for senior and magistrate judges. These policies, as well as the new planning approach discussed immediately below, supersede a number of factors and planning assumptions in the *U. S. Courts Design Guide*. On recommendation of the Committee, the Judicial Conference agreed to update the *Design Guide* to reflect the changes made by these policies.

PLANNING THE SIZE OF NEW COURTHOUSES

On recommendation of the Committee, the Judicial Conference agreed to adopt a new approach to planning the size of new courthouses that reassesses the manner in which space is planned for projected judgeships. The approach includes the following assumptions:

> New courthouse construction projects will be designed to provide space for the existing circuit, district, bankruptcy and magistrate judges (including vacant judgeship positions), and senior judges, as well as space to account for judges who will be eligible for senior status within the 10-year planning period for the project consistent with Judicial Conference policy and congressional direction.

Space for Judicial Conference-approved judgeships not yet created by Congress will be taken into consideration at the design concept phase in that the architects will show how space for these judgeships could fit into the design. Architects will not, however, complete a detailed design that includes space for these judgeships because they have not yet been created by Congress. Should the positions be created by Congress during the design phase, the design documents would be amended to include the new positions and space would be constructed for them.

Space for judgeships that the judiciary projects will be needed, but that have not yet been recommended to the Judicial Conference for approval, will be considered by GSA as part of future expansion plans for the building. Space will not be designed for these projected positions.

COMMITTEE ACTIVITIES

The Committee on Space and Facilities reported that with regard to the circuit rent budget program, it approved 17 Component B requests, and that due to the delay in the approval of a fiscal year 2011 budget, circuits will be allowed to extend the availability of fiscal year 2011 Component C funding through FY 2013 on a one-time basis. The Committee discussed potential short- and long-term cost-containment initiatives involving the space and facilities program, and determined to gather the data necessary to quantify the cost savings and determine the operational impact of the proposed initiatives. In addition, the Committee was updated on the efforts underway to develop an implementation strategy for the Capital Security Program, should that program be funded by Congress in FY 2012 or in subsequent years. The program is intended to assist courts at locations that have security deficiencies, but that may not qualify for a new building.

FUNDING

All of the foregoing recommendations that require the expenditure of funds for implementation 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.

Chief Justice of the United States
Presiding

TAB 2A-1

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

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 in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

(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:

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

* * * * *

(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 United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests; or

(ii) make any other consular notification required by treaty or other international agreement.

* * * * *

Committee Note

Subdivision (c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna 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 this amendment, 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). This amendment does not address those questions.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

* * * * *

TAB 2A-2

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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) any 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 United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the defendant's country of nationality that the defendant has been arrested if the defendant so requests; or

(ii) make any other consular notification required by treaty or other international agreement.

* * * * *

Committee Note

Subdivision (b)(2)(H). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna 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 this amendment, 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). This amendment does not address those questions.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

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TAB 2A-3

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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.

* * * * *

(f) Admissibility and Use as Evidence. An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

* * * * *

Committee Note

Subdivisions (c)(3) and (f). This amendment provides a mechanism for taking depositions in 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.

While a party invokes Rule 15 in order to preserve testimony for trial, the rule does not determine whether the resulting deposition will be admissible, in whole or in part. Subdivision (f) provides that in the case of all depositions, questions of admissibility of the evidence obtained are left to the courts to resolve on a case by case basis.

Under Rule 15(f), the courts make this determination applying the Federal Rules of Evidence, which state that relevant evidence is admissible except as otherwise provided by the Constitution, statutes, the Rules of Evidence, and other rules prescribed by the Supreme Court. Fed. R. Evid. 402.

Rule 15(c) as amended imposes significant procedural limitations on taking certain depositions in criminal cases. The amended rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances after the trial court makes case-specific findings. Amended Rule 15(c)(3) 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 — on the elements that must be shown. The amended rule recognizes the important witness confrontation principles and vital law enforcement and other public interests that are involved.

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.

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 to situations where the deposition serves an important public interest, the limiting phrase "in a felony prosecution" was added to subdivision (c)(3)(A).

The text of subdivision (f) and the Committee Note were revised to state more clearly the limited purpose and effect of the amendment, which is providing assistance in pretrial discovery. Compliance with the procedural requirements for the taking of the foreign testimony does not predetermine admissibility at trial, which is determined on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Other changes were also made in the Committee Note. In conformity with the style conventions governing the rules, citations to cases were deleted, and other changes were made to improve clarity.

* * * * *

TAB 2A-4

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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 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 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." (Federal Rule of Appellate Procedure 4(b)(3) lists three 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 judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 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). 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 appellate 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 Federal Rule of Appellate Procedure 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.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

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TAB 2A-5

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PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

* * * * *

(2) ***Information Not Subject to Disclosure.*** Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G) ~~Except as Rule 16(a)(1) provides otherwise~~, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of

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

statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Committee Note

Subdivision (a). Paragraph (a)(2) is amended to clarify that the 2002 restyling of Rule 16 did not change the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs–not including Rule 16(a)(1)(C)–Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

With one exception not relevant here, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe

the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that Rule. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. *See, e.g.*, *United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106, 1110 n.2 (9th Cir. 2007) (adopting the *Rudolph* court's analysis).

By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

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TAB 2B-1

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 11

DATE: March 27, 2012

The Advisory Committee's proposal to amend Rule 11 was published for notice and comment in August 2011, and six written comments were received. The Rule 11 Subcommittee, chaired by Judge Timothy Rice, met by teleconference to review the comments. Subcommittee members Judge David Lawson, Leo Cunningham, Professor Andrew Leipold, and Department of Justice representatives Kathleen Felton and Jonathan Wroblewski participated in the teleconference. Although Judge Donald Molloy was unable to participate, he advised the Subcommittee of his views before the teleconference. After extended discussion, the Subcommittee endorsed the language of the proposed amendment as published, but recommended several changes in the Committee Note which respond to issues raised in the comments.

This memorandum describes the proposed amendment, the public comments, and the Subcommittee's recommendations. The amendment, including the Subcommittee's proposed revisions to the Committee Note, appears at the end of this memorandum. The public comments are also included.

A. The proposed amendment

After studying the Supreme Court's ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded at its October 2010 meeting that a warning regarding possible immigration consequences should be required as a uniform practice. *Padilla* held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Court stated that in light of changes in immigration law "deportation is an integral part–indeed, sometimes the most important part–of the penalty that may be imposed on noncitizen defendants who plead guilty." 130 S.Ct. at 1480 (footnote omitted). It also noted that "because of its close connection to the criminal process," deportation as a consequence of conviction is "uniquely difficult to classify as either a direct or a collateral consequence" of a plea. *Id*. at 1482. The Committee concluded that the Supreme Court's decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving

the question whether to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

Although the motion to adopt the language of the proposed amendment passed unanimously, the Advisory Committee was initially divided on the question whether to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it did not speak to the duty of judges. Members expressed concern that the list of matters that must be addressed in the plea colloquy is already lengthy, and that adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge.

After discussion, the Committee concluded that deportation is qualitatively different than the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court's logic also supports requiring a judge to issue a similar warning. Recognizing the distinctive nature of immigration consequences would be consistent with the practice of the Department of Justice, which now singles out immigration consequences for special treatment and advises prosecutors to include a discussion of those consequences in plea agreements. Similarly judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

The proposed amendment mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, as well as the fact that there have been, and likely will be, legislative changes in the immigration laws. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

B. The Public Comments

The public comments were divided, though most favored the provision of advice concerning immigration consequences at the plea colloquy. Only one comment disagreed with the decision to add advice concerning possible immigration consequences to the plea colloquy and recommended that the amendment be withdrawn or at least substantially narrowed. The remaining comments–which came from immigration specialists, a federal defender, and the National Association of Criminal Defense Lawyers–agreed with the concept of adding an amendment, but disagreed on the scope and nature of the warning that should be provided. Two comments supported the amendment as published. Two other comments suggested modifications to the Committee Note. The final comment urged the Advisory Committee to withdraw the amendment and pursue a different strategy, placing the burden of providing warnings and advice at the plea colloquy upon the prosecution, rather than the court.

Judge Hayden Head (SD TX) (11-CR-001) opposed the amendment and suggested that it be withdrawn or narrowed. He emphasized that "Rule 11 has served well by wisely excluding collateral consequences." No amendment addressing immigration consequences in the plea colloquy is required because the Supreme Court's decision in *Padilla v. Kentucky*, 130 U.S. 1473 (2010), addressed the duty of counsel, not the courts. However, if the Committee does choose to proceed with the amendment, it should be revised to narrow its scope to the facts of *Padilla*, which concerned a person with a documented right to be in the United States.

Jack Schisler, Fayetteville Chief of the Arkansas Federal Defender Organization (11-CR-002), supported the proposed amendment. It is "good practice" to include this information, a practice that is now followed in the Western District of Arkansas. He saw no harm in the admonition being given to all defendants.

The Federal Magistrate Judges Association (11-CR-004) endorsed the proposed amendment.

Sejal Zota and Dan Kesselbrenner of the National Immigration Project (NIP), National Lawyers Guild (11-CR-005) proposed six changes or additions to the Committee Note accompanying the proposed amendment. Two of NIP's changes relate directly to the proposed Committee Note. They recommended:

> (1) striking the statement that the Rule "does not require" the court to provide specific advice concerning the defendant's individual situation, and substituting for it the admonition that the court "should not" provide such specific advice. NIP argues that any specific advice requires an investigation (which the court cannot undertake) of the defendant's immigration history, and courts might give erroneous advice. Morever, any enquiry into the content of the advice the defendant has received might violate the attorney-client privilege.
>
> (2) modifying the language of the Note so that it no longer suggests that the court should, at any time during the plea proceeding, attempt to determine the defendant's citizenship. NIP proposes striking the word "first," so that the Note would provide that the information should be provided in every case "without ~~first~~ attempting to determine the defendant's citizenship."

NIP also suggested four other additions to the Committee Note that go far beyond the scope of the proposed amendment and/or address other parts of Rule 11 not affected by the proposed amendment. They recommend:

> (3) instructing the court to appoint counsel to provide immigration advice.
>
> (4) stating that the provision of judicial advice at the plea proceeding does not cure a *Strickland* violation.
>
> (5) stating that a defendant should be permitted to withdraw his plea if counsel did not provide the advice required by *Padilla*.

(6) stating that the defendant should be permitted to withdraw his plea if the court failed to provide the warning required by proposed Rule 11(b)(1)(O).

Peter Goldberger of the National Association of Criminal Defense Lawyers (NACDL) (11-CR-009) suggested that the Committee withdraw the current proposal and develop a more robust alternative affording greater protection to defendants. The proper approach is to place the burden on the government, not the court, requiring the prosecutor to "make an affirmative and well informed representation as to what immigration consequences will likely flow from conviction on the tendered plea" when the government's records indicate that the defendant is not a citizen.

Alina Das, co-director of the Immigrant Rights Clinic at NYU School of Law (11-CR-011) suggested that the Committee Note be amended to refer to, or draw from, two online reports co-authored by the Clinic and the Immigrant Defense Project, which describe the proper role of courts in ensuring compliance with *Padilla*. One of the publications cautions that judges should not ask criminal defendants about their immigration status.

C. The Subcommittee's recommendation

1. <u>Issues concerning the text of the rule</u>.

The Subcommittee first discussed the foundational question whether Rule 11 should be amended to require advice concerning possible immigration consequences in all plea colloquies. Although he was not able to participate in the Subcommittee's teleconference, Judge Molloy wrote to the Subcommittee reiterating his opposition to any expansion of the court's obligations under Rule 11 to include collateral consequences such as immigration. In this respect, he agreed with Judge Head.

After discussion, all Subcommittee members who participated in the teleconference reiterated their support for adding immigration consequences to the Rule 11 colloquy. Committee members agreed that the immigration consequences covered by the proposed amendment–removal from the U.S. and denial of citizenship and reentry–are qualitatively different than other collateral consequences, and that they warrant inclusion in the plea colloquy. As the Supreme Court noted in *Padilla*, "deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty." 130 S.Ct. at 1480 (footnote omitted and emphasis added). One member noted that advising defendants of these consequences is consistent with one of the two functions of the plea colloquy required by Rule 11: advising the defendant of his procedural rights and advising him of the maximum and minimum potential punishment. Moreover, as noted at the October 2010 meeting, although the Supreme Court's decision does not require the proposed amendment, it does provide an appropriate basis for distinguishing advice concerning immigration consequences from other collateral consequences.

There was also support for the requirement that the court provide the general statement of possible immigration consequences in every case. Members emphasized that immigration consequences are an issue in nearly half of all criminal cases. In fiscal year 2011, 48% of

defendants for whom sentencing data were available were non-citizens.[1] Moreover, as emphasized in several of the public comments, attempts to determine the immigration consequences of individual defendants would pose serious problems, including the risk of compelled self-incrimination. Accordingly, the Subcommittee concluded it would be unwise to adopt Judge Head's suggestion that the proposed amendment be limited to defendants (like Padilla) who were lawfully in the United States.

There was no support on the Subcommittee for NACDL's suggestion that the proposed amendment be withdrawn to allow for development of a substitute requiring the government to inform the court and the defendant at the Rule 11 proceeding of the specific immigration consequences that the defendant would face upon conviction. Mr. Wroblewski noted that the focus of the Rule 11 colloquy is the maximum and minimum possible punishment, not an individual's status, and he explained that the government frequently does not know the defendant's immigration status when a plea is entered. NACDL seeks to impose a duty on the government to determine the defendant individual situation and provide tailored advice, but *Padilla* imposed the duty to advise the defendant upon his counsel, not the government.

2. <u>Issues concerning the Committee Note</u>.

The Subcommittee voted to recommend three changes in the Committee Note that address concerns raised in the public comments. The changes emphasize that the court should provide only a general statement that there may be immigration consequences of conviction, not specific advice concerning a defendant's individual situation. NIP argued persuasively that it is neither appropriate nor feasible for judges to give individualized advice, and it provided examples of cases in which courts gave erroneous advice. *See* 11-CR-005 at 2 n.2. Moreover, attempts to elicit information that would provide the basis for individual advice may lead to violations of the defendant's privilege against compelled self incrimination.

The Committee Note as published and the changes recommended by the Subcommittee are shown below:

[1]U. S. Sentencing Commission, 2011 Sourcebook of Federal Sentencing Statistics, Table 9, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table09.pdf .

Subdivision (b)(1)(O). The amendment requires the court to include a general statement ~~concerning the potential~~ that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, ~~and does not require the judge to provide~~ not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without ~~first~~ attempting to determine the defendant's citizenship.

The modification in the first sentence removes any suggestion that the court should seek to determine in individual cases what the "potential" consequences might be. The changes in the last paragraph emphasize that the judge is to provide a generic warning–*not* specific advice–and eliminate any suggestion that the judge should attempt to determine the defendant's citizenship after first giving the generic warning.

The Subcommittee declined to make the other changes in the notes suggested in NIP's letter, concluding they went far beyond the scope of the amendment. Additionally, it declined Ms. Das's suggestion that the Committee Note refer to, or draw on, materials prepared by the NYU Immigration Rights Clinic. That decision is in accord with the Standing Committee's general preference for short Committee Notes unadorned by citations to secondary sources.

Rule 11. Pleas.

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); ~~and~~

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and~~.~~

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

CHANGES MADE AFTER PUBLICATION

The Committee Note was revised to make it clear that the court is to give a general statement that there may be immigration consequences, not specific advice concerning a defendant's individual situation.

Public Comments

The Honorable Hayden Head (11-CR-001)

Jack Schisler, Fayetteville Chief of the Arkansas Federal Defender Organization (11-CR-002)

The Federal Magistrate Judges Association (11-CR-004)

Sejal Zota and Dan Kesselbrenner (National Immigration Project, National Lawyers Guild) (11-CR-005)

Peter Goldberger (NACDL) (11-CR-009)

Alina Das (Co-Director of the Immigrant Rights Clinic at NYU School of Law) (11-CR-011)

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PUBLIC COMMENTS

Judge Hayden Head (SD TX) (11-CR-001) opposed the amendment and suggested that it be withdrawn or narrowed. He emphasized that "Rule 11 has served well by wisely excluding collateral consequences." No amendment addressing immigration consequences in the plea colloquy is required because the Supreme Court's decision in *Padilla v. Kentucky*, 130 U.S. 1473 (2010), addressed the duty of counsel, not the courts. However, if the Committee does choose to proceed with the amendment, it should be revised to narrow its scope to the facts of *Padilla*, which concerned a person with a documented right to be in the United States.

Jack Schisler, Fayetteville Chief of the Arkansas Federal Defender Organization (11-CR-002), supported the proposed amendment. It is "good practice" to include this information, a practice that is now followed in the Western District of Arkansas. He saw no harm in the admonition being given to all defendants.

The Federal Magistrate Judges Association (11-CR-004) endorsed the proposed amendment.

Sejal Zota and Dan Kesselbrenner of the National Immigration Project (NIP), National Lawyers Guild (11-CR-005) proposed changes to the Committee Note to clarify that the court should neither attempt to provide specific advice to individual defendants nor to determine their citizenship, as well as additional notes regarding the appointment of immigration counsel and the withdrawal of pleas if the defendant was not advised of immigration consequences.

Peter Goldberger of the National Association of Criminal Defense Lawyers (NACDL) (11-CR-009) suggested that the Committee withdraw the current proposal and develop an alternative proposal that would place the burden on the prosecutor to "make an affirmative and well informed representation as to what immigration consequences will likely flow from conviction on the tendered plea" when the government's records indicate that the defendant is not a citizen.

Alina Das, co-director of the Immigrant Rights Clinic at NYU School of Law (11-CR-011) suggested that the Committee Note be amended to refer to or draw from two online reports co-authored by the Clinic and the Immigrant Defense Project.

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11-CR-001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

HAYDEN HEAD
SENIOR U.S. DISTRICT JUDGE

1133 N. SHORELINE BLVD.
CORPUS CHRISTI, TEXAS 78401
(361) 888-3148
fax (361) 888-3179

January 31, 2012

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

Members of the Committee on Rules of Practice and Procedure:

Thank you for the opportunity to comment on the proposed amendment to the Federal Rules of Criminal Procedure, Rule 11, which adds the admonition that "if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future." Fed.R.Crim.P. 11. For this change, the Committee relies on a Sixth Amendment ineffective assistance of counsel case, *Padilla v. Kentucky*, --- U.S. ---, 130 S.Ct. 1473 (2010). The *Padilla* majority held that an attorney gave ineffective assistance to a permanent resident alien when the attorney provided improper immigration advice that Padilla would not be deported if convicted by his plea of guilty to a drug charge. Hopefully the Committee will conclude that *Padilla* is not a sufficient basis to amend, and that *Padilla* certainly does not justify broadly applying the amendment to <u>all</u> non-citizens.

The Supreme Court addresses the failed duty of counsel, not an error of the court. Without precedent, the proposed amendment, not *Padilla*, would create a due process duty to judicially admonish a defendant of adverse immigration consequences. Indeed, precedent is to the contrary. *See United States v. Delgado-Ramos*, 635 F.3d 1237 (9th Cir. 2011) (rejecting *Padilla* as a reason to find the present Rule 11 inadequate to protect an undocumented alien's due process rights).

Rule 11 has served well by wisely excluding collateral consequences from its admonitions. Adverse consequences not addressed by Rule 11 include, but are not limited to, loss of federal benefits, exclusion from health care programs, loss of eligibility for student grants and loans, loss of eligibility for housing benefits, negative effects on employment and professional licenses, potential effects on parental and custodial rights, loss of right to possess firearms, loss of certain voting rights, exclusion from jury service, ineligibility to acquire a commercial driver's license, and exclusion from military service. See, e.g., 21 U.S.C. § 862 (federal benefits); 42 U.S.C. § 1320a-7 (health care programs); 20 U.S.C. § 1091 (student grants and loans); 42 U.S.C. §§

13661, 13662, 13663, 1437f(d)(1)(B)(iii) (housing benefits); 42 U.S.C. §§ 675 (parental rights); 18 U.S.C. §§ 922(g), 921(a)(20) (firearms); 10 U.S.C. § 504 (military). Loss of one or a combination of these significant benefits may have the same, or even greater, adverse effect on an American citizen as would removal of a non-citizen to his own homeland. *Padilla* provides no justification to disrupt the policy embedded in Rule 11 that it is a procedure to be followed to protect due process rights, not a practice guide for attorneys.

If the Committee does choose to proceed to amend, it should narrow its scope to the facts of *Padilla*. As written, the amendment extends *Padilla* beyond its facts to include undocumented aliens, i.e. persons without any lawful right to be in the United States, not just ones like Padilla who held a documented right to be within the United States. Nothing is achieved by a judge warning a defendant who claims no right to be present within the United States that he risks deportation by pleading guilty. Conviction or not, such a defendant is subject to deportation.

Respectfully,

Hayden Head
Senior United States District Judge
Southern District of Texas, Corpus Christi Division

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Proposed Amendments to Fed Rules - comments
Jack Schisler to: Rules Comments 02/13/2012 06:54 PM

Dear Mr. McCabe:

These are my comments on proposed amendments to the federal rules pertinent to my area of practice:

FRAP 28 & 28.1: These changes are welcome. They serve to streamline the process, and to avoid the redundancy in current appellate practice.

FRCP 11: I believe it is a good practice to include *the Padilla* information. This admonition is being made in the Western District of Arkansas currently, and is also part of written plea agreements when applicable. I see no harm in admonishing any defendant with immigration issues of the possibility that a criminal conviction could impact the defendant's immigration status.

Thank you for taking the time to consider these comments.

Jack Schisler

Jack Schisler, Fayetteville Chief
Arkansas Federal Defender Organization
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FEDERAL MAGISTRATE JUDGES ASSOCIATION

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11-CV-018
11-CR-004
11-EV-001

February 10, 2012

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

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

Dear Peter:

I am very pleased to submit the attached comments to the Rules Advisory Committee on behalf of The Federal Magistrate Judges Association. These well thought out comments were thoroughly discussed and considered by our Standing Rules Committee. The learned members of this committee include:

Honorable S. Allan Alexander, Northern District of Mississippi, Chair
Honorable David E. Peebles, Northern District of New York, Co-Chair
Honorable Clinton E. Averitte, Northern District of Texas
Honorable William Baughman, Jr., Northern District of Ohio
Honorable Alan J. Baverman, Northern District of Georgia
Honorable Hugh W. Brenneman, Jr., Western District of Michigan
Honorable Geraldine Soat Brown, Northern District of Illinois
Honorable Joe B. Brown, Middle District of Tennessee
Honorable Martin C. Carlson, Middle District of Pennsylvania
Honorable Waugh B. Crigler, Western District of Virginia
Honorable Judith Dein, District of Massachusetts
Honorable Marilyn D. Go, Eastern District of New York
Honorable Steven Gold, Eastern District of New York
Honorable David A. Sanders, Northern District of Mississippi
Honorable Nita L. Stormes, Southern District of Pennsylvania
Honorable Mary Pat Thynge, District of Delaware

The committee members come from all size districts and their collective experiences encompasses all types of judicial duties. In addition, the committee members often consulted with their colleagues in the course of preparing these comments. The committee's comments were reviewed and unanimously approved by the Officers and Directors of the Federal Magistrate Judges Association.

We are pleased to have this opportunity, once again, to present written comments representing the views of the Federal Magistrate Judges Association, and we welcome the opportunity to testify, if requested.

Sincerely,

Malachy E. Mannion
President
Federal Magistrate Judges Association

Chief United States Magistrate Judge
Middle District of Pennsylvania

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COMMENTS OF
THE FEDERAL MAGISTRATE JUDGES ASSOCIATION
ON PROPOSED AMENDMENTS TO

THE FEDERAL RULES OF CIVIL PROCEDURE,

THE FEDERAL RULES OF CRIMINAL PROCEDURE

and

THE FEDERAL RULES OF EVIDENCE
(Class of 2013)

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE, THE FEDERAL RULES OF CRIMINAL PROCEDURE and THE FEDERAL RULES OF EVIDENCE (Class of 2013)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

A. PROPOSED RULE 45 – SUBPOENA

COMMENT: The proposed new Rule 45 substantially re-writes that rule in an attempt to make it clearer and more concise. The FMJA generally endorses the proposed amendment.

However, the FMJA has concerns that the terminology in subsection 45(c)(1)(B)(ii) is not consistent with terminology elsewhere in the Rule and that, as written, it will significantly increase motion practice for the trial judge in determining the meaning of the term "substantial expense" where a person must travel more than 100 miles to attend trial and deciding who has the burden of proof in the matter.

The FMJA also offers an unsolicited suggestion to establish a presumptive time for the target of the subpoena to comply with a subpoena.

Finally, the FMJA believes strongly that the decision whether to transfer a discovery motion to the issuing court should not be limited to "exceptional circumstances" or subject to veto by either a party or the non-party target, but should be left to the discretion of the court under a standard of "the interests of justice," giving due consideration to the non-party's interests.

D**ISCUSSION:**

1. Rule 45(c)(1)(B)(ii): The new provision alters the geographic scope of Rule 45 trial subpoenas. It extends the geographic boundaries beyond 100 miles from the location of the court provided: a) the target of the subpoena resides or works within the state; and b) the person can comply without "substantial expense."

The FMJA has two concerns. First, the terminology within the Rule, as a whole, is not uniform and is subject to diverse and potentially inconsistent interpretations, depending on the circumstances. Although some terms are carry-overs from the old Rule, it is clear that the new Rule was intended to both simplify and clarify practice as well as to eliminate ambiguity as best it can.

Proposed Rule 45(c)(1)(B)(ii), establishing the geographic scope of a trial subpoena, uses the standard "substantial expense" although Rule 45(d)(3)(a)(iv) specifies "undue burden" as the standard under which a subpoena must be quashed. A third standard appears in Rule 45(d)(1), which places a burden on the party issuing a subpoena to avoid imposing "undue burden or expense." Finally, Rule 45(d)(2)(B)(ii) protects a non-party responding to a document subpoena from "significant expense."

The FMJA is uncertain whether the drafters intended for different standards to be applied in these different contexts. Different terminology implies different standards, but the differences in terminology here are difficult to define and apply. For example, do the drafters intend to distinguish between "substantial" and "significant"? If the intent is that courts should apply different standards, the terms setting those standards should be more clearly defined. If not, then the Rule should employ the same language throughout.

A greater concern relates to who bears the burden of establishing whether the subpoena is quashed or enforced under the proposed "substantial expense" standard of Rule

45(c)(1)(B)(ii). As it stands, the proposed Rule seems to place the burden on the issuing party to show that compliance will not require substantial expense. We believe the subpoena target is in the best position to provide information concerning the burden and expense of compliance and, thus, is in the better position to assert any opposition to the subpoena based on that information. The FMJA believes that this is what is contemplated by proposed Rule 45(c)(1)(B)(ii), but suggests that a better place to set forth the standard would be in subparagraph 45(d)(3)(A) in the context of quashing or modifying a subpoena.

2. **Rule 45(d)(3)(A)(i):** There are no changes proposed here, but the FMJA suggests that the phrase "fails to allow a reasonable time to comply" could be better defined. Many districts have invoked presumptive time periods to lend some consistency to what the court will deem "reasonable." The question often arises and should be addressed more definitively by the proposed Rule.

   The FMJA suggests establishing a presumptively reasonable time, such as fourteen days, for compliance with a subpoena. Doing so would eliminate uncertainty from district to district, assuring more consistency among the circuits. The presumption, of course, should be rebuttable depending upon the circumstances of the case.

3. **Rule 45(f):** The new provision would allow under some circumstances a court in one district to transfer motions relating to a subpoena to the issuing court.

   The FMJA endorses the concept of transferring such disputes, but feels strongly that limitations built into the proposed Rule are unduly restrictive and may undercut an issuing court's ability to manage effectively and consistently cases pending before it. In fact, the FMJA believes that transfer of such disputes should be the preferred practice.

The first sentence of the Rule permits the court where compliance is required to transfer a motion to the issuing court in only two circumstances: a) Where the parties and the target of the subpoena consent; or b) where the court finds "exceptional circumstances." The comment to the Rule states that "transfers will be truly rare events."

The FMJA, whose members have substantial responsibility for supervising discovery in civil cases, including disputes arising under Rule 45, is of the opinion that neither party should have "veto" power. It is entirely possible that possession of such power may lead to forum shopping if a party is unhappy with previous rulings on similar matters in the issuing court. The real inconvenience, if any, will in most cases be visited upon the person who must comply with the subpoena, but the FMJA believes that although that person's concerns should be given careful consideration, even that person should not have absolute veto power.

Secondly, the FMJA believes that the transfer authority set out in the proposed rule is an important improvement that should not be limited to the parties' agreement or exceptional circumstances. Under the current rule, magistrate judges dealing with enforcement of a subpoena relating to a case in another district are required to make rulings in cases with which they have no familiarity, out of the context of the total case. Their ruling may conflict with or even interfere with previous rulings in the same case. The proposed rule addresses this problem by allowing transfer from the district where compliance is sought to the "issuing district," that is, the district where the case is pending. In most situations, the FMJA believes, a transfer will significantly advance the just and efficient resolution of the dispute. The issuing court will have entered prior orders or made prior rulings on discovery issues, and sometimes substantive issues, of which the other court will have no knowledge, particularly in complex cases or cases which have involved voluminous discovery or multiple parties or discovery being sought in multiple districts. It is frequently the case that the matters raised by such a motion are connected to other matters that have already been addressed in the issuing

court. In addition, if a motion is pending in another court, the issuing court has no control over when or how a motion may be decided, and the other court will have no knowledge of scheduling concerns known only to the issuing court, *i.e.*, whether the discovery sought will interfere with a discovery deadline, motion schedule or trial date.

Generally, magistrate judges would prefer to assume the full management of discovery matters in their pending cases to assure consistency and efficient case management. Moreover, magistrate judges have reservations about making rulings that may make things more difficult in a case pending elsewhere.

Before transferring a motion, the magistrate judge should give careful consideration to the interests of the subpoenaed party, but it is highly unlikely that the person subpoenaed would be required to actually appear in person in the issuing court. Magistrate judges are sensitive to the financial burdens that might be imposed by transfer and would be likely to decide the motion either on the papers or after a hearing via telephonic or other electronic means to minimize delay and expense. Any concerns the committee may have on this score could be addressed in the comment to the Rule making clear that courts should consider these alternative means of hearing the parties.

The FMJA believes that a more appropriate standard for determining whether an adversarial proceeding under Rule 45 should be transferred should be the interests of the person subpoenaed and the interests of justice. The decision should be left to the sound discretion of the transferring court.

B. PROPOSED RULE 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

COMMENT: The FMJA endorses the purpose behind the proposed conforming amendment to Rule 37(b)(1), but suggests re-wording the amendment to conform the terminology to that used in amended Rule 45.

DISCUSSION:

The proposed amendment to Rule 37(b)(1) is needed, but the FMJA suggests that because its purpose is to conform it to amended Rule 45, both rules should use consistent terminology to assure that the intent of each is clear. The FMJA respectively suggests that substituting the following language will accomplish the same purpose as that intended by the proposed amendment with a minimum of confusion:

If a motion is transferred pursuant to Rule 45(f), and the deponent fails to obey an order by the issuing court to be sworn or to answer a question, the failure may be treated as contempt of either the issuing court or the court where the motion was brought.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. PROPOSED RULE 11 – PLEAS

COMMENT: Proposed new Rule 11(O) adds a requirement that the court must advise a defendant as a part of a plea colloquy that a defendant who is not a United States citizen may be removed from the country, denied citizenship and denied future admission to the United States. The FMJA endorses the proposed amendment.

B. PROPOSED RULE 12 – PLEADINGS AND PRETRIAL MOTIONS

COMMENT: The amendments to Rule 12 clarify when certain motions must or may be raised and the consequences of failure to raise issues via motion in a timely matter. The FMJA endorses the proposed amendment.

III. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

PROPOSED AMENDMENT TO RULE 803(10) – EXCEPTIONS TO THE RULE AGAINST HEARSAY – REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

COMMENT: The intent of the proposed amendment is to conform admissibility requirements relating to a testimonial certificate to the Supreme Court's holding in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). The FMJA endorses the proposed amendment.

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VIA ELECTRONIC MAIL 11-CR-005

February 15, 2011

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

Public Comment on Proposed Amendment to Federal Rule of Criminal Procedure 11

Dear Secretary McCabe:

On behalf of the National Immigration Project of the National Lawyers Guild (National Immigration Project) we submit these comments pursuant to the Committee on Rules of Practice and Procedure's request for public comments relating to the Committee's proposed amendment to Rule 11 of the Federal Rules of Criminal Procedure.

We thank you for considering our comments and hope the Committee finds them helpful.

I. The Advisory Committee Note to the Proposed Amendment to Rule 11 of the Federal Rules of Criminal Procedure Should Contain Language Barring Judges from Providing Specific Immigration Advice or Questioning Defendants Beyond the Proposed Text of Rule 11(b)(1)(O).

The Advisory Committee Note to the Rule 11 amendment currently "mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation." The Advisory Committee Note to the 1974 amendment to Rule 11 regarding collateral and other consequences of a plea explains that "the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant." Read together, these notes suggest it may be appropriate for judges in specific cases to provide a more detailed immigration warning or to question defendants concerning their individual immigration situation.

The National Immigration Project strongly believes the proposed warning should be a ceiling and not a floor, i.e., that judges should leave to defense counsel the duty to provide specific individualized advice about the actual immigration consequences. It is neither appropriate nor feasible for a court to give specific, individualized

advice to defendants about the immigration consequences of a conviction, which requires investigation of the defendant's specific immigration history and legal analysis.[1] Nevertheless, some federal courts provide specific advice to defendants (and in some cases wrongly) by advising a noncitizen defendant that she *will* be subject to detention and deportation.[2] Such advice is potentially inaccurate, and also may undermine a carefully negotiated plea intended to preserve the possibility of later relief from deportation.

It is also critical that judges provide the Rule 11(b)(1)(O) warning without inquiring into the content of the advice provided by defense counsel. When the court makes such inquiries, defendants may feel pressured to provide a response, regardless of the adequacy of their defense counsel's prior advice. Such an inquiry also may compel a disclosure of communications between a defendant and counsel that potentially violates attorney-client privilege, as discussed below in Point II. Modifying the Committee Note to discourage judges from adding inquiry beyond the proposed text of Rule 11(b)(1)(O) would avoid such inappropriate questioning.

Therefore, the National Immigration Project urges the Committee to modify the language in the Advisory Committee Note to the Rule 11 amendment as follows:

> The amendment mandates a generic warning, and ~~**does not require**~~ the judge ~~**to**~~ **[should not]** provide specific advice concerning the defendant's individual situation **[or add other inquiry beyond the language of the amendment]. This Note supersedes the language relating to collateral consequences in the Advisory Committee Note to the 1974 amendment, as Rule 11(b)(1)(O) now specifically addresses immigration consequences.**

II. The Advisory Committee Note to the Proposed Amendment to Rule 11 of the Federal Rules of Criminal Procedure Should Bar Judges from Inquiring about a Defendant's Citizenship.

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[1] *See, e.g.,* ABA Pleas of Guilty Standard 14-3.2, Commentary (stating that the court's "inquiry is not, of course, any substitute for advice by counsel"); ABA Pleas of Guilty Standard 14-3.2(f) ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.").

[2] *See, e.g., Mendoza v. United States*, 774 F.Supp.2d 791, 794 (E.D. Va. 2011) (warning the defendant during the Rule 11 plea colloquy that "you *will* also be subject to deportation") (emphasis added); *Marroquin v. United States*, 2011 WL 488985, *8 (S.D. Tex. Feb. 4, 2011) (unpublished) (warning the defendant during the plea colloquy that "if you're not a citizen of this country, then this *would* require that your status here be revoked, and you *would be* deported back to your home country") (emphasis added); *United States v. Bhindar*, 2010 WL 2633858, *2 (S.D.N.Y. June 30, 2010) (unpublished) (warning the defendant during the plea allocution, "do you understand that one of the consequences of your plea, if you are not a citizen of the United States is that, at the conclusion of your sentence, you *will* be removed from the United States and prohibited from ever re-entering the United States?") (emphasis added).

The Advisory Committee should modify the Note to clarify that judges should not require the disclosure of the defendant's citizenship as part of the proposed immigration warning. Any judicial questioning about a defendant's citizenship is not only unnecessary for the administration of the immigration warning, but also inappropriate, and potentially prejudicial and unconstitutional.[3] For example, questioning defendants about immigration status on the record potentially infringes on Fifth Amendment protections against self-incrimination.[4] Such questions may result in oral statements about alienage on the record which the government could use as evidence in support of other criminal charges for offenses in which immigration status is an element, such as the federal crimes of illegal entry[5] and illegal reentry following deportation.[6] To avoid such complications, judges should not ask about alienage on the record.

Further, attorneys need to be able to ask defendants about their immigration status and related issues to provide competent advice regarding the immigration consequences of a plea, making such communications subject to attorney-client privilege. Compelling the disclosure of a defendant's communications with her lawyer in the pursuit of legal advice, where it is not relevant to her criminal proceedings, may violate Federal Rule of Evidence 501.[7] Also, defendants who fear the disclosure of information shared with their attorneys about their immigration status in court may withhold facts that are essential for their attorneys to provide accurate advice.

Recognizing the concerns associated with disclosure of citizenship on the record, at least ten states explicitly prohibit courts from asking about or otherwise requiring disclosure of a defendant's citizenship.[8] For example, Arizona's rule on pleas of

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[3] *See generally* Immigrant Defense Project & New York University School of Law Immigrant Rights Clinic, Judicial Obligations After *Padilla v. Kentucky* (2011), *available at* http://immigrantdefenseproject.org/wpcontent/uploads/2011/05/postpadillaFINALnew2.pdf.

[4] The Fifth Amendment states, "No person shall … be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. An individual's right under the Amendment to avoid self-incrimination applies "to any official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

[5] 8 U.S.C. § 1325.

[6] 8 U.S.C. § 1326.

[7] Fed. R. Evid. 501 (establishing general rule with regard to privileges); *see also Upjohn Co. v. U.S.*, 449 U.S. 383, 396 (1981); S. Rep. No. 93-1277, at 13 (1974) (emphasizing that "the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis," depending on the facts relevant to a particular case); *Trammel*, 445 U.S. 40, 47 (1980) ("In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis' . . .") (citations omitted).

[8] *See* Ariz. R. Crim. P. 17.2(f); Cal. Penal Code § 1016.5(d); Conn. Gen. Stat. Ann. § 54-1j(b); Md. Rule 4-242(e) (specifying in Committee note that court should not question defendants about citizenship status); Mass. Gen. Laws Ann. ch. 278, § 29D; Neb. Rev. Stat.

guilty and no contest states, "The defendant shall not be required to disclose his or her legal status in the United States to the court."[9] The ABA's *Standards for Criminal Justice Pleas of Guilty* also stipulates that courts should advise defendants as to immigration consequences, but "such a notice should not, however, require the defendant to disclose to the court his or her immigration status."[10]

The National Immigration Project urges the Committee to modify the following language in the Advisory Committee Note to the Rule 11 amendment:

> "The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without ~~first~~ attempting to determine the defendant's citizenship."

III. The Committee Should Include Language in an Advisory Committee Note to Rule 11(b)(1)(D) of the Federal Rules of Criminal Procedure Instructing Judges to Appoint Counsel to Provide Immigration Advice of the Plea for Certain Defendants Denied Court-Appointed Counsel for a Non-Jailable Petty Offense.

The Federal Rules of Criminal Procedure entitle misdemeanor defendants to counsel in all cases before a district court judge.[11] A magistrate judge, however, may preside over cases involving certain petty offenses without counsel if the magistrate judge "waives" imprisonment and does not find counsel required in the interests of justice.[12] Although some of these offenses may not carry a risk of incarceration, some may carry severe immigration penalties—penalties that the United States Supreme Court has acknowledged may be of greater concern to a defendant than incarceration.[13] For example, in October of 2011, the most frequently cited charge in magistrate courts

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§29-1819.03 (providing legislative findings and intent); Ohio Rev. Code Ann. (ORC Ann.) § 2943.031(C); R.I. Gen. Laws § 12-12-22(d); Wash. Rev. Code (ARCW) § 10.40.200(1); Wis. Stat. § 971.06(c)(3). Ohio's statute specifies that a defendant must not be required to disclose legal status *except* when the defendant has indicated that he or she is a citizen through his entry of a written guilty plea or an oral statement on the record. *See* ORC ANN. § 2943.031(C).

[9] Ariz. R. Crim. P. 17.2(f).

[10] ABA Criminal Justice Standards Pleas of Guilty, http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.authcheckdam.pdf at 59).

[11] Fed. R. Crim. P. 44 & Advisory Committee's Note (1966 Amendment).

[12] 18 U.S.C. § 3006A(a)(2) (2006); *see also* Fed. R. Crim. P. 58(a)(2), (b)(2)(C). In *Shelton v. Alabama*, 535 U.S. 654, 662 (2002) the Supreme Court held that whether an offense carries any possibility of incarceration determines if a defendant is entitled to assistance of counsel is. Some courts interpret this as meaning that a charged defendant is not entitled to court-appointed counsel when an offense carries no penalty of jail time.

[13] *See generally* Alice Clapman, *Petty Offenses, Drastic Consequences: Toward A Sixth Amendment Right To Counsel For Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 2011.

was illegal entry under 8 U.S.C. § 1325,[14] a plea which renders permanent residents subject to removal.[15] If the court denies appointed counsel, these permanent residents risk entering pleas without knowledge of the prejudicial immigration effects.

Rule 11(b)(1)(D) appears to allow the court to appoint counsel, if necessary, at the time of the guilty plea. Prior to accepting pleas in such cases, the court, at a minimum, should appoint counsel when the defendant specifically inquires about the immigration consequences of a plea, when alienage is an element of the offense, or when the court has a good faith basis to believe that a defendant could benefit from advice about immigration consequences. Counsel is necessary to provide these defendants with individualized advice about the immigration consequences of a plea or conviction as required by *Padilla v. Kentucky*. Only counsel can provide such advice, since judges are not in a position to conduct the detailed factual investigation and legal analysis required to advise each individual defendant regarding his or her specific case.

The National Immigration Project urges the Committee to add the following proposed language in an Advisory Committee Note to Rule 11(b)(1)(D):

> **For a defendant who has been denied court-appointed counsel on the grounds that he or she is charged with a non-jailable petty offense, the judge should appoint counsel at the time of the plea under Rule 11(b)(1)(D) to provide him or her with advice about the immigration consequences of a plea as required by *Padilla v. Kentucky*, if the defendant specifically inquires about the immigration consequences of the plea, if alienage is an element of the offense, or if the court has a good faith basis to believe that a defendant could benefit from individualized advice about immigration consequences.**

IV. The Advisory Committee Note to the Proposed Amendment to Federal Rule of Criminal Procedure 11 Should Recognize that the Warning Under Federal Rule of Criminal Procedure 11(b)(1)(O) Protects Defendant's Fifth Amendment Rights Whereas Effective Assistance of Counsel is a Sixth Amendment Right.

A judge's obligation to ensure that a defendant's plea is voluntary stems from the Fifth Amendment's Due Process Clause.[16] It almost needs no mention that a judge's

[14] This was the lead charge for 72 percent of all magistrate convictions in October 2011. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION CONVICTIONS FOR OCTOBER 2011 (2012), http://trac.syr.edu/tracreports/bulletins/immigration/monthlyoct11/gui.

[15] 8 U.S.C. § 1182(a)(6)(A); *see also Leal-Rodriguez v. INS*, 990 F.2d 939, 946-947 (7th Cir. 1993).

[16] *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969).

role is to serve as a neutral arbiter,[17] while counsel's role is to serve as the defendant's advocate.[18] Effective assistance of counsel requires counsel to provide competent advice to the defendant. In addition, the Sixth Amendment requires a criminal defense practitioner to advise her client regarding the immigration consequences of a guilty plea.[19]

Since the Supreme Court's decision in Padilla, several courts seemingly have conflated the respective roles of judge and defense counsel in assessing the significance of an immigration warning during the plea colloquy. The proposed amendment to Federal Rule of Civil Procedure 11 should help to reduce that problem. However, the National Immigration Project respectfully suggests that adding additional language to the Advisory Committee Note would avoid potential confusion regarding the important distinction between (1) the Court's obligation to protect a defendant's Fifth Amendment rights and (2) defense counsel's obligation to provide effective assistance of counsel.

In the time since the Court decided *Padilla*, this confusion already has arisen in at least one federal court. In *Marroquin v. United States*,[20] the district court told the defendant that she would be deported if she were a noncitizen. Moreover, the court used its warning as its basis for precluding post-conviction relief under the *Padilla* decision. That the district court conflated its role with defense counsel's role is evident from the court's statement that: "[T]he Court finds that an unequivocal admonition by the Court regarding the risk of deportation was sufficient for Petitioner to decide whether or not to enter a guilty plea." [21]

The National Immigration Project urges the Committee to add the following proposed language to Advisory Committee Note to the Rule 11 amendment:

> **The role of the court is to ensure that all defendants understand that the plea that they are entering may have adverse immigration consequences. This role is distinct from the role of counsel, which is to provide effective legal advice as required by the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Thus, provision of the 11 (b)(1)(O) immigration warning does not cure a *Strickland* violation.**

The National Immigration Project believes that including the language above would provide important guidance to judges in applying the rule as intended.

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[17] *See Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252, 2259 (2009); ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004).

[18] *United States v. Cronic*, 466 U.S. 648, 656 (1984).

[19] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

[20] 2011 WL 488985, *8 (S.D. Tex. Feb. 4, 2011) (unpublished).

[21] *Id*.

V. The Advisory Committee Note to the Proposed Amendment to Rule 11 of the Federal Rules of Criminal Procedure Should Recognize that a Court Generally Should Permit a Defendant to Withdraw her or his Plea if the Defendant Demonstrates that Defense Counsel Failed to Provide the Immigration Advice Required under *Padilla* v. *Kentucky.*

The two-pronged test under *Strickland v. Washington* for ineffective assistance of counsel requires a petitioner to establish both that (1) the attorney's representation was objectively inadequate; and (2) petitioner suffered prejudice as a result of defense counsel's inadequacy.[22] In *Padilla v. Kentucky*, the Court held that counsel's failure to give advice about immigration consequences satisfies the first prong's requirement; that counsel's representation fell short of accepted standards.[23] If a defendant seeks to withdraw a plea and satisfies the court that defense counsel failed to give necessary immigration advice, then a defendant satisfies the first prong of *Strickland.*

In *Hill*, the Supreme Court recognized that, to demonstrate prejudice, a petitioner must demonstrate that he or she would have been willing to go to trial but for counsel's error.[24] Post-conviction relief often is the preferred forum to raise a claim of ineffective assistance of counsel,[25] and in this context, a petitioner must convince the factfinder that a decision not to plead guilty would have been rational under the facts of the case.[26] Where a defendant affirmatively renounces a plea by seeking to withdraw it, however, a factfinder need not engage in speculation about the reasonableness of a defendant's after-the-fact statement about rejecting the plea. Consequently, by seeking to withdraw the plea, the defendant meets the test under *Hill* and satisfies the second prong of *Strickland*.[27]

The National Immigration Project urges the Committee to include in the Advisory Committee Note to the proposed Rule 11 amendment the following language:

> **A defendant who demonstrates that her or his attorney failed to provide immigration advice required under *Padilla* v. *Kentucky* and seeks to withdraw her or his plea before sentencing has established a "fair and just" reason to withdraw the plea pursuant to Federal Rules of Criminal Procedure 11(d)(2)(B).**

As shown above, a defendant who demonstrates that counsel failed to advise prior to the guilty plea and who affirmatively rejects the plea by seeking to withdraw it,

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[22] *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

[23] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010).

[24] *Hill v. Lockhart*, 474 U.S. 52, 54-60 **(**1985).

[25] *See generally Massaro v. United States*, 538 U.S. 500 (2003).

[26] *Roe* v. *Flores-Ortega*, 528 U.S. 470, 480, 486 (2000).

[27] *See, e.g., United States v. Toothman*, 137 F.3d 1393, 1400-01 (9th Cir.1998) (holding that defense counsel's mistake constitutes a fair and just reason to withdraw a plea for purposes of Rule 11 because the defendant was not "equipped intelligently to accept the plea offer made to him").

satisfies both prongs of the *Strickland* test. Therefore, having established a Sixth Amendment violation under Supreme Court case law, a court should allow find that the defendant has raised a "fair and just" reason sufficient to withdraw her or his plea.

VI. The Advisory Committee Note to the Proposed Amendment to the Federal Rule of Criminal Procedure 11 Should Recognize that the Court's Failure to Give the Immigration Warning under Federal Rule of Criminal Procedure 11(b)(1)(O) May Constitute a "Fair and Just" Reason to Withdraw a Guilty Plea Before the Court Imposes Sentence.

The National Immigration Project strongly believes a court may underestimate the legal significance of its failure to comply with the proposed amendment unless the Committee adds language addressing this issue to the Advisory Committee Note. Our concern stems, in part, from a widespread confusion regarding direct and collateral consequences of a plea.

On the one hand, the Court in *Padilla* determined that the distinction between direct and collateral review was not a useful framework for determining whether defense counsel must provide advice regarding the immigration consequence of a defendant's plea under the Sixth Amendment.[28] On the other hand, the Court in *Boykin* conditions the voluntariness of a plea on the defendant's understanding of the direct consequences of it.[29] The plea colloquy in Federal Rule of Criminal Procedure 11 implements the requirements in *Boykin*.[30] In light of this history, a court may incorrectly believe that its obligation to give the proposed immigration consequences warning (which does not relate to a direct consequence of the plea) is less important than the other parts of the colloquy. This potential confusion could prevent a court from considering its failure to give the immigration warning under Federal Rule of Criminal Procedure 11(b)(1)(O) as a sufficient basis to permit a defendant to withdraw a plea.

The National Immigration Project suggests that the Advisory Note include the following language to prevent such confusion:

> **Subject to a harmless error analysis in Federal Rule of Criminal Procedure 11(h), the court's failure to give the immigration warning under Federal Rule of Criminal Procedure 11(b)(1)(O) may constitute a "fair and just" reason to withdraw a guilty plea before the court imposes sentence.**

The National Immigration Project believes that the inclusion of the proposed language would increase a judge's understanding of the rule, reduce unnecessary appeals, and promote fairness.

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[28] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

[29] *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969).

[30] Notes of Conference Committee, House Report No. 94-414; 1975 Amendment.

Thank you for considering our views. We are grateful for the opportunity to submit comments.

Sincerely,

s/Sejal Zota

Sejal Zota
Staff Attorney

Dan Kesselbrenner
Executive Director

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11-CR-009

February 15, 2012
via e-mail

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
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COMMENTS OF THE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendment to Rule 11,
Federal Rules of Criminal Procedure
Published for Comment in August 2011

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed change to Rule 11 of the Federal Rules of Criminal Procedure. NACDL's comments on the proposed amendments to the Evidence and Appellate Rules have been submitted separately, and our comments on Criminal Rule 12 will be submitted within a few days. (We appreciate the agreement of your office to accept those comments after the deadline.) Our organization has more than 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

The Committee proposes that Rule 11 be amended to add a requirement to the guilty plea colloquy of a judicial admonition that a guilty plea "a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission into the United States in the future" as a result of the conviction. This, of course, is inspired by the Supreme Court's recognition in *Padilla v.*

Kentucky, 559 U.S. —, 130 S.Ct. 1473 (2010), that effective assistance of counsel under the Sixth and Fourteenth Amendments requires that defense counsel give correct advice to defendants who are not citizens concerning the "immigration consequences" of the conviction which will result from a guilty plea (including risk of removal, future inadmissibility, and ineligibility for naturalization), at least where those consequences are clear. NACDL enthusiastically supports the holding in *Padilla* as an important step forward in the elevation of standards of criminal defense practice. We therefore begin by emphasizing that the purpose and effect of the amendment to Rule 11 must be to further ensure that the defendant has substantively and effectively received full advice as to the consequences of the plea, and thus to ensure that the many waivers of constitutional rights involved in every guilty plea are genuinely voluntary. The goal cannot be to adjust the plea allocution with an eye merely to insulating the plea from subsequent attack on *Padilla* grounds. NACDL commends the committee for making a proposal which, at least under current law, goes beyond the constitutional minimum (as *Padilla* did not address the judge's duty, but only that of counsel). With this in mind, NACDL suggests that a more robust amendment to the Rule would be more effective.

There are many cases where a defendant's possible alienage would potentially be an incriminating fact, with respect to one or more offenses to which the defendant is not presently entering a plea. For this reason, the Rule cannot require either the defendant or defense counsel to address this subject without giving rise to significant Fifth Amendment and attorney-client privilege issues, and we are pleased that the proposed amendment does not do so. However, either as a result of the grand jury investigation or in connection with the bail inquiry, the government in many cases will have concluded that the defendant is not a citizen. Indeed, by the time a case reaches the change-of-plea stage there is no reason the prosecutor should not be expected in every case to have carefully ascertained the defendant's identity and thus, from available government records, his or her citizenship and immigration status. We believe the rule can and should properly require the prosecutor, therefore, to advise the court accordingly, and if the government believes the defendant not to be a citizen to make an affirmative and informed representation as to what immigration consequences will likely flow from conviction on the tendered plea. (For a non-citizen, these should be required to be included in the terms of any written plea agreement as well.) Where the offense to which the plea is being offered is on its face an "aggravated felony," on account of which removal will be mandatory and likely without resort to any discretionary relief, it is not too much to expect someone to say so. In other instances, the consequences may depend on what kind of prior convictions, if any, the defendant has, or on what status the non-citizen has in the United States and for how many years, or on what sentence is actually later imposed. In such cases, the prosecutor should at least be required to say that much. As stated previously, the defendant should not be expected to agree or disagree, but only to acknowledge understanding of what is being said on this subject.

Padilla has placed on the defense bar a burden of learning more about immigration law than many of us did before, and we in NACDL have willingly embraced that burden through enhanced professional education efforts. It is

not unreasonable to impose a duty under Rule 11 on United States Attorneys' Offices to acquire the same sort of knowledge and to explicate it – and on federal district or magistrate judges then to affirm or question the legal accuracy of that advice – so that guilty pleas are rendered more likely genuinely knowing and voluntary. The defendant can be required, in tendering his or her plea, to acknowledge understanding this advice, without being required to admit that it applies. For these reasons, NACDL does not support the amendment as drafted, favoring instead a much stronger protection for defendant's rights in light of *Padilla*.

In the *Padilla* opinion, the Supreme Court expressed doubt as to the viability and constitutional significance of the heretofore long-accepted distinction between the "direct" and "collateral" consequences of a conviction, recognizing that some "collateral" consequences which flow inevitably from the fact of conviction can be as serious and important, or more so, as some of the elements of the criminal sentence that must be made known to the defendant before a guilty plea will be considered voluntary. Sex offender registration and related requirements and dispossession of firearms are the most obvious and common examples of direct and automatic, but supposedly "collateral" consequences of many convictions entered on guilty pleas in federal court. Others include loss of voting and jury-service rights, loss of public benefits such as pension rights, denial of federal benefits of various kinds, and loss of professional and nonprofessional licenses and eligibility for many forms of employment. We believe that before accepting a guilty plea the court should at least ensure that the defendant has spoken about these potential penalties and disqualifications with counsel, even if the court does not itself give the defendant any specific advisement about them.

In that regard, we call to the committee's attention for further study – without necessarily fully endorsing – the differing approaches of the ABA Standards ("Collateral Sanctions and Discretionary Disqualification," 2003) and of the Uniform Law Commissioners to this issue, both of which are substantially broader and stronger than the present proposal:

> **[ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification] Standard 19-2.3 Notification of collateral sanctions before plea of guilty**
>
> (a) The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged.
>
> (b) Failure of the court or counsel to inform the defendant of applicable collateral sanctions shall not be a basis for withdrawing the plea of

guilty, except where otherwise provided by law or rules of procedure, or where the failure renders the plea constitutionally invalid.

The Uniform Collateral Consequences of Conviction Act (2010) provides:

> **SECTION 5. NOTICE OF COLLATERAL CONSEQUENCES IN PRETRIAL PROCEEDING AND AT GUILTY PLEA**.
>
> (a) When an individual receives formal notice that the individual is charged with an offense, [the designated governmental agency or official] shall cause information substantially similar to the following to be communicated to the individual:
>
> *NOTICE OF ADDITIONAL LEGAL CONSEQUENCES*
>
> If you plead guilty or are convicted of an offense you may suffer additional legal consequences beyond jail or prison, [probation] [insert jurisdiction's alternative term for probation], periods of [insert term for post-incarceration supervision], and fines. These consequences may include:
>
> • being unable to get or keep some licenses, permits, or jobs;
>
> • being unable to get or keep benefits such as public housing or education;
>
> • receiving a harsher sentence if you are convicted of another offense in the future;
>
> • having the government take your property; and
>
> • being unable to vote or possess a firearm.
>
> If you are not a United States citizen, a guilty plea or conviction may also result in your deportation, removal, exclusion from admission to the United States, or denial of citizenship.
>
> The law may provide ways to obtain some relief from these consequences.
>
> Further information about the consequences of conviction is available on the Internet at [insert Internet address of the collection of laws published under Section 4(c) and (d)].
>
> (b) Before the court accepts a plea of guilty or *nolo contendere* from an individual, the court shall confirm that the individual received and understands the notice required by subsection (a) and had an opportunity to discuss the notice with counsel.

For these reasons, NACDL suggests that the Committee withdraw the presently proposed amendment for further study, with an eye to affording greater protection to defendants offering to plead guilty than would be conferred by the language published for comment.

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

Very truly yours,
s/Peter Goldberger

Alexander Bunin
Houston, Texas
Cheryl Stein
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Alina Das
Assistant Professor of Clinical Law

February 15, 2012

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

Dear Mr. McCabe:

I write to offer comments on the proposed change to Rule 11 of the Federal Rules of Criminal Procedure, regarding advice concerning immigration consequences of a gulty plea.

As co-director of the Immigrant Rights Clinic at New York University School of Law, I support the Committee's efforts to change Rule 11 to reflect the ruling of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). I would further suggest that the notes to the amended rule refer to or otherwise draw from two sources of guidance on this issue:

> JUDICIAL OBLIGATIONS AFTER PADILLA V. KENTUCKY: THE ROLE OF JUDGES IN UPHOLDING DEFENDANTS' RIGHTS TO ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF CRIMINAL DISPOSITIONS (October 2011) *available at* http://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf
>
> ENSURING COMPLIANCE WITH PADILLA V. KENTUCKY WITHOUT COMPROMISING JUDICIAL OBLIGATIONS: WHY JUDGES SHOULD NOT ASK CRIMINAL DEFENDANTS ABOUT THEIR CITIZENSHIP/IMMIGRATION STATUS (January 2011), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2011/11/IDP_Judicial_Inquiry_Into_Status_Jan20111.pdf

My clinic co-authored these reports with the Immigrant Defense Project, an organization with some of the leading national experts on the intersection of immigration and criminal law and practice. These reports are the result of over a year of painstaking legal research, careful deliberation, and numerous interviews with key criminal justice stakeholders about how courts may facilitate compliance with *Padilla*.

I hope that you will find these reports helpful as you finalize changes to Rule 11. Please do not hesistate to contact me if I may offer any additional information.

Sincerely,

Alina Das
Assistant Professor of Clinical Law

TAB 2B-2

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rules 12 and 34

DATE: March 28, 2012

The Advisory Committee's proposed amendment to Rule 12 and the conforming change to Rule 12 were published in August 2011. The period for public comment closed on February 15, 2012, and one comment was received later by arrangement with the Rules Support Office.

Comments supporting the proposed amendment were received from the Federal Magistrate Judges Association and the Department of Justice.

Lengthy comments were also received from three defense groups, the Federal Defenders, the National Association of Criminal Defense Lawyers, and the New York Council of Defense Lawyers. Although all of the defense groups were critical of multiple aspects of the proposed amendment, there were significant variations in the provisions each critiqued. Moreover, each of the defense comments proposed significant modifications in the amendment as published, and these proposals varied as well.

The Rule 12 Subcommittee met by teleconference. Because of the many issues raised and the multiple (and conflicting) modifications that have been proposed, the Subcommittee concluded that a teleconference would not be sufficient to fully explore the issues. Additionally, the Reporters requested more time to prepare a detailed memorandum describing and evaluating each of the issues raised in the comments.

At the conclusion of the call, members accepted the suggestion of Judge England and Judge Raggi that the Subcommittee hold a half-day meeting to discuss the public comments. The longer time period and face-to-face interaction will greatly facilitate consideration of the issues. At the conclusion of that meeting, the Reporters will be charged with any additional work deemed necessary, such as further research or drafting alternative language. It is anticipated that the Subcommittee will continue its work over the summer and early fall, in order to present its report at the Advisory Committee's October 2012 meeting.

Since all Subcommittee members planned to be in San Francisco for the meeting of the Advisory Committee, the Subcommittee meeting has been scheduled in San Francisco on the afternoon of Monday, April 23, 2012.

TAB 2C-1

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 6(e)

DATE: March 13, 2012

Writing on October 18, 2011, Attorney General Eric Holder proposed a two part amendment to Rule 6(e) to (1) allow district courts to permit disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance and (2) provide a temporal end point for grand-jury materials that had become part of the National Archives. After a brief initial discussion at the Advisory Committee's October 2011 meeting, Judge Raggi referred the proposal to a Rule 6 Subcommittee chaired by Judge John Keenan. The members of the Subcommittee are Carol Brook, James Hatten, Andrew Leipold, Judge Donald Molloy, Judge James Zagel, and Jonathan Wroblewski and Kathleen Felton on behalf of the Department of Justice.

After two teleconferences, the members of the Rule 6 Subcommittee–other than those representing the Department of Justice–voted to recommend that the Advisory Committee not pursue the proposed amendment. This memorandum describes the proposed amendment and explains the Subcommittee's recommendation.

A. The proposed amendment

As described in greater detail in the Attorney General's letter (which is included at the end of this memorandum), historians have sought disclosure of grand jury materials in a small number of cases involving historical figures including Alger Hiss, Julius and Ethel Rosenberg, and Jimmy Hoffa. Most recently, in a case brought by a historian and several historical associations, Judge Royce Lamberth ordered the disclosure of President Richard Nixon's grand jury testimony in *In re Kutler*, 800 F. Supp. 2d 42 (D. D.C. 2011). In these cases, the courts have relied upon their inherent authority to release historically significant grand-jury material. The leading case is *In re Craig*, 131 F.3d 99 (2d Cir. 1997), which held that "there are certain 'special circumstances' in which release of grand jury records is appropriate even outside the boundaries of the rule." (quoting *In re Biaggi*, 478 F.2d 489, 494 (2d Cir. 1973).

In the Attorney General's view, Rule 6 does not presently permit the disclosure of historically significant grand jury materials even when doing so would not be inconsistent with the interests protected by grand jury secrecy. General Holder argues that Rule 6(e) provides the exclusive framework for the disclosure of grand jury materials, and he urges that "the Supreme Court has

specifically rejected the proposition that a district court has inherent authority to create exceptions to the rules of criminal procedure adopted by the Court in its rulemaking capacity." In support of this position, he cites *Carlisle v. United States*, 517 U.S. 416, 426 (1996), *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988), *Thomas v. Arn*, 474 U.S. 140, 148 (1985), and *United States v. Baggot*, 463 U.S. 476, 480 (1983). He argues, moreover, that the direct Congressional amendment of Rule 6(e) in 1977 further weakens the claim for inherent judicial authority outside the four corners of the rule.

The Attorney General contends that an amendment is needed to maintain the primacy of the Rules of Criminal Procedure, permit the district courts to act on requests for historically significant grand jury materials, and cabin judicial discretion through a formal exception to Rule 6. The proposed amendment limits disclosure to records determined to have historical value under Title 44 of the United States Code, which provides for the transfer of such records to the National Archives and Records Administration (NARA). Within this universe, the proposal creates a two-prong approach. The first prong regulates grand jury records that are at least 30 years old, authorizing courts to make a case-by-case determinations about release and balancing the requirements of grand jury secrecy against the interests in disclosure. The second prong regulates grand jury records that are at least 75 years old; grand jury secrecy is no longer applicable to these records, and the authority to authorize release is delegated to the NARA. The proposed amendment appears on pages 8-10 of the Attorney General's letter.

B. The Subcommittee's Deliberations and Recommendation

1. Information considered by the Subcommittee.

The Subcommittee was aided in its deliberations by the Attorney General's very thorough letter, as well as comments on the proposal received from (1) Public Citizen Litigation Group (PCLG) (which litigated *In re Kutler* and other cases on behalf of historians seeking access to grand jury materials), (2) Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), and (3) former Attorney General Michael Mukasey. Judge Keenan also spoke to two former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Finally, the Reporters prepared a research memorandum exploring the general principles governing the relationship between the court and the grand jury and precedents from the Advisory Committee's prior deliberations. The letters and the Reporters' research memorandum are included at the end of this memorandum.

a. PCLG comments

PCLG strongly supports an amendment along the general lines proposed by the Attorney General, but with modifications to expand disclosure. PCLG argues that the disclosure should be available for all grand jury records of sufficient historical interest, not only materials that the NARA has determined to have permanent historical value. Moreover, in the case of materials NARA has previously determined to be of historical value, PCLG proposes that determination should be

sufficient to demonstrate historic significance, without requiring further judicial findings on that issue.

b. Judge Jensen's and Mr. Mukasey's comments

Judge Jensen and Mr. Mukasey oppose the proposed amendment on the grounds that no change to Rule 6 is needed, and that the proposed change would be both under- and over-inclusive, as well as unwise. Both letters review the "special circumstances" exception initially recognized by Judge Henry Friendly's opinion in *In re Biaggi*, its subsequent recognition and application in cases from the Second Circuit, Eleventh, and D.C. Circuits. They conclude, contrary to the Attorney General, that the present state of the law supports the district courts' exercise of inherent authority to order disclosure of grand jury material not covered by the existing exceptions to Rule 6(e) when factually established special circumstances are found to exist in a case and are weighed against the need for continued secrecy.

Mr. Mukasey's letter also responds to the Attorney General's argument that the direct Congressional enactment of Rule 6(e) in 1977 undermines any claim for inherent judicial authority. Noting the prominent cases adopting the "special circumstances" doctrine, Mr. Mukasey draws attention to the rule that when Congress re-enacts a statute that has been interpreted by the courts, it is presumed to have been aware of these interpretations and to have adopted them if it reenacts a statute without change.

Judge Jensen and Mr. Mukasey also note aspects of the proposed amendment that may make it under- or over-inclusive:

- it allows disclosure only of cases after the passage of 30 years, though that arbitrary line would not encompass all of the prior cases or permit consideration of other significant cases in the future;

- the 30 years begins to run only when the case has been "closed," which may mean final on appeal;

- it draws no distinction between testimony and records relating to deliberations and voting by grand jurors;

- it grants all gate-keeping authority for records older than 75 years to the Archivist of the United States, who has no training in issues related to law enforcement; and

- not all of the special circumstances cases involved historical records.

Both letters conclude that the Committee should take no action that would strip the courts of their historic authority to respond to the wide range of special circumstances which no rule can fully capture. Mr. Mukasey's letter concludes:

> The cases reflect careful and informed exercise by courts of the authority to authorize disclosure even outside the four corners of Rule 6(e). They do not conjure the image of judges running amok and forcing unwarranted disclosures. As shown above, there is nothing in either the text or the history of Rule 6(e) to support the conclusion that courts have exceeded their authority.... For the reasons illustrated by the well thought out cases discussed above, I believe Rule 6(e) ain't broke, and thus see no reason to fix it.

Judge Keenan reported to the Subcommittee that he had also spoken to two former United States Attorneys for the Southern District of New York concerning this issue, Robert Fiske and Otto Obermaier. Both indicated that they were opposed to the Attorney General's suggestion, primarily for the reasons articulated by Judge Jensen and former Attorney General Mukasey.

c. The reporters' memorandum

The reporters examined two sources of background information to evaluate what light they may shed on the government's argument that absent an amendment to Rule 6, the courts have no authority to order the disclosure of material of significant historical interest: (1) the general principles governing the relationship between the court and the grand jury as expressed by the Supreme Court, and (2) precedents from the Advisory Committee's prior deliberations.

We concluded, first, that although the constitutional independence of the grand jury imposes limitations on the courts' authority to prescribe procedural rules for the grand jury or require changes in its traditional functions, these separation of powers concerns can be distinguished from and have little bearing on the questions posed by judicial decisions authorizing disclosure of grand jury materials of exceptional historical importance. Courts have traditionally exercised the authority to permit exceptions to grand jury secrecy in the interests of justice.

We also concluded that although the records from the 1940s provide no firm guidance on the question whether the drafters of Rule 6(e) intended it to provide the exclusive grounds for judicial exceptions to grand jury secrecy, the previous administrative precedents of the Advisory Committee include three instances in which the Committee's attention was drawn to decisions authorizing disclosures that may not have been provided for in the rules. In none of these cases did the Advisory Committee treat these judicial decisions as improper. In one instance, the Committee appears to have relied on the existence of judicial authority to order disclosure in exceptional cases as one of the justifications for declining to amend Rule 6(e), and in the other two instances the Committee recommended amendments incorporating what it discerned to be a trend in the case law.

2. The Subcommittee's recommendation.

Although there was general agreement that disclosure of some historically significant grand jury material is in the public interest, the Subcommittee was not persuaded that the case had been made for an amendment at this time. Because the rules process is time-consuming and costly, no amendment should be pursued without a stronger justification.

Most fundamentally, the Subcommittee was not persuaded that there is a problem that warrants an amendment. There have been only a small number of cases involving requests for historically significant grand jury materials, and the courts in these cases have carefully weighed the interests protected by grand jury secrecy in determining whether release would be in the public interest. Although the Attorney General argues that courts lack the authority to order disclosure in such cases, there is now well established case law for the exercise of this authority. Indeed, since the adoption of Rule 6, courts have exercised the authority to order disclosure in a variety of cases not expressly provided for in the Rule. The Advisory Committee has indicated its awareness of these developments from time to time, and on occasion it has adopted a judicially-developed amendment into the rule.

Because there have been so few cases involving disclosure of historically significant grand-jury materials, members expressed concern that rulemaking would be premature. There is not enough case law at this point to serve as a basis for a rule, and there is a significant danger that any rule written now might omit circumstances that should be considered. Indeed, an amendment might be counterproductive, reducing rather than expanding disclosure in appropriate cases. As noted above, Judge Jensen and Mr. Mukasey identified aspects of the proposed amendment that they viewed as under-inclusive. Similarly, PCLG proposed changes that would broaden the proposed amendment. The proposed amendment might also raise procedural issues. For example, although the proposed amendment formalizes the process of disclosure, it makes no provision for representing the interests of persons who might be prejudiced by the disclosure.

The proposal also raises a more fundamental concern. The amendment – particularly the provision granting the NARA full control over records at least 75 years old – seems to embody a fundamental shift in the presumption of the continued secrecy of grand jury records. It is not clear that the case has been made for such a fundamental shift, even as to a defined category of records. This is a major policy question. The government itself has argued that cases seeking disclosure of historical grand jury materials raise different kinds of considerations than those where the records are sought on a case-by-case basis by the parties in criminal or civil litigation. Perhaps Congress would be best suited to balancing the extra legal interest in historical disclosure against the traditional interests favoring grand jury secrecy.

3. <u>Additional information</u>.

After the Subcommittee held its teleconferences, the Archivist of the United States wrote to express his continuing support for the Attorney General's proposal to allow access to archival grand-jury records after 75 years. In the Archivist's view, after an appropriate period of time has passed, all of the permanent records in the National Archives should be made available for research by the public, including grand-jury information for very old cases in which all of the participants can be presumed to be deceased. In such cases, he contends, it should not be necessary for either an individual researcher or the Archivist of the United States to file a petition in the federal courts authorizing release. He expressed support for the proposed 75-year period but also a willingness to consider an alternative period. The Archivist's letter is provided at the end of this memorandum.

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Office of the Attorney General
Washington, D. C. 20530

October 18, 2011

The Honorable Reena Raggi, Chair
Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201-1818

Dear Judge Raggi:

The Department of Justice recommends an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure to allow district courts to permit the disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance and to provide a temporal end point for grand-jury secrecy with respect to materials that become part of the permanent records of the National Archives.

Although most other categories of historically significant federal records, including classified records, eventually become part of the public historical record of our Nation, Rule 6(e) recognizes no point at which the blanket of grand-jury secrecy is lifted. The public policies that justify grand-jury secrecy are, of course, "manifold" and "compelling." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399 (1959). But they do not forever trump all competing considerations. After a suitably long period, in cases of enduring historical importance, the need for continued secrecy is eventually outweighed by the public's legitimate interest in preserving and accessing the documentary legacy of our government. For this reason, a number of federal courts have granted third-party petitions to disclose historically significant grand-jury materials—most recently, for example, the transcript of President Nixon's 1975 testimony to the Watergate grand jury—by invoking the inherent authority of federal courts as a justification for deviating from the requirements of Rule 6(e).

The difficulty is that, as the Supreme Court has made clear, federal courts have no inherent authority to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure. See, *e.g.*, *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996). In our view, the growing acceptance among federal courts of a "historical significance" exception to Rule 6(e) threatens to undermine the essential principle that Rule 6(e) encompasses, within its four corners, the rule of grand-jury secrecy and all of its exceptions and limitations. We therefore propose an amendment to Rule 6(e) that would accommodate society's legitimate interest in securing eventual public access to grand-jury materials of significant historical importance, while at the same time defining the contours of that access within the text of Rule 6(e).

A. Background

Rule 6(e) "codifies the traditional rule of grand jury secrecy," *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983), which is "older than our Nation itself," *Pittsburgh Plate Glass*, 360 U.S. at 399. Rule 6(e) imposes a flat prohibition on disclosures by non-witness participants in grand-jury proceedings "[u]nless these rules provide otherwise." Fed. R. Crim. P. 6(e)(2)(B). Most of the exceptions, which are enumerated in Rule 6(e)(3), concern disclosures to other government officials or related persons in the course of government business. See Rule 6(e)(3)(A)-(D).

Rule 6(e)(3)(E), in turn, identifies five circumstances in which a district court may order the disclosure of grand-jury materials in its own discretion. It is not an open-ended list: by its plain terms, the rule defines the universe of circumstances in which a district court "may authorize disclosure . . . of a grand-jury matter." Of the five circumstances listed, only two permit disclosures to non-government officials:

> (E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:
>
> > (I) preliminarily to or in connection with a judicial proceeding;
> >
> > (ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury; . . .

Fed. R. Crim. P. 6(e)(3)(E)(i)-(ii).

Neither of these provisions—nor any other provision of law—authorizes a third party to obtain access to grand-jury material merely because it is historically significant. The first exception ("preliminarily to or in connection with a judicial proceeding") cannot support a free-standing petition to release historical grand-jury records. "[O]bviously the permission to disclose for use in connection with 'a judicial proceeding' does not encompass a proceeding instituted solely for the purpose of accomplishing disclosure." *In re Biaggi*, 478 F.2d 489, 492 (2d Cir. 1973) (Friendly, J.). Rather, disclosure under Rule 6(e)(3)(E)(I) is permitted only if "the primary purpose" is "to assist in preparation or conduct of a judicial proceeding," *United States* v. *Baggot*, 463 U.S. 476, 480 (1983), and only where the materials are "needed to avoid a possible injustice" and the disclosure is tailored "to cover only material so needed," *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). And all of the other exceptions address specific circumstances in which the need for the materials and identity of the recipient is carefully delineated. In this sense, Rule 6(e) "is, on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." *Baggot*, 463 U.S. at 479. The court-ordered disclosure to third-party requesters of grand-jury records in their entirety,

unconnected to any otherwise pending judicial proceeding, without a particularized showing of need, and based solely on the records' historical significance, is outside the contemplation of Rule 6(e).

Nonetheless, some courts have exercised what they have described as their inherent authority to release historically significant grand-jury material. These courts have held that "special circumstances" may justify disclosure of grand-jury materials even when none of Rule 6(e)'s specific exceptions applies. The leading decision is *In re Craig*, 131 F.3d 99 (2d Cir. 1997), in which the Second Circuit stated that "there are certain 'special circumstances' in which release of grand jury records is appropriate even outside of the boundaries of the rule." *Id.* at 102 (quoting *In re Biaggi*, 478 F.2d at 494 (supplemental opinion)). Under that doctrine, the court reasoned, "historical interest, on its own," may "justify[] release of grand jury material in an appropriate case." *Id.* at 105. "To the extent that the John Wilkes Booth or Aaron Burr conspiracies, for example, led to grand jury investigations, historical interest might by now overwhelm any continued need for secrecy." *Ibid.* To the government's argument that Rule 6(e) controls the disclosure of grand-jury material, the court responded that the rule "reflects rather than creates the relationship between federal courts and grand juries," *id.* at 102 (citing *Pittsburgh Plate Glass*, 360 U.S. at 399), and that "permitting departures from Rule 6(e)" is therefore "fully consonant with the role of the supervising court," *id.* at 103.[1]

Embracing this approach, district courts in several circuits have granted petitions for access to grand-jury materials of historical importance. See, *e.g.*, *In re Petition of Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011) (granting petition for access to grand-jury testimony by President Nixon); *In re Tabac*, No. 3:08-mc-0243, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009) (same, grand-jury records concerning the jury-tampering indictment of Jimmy Hoffa); *In re Petition of National Security Archive*, No. 1:08-cv-6599, Docket entry No. 3 (S.D.N.Y. Aug. 26, 2008) (same, espionage indictment of Julius and Ethel Rosenberg); *In re American Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999) (same, espionage investigation of Alger Hiss). Following the Second Circuit's reasoning in *In re Craig*, these decisions have all relied on a notion of inherent authority to approve the release of grand-jury records that Rule 6(e) would otherwise require to remain secret. In the *Kutler* case, for example, the district court

[1] The Eleventh Circuit reached a similar conclusion about the scope of a district court's inherent authority in *In re Petition to Inspect and Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261 (11th Cir.), cert. denied, 469 U.S. 884 (1984), which concerned a petition filed on behalf of a special committee of the court of appeals that was investigating misconduct by a district judge. The Eleventh Circuit rejected the contention that Rule 6(e) spells out the exclusive basis on which a court may order the disclosure of grand-jury records and held that the district court had properly exercised its "inherent power" to grant the special committee's request. *Id.* at 1268; see also *Haldeman* v. *Sirica*, 501 F.2d 714 (D.C. Cir. 1974) (en banc). Although *Hastings* relied on inherent authority, the disclosure might alternatively be understood as being "in connection with a judicial proceeding." The court viewed the disclosure to the special committee as "at least closely analogous to the situation for which the explicit Rule 6(e)(3)(C)(I) exception was created." 735 F.2d at 1268.

granted a petition filed by historian Stanley Kutler and various historical organizations for access to the transcript of President Nixon's 1975 testimony before the Watergate special grand jury and certain related files of the Watergate Special Prosecution Force. The petitioners conceded that no provision of Rule 6(e) would permit the court to approve their request. The court nevertheless approved it, holding that the power to release historically significant grand-jury records is "well grounded in courts' inherent supervisory authority to order the release of grand jury materials." 2011 WL 3211516, at *5; see also *id.* at *3 ("[C]ourts' ability to order the disclosure of grand jury records has never been confined by Rule 6(e)'s enumerated exceptions.").

Although historians have an understandable desire for access, many decades after the investigations have closed, to grand-jury records concerning the Watergate investigation, the espionage trial of the Rosenbergs, and similar matters of enduring historical resonance—provided that interests in personal privacy and governmental functions are taken into account and appropriately weighed—the Supreme Court has specifically rejected the proposition that a district court has inherent authority to create exceptions to the rules of criminal procedure adopted by the Court in its rulemaking capacity. "Whatever the scope of [a court's] 'inherent power,' * * * it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996); see also *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (refusing to "creat[e] out of whole cloth * * * an exception to" Rule 52(b), "an exception which we have no authority to make" (citing *Carlisle*, 517 U.S. at 425-426)). As the Supreme Court explained in *Bank of Nova Scotia*, the Rules Enabling Act provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. 2072(b); see 487 U.S. at 255. That principle applies *a fortiorari* under Rule 6(e), which in relevant part was enacted directly by Congress. Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977); see *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985) (even a "sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions"). Because Rule 6(e) is, "on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials," *Baggot*, 463 U.S. at 479, a judicially created doctrine of public access to historically significant grand-jury material exceeds the bounds of courts' inherent authority.

Indeed, federal courts do not typically regulate the conduct of a grand jury, which is "an institution separate from the courts, over whose functioning the courts do not preside." *United States* v. *Williams*, 504 U.S. 36, 47 (1992). "Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office." *Ibid.* Consequently, "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own

proceedings." *Id.* at 50. The notion that a court possesses "inherent supervisory authority to order the release of grand jury materials," *Kutler*, 2011 WL 3211516, at *5, is therefore not only inconsistent with the prescriptive force of Rule 6(e), but also in tension with the institutional relationship between courts and grand juries.

Notably, Judge Friendly's 1973 decision in *In re Biaggi*, the wellspring of the "special circumstances" doctrine, predates the Supreme Court's decisions in *Carlisle*, *Bank of Nova Scotia*, and *Williams*. So, too, does the Eleventh Circuit's decision in *Hastings*. See note 1, *supra*. Indeed, *In re Biaggi* also predates Congress's direct enactment of Rule 6(e) in 1977, which undermines any claim that the rule is open to circumvention through a court's inherent authority. And although the Second Circuit decided *In re Craig* in 1997, the court "reaffirm[ed] the continued vitality of our 'special circumstances' test of *Biaggi*," 131 F.3d at 103, without citing or discussing *Carlisle*, *Bank of Nova Scotia*, or *Williams*.[2]

In sum, the Second Circuit's basic insight in *In re Craig*—that in long-closed cases of enduring historical significance, the public's interest in access to the primary-source records of our national history may on occasion "overwhelm any continued need for secrecy," 131 F.3d at 105—seems fundamentally correct. Although the justifications for grand-jury secrecy "are not eliminated merely because the grand jury has ended its activities," *Douglas Oil*, 441 U.S. at 222, neither do those interests remain paramount for all time. But the present state of the doctrine, in which individual district courts entertain motions for disclosure under their inherent authority and subject to their unbounded discretion, is untenable under governing Supreme Court precedent. It is also harmful to the fundamental principle that Rule 6(e) controls the secrecy of grand-jury materials within its four corners.

B. Description of Proposed Amendment

The Department of Justice therefore proposes amending Rule 6(e) to authorize the disclosure of historically significant grand-jury materials after a suitable period of years, subject to appropriate limitations and procedural protections. By expressly permitting district courts to act on requests for such records, yet at the same time cabining their discretion through a formal exception to Rule 6(e), the Committee can maintain the primacy of the Criminal Rules and the exclusivity of the framework created by Rule 6(e). Such an amendment would recognize the public's legitimate interest in gaining access to records that may cast new light on important people and events in American history, while at the same time protect the important goals served by the rule of grand-jury secrecy.

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[2] The Second Circuit in *In re Craig* also relied on *Pittsburgh Plate Glass* for the proposition that Rule 6(e) commits disclosure to the discretion of the trial judge. 131 F.3d at 102. But the Supreme Court in that case emphasized that "any disclosure of grand jury minutes is covered by Fed. Rules Crim. Proc. 6(e) promulgated by this Court in 1946 after the approval of Congress." 360 U.S. at 398-399.

Our proposal limits the release of grand-jury records to those determined to have permanent historical value under Title 44, United States Code.[3] Such records are transferred to the National Archives and Records Administration (NARA) as part of Department of Justice case files and form part of its permanent collection. This threshold screening requirement ensures that grand-jury secrecy is not abrogated in routine cases that do not, in themselves, have any recognized historical value. Within the universe of those documents transferred to NARA, the proposal embodies a two-tier approach. First, as to cases at least 30 years old, the rule would authorize district courts, on a case-by-case basis, to determine that the requirements of grand-jury secrecy are outweighed by the records' historical significance. Second, as to cases that are 75 years old or older, grand-jury secrecy interests would cease to be applicable and the records would become available to the public under the same standards applicable to other public records held by NARA.

The current treatment of grand-jury records helps illuminate this proposal. Much grand-jury material is deemed to be of no particular historical value. After the relevant cases are closed and a suitable period has passed, these materials are destroyed pursuant to record schedules approved by NARA. Grand-jury materials of continuing interest or value to the Department of Justice are stored for a period of time. Of these materials, some are ultimately transferred to the Archives' custody on the basis that they have been "determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government." 44 U.S.C. 2107(1). The standards and timetables governing that determination for case files that contain grand-jury information are set forth in records schedules already in place for the Department of Justice and approved by NARA. Under present law, a Freedom of Information Act (FOIA) request filed with NARA for grand-jury records in NARA's custody will be denied under FOIA Exemption 3, 5 U.S.C. 552(b)(3), on the ground that disclosure is barred under Rule 6(e). See, *e.g.*, *Fund for Constitutional Government* v. *National*

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[3] In relevant part, 44 U.S.C. 2107 provides:

> When it appears to the Archivist to be in the public interest, he may—
>
> > (1) accept for deposit with the National Archives of the United States the records of a Federal agency, the Congress, the Architect of the Capitol, or the Supreme Court determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government; [and]
> >
> > (2) direct and effect the transfer to the National Archives of the United States of records of a Federal agency that have been in existence for more than thirty years and determined by the Archivist of the United States to have sufficient historical or other value to warrant their continued preservation by the United States Government, unless the head of the agency which has custody of them certifies in writing to the Archivist that they must be retained in his custody for use in the conduct of the regular current business of the agency[.]

44 U.S.C. 2107(1)-(2).

Archives and Records Service, 656 F.2d 856, 866-870 (D.C. Cir. 1981).

Under the proposed rule, courts would have authority to consider requests for the disclosure of grand-jury records of great historical significance after they have been transferred to the permanent custody of the Archives. No request could be entertained until the records have been in existence for 30 years. The 30-year benchmark corresponds to the statutory time after which the Archivist may direct that agencies transfer historically significant records to his custody. See note 3, *supra*. Those two limitations ensure that (1) the grand-jury records might have some value to historians and (2) sufficient time has passed both to gauge their historical significance and to create a reasonable possibility that privacy interests have faded to a degree that disclosure might be warranted, with or without redactions.

But even within that universe of records, grand-jury secrecy interests still have presumptive force, and the grant of a disclosure order under Rule 6(e) should not be routine. Rather, it should be relatively rare—as it has been to date. Courts should evaluate each request on a case-by-case basis to assess whether the records have true value to historians and the public and whether that value outweighs the secrecy interests of living persons. While such an evaluation will inevitably involve a measure of judgment and discretion in light of the specific facts and context, courts will be guided by the paradigm examples of disclosure to date—*e.g.*, the Nixon, Rosenberg, and Hiss grand-jury testimony—and by the factors considered by the courts that ordered disclosure in those cases. Those factors include:

> (I) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury proceedings and that of their families; (vii) the extent to which the desired material—either permissibly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question.

In re Craig, 131 F.3d at 106. The proposed rule authorizing disclosure of grand-jury material does not spell out these factors, which are better left to elaboration in the Advisory Committee Notes and then to development in the case law. But it does require the district court to make appropriate findings, before authorizing disclosure, to determine that the records have "exceptional historical importance" above and beyond their possession in the custody of the Archivist; to confirm that they have been in existence for at least 30 years; to ensure that the legitimate interests of any living witnesses or investigative targets whose interests might be

prejudiced through disclosure are not prejudiced; and to confirm that no impairment of ongoing law enforcement activities would result. The rule also allows the court to impose reasonable conditions, such as redaction, to protect ongoing privacy or other interests.

Our proposal provides that an order granting or denying a petition for the release of historically significant grand-jury material is a final decision subject to appeal under 28 U.S.C. 1291. The Rules Enabling Act specifically provides that the federal Rules "may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." 28 U.S.C. 2072(c). Because a petition to disclose grand-jury materials created in connection with a long-closed investigation or criminal case is neither a continuation of a criminal matter nor a traditional civil action, it seems appropriate to clarify that a district court order granting or denying such a petition is an appealable decision in its own right.

After 75 years, the interests supporting grand-jury secrecy and the potential for impinging upon legitimate privacy interests of living persons have virtually entirely faded. That is generally true for government records that are highly protected against routine disclosure. For example, most classified records in the custody of the Archivist that have not previously been declassified become automatically declassified after 75 years.[4] Thus, we propose that Rule 6(e) be amended to provide that, after 75 years, grand-jury records would become available to the public in the same manner as other archival records in NARA's collections, typically by requesting access to the records at the appropriate NARA research facility or by filing a FOIA request. See generally 36 C.F.R. Part 1256, Subpart B.

C. Language of Proposed Amendment

Our proposed amendment includes three parts.

1. We propose to define the term "archival grand-jury records" by adding a new Rule 6(j), following the existing definition of "Indian Tribe" in Rule 6(I). (Alternatively, if the Committee preferred, these definitions could be consolidated into a single "definitions" paragraph.)

---

[4] Under Executive Order 13526, many classified records are automatically declassified at 25 years and most of the remaining classified records are automatically declassified after 75 years:

> Records exempted from automatic declassification under this paragraph shall be automatically declassified on December 31 of a year that is no more than 75 years from the date of origin unless an agency head, within 5 years of that date, proposes to exempt specific information from declassification at 75 years and the proposal is formally approved by the Panel.

Exec. Order No. 13,526, § 3.3(h)(3), 3 C.F.R. 310 (2010). For additional information on the automatic declassification process, see http://www.justice.gov/open/declassification-faq.html.

(j) "Archival Grand-jury Records" Defined. For purposes of this Rule, "archival grand-jury records" means records from grand-jury proceedings, including recordings, transcripts, and exhibits, where the relevant case files have been determined to have permanent historical or other value warranting their continued preservation under Title 44, United States Code.

2. We propose the following addition to Rule 6(e)(3)(E) to permit district courts to grant petitions for the release of archival grand-jury records that have exceptional historical importance after 30 years in appropriate cases:

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

. . . .

(vi) on the petition of any interested person if, after notice to the government and an opportunity for a hearing, the district court finds on the record by a preponderance of the evidence that:

(a) the petition seeks only archival grand-jury records;

(b) the records have exceptional historical importance;

(c) at least 30 years have passed since the relevant case files associated with the grand-jury records have been closed;

(d) no living person would be materially prejudiced by disclosure, or that any prejudice could be avoided through redactions or such other reasonable steps as the court may direct;

(e) disclosure would not impede any pending government investigation or prosecution; and

(f) no other reason exists why the public interest requires continued secrecy.

An order granting or denying a petition under this paragraph is a final decision for purposes of Section 1291, Title 28.

3. Finally, we propose to make the following addition to Rule 6(e)(2) to establish the authority of NARA to release archival grand-jury materials in its collections after 75 years. Because Rule 6(e) is the only impediment to NARA's acting on a FOIA request for grand-jury records, all that is necessary is to state that Rule 6(e) shall not prohibit disclosure after that time.

The "require . . . to withhold from the public" formulation tracks the terms of FOIA Exemption 3, 5 U.S.C. 552(b)(3).

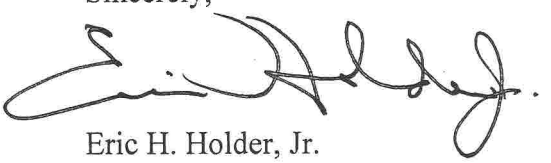
> (2) Secrecy.
>
> ....
>
> **(C) Nothing in this Rule shall require the Archivist of the United States to withhold from the public archival grand-jury records more than 75 years after the relevant case files associated with the grand-jury records have been closed.**

* * *

We believe this proposal warrants timely and thorough consideration by the Advisory Committee, as it will eliminate the prevailing uncertainty over the authority of district courts to deviate from the scope of Rule 6(e) when faced with petitions for access to historically significant grand-jury material. We also believe it strikes the appropriate balance between safeguarding the purposes of grand-jury secrecy and acknowledging the public's legitimate interest in obtaining access to grand-jury records that have enduring significance for the history of our Nation.

We look forward to discussing this with you and the Committee.

Sincerely,



Eric H. Holder, Jr.
Attorney General

cc: Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

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PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW • Washington DC 20009
202/588-1000 • www.citizen.org

11-CR-D

December 7, 2011

The Honorable Reena Raggi, Chair
Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201-1818

Dear Judge Raggi:

On behalf of Public Citizen Litigation Group (PCLG), I am writing in connection with Attorney General Holder's letter to you of October 18, 2011. Writing for the Department of Justice, Mr. Holder "recommends an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure to allow district courts to permit disclosure, in appropriate circumstances, of archival grand-jury materials of great historical significance and to provide a temporal end point for grand-jury secrecy with respect to materials that become part of the National Archives."

Mr. Holder's letter was prompted by a recent case brought by PCLG, *In re Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011), in which the district court agreed to unseal the 1975 grand jury testimony of former President Richard Nixon. PCLG has also handled other significant cases on unsealing grand jury records based on historical significance. *See In re Craig*, 131 F.3d 99 (2d Cir. 1997); *In re American Historical Ass'n*, 49 F. Supp. 2d 274 (S.D.N.Y. 1999).

PCLG strongly supports an amendment along the general lines set forth in the Attorney General's letter, but we write to suggest certain substantive modifications to the proposal. As the law firm that litigated many of the cases on behalf of historians seeking access to grand jury material, we of course disagree with the Department of Justice's view that the existing case law in this area is erroneous in recognizing that courts have inherent authority to open grand jury records in exceptional circumstances outside the scope of Rule 6(e). For present purposes, however, that disagreement is not pertinent.

We write to make two points related to the Department's proposed rule. The Department suggests modifying Rule 6(e) to allow courts to order disclosure of grand jury records where a court finds that (1) the petition seeks only archival grand-jury records, (2) the records are of exceptional historical importance, (3) 30 or more years have passed since the case file associated with the records was closed, (4) no living person would be materially prejudiced by the disclosure or prejudice could be avoided through redactions, (5) disclosure would not impede a pending government investigation or prosecution, and (6) no other reason exists why the public interest requires continued secrecy. PCLG urges the Committee to adopt a rule providing that *either* the first or second criterion listed by the Department be met, but not both. We further suggest that the second criterion be modified, as detailed below.

First, the Department suggests that the rule allow for disclosure of "only archival" records, which is material that the National Archives and Records Administration (NARA) has already determined to have "permanent historical value under Title 44, United States Code." Holder Letter at 6. It separately suggests that Rule 6(e) permit disclosure only after a finding of "exceptional historical importance." Where NARA has already determined material to be of "permanent historical value," however, there is no reason also to require the proposed finding of "exceptional historical importance."

To be sure, in the cases that PCLG has litigated concerning disclosure of grand-jury records, we have argued that the courts' inherent authority to disclose grand jury material exists when the records have "exceptional historical importance." But if Rule 6(e) is amended—as we hope it will be—to expressly address disclosure for historical interest, the disclosure should not be limited to that category of cases. Rather, if NARA has already made a determination of permanent historical value, and if there is no countervailing interest in continued secrecy (criteria 4-6 of the Department's proposed amendment), the material should be disclosable. At that point, the subset of cases that are of "exceptional historical importance" need not be separated from those of "permanent historical importance" because, in either case, the rationale for secrecy has ceased. Although the Department asserts that even within the universe of archival records, "grand-jury secrecy interests still have presumptive force" (Holder Letter at 7), it gives no explanation for that assertion. If disclosure would not prejudice any living person or investigation, and if "no other reason exists why the public interest requires continued secrecy," it is hard to see a basis for that "presumptive force"; or looked at another way, any such presumption has been overcome.

Not only should the second-listed criterion not be required if the first is met, but the first should not be required if the second is met. That is, if the petition otherwise demonstrates adequate historical significance, the rule should not require that the petition seek only archival grand-jury records. Again, satisfying the first criterion should be *sufficient* to demonstrate a level of historical importance adequate to satisfy the rule (subject to the remaining criteria), as discussed above. It should not be *required*, however. Making it a requirement would allow the government to limit the universe of records subject to the amended rule by not tendering materials to NARA for transfer and thus preventing NARA from making a determination of permanent historical importance. Notably, the Department of Justice has objected to unsealing in cases of such indisputable historical significance as the Hiss, Rosenberg, and Watergate grand-jury proceedings (*see* cases cited on page 1) and the Jimmy Hoffa grand-jury proceedings, *see In re Petition of Tabac*, 2009 WL 5213717 (M.D. Tenn. Apr. 14, 2009). In light of the Department's position in prior cases, adopting a rule that would allow it to limit the grand-jury records for which disclosure is even a possibility would undermine the amended rule and, potentially, operate to limit disclosure even more than under current law. In addition, the first criterion, if required even when the second is met, may delay availability of records, either because NARA has not yet requested material that it would agree is of permanent historical importance or because the Department or the court has not yet transferred materials. Our experience with records requests is that delays in processing can be significant.

Second, where the grand-jury material sought is not at NARA, the rule should not require a showing of "exceptional historical interest," but of "historical interest." In the prior cases, courts have adopted the "exceptional" standard, and Public Citizen has advocated its use to allow access to grand-jury materials. Those cases, however, involved courts exercising their inherent supervisory authority, in the absence of a specific rule directing their discretion. In that circumstance, it made sense for the courts to impose on themselves a high standard. In a rule expressly providing for unsealing based on historical interest, however, that high standard need not be adopted. Of course, a court would be more likely to order disclosure based on a showing that the historical interest in particular materials is exceptional, as opposed to significant or strong, for example. Nonetheless, if the balance of interests would weigh in favor of disclosing material of lesser importance, the rule should allow disclosure. Indeed, the Department's proposal that NARA be authorized to unseal *all* material, not only "exceptionally" important material, after 75 years supports this view. The 75-year proposal reflects the fact that, as time passes, interests in secrecy diminish to such an extent that *any* degree of historical importance outweighs them. Amending the rule to permit unsealing based on "historical importance" allows courts the flexibility to weigh the various interests case-by-case, recognizing that the degree of historical importance that warrants unsealing in one case may not be the same as in others.

For the foregoing reasons, PCLG requests that, as the Committee evaluates the Department of Justice proposal, it consider allowing disclosure when *either* the petition seeks "archival grand-jury records" *or* "records of historical importance." Revising the Department's proposal in light of this suggestion, the amended Rule 6(e)(3)(E) would thus provide:

> **(vi) on petition of any interested person if, after notice to the government and an opportunity for a hearing, the district court finds on the record that:**
>
> > **(a) the petition seeks only archival grand-jury records or other grand-jury records of historical importance;**
> >
> > **(b) at least 30 years have passed since the relevant case files associated with the grand-jury records have been closed;**
> >
> > **(c) no living person would be materially prejudiced by disclosure, or that any prejudice could be avoided through redactions or such other reasonable steps as the court may direct;**
> >
> > **(d) disclosure would not impede any pending government investigation or prosecution; and**
> >
> > **(e) no other reason exists why the public interest requires continued secrecy.**
>
> **An order granting or denying a petition under this paragraph is a final decision for purposes of Section 1291, Title 28.**

We would be happy to discuss this proposal further with the Committee.

Sincerely,

Allison M. Zieve
Public Citizen Litigation Group

cc: Prof. Sara Sun Beale, Reporter
Prof. Nancy J. King, Assistant Reporter
Peter G. McCabe, Secretary
Eric H. Holder, Jr., Attorney General

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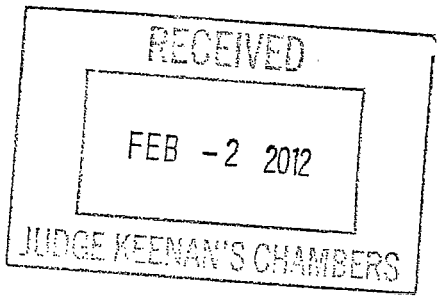
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND, CALIFORNIA 94612

CHAMBERS OF
D. LOWELL JENSEN
UNITED STATES DISTRICT JUDGE

January 31, 2012



The Honorable John F. Keenan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Dear John:

I have received and reviewed the materials concerning the DOJ proposal to amend Federal Rule of Criminal Procedure 6(e) related to Grand Jury secrecy.

There are actually two separate proposed amendments.

The first would amend Rule 6(e)(3)(E) to add a new category to the existing list of circumstances which establish "exceptions" to the general rule of grand jury secrecy. The new exception would be limited to cases which: have been accepted by the Archivist of the United States to have sufficient historical value to warrant their preservation as permanent records of the United States; at least 30 years have passed since the case was closed; and, have been found by the Court at a hearing to have "exceptional historical importance." For reasons to be described, I believe the present law already authorizes Courts to order such disclosures, and that the Committee should decline to adopt the proposed amendment.

The second proposed amendment does not concern the proposed new 6(e)(3)(E) exception. This amendment would amend Rule 6(e)(2) to make it clear that grand jury secrecy

rules would not prevent public access to grand jury records that have been accepted for permanent preservation by the Archivist and are now over 75 years old. I do not know if this would actually change present access to such Grand Jury records, but I can see no reason why the proposed amendment should not be adopted, with the caveat that it should be considered in the same context as I would suggest for the first amendment.

Discussion

On July 29, 2011 Judge Royce Lamberth of the District of Columbia Court ordered the disclosure of the June 23 and June 24, 1975 Grand Jury testimony of President Richard Nixon upon the petition of historian Stanley Kutler, Professor Emeritus at the University of Wisconsin. The Judge acknowledged the disclosure in this case was not authorized by any of the existing exceptions to grand jury secrecy codified in Rule 6(e)(3). Judge Lamberth, nevertheless found that the supervisory role of the Court as to the Grand Jury, in cases where "special circumstances" were shown, provided the Court the "inherent power" to order disclosure of grand jury records. The Court relied primarily upon In re Petition of Craig, by the Second Circuit in 1997, as precedent for its decision. The opinion of the Court in Kutler also contains an extensive discussion of the law that relates to the issue of the "inherent power" of the Courts to order disclosure of grand jury records in cases which are not covered by Rule 6(e)(3). The DOJ opposed the Kutler disclosure petition, arguing that Courts do not have inherent supervisory power to authorize disclosure of Grand Jury records in cases which are not covered by the existing text of Rule 6(e)(3).

The DOJ opposition in Kutler does not appear to be based on the disclosure itself. If the proffered DOJ amendment was already a part of Rule 6(e)(3), the disclosure ordered by the Court would be authorized by the Rule which is now proposed by DOJ. It is apparent, rather, that the

DOJ objection is to the grounds stated by the Court in support of its authority to order disclosure, and that that is the driving force behind the proposed amendments. DOJ believes that Courts do not have "inherent power" to act beyond the "boundaries" or the "four corners" of Rule 6(e)(3). In its submission to the Committee, DOJ offers as justification for the amendment that the use of this asserted power by Courts "threatens to undermine the essential principle that Rule 6(e) encompasses, within its four corners, the rule of grand jury secrecy and of its exceptional limitations." To my mind the Committee should examine whether or not there is any such "essential principle."

State of the Law

The DOJ submission asserts that consideration is warranted ". . . as it will eliminate the prevailing uncertainty over the authority of district courts to deviate from the scope of Rule 6(e) when faced with petitions for access to historically significant grand-jury material." But, to my thinking, there is no uncertainty; under prevailing law courts do have "inherent power" to order disclosure beyond the present exceptions stated in Rule 6(e)(3).

The generally accepted start of this jurisprudence is the Biaggi decision of the Second Circuit in 1973. The DOJ submission describes this case as the "wellspring" of the "special circumstances" doctrine. In that case, one Mario Biaggi was a candidate for mayor in New York. The New York Times ran a story stating that Biaggi had invoked the 5th Amendment during his past appearance as a witness before a Grand Jury. Biaggi denied the story and filed suit to have the grand jury testimony disclosed. Southern District Judge Palmieri ordered disclosure and was affirmed by the Second Circuit in an opinion by Judge Friendly. Over a dissent by Judge Hays that disclosure could not be ordered because the request was not covered by any of the exceptions in Rule 6(e)(3), Judge Friendly approved the disclosure as an "exercise of some discretion under

the special circumstances of this case."

Halderman v. Sirica. In 1974 the D.C. Circuit denied a writ seeking to prohibit a decision of District Judge Anthony Sirica that ordered disclosure of Watergate related grand-jury testimony to the House Judiciary Committee.

Alcee Hastings. After Southern District of Florida Judge Hastings was found not guilty in 1984 of a charge of soliciting a bribe. A Special Committee of the 11th Circuit petitioned to be permitted to examine his pre-indictment grand-jury testimony. The 11th Circuit (comprised of an appointed panel, as all members of the 11th Circuit had recused themselves) affirmed a District Court order granting disclosure of this grand-jury testimony.

The Circuit Court specifically approved the District Court ruling that Rule 6(e) did not preclude it "from furnishing an alternate method for disclosure under its general supervisory authority over grand jury proceedings and records." The opinion also offered an oft-cited passage observing that the Rules of 6(e), "permitting disclosure were not intended to ossify the law, but rather are subject to development by the Courts in conformance with the rule's general rule of secrecy." In this case the government supported the requested disclosure and it appears that this is not a case which could be described as one of "historical importance" at the time disclosure was ordered.

In re Craig. In 1995 the Second Circuit, in an opinion authored by Judge Calabresi, approved the inherent authority of the Court as a rationale for disclosure and specifically held that a District Court has the authority to order disclosure outside Rule 6(e)(3). The Court citing Biaggi as precedent, set forth a comprehensive list of factors to be considered by a Court faced by such a "highly discretionary and fact-sensitive 'special circumstances' motion." The petitioner in this case asked for disclosure of the 1948 grand-jury testimony of Harry Dexter White. It is a

case which can be fairly described as a case of "historical importance." In the course of its opinion, the Court stated that there was no circuit split on this issue and "(rejected) the government's suggestion that we unsettle this area of good law."

Alger Hiss. In 1999, Southern District of New York Judge Peter Leisure ordered disclosure of 1948 grand-jury testimony related to the Indictment of Alger Hiss, in a proceeding entitled In re American Historical Association. In this case, Judge Leisure cites Biaggi and Craig as precedent, rejects the government position that courts have no authority to use "special circumstances" as a ground for disclosure of grand-jury records, and finds that it is unquestionable that the supervisory powers of Courts authorize them to develop grand-jury secrecy rules outside of Rule 6(e)(3). In his opinion, Judge Leisure also analyzes and rejects the government position that the 1992 decision of the Supreme Court in U.S. v. Williams supports an argument that the actual institutional relationship of courts and grand juries is inconsistent with the "inherent" power of the court to fashion grand-jury secrecy rules.

Kutler. As already described, Kutler appears to be the latest case declaring that courts have inherent authority to go beyond the exceptions already stated in Rule 6(e)(3) and order disclosure of grand-jury records where exceptional circumstances exist.

In support of its position that courts do not have "inherent authority" to fashion rules that go beyond the existing exceptions stated in Rule 6(e)(3), DOJ relies primarily on three Supreme Court cases: Williams in 1992; Carlisle in 1996; and Baggott in 1983.

In Williams, a defendant sought to have an Indictment dismissed because the government had failed to disclose to the Grand Jury substantial exculpatory evidence in its possession. The Supreme Court, in an opinion by Justice Scalia, rejected the petition, finding, *inter alia*: that the courts are not directly involved in the functioning of the grand jury; their institutional

relationship with the grand jury has traditionally been at "arms length"; and that the supervisory power of the court would not encompass enforcement of such a mandatory disclosure rule. DOJ argues that this case establishes that the existence of an "inherent authority" justification for ordering disclosures beyond the scope of the existing exceptions in Rule 6(e) is in tension with the institutional relationship of the Court and the Grand Jury. But Williams does not hold that Courts have **no** supervisory power, but rather that such power is a limited one which must in any event be based on the presence of special circumstances. In Williams the court found that the proposed rule would improperly transform the Grand Jury by changing its traditional role as an accusatory body to that of an adjudicatory body. The government's reading of Williams has been rejected by several courts. The Alger Hiss ruling by Judge Leisure has a thorough and forceful analysis in support of such a rejection.

In Carlisle a litigant requested the trial court to hear a motion for judgment of acquittal which had been filed one day later than the time limit set by Rule 29(c). The trial court heard and granted the motion. The Supreme Court, in an opinion written by Justice Scalia reversed and denied the motion, holding that the inherent supervisory power of the district court ". . . does not include the power to develop rules that circumvent of conflict with the federal Rules of Criminal Procedure." This is a case where the language of the case supports the DOJ position, but the case is factually inapposite. As the Supreme Court points out this is a case where the District Court had "contradicted the plain language" of Rule 29 (c), and had simply "annull[ed]" the Rule, which it is not permitted to do. Again, this is a case where the government's reading has been rejected by courts in the course of ordering disclosure in cases not covered by Rule 6(e). In Kutler, for example, the Court found that Carlisle does not preclude the exercise of inherent power in ordering disclosure outside the boundaries of Rule 6(e).

In Baggott, the U.S. filed a motion under the "judicial proceeding" exception of Rule 6(e)(3)(c)(I), seeking disclosure of grand jury transcripts of a commodity futures investigation, that did not result in an indictment, to be disclosed to the IRS for use in a civil tax audit. The Supreme Court, in an opinion by Justice Brennan, affirmed the Court of Appeals ruling that the disclosure could not be made because the requested disclosure was not "preliminary to or in connection with a judicial proceeding." This case simply decides whether or not the factual circumstances underlying the motion are covered by the existing exception codified in Rule 6(e). The Court does not rule on the "inherent authority" issue.

Grand jury secrecy has been a part of our law from our Colonial times. It was first codified as Rule 6(e) in 1944. The codification, of course, was a statement of existing law and included those exceptions to secrecy which had been developed by courts up to that time. There was nothing to suggest that the role of the court in the development of the rules governing Grand Juries and its tradition of secrecy would be altered. Historically, courts had permitted disclosure to benefit the public and to prevent injustice when the circumstances required. In recognizing the authority of courts to permit disclosures of grand jury materials when there were special circumstances sufficient to support that decision, even though it was not within the present codification of Rule 6(e), the Craig court explained that this was ". . .consistent with the origins of Rule 6(e), which reflects rather than creates the relationship between federal courts and grand juries."

The history of the changes to 6(e)(3), which have been made on a number of occasions since its adoption, establishes that for the most part they have been adopted by the Advisory Committee after courts have developed them through their discretionary decisions made in the exercise of their inherent authority to supervise the Grand Jury. As an example, when the

Advisory Committee amended 6(e)(3) to allow disclosure to government personnel deemed necessary to assist government attorneys in the performance of their duties, it cited the Pflaumer decision of the Eastern District of Pennsylvania in support of its action. Amendments to Rule 6(e)(3): permitting disclosure to other grand juries; and to state authorities when proceedings disclose violations of state law, were also attributed in the Advisory Committee Notes to initiatives undertaken by courts.

In sum, the DOJ position that District Courts do not have the authority to order disclosure of grand jury proceedings when it is not covered by the existing exceptions stated in Rule 6(e)(3), is not the state of the present law. Rather, present law supports a rule that the supervisory role of the District Court as to the Grand Jury provides the Court with the inherent authority to order a disclosure which is beyond the bounds of Rule 6(e)(3), when factually established special circumstances consistent with the general traditions of secrecy are found to exist in the case.

Conclusions

Based on what I believe to be the present state of the law, any disclosure which would be covered by the DOJ proposal for a grand-jury secrecy "historical importance" exception, can already be granted by a District Court pursuant to its inherent authority. The amendment would not change present substantive law as to grand-jury secrecy. Am amendment, however, would be consistent with past Advisory Committee practice where multiple additions to Rule 6(e)(3) have been based on court decisions which have created new exceptions beyond the boundaries of the existing Rule.

There are further considerations, however. The text of the proposed amendment limits disclosure to records that are at least 30 years old. This is not the present state of the law and I do not think it is a good idea. Cases can be historically important before they are 30 years old. If

it were to come to pass that special circumstances warranting disclosure of grand-jury proceedings connected to the Oklahoma City bombings, or to 9-11, were to be factually established, it would make no sense to say they should not be disclosed because they are not 30 years old. 30 years is simply an arbitrary line and we should avoid arbitrary lines when we can.

The 30 year notion may be related to the DOJ proposal to link the exception to an action to be taken by the Archivist. This is also not the present law and it is also not a good idea. Once again, it may be that special circumstances exist that support a disclosure. If that is so, disclosure should not be held up for an Archivist's decision that cannot, by law, be made unless the record is at least 30 years old.

I also question the need for a limitation that says that the 30 years cannot start until the case has been "closed." That is, again, not a part of the present law as far as I can see. I would think that this means that a case is not "closed" until it is final on appeal. That can be a very long time after the Grand Jury proceedings have been "closed," and particularly so in cases of such significance that they will ultimately be said to have "historical importance."

There is another, more fundamental than text, problem with the DOJ proposal. At least 3 of the major cases in the overall history of this area of the law are not covered by the proposed amendment. They are the Biaggi, Haldeman and Hastings cases. All of these cases involve disclosures: which are close in time to the grand jury proceedings (certainly less than 30 years); which cannot be said to have a "historical importance" nexus at the time of disclosure; and which are not within the existing bounds of Rule 6(e)(3). The DOJ proposal does not deal directly with this matter, but it seems to be their present position that in cases such as these the Court does not have the "inherent authority" to exercise its "unbounded discretion" and that a court-ordered disclosure would be unlawful. If that is the position of the DOJ, it is directly contrary to the DOJ

position at the time of the disclosures in those cases as the DOJ supported disclosure in each of them. If that is so, what has changed?

I believe these cases were decided correctly. They have not been challenged, overruled, or distinguished in any way. To the contrary, they have been cited with approval as valid and relevant precedent in many cases since they were decided. In its consideration of the DOJ proposal, I believe the Advisory Committee should be careful to take no action what would change the legal context as to grand-jury secrecy in such a way that a District Court faced with similar circumstances would be prevented from ordering a disclosure.

History and common sense indicate that one cannot write a rule that will be so prescient that there can never be a future circumstance that will require it to be altered. The history of Rule 6(e) amendments illustrate that this is so, and there is no reason to believe that the future will not produce circumstances requiring further changes. This is all to say that the present law, recognizing that District Courts have inherent authority to go beyond the four corners of Rule (6)(e)(3) when circumstances require them to do so, ought to be maintained. They have done so in the past and there is no reason to believe they will not be able to thoughtfully and responsibly do so in the future. If the purpose of DOJ is to change the law and effectively prohibit any alteration of Rule 6(e)(3) except by the Rules Enabling Process or the Congress, the Advisory Committee should not help them in that effort.

I am not of the opinion that any action by the Advisory Committee as to the proposed amendment can actually control the question of whether or not District Courts have inherent authority to act outside of the Rules already codified in Rule 6(e)(3), as that is ultimately a question for the Courts themselves. I believe, however, that the Committee should not take any action that supports a change of the present state of the law. If the Committee believes that ther

should be some codification of an "historical importance" provision, I believe it should be made clear, perhaps in the Notes, that this action is not intended to encourage a state of the law as to grand-jury secrecy that District Courts should have no inherent authority to order disclosures in appropriate cases.

Sincerely,

D. Lowell Jensen

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February 8, 2012

The Hon. John F. Keenan
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007

Attorney General's October 18, 2011 Recommendation to Amend Rule 6(e)

Dear Judge Keenan:

You have asked for my views on the Attorney General's recommendation, in an 18-page, single-spaced letter dated October 18, 2011 to Judge Reena Raggi, as Chair of the Advisory Committee on the Criminal Rules, to amend Rule 6(e), to eliminate the judicially recognized "special circumstances" exception to the secrecy mandated by the Rule, and to replace it with a "historical significance" exception that would apply only after 30 years and only when various conditions, some specified and some not, are met. The premise underlying the letter is that federal courts for decades have been exceeding their authority by applying a "special circumstances" exception, and that a Rule amendment is necessary to end this unfettered exercise of an unwarranted discretion.

For the reasons outlined briefly below, I believe that the letter's premise is incorrect, and that the proposed Rule is both under-inclusive and over-inclusive, would unwisely delegate authority entirely outside the legal system , and is otherwise unnecessary. Accordingly, I think the Advisory Committee should reject the recommendation.

Rule 6(e) itself governs both recording and disclosure of grand jury materials. To the extent it addresses disclosure, it begins with a prohibition not on disclosure, but on imposing any obligation of secrecy "on any person except in accordance with Rule 6(e)(2)(B)." That Rule, in turn, imposes a secrecy obligation on enumerated participants in the grand jury process as well as others to whom disclosure is permitted under certain sub-sections of Rule 6(e)(3), which sets forth various situations in which grand jury "matter" – excluding the grand jury's deliberations and any grand juror's vote – may be disclosed.

The "special circumstances" exception was recognized initially in Judge Friendly's opinion for the Second Circuit in In re Biaggi, 478 F.2d 489 (2d Cir. 1973), a case cited but not discussed in the Attorney General's letter. In that case, a New York mayoral candidate, target of a grand jury investigation, and later a defendant, Mario Biaggi, asserted publicly that he had responded fully to questions put to him before a federal grand jury looking into his conduct. In fact, as court-ordered disclosures later showed, he had invoked his Fifth Amendment rights in response to those questions. Biaggi agreed to disclosure of the grand jury records, but apparently hoped to use as a shield to hide his deception the rule restricting participants in the grand jury process, including government counsel, from disclosing testimony. The Second Circuit held that Biaggi's own public statements about his testimony during a campaign for public office, and his waiver, constituted a "special circumstance" that permitted a court to grant the petition of government counsel to release his testimony.

The Biaggi "special circumstances" exception was recognized again in In re Petition of Craig, 131 F.3d 99, 102 (2d Cir. 1997), in the setting of an application for disclosure to a scholar of historically significant grand jury testimony. The court made it clear, however, that a mere showing of historical significance would not suffice, and that a fact-intensive review would have to satisfy a burden higher even than the "particularized need" showing required to come within an enumerated disclosure exception. Such a review would consider such matters as the identity of the petitioner, the materials requested, the specific reasons disclosure is sought, how long ago the grand jury proceedings had been held, whether portions of the materials previously had been disclosed, the need for maintaining secrecy — including the privacy interests of witnesses — and the government's position with respect to disclosure. Craig, 131 F.3d at 105-06 & n.10. Significantly, however, the court in Craig upheld the district court's refusal to permit the disclosure, noting that some witnesses were still alive and no prior disclosure of the materials had occurred. The Craig court also noted that recognizing special circumstances outside the boundaries of the Rule is consistent with the Rule itself, because Rule 6(e) "reflects rather than creates the relationship between federal courts and grand juries." Craig, 131 F. 3d at 102 (citing Pittsburgh Plate Glass Co. v. United States, 360 U.S. 360 U.S. 395, 399 (1959).

Other courts have applied the exception, whether implicitly or explicitly. Notably, the D.C. Circuit in Haldeman v. Sirica, 501 F.2d 714, 716 (D.C. Cir. 1974) denied a petition to prohibit the release of grand jury testimony to the House Judiciary Committee, and rejected the contention that "the discretion ordinarily reposed in a trial court to make such disclosure" is limited by Rule 6(e). More recently, the same court released grand jury testimony on the ground that its substance had become widely known and it had thereby lost its character as secret Rule 6(e) information. In re Grand Jury Subpoena, Judith Miller, 493 F.3d 152, 154-55 (D.C. Cir. 2007).

Most recently, in what seems to have provided the occasion for the Attorney General's request, the District Court for the District of Columbia, in July 2011, permitted the disclosure to a scholar of historically significant testimony presented before the grand jury investigating the Watergate break-in. In re Petition of Kutler, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011). The Kutler court reviewed, inter alia, the Advisory Committee notes to the Rule, and found that, from the outset, those who drafted the Rule recognized the inherent authority of federal courts to permit disclosure of grand jury testimony. Thus, the 1944 note on the adoption of the Rule states that it "continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure[.]" According to the Advisory Notes that describe subsequent amendments permitting disclosure, several were adopted, as the Kutler court noted, in part to conform the Rule to judicial decisions that already permitted disclosure. Id., at *3.

On the first page of his letter, the Attorney General finds that the "difficulty" with these holdings "is that, as the Supreme Court has made clear, federal courts have no inherent authority to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." That, of course, assumes the very point under discussion – whether the holdings at issue do circumvent or conflict with the Rule. In fact, the language quoted immediately above – "no inherent authority to develop rules that circumvent or conflict with the Federal Rules of Civil Procedure" – is taken verbatim from Carlisle v. United States, 517 U.S. 416, 426 (1996), one of five Supreme Court cases involving the Federal Rules of Criminal Procedure that the Attorney General relies on. Four of those five cases, including Carlisle, do not deal with Rule 6(e), and have little to contribute to the discussion. Thus, the quoted admonition from Carlisle responds to a court's attempt to annul the time limit in Rule 29(c) for a defendant to move for a judgment of acquittal. Bank of Nova Scotia v. United States, 487 U.S. 250, 254-55 (1988) held simply that when Rule 52(a) tells courts that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," that direction is mandatory and may not be circumvented. Johnson v. United States, 520 U.S. 461, 466 (1997) stands for the unremarkable principle that the definition of plain error contained in Rule 52(b), which under relevant case law is "limited" and "circumscribed," should not be expanded because to do so would skew the balance struck by the Rule.

United States v. Williams, 594 U.S. 36, 47 (1992), dealt with a grand jury issue, but not one relevant here. At issue there was whether a court has inherent authority outside the provisions of Rule 6 to impose on a prosecutor the obligation to present exculpatory evidence to a grand jury, which raises a host of policy and practical considerations that have no bearing on our question. As part of that discussion, the Court said that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." Id. at 50. The question of whether to disclose grand jury testimony after it has been given is not a "rule of grand jury procedure" in any sense relevant to the discussion in Williams; it does not deal with what anyone must do or

refrain from doing in the conduct of proceedings before a grand jury. The disclosure of grand jury testimony thus does not engage the strict limitations upon courts in fashioning remedies when allegations of improper procedure before grand juries are advanced, as illustrated, for example, by the holding in Costello v. United States, 350 U.S. 359, 363 (1956) that a properly drawn indictment returned by a duly constituted grand jury is ordinarily not subject to attack based on alleged inadequacies in the procedure followed before the grand jury.

The remaining case, United States v. Baggot, 463 U.S. 476 (1983), dealt with a narrow issue that both sides agreed was governed, if at all, by one of the explicit categories of permissible disclosure referred to in the text of Rule 6(e)(3)(E)(i). The issue was whether "disclosure for use in an IRS civil audit is 'preliminary to' a redetermination proceeding or a refund suit within the meaning of" that portion of the Rule permitting disclosure "preliminarily to or in connection with a judicial proceeding." Because the parties agreed that that was the issue in the case, the Court explicitly limited its decision to construing the meaning of that exception. Id. at 479 n.3. It was in that setting that the Court wrote the words quoted by the Attorney General on page 4 of his letter, that Rule 6(e) is, "on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials." Id. at 479. Once again, that discussion has no bearing on whether courts have the discretion to disclose testimony in cases not covered by one of the explicit exceptions written into the Rule.

The Attorney General is on to something relevant when he turns, on page 4 of his letter, to the legislative process followed by Congress in enacting Rule 6(e), but he cites the language of the Rules Enabling Act that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect," 28 U.S.C. Section 2072(b), and then asserts that "[t]hat principle applies a fortiorari [sic] to Rule 6(e), which in relevant part was enacted directly by Congress." Once again, as he did with the cited language from Carlisle, the Attorney General has simply assumed that the exercise of judicial discretion in exceptional cases conflicts with the Rule. However, in referring to the legislative process, the Attorney General has actually hit the nail on the head, albeit regrettably with a screw driver -- the Rules Enabling Act. The right tool to pound home the significance of the fact that Rule 6(e) was enacted by Congress, and indeed amended by Congress repeatedly, is not any principle in the Rules Enabling Act, but rather the one that holds that when Congress re-enacts a statute that has already been interpreted by the courts, it is "presumed to be aware of . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978); see also, N.Y. Credit Men's Adjustment Bureau, Inc. v. A. Jesse Goldstein & Co., 276 F.2d 886, 888-89 (2d Cir. 1960) (same). Leaving aside tacit acceptance of the special circumstances doctrine, or its recognition in dictum, as in In re Special Grand Jury 89-2, 450 F.3d 1159, 1178-79 (10th Cir. 2006) (remanding to district court for determination of special circumstances before deciding whether court had inherent power to order disclosure); In re Grand Jury Proceedings, 800 F.2d 1293 (4th Cir.

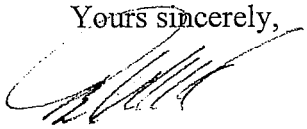
1986) (holding no abuse of discretion when lower court allowed disclosure of grand jury material to the government in a civil suit); In re Grand Jury Proceedings, Miller Brewing Co., 687 F.2d 1079, 1088 (7th Cir. 1982) (dictum); and In re Special February 1975 Grand Jury, 662 F.2d 1232, 1239 (7th Cir. 1981) (recognizing possibility of "compelling circumstances necessitating disclosure to satisfy the 'ends of justice,'" but that possible tax deficiency was not among them); Biaggi was decided in 1973, Haldeman in 1974 and Craig in 1997. Rule 6(e) was amended in 1977, 1979, 1983, 2002 and 2006, with no addition whatever of language limiting the careful exercise of judicial discretion reflected in those cases.

The Attorney General's proposed change to Rule 6(e) is both too broad and too narrow, and it grants gate-keeping authority with respect to records older than 75 years to the Archivist of the United States, an official not necessarily trained in issues relating to law enforcement. It is too broad in the sense that it casts into one pot all grand jury proceedings after 30 years have passed, and into another all such proceedings after 75 years have passed, with no distinction drawn between testimony, which may warrant disclosure after the passage of time, and records relating to deliberation and voting by grand jurors, the disclosure of which I believe would break faith with grand jurors who are assured that their deliberations are not subject to public review. It is too narrow in that it would restrict absolutely disclosure of grand jury testimony more recent than 30 years old other than as provided in the specific exceptions now frozen in Rule 6(e), notwithstanding that, as noted in Kutler, that Rule has been amended periodically to include exceptions that were the subject of court rulings beyond exceptions previously enumerated.

The cases reflect careful and informed exercise by courts of the authority to authorize disclosure even outside the four corners of Rule 6(e). They do not conjure the image of judges running amok and forcing unwarranted disclosures. As shown above, there is nothing in either the text or the history of Rule 6(e) to support the conclusion that courts have exceeded their authority; indeed, the textual and historical evidence is to the contrary. To enact the change suggested by the Attorney General would offend a prudential rule that should govern in both public and private matters: If it ain't broke, don't fix it. For the reasons illustrated by the well thought out cases discussed above, I believe Rule 6(e) ain't broke, and thus see no reason to fix it.

You may feel free to share this letter with Judge Raggi, other members of the Advisory Committee, and whomever else you think appropriate.

Yours sincerely,



Michael B. Mukasey

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NATIONAL ARCHIVES

ARCHIVIST *of the* UNITED STATES

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26 March 2012

The Honorable Reena Raggi, Chair
Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201-1818

Dear Judge Raggi:

I write on behalf of the National Archives and Records Administration (NARA) with respect to the recommendations that Attorney General Eric Holder provided you in his letter of October 18, 2011, with respect to amending Rule 6(e) of the Federal Rules of Criminal Procedure, which are pending before the Advisory Committee.

The principal recommendation by the Attorney General was to amend Rule 6(e)(3)(E) "to permit district courts to grant petitions for the release of archival grand-jury records that have exceptional historical importance after 30 years in appropriate cases." Holder Letter, at 9. The National Archives has welcomed the development by the courts of the special circumstances exception to Rule 6(e) for historically significant grand-jury material, as reflected in *In re Craig*, 131 F.3d 99 (2d Cir. 1997) and its subsequent line of District Court cases. These cases have provided a tremendous service in allowing us to provide the public access to highly sought-after grand-jury materials from a small number of the criminal case files that are permanently preserved in the National Archives.

I also appreciate the Department of Justice's interest in regularizing this exception through an amendment to Rule 6(e), but I understand that a Subcommittee of the Advisory Committee has recommended against this change, based in part on input from current and former federal judges that changes to the rule are unnecessary because the courts already have inherent

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authority in this area. We at NARA believe that the special circumstances exception to Rule 6(e) for historically significant cases is vitally important, and support its continuance through either inherent judicial authority or codification in the Federal Rules of Criminal Procedure.

I write to you now only with respect to the second recommendation proposed by the Attorney General, which is to amend Rule 6(e)(2) in order to establish an end point in time far enough into the future that the need for grand-jury secrecy is no longer necessary with respect to the permanent archival records that we preserve in the National Archives.[1] The Attorney General proposed that the need for grand-jury secrecy should subside 75 years after a case has been closed. I strongly support this recommendation and hope that the Advisory Committee will agree to adopt it separate and apart from the exceptional historical importance exception, for the reasons discussed below.

The National Archives exists to preserve and provide access to the permanent records of the United States Government. From the Declaration of Independence and Constitution that founded our nation to the White House records of the most recent presidential administration, the National Archives holds over ten billion pages of textual records, along with ever increasing terabytes of electronic records, photographs, film, sound records, maps, and numerous other media. As vast as our collection is, our archival holdings comprise only a small portion of the records that the government creates – we estimate that less than five percent of U.S. Government records are scheduled as permanent for transfer into the National Archives. Our archival holdings include many millions of pages of criminal case files from the Department of Justice (including Special Prosecutors), the Offices of Independent Counsels, and the Offices of the U.S. Attorneys, going back at least 100 years, many of which contain grand-jury transcripts and related materials.

Coupled with our mission to provide access to archival records is our fundamental responsibility to protect from public disclosure all sensitive information that is subject to statutory, regulatory, and judicially required protection, including, but not limited to, classified national security information, personal privacy information, taxpayer identification information, grand-jury information, and court-sealed information. We take this responsibility very seriously, and regularly withhold from public access such sensitive information for as long as necessary and legally required. Our regulations require, for example, that we protect sensitive personal privacy information for 75 years. 36 C.F.R. § 1256.56(a)(2).[2] The Attorney General's letter referenced the automatic declassification requirement after 75 years established in Executive Order 13526 (2010), and I note that last year we worked with the CIA to declassify and release the oldest classified documents in the National Archives, which dated from 1918 concerning German formulas for invisible ink.[3]

However, we believe that, after the appropriate period of time has passed, all of the permanent records here in the National Archives must eventually be made available for research

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[1] This amendment, as currently drafted, remains dependent on the Attorney General's recommendation to add a new definition for "archival grand-jury records" at Rule 6(j).

[2] Other agencies withhold personal privacy information for up to 100 years or upon the death of the person, whichever occurs sooner. *See, e.g.,* the FBI's policy at http://www.fbi.gov/foia/requesting-fbi-records.

[3] See NARA Press Release, July 11, 2011, at http://www.archives.gov/press/press-releases/2011/nr11-148.html.

by the public, including grand-jury information for very old cases in which all of the participants can be presumed to be deceased. At such point in time, it should not be necessary for a researcher or I, as Archivist of the United States, to file a petition in federal court to obtain an order authorizing the release of historical grand-jury records. The Department of Justice has recommended that 75 years after the end of a case is an appropriate period of time for grand jury secrecy to subside. While I support this recommendation and believe that the passage of 75 years should allay any remaining need for continued grand-jury secrecy, I am happy to consider an alternative time period if the Advisory Committee deems one to be more appropriate – I certainly think, however, that no one would feel the need to maintain the secrecy of grand-jury information that originated in the 19th Century.

Accordingly, I urge the Advisory Committee to adopt a final cut-off time, as recommended by the Attorney General or revised by the Advisory Committee, after which the National Archives could review and release grand-jury information without the need to obtain a court order, subject to the normal archival processing and restrictions that we would apply to any other records of that age. My General Counsel, Gary M. Stern, is available to work with you and the Advisory Committee should you have any questions or wish to discuss this matter further. Mr. Stern can be reached at 301-837-3026 or garym.stern@nara.gov.

Sincerely,

DAVID S. FERRIERO
Archivist of the United States

cc: The Honorable Eric H. Holder, Jr., Attorney General

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To: The Rule 6 Subcommittee

From: Sara Beale and Nancy King

Re: Background information related to proposed amendment to Rule 6(e)

Date: February 27, 2011

This memorandum supplements the detailed discussion of judicial precedents concerning the disclosure of grand jury materials of historical interest contained in letters from Attorney General Eric Holder, Judge D. Lowell Jensen, and Michael Mukasey, as well as the court's opinion in *In re Kutler*, 800 F. Supp. 2d 42 (D. D.C. 2011).

We examine two sources of background information to evaluate what light they may shed on the government's argument that absent an amendment to Rule 6, the courts have no authority to order the disclosure of material of significant historical interest: (1) the general principles governing the relationship between the court and the grand jury as expressed by the Supreme Court, and (2) precedents from the Advisory Committee's prior deliberations.

We conclude first that although the constitutional independence of the grand jury imposes limitations on the courts' authority to prescribe procedural rules for the grand jury or require changes in its traditional functions, these separation of powers concerns can be distinguished from and have little bearing on the questions posed by judicial decisions authorizing disclosure of grand jury materials of exceptional historical importance. Courts have traditionally exercised the authority to permit exceptions to grand jury secrecy in the interests of justice.

We also find that although the records from the 1940s provide no firm guidance on the question whether the drafters of Rule 6(e) intended it to provide the exclusive grounds for judicial exceptions to grand jury secrecy, the previous administrative precedents of the Advisory Committee include three instances in which the Committee's attention was drawn to decisions authorizing disclosures that may not have been provided for in the rules. In none of these cases did the Advisory Committee treat these judicial decisions as improper. In one instance, the Committee appears to have relied on the existence of judicial authority to order disclosure in exceptional cases as one of the justifications for declining to amend Rule 6(e), and in the other two instances the Committee recommended amendments incorporating what it discerned to be a trend in the case law.

We do not address the ultimate question of whether the Committee should move forward with the proposed amendment. The Committee may decide that the amendment is warranted, even if it concludes that neither the Court's precedents nor the prior actions of the Committee establish that the court's authority to disclose grand jury materials is limited to that provided for by Rule 6.

I. The general principles governing the relationship between the court and the grand jury; the *Williams* case

No decision of the Supreme Court specifically restricts judicial power to disclose grand jury material. The Supreme Court's 5-to-4 decision in *Williams v. United States*, 504 U.S. 36, 47-48 (1992), did limit judicial power to invoke supervisory power to craft rules of procedure for grand jury proceedings, but that is a very different question. Although it is common ground that the framers modeled the federal grand jury on the English grand jury, the justices disagreed on the question how much authority the courts have to supervise the grand jury and to establish procedural rules for the prosecutors who appear before it. In our view, the issues that divided the Court in *Williams* – the judiciary's authority to establish procedural rules for grand jury proceedings – can be distinguished from the issue under consideration by the Committee, which is the extent of a court's authority to release materials of historical interest on a case-by-case basis long after the conclusion of any prosecutions arising from the grand jury proceedings. As discussed in Section II below, the federal courts have traditionally exercised the authority to permit the disclosure of grand jury matters, and judicial decisions authorizing disclosure do not cross the line defined by the majority in *Williams*.

The Supreme Court has repeatedly stated that the grand jury provided for in the Fifth Amendment was intended to operate substantially like its English forebear. For example, in *Costello v. United States*, 350 U.S. 359, 361-62 (1956), the Court stated:

> The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor.

The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." In *United States v. Dionisio*, 410 U.S. 10, 16-17 (1973) (footnote omitted), the Supreme Court stated:

> This constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252, whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.

Writing for the majority in *Williams v. United States*, 504 U.S. 36, 47-48 (1992), Justice Scalia emphasized the grand jury's traditional independence from the court as well as other branches of government:

> "[R]ooted in long centuries of Anglo-American history," *Hannah v. Larche*, 363 U.S. 420, 490, 80 S.Ct. 1502, 1544, 4 L.Ed.2d 1307 (1960) (Frankfurter, J., concurring in result), the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been

> textually assigned, therefore, to any of the branches described in the first three Articles. It " 'is a constitutional fixture in its own right.' " *United States v. Chanen*, 549 F.2d 1306, 1312 (CA9 1977) (quoting *Nixon v. Sirica*, 159 U.S.App.D.C. 58, 70, n. 54, 487 F.2d 700, 712, n. 54 (1973)), cert. denied, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977). In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. See *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960); *Hale v. Henkel*, 201 U.S. 43, 61, 26 S.Ct. 370, 373, 50 L.Ed. 652 (1906); G. Edwards, The Grand Jury 28-32 (1906). Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office. See *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974); Fed.Rule Crim.Proc. 6(a).

The *Williams* majority concluded that the grand jury's "operational separateness from its constituting court" led to a proper reluctance to invoke judicial supervisory power to prescribe modes of grand jury procedure. 504 U.S. 49-50. In accordance with these precedents, the majority concluded in *Williams* that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." *Id.* at 50. Accordingly, the Court declined to impose on federal prosecutors a duty to present exculpatory evidence, a duty which would be incompatible with the traditional role of the grand jury.

Four members of the Court dissented in *Williams*, articulating a much more expansive view of the court's authority over the grand jury. Writing for four members of the Court, Justice Stevens stated (504 U.S. at 66):

> Although the grand jury has not been "textually assigned" to "any of the branches described in the first three Articles" of the Constitution, . . . it is not an autonomous body completely beyond the reach of the other branches. Throughout its life, from the moment it is convened until it is discharged, the grand jury is subject to the control of the court. As Judge Learned Hand recognized over 60 years ago, "a grand jury is neither an officer nor an agent of the United States, but a part of the court." *Falter v. United States*, 23 F.2d 420, 425 (CA2), cert. denied, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928). This Court has similarly characterized the grand jury:
>
> > "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so." *Brown v. United States*, 359 U.S. 41, 49, 79 S.Ct. 539, 546, 3 L.Ed.2d 609 (1959).

In *Williams* the Supreme Court emphasized the grand jury's "operational separateness" from the court and the limits of judicial authority to fashion rules for the operation of the grand jury, especially those which would alter in some fundamental way the grand jury's role. Recognition of the court's authority to authorize exceptions to grand jury secrecy on a case-by-case basis does not intrude upon the grand jury's operational separateness and is consistent with the traditional role of the court. Accordingly, it does not pose the constitutional issues[2] identified in *Williams*.

The policy of grand jury secrecy is "older than our Nation itself," *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959), and early decisions of the Supreme Court recognize the principle of grand jury secrecy. *See, e.g., Post v. United States*, 161 U.S. 583, 613 (1896). However, the Supreme Court also recognized that the courts had the power to permit disclosure in the interests of justice. For example, in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940), the Supreme Court stated that "Grand Jury testimony is ordinarily confidential. ... [b]ut after the Grand Jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

II. Grand Jury Secrecy and the effect of Rule 6(e); Former Committee Actions

A. Grand jury secrecy and Rule 6 as originally promulgated.

The original Rule 6(e) (reprinted at the end of this memorandum) incorporated the general rule of grand jury secrecy. There were multiple preliminary drafts of the Criminal Rules, and the provision governing grand jury secrecy first appeared in the fourth draft, dated May 18, 1942. *See* LESTER B. ORFIELD, 1 CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 6:1 at 341 (1966). Modifications were made in the fifth and sixth drafts, which removed witnesses from the persons subject to grand jury secrecy but added a provision (later deleted) on obstruction of justice by disclosing what was said or done during the proceedings. *Id.* at 343. The seventh draft, dated May 1943, included the language in subdivision (e) providing that a juror, interpreter, clerk, or stenographer may disclose matters occurring before the grand jury only when directed to do so by the court preliminary to or in connection with a judicial proceeding, or upon a showing that grounds may exist to dismiss the indictment. The ninth draft, dated July 1944, added a sentence stating that no obligation of secrecy may be *imposed* except in accordance with the rule.

As adopted, Rule 6(e) authorized access to grand jury materials by attorneys for the government for use in the performance of their duties, and permitted grand jurors, interpreters, attorneys, and stenographers to make disclosures when directed or permitted by the court "preliminarily to or in connection with a judicial proceeding" or "at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Although the rule itself did not directly address the court's authority to order or permit

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[2]The federal courts' supervisory power, including the courts' authority over grand jury proceedings, is discussed in Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts,* 84 Colum. L. Rev. 1433 (1984).

disclosure, the amended rule stated that the grand jurors and others subject to the rule of grand jury secrecy "may disclose matters occurring before the grand jury *only* when so directed by the court ... *or* when permitted by the court ... ."

Neither the original advisory committee note to Rule 6(e) nor the minutes of the Committee directly addressed the question whether the Rule was intended to strip the courts of any authority to permit disclosure not expressly authorized by the rule itself. The 1944 Advisory Committee Note to Rule 6(e) (reprinted in full at the conclusion of this memorandum) states that "[t]his rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure." (Citations omitted.) Our review of the minutes of the Advisory Committee from 1943 and 1944 found no discussion directly pertinent to the question whether the enumerated bases for disclosure were intended to restrict the courts' traditional discretion to order disclosure in the interests of justice. The discussion focused on other matters, particularly the questions whether to impose the duty of secrecy on witnesses and whether to allow automatic disclosure to the defense after indictment or after a witness testified at trial.

However, the Supreme Court did comment on the relationship between Rule 6(e) and the courts' traditional authority in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959). The question was whether the trial court erred in refusing to permit the defendant to inspect the transcript of the testimony of a grand jury witness who testified at trial. In reaching the conclusion that the district court had not erred, the Supreme Court reviewed the basis for the courts' authority to order the disclosure of grand jury materials. It stated (360 U.S. at 398-99) (emphasis added and footnotes omitted):

> Petitioners concede, as they must, that any disclosure of grand jury minutes is covered by Fed. Rules Crim. Proc. 6(e) promulgated by this Court in 1946 after the approval of Congress. <u>In fact, the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.</u>

The final sentence in this quotation was cited in the *Kutler* opinion (and other opinions upon which that court relied) as authority for the view that the federal courts retain authority in exceptional cases to authorize disclosure not provided for by the Federal Rules. *See* 800 F.Supp. 2d at 44-45.

B. <u>Subsequent actions by the Advisory Committee and Congress</u>.

We have been able to identify three occasions when the Advisory Committee's attention was drawn to judicial decisions permitting disclosures not specifically authorized by Rule 6(e). In none of these cases did the Advisory Committee treat these decisions as improper. In one instance, the Committee appears to have relied on the existence of the judicial authority to deal with exceptional cases as one of the justifications for declining to amend Rule 6(e), and in the other two cases the Committee recommended amendments incorporating what it identified as a trend in the case law. The first two events occurred in the 1970s, before Congress revised Rule 6(e) in 1977. However, after the Congressional enactment of Rule 6(e) the Advisory Committee again proposed an

amendment following judicial decisions allowing disclosure not expressly provided for in the rule. This amendment was forwarded by the Supreme Court to Congress, which allowed it to take effect in 1983.

In 1974, the Advisory Committee's reporter, Professor Wayne LaFave, cited the seminal Second Circuit decision upon which the *Kutler* decision relied, *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973), in recommending that there was no need for an amendment to Rule 6 to permit disclosure to a witness of his own testimony. Citing *Biaggi* and *In re Russo*, 53 F.R.D. 564 (C.D. CA 1971), Professor LaFave wrote:

> Given appropriate circumstances, courts presently possess the power to provide a transcript to the witness. ... The circumstances which might call for permitting the witness to receive a transcript are so varied that a general standard could not be expressed in a rule or statute.

Memorandum from Wayne LaFave to Members of the Advisory Committee on Criminal Rules, April 28, 1975, at 48.[3] The minutes of the Advisory Committee's meeting on August 28, 1975, state that it "agreed there was no need for a change to provide transcripts to grand jury witnesses." Only two comments are noted, and they do not pursue this aspect of the reporter's memorandum. One member favored disclosure "in the interest of protecting against perjury," and another responded that a witness may always recant. Thus the memorandum seems to reflect the view that the courts retain authority to order disclosures not specified in the rule, but there may have been other reasons that the proposed amendment was not pursued.

Two years later, in proposing an amendment to Rule 6(e) in 1976[4] the Advisory Committee pointed with approval to a trend in judicial decisions authorizing disclosures not clearly provided for by Rule 6(e) as a reason for amending the rule to reflect judicial practice. The question was whether disclosure could be made to various experts, including those from agencies such as the IRS and SEC, to assist in the preparation of the case before the grand jury. The 1976 Committee Note drew attention to the current definition of "attorney for the government," and to judicial and secondary authorities noting that the limited definition had presented a problem. The Committee Note stated:

> Although case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where the expertise is required. This is subject to the qualification that the matter disclosed be used only for the purposes of the grand jury investigation.

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[3]Multiple drafts of this memorandum were prepared. It was amended subsequent to April 28, but to date we have not been able to find a later complete draft that includes this section.

[4]Because the amendment proposed by the Advisory Committee was transmitted by the Supreme Court to Congress on April 26, 1976, we refer to this as the 1976 Advisory Committee Note.

Consistent with that trend, the Advisory Committee recommended amending the definition of attorneys for the government to include "such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties." The Committee's action seems to provide a degree of support for the view that Rule 6 declares the traditional exceptions to the general rule of grand jury secrecy but does not preclude the district courts from exercising their traditional authority to authorize disclosure in exceptional cases not prescribed by the rule. The situation is distinguishable, however, from the cases involving materials of historical interest, because it was at least arguable that the disclosures were authorized by the provision permitting disclosure to attorneys for the government.

In any event, as noted in the Attorney General's letter of October 18, 2011, Congress passed legislation that prevented the amendment proposed by the Advisory Committee from taking effect, and statutory language amending Rule 6(e) was enacted in 1977.[5] Congress initially deferred for one year the effective date of amendments to various rules, including Rule 6(e), Rule 23 (trials by juries of less than 12 persons), and Rule 24 (peremptory challenges). The Senate Committee report[6] attributed the criticism of the amendment proposed by the Advisory Committee "to the lack of precision in defining, and consequent confusion and uncertainty concerning, the intended scope of the proposed change," rather than to a disagreement with its objective.[7] The Senate report contrasted what it characterized as the current "commonsense interpretation" and "weight of the case law"–which permitted disclosure to representatives of other government agencies actively assisting in the grand jury investigation–with the "anomalous language or Rule 6 itself." Concluding that the language of the Rule was "spawning some judicial decisions highly restrictive of the use of government experts," the Committee concluded it was "timely to redraft subdivision (e) of Rule 6 to make it clear."[8]

As redrafted, Rule 6(e) assumed its present structure, with subdivision (e)(1) stating the "GENERAL RULE" of secrecy, and (e)(2) stating exceptions. Subdivision (e)(1) stated that grand jurors, interpreters, stenographers, attorneys for the government, and those
recording the grand jury "shall not disclose matters occurring before the grand jury, except as otherwise provided by these Rules." It also provided that a knowing violation of Rule 6 could be punished as contempt of court. The Attorney General's letter argues that as redrafted, Rule 6 provides an exhaustive list of exceptions to grand jury secrecy, leaving no room for judicial discretion not authorized by the rule. He also notes that the principal decisions upon which the

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[5]P.L. 95-78, § 2(a), 91 Stat. 319 (July 30, 1997). For a detailed discussion of the legislative action, see S. REP. NO. 95-354, 95th Cong., 4-6 (1977).

[6]The House of Representatives preferred to disapprove the proposed amendment and defer any change in Rule 6 to permit a comprehensive reform of grand jury procedure, but it ultimately acquiesced in a Senate bill redrafting Rule 6(e).

[7]*Id.* at 6-7.

[8]*Id.* at 7.

Kutler court relied were decided prior to the enactment of the 1977 legislation amending Rule 6(e). On the other hand, neither Congress nor the Advisory Committee had voiced any concern about or proposed any change in response to the decisions relied upon by the *Kutler* court, and it is unclear whether the clarification enacted by Congress was intended to make any change in that respect.

We also noted that in some of the grand jury litigation in the 1970s it appears that the government urged courts to order disclosures not expressly permitted by the text of Rule 6(e). In *In re Special February, 1975 Grand Jury (Baggott)*, 662 F.2d 1232 (7th Circ. 1981),[9] the trial court had permitted disclosure of grand jury materials to the Internal Revenue Service. In its discussion of the trial court's use of its supervisory powers, the court of appeals notes that the government relied upon *In re Biaggi*, *In re Bullock*, 103 F. Supp. 639 (D.D.C. 1952). and the order releasing the Watergate grand jury report to the House of Representatives. *In re Report and Recommendations of June 5, 1972 Grand Jury*, 370 F. Supp. 1219 (D.D.C. 1974). *See* 662 F.2d at 1235-36.

Finally and most recently, in 1983 the Rule 6(e) was again amended to incorporate a development in the law by the courts. The Advisory Committee note explained (emphasis added):

> New subdivision (e)(3)(C)(iii) recognizes that it is permissible for the attorney for the government to make disclosure of matters occurring before one grand jury to another federal grand jury. *Even absent a specific provision to that effect, the courts have permitted such disclosure in some circumstances*. See e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 [60 S.Ct. 811, 84 L.Ed. 1129] (1940); *United States v. Garcia*, 420 F.2d 309 (2d Cir.1970).

[9]This case may be familiar because of its subsequent history. The court of appeals held that all the materials sought, with one possible exception, were "matters occurring before the grand jury" and therefore subject to Rule 6(e). It agreed with the District Court that no disclosure is available under (C)(I), but it held that the District Court erred in granting disclosure under "general supervisory powers." The Government sought certiorari, limited to the question of whether the IRS's civil tax audit is "preliminar[y] to or in connection with a judicial proceeding" under (C)(I). The Supreme Court held that a tax audit was not "preliminar[y] to or in connection with a judicial proceeding" within meaning of rule permitting disclosure of matters occurring before a grand jury. *United States v. Baggot*, 463 U.S. 476, 481-82 (1983). The Court reasoned that "[w]here an agency's action does not require resort to litigation to accomplish the agency's present goal, the action is not preliminary to a judicial proceeding for purposes of (C)(I)."

Excerpt from Rule 6 and the Advisory Committee Note as adopted in 1944

Rule 6. The Grand Jury.

* * * * *

(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Advisory Committee Notes

Note to Subdivision (e). 1. This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure, *Schmidt v. United States*, 115 F. (2d) 394 (CCA 6th); *United States v. American Medical Association*, 26 F. Supp. 429 (D.C.); Cf. *Atwell v. United States*, 162 Fed. 97 (CCA 4th); and see 18 U.S.C. 554 (a) (Indictments and presentments; objection on ground of unqualified juror barred where twelve qualified jurors concurred; record of number concurring). Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice.

2. The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.

3. The last sentence authorizing the court to seal indictments continues present practice.

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TAB 3A

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

FROM: **Professor Sara Sun Beale, Reporter**

RE: **March 27, 2012**

DATE: **Rule 16(a)**

In a letter to Judge Raggi, Judge Christina Reiss (D. Vt.) proposes that Rule 16(a) be amended to require pretrial disclosure of all of a defendant's prior statements that are in the government's possession, custody, or control. In an article accompanying her letter, Judge Reiss supports this proposal by an examination of Rule 16's history, an analysis of the current rule, and a description of the decisions applying the rule. See Christina Reiss, *Closing Fed. R. Crim. P.'s Loopholes: Why Criminal Defendants Are Entitled to Discovery of All of Their Statements*, forthcoming American University (2012). Judge Reiss's letter and article follow at the end of this memorandum.

In brief, Judge Reiss recommends that the federal rules adopt the practice in Vermont and other states (see *id.* at 1 n.1, citing court rules from Arizona, Illinois, Kentucky, Ohio, Rhode Island, Tennessee, and Vermont). She explains that these rules–which generally require the government to disclose before trial all of the defendant's written or recorded statements and the substance of any oral statement–are simple, straightforward, and easily administered. In contrast, the present structure of Rule 16(a) is complex, requiring the court and the parties to define the term "statement" and then to draw distinctions between "oral," "written," and "recorded" statements. Moreover, depending on the kind of statement, the court will also have to make a variety of other determinations (e.g., whether the statement was made "before or after arrest, in response to interrogation, by a person the defendant knew to be a government agent"). Judge Reiss argues that the current rule is undesirable for many reasons. It has spawned voluminous and conflicting case law. Substantial disruption occurs when the government fails to make pretrial disclosure, and courts may be required to order costly continuances or mistrials. The many exceptions provided within the current rule create the wrong incentives for government investigators and prosecutors, who may be encouraged to forego the preservation of damaging evidence, inadvertently encouraging behavior that diminishes the reliability of the process. *Id*. at 3.

Judge Reiss concludes that an amendment providing for broader disclosure would "achieve greater judicial economy, uniform application of the rule, and, most importantly, the fair and expeditious resolution of criminal matters through broader pretrial disclosures."

Judge Reiss's proposal is on the agenda for discussion of whether to proceed with further study in the absence of any indication of a broader judicial concern with the operation of Rule 16(a).

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UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT
P.O. BOX 478
RUTLAND, VERMONT 05702-0478
802-773-2205

Chambers of
CHRISTINA REISS
Chief Judge

February 9, 2012

12-CR-A

Hon. Reena Raggi
2nd Circuit Court of Appeals
United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201-1818

Dear Judge Raggi,

I hope this letter finds you well. At the suggestion of Judge Brock Hornby (for whom I clerked), I am writing to you in your capacity as chair of the Criminal Rules Committee. I know your committee is at the forefront of all important criminal rule changes. I have authored the enclosed article, *Closing Fed. R. Crim. P. 16(a)'s Loopholes: Why Criminal Defendants Are Entitled to Discovery of All of Their Statements*, which I hope your Committee will consider. The article will be published by American University in 2012.

As a former Vermont trial court judge, I presided in a state where the prosecution has a pretrial duty to disclose all of a criminal defendant's statements that may be used at trial. The rule was simple, straightforward, and easily administered. Upon becoming a federal judge in 2009, I was surprised to discover that in federal court, a defendant has no such right and may discover the existence of such statements for the first time from the witness stand at trial. Since then, on numerous occasions, I have been called upon to rule on the prosecution's disclosure obligations. In doing so, I have found that the interpretation and implementation of Fed. R. Crim. P. 16(a) varies widely among the federal courts. Indeed, it would not be an exaggeration to state that a criminal defendant's discovery rights in federal court depend upon the court in which he or she appears.

My article examines the pragmatic and policy considerations that weigh heavily in favor of a revised Rule 16(a) which requires pretrial disclosure of all of the accused's own statements. It examines Rule 16's history, analyzes the current version of the rule,

and highlights the absence of uniform application among the federal courts. In addition, the article addresses the lack of detriment to the prosecution in granting defendants full access to their own statements, as compared to the substantial disadvantage to defendants of limited discovery of these crucial statements. The article advocates in favor of broader discovery of an accused's own statements as a means of achieving greater judicial economy, uniform application of the rule, and, most importantly, the fair and expeditious resolution of criminal matters through broader pretrial disclosures.

Thank you for your time and consideration.

Very truly yours,

Christina Reiss, Chief Judge
United States District Court

Closing Fed. R. Crim. P. 16(a)'s Loopholes: Why Criminal Defendants Are Entitled to Discovery of All of Their Statements

Hon. Christina Reiss

I. Overview.

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The most formidable witnesses criminal defendants may face at trial are often themselves. The government may be expected to present as evidence all confessions, incriminating statements, and damaging stray remarks allegedly made by the defendant in preparation for a crime, in its commission, in its concealment, and in its investigation. In federal court, however, a criminal defendant's right to pre-trial disclosure of his or her own statements is severely constrained. Because Rule 16(a) is laden with loopholes, the court must undertake a complex inquiry with regard to each such statement to determine whether the prosecution bears a duty to disclose it. Too often the conclusion is that no such duty exists.

Unlike many state court discovery rules,[1] Fed. R. Crim. P. 16(a) requires the government to disclose only certain types of the accused's own statements, and then only upon the accused's

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[1] *See, e.g.*, Ariz. R. Crim. P. 15.1 (requiring prosecution to disclose defendant's recorded statements no later than thirty days after arraignment); Ill. S. Ct. R. 412(a)(ii) (ordering prosecution to disclose "any written or recorded statements and the substance of any oral statements made by the accused" upon defense counsel's written motion); Ky. R. Cr. 7.24(a) (obligating the commonwealth to disclose "the substance, including time, date, and place, of any oral incriminating statement . . . to have been made by a defendant to any witness" upon his or her written request, as well as to permit the defendant to inspect and copy any relevant "written or recorded statements or confessions made by the defendant . . . that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth"); Ohio R. Cr. P. 16(B) (ordering disclosure upon written request of "[a]ny written or recorded statement by the defendant . . . including police summaries of such statements, and including grand jury testimony by . . . the defendant . . ."); RI Super. R. Crim. P. 16(a)(1) (requiring state, upon written request, to disclose "all relevant written or recorded statements or confessions, signed or unsigned, or written summaries of oral statements or confessions made by the

request.[2] A criminal defendant is *not* entitled to disclosure of three broad categories of his or her own statements. First, a defendant is not entitled to his or her statements made to third parties, unless they were written or recorded. Second, a defendant is not entitled to his or her oral statements unless, at the time of making the statement: (a) the defendant knew he or she was speaking to a government agent, and (b) the defendant made the statements in response to interrogation. And third, a defendant is not entitled to his or her oral, written, or recorded statements made to state agents prior to the commencement of a federal investigation or prosecution. Even if the government is aware of these statements long before trial, and even if disclosure compromises no aspect of the prosecution, Rule 16 does not require disclosure to the accused.

If criminal defendants have a constitutional right to confront the witnesses against them, shouldn't this right extend to their own incriminating statements? If the prosecution is aware of a defendant's damaging statements in advance of trial, what values are protected by non-disclosure other than the element of surprise? The statements are not the prosecutor's or government agent's work product, and they are not privileged. Unquestionably, the statements

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defendant, or copies thereof"); Tenn. R. Crim. P. 16(a) (instructing the state, upon request, to disclose "the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at trial," as well as defendant's written or recorded statements within the state's control of which the state's attorney is aware); and Vt. R. Crim. P. 16(a)(2)(A) (requiring disclosure of "any written or recorded statements and the substance of any oral statements made by the defendant").

[2] *See United States v. Brown*, 345 F. Supp. 2d 358, 359 (S.D.N.Y. 2004) ("Other than exculpatory evidence, the Government is not required by Federal Rule of Criminal Procedure 16 to provide a defendant with advance notice of any statements that it intends to offer into evidence, unless the defendant made a request for such information.").

are not only often "relevant,"[3] but frequently the most critical evidence against the accused. Accordingly, full disclosure should be "dictated by the fundamental fairness of granting the accused equal access to his own words, no matter how the Government came by them." *United States v. Caldwell*, 543 F.2d 1333, 1353 (D.C. Cir. 1974).

Although Fed. R. Crim. P. 16(a) was intended to provide more liberal discovery in criminal cases, its loopholes prevent criminal defendants from adequately preparing to confront the evidence against them at trial. They may also inadvertently provide an incentive for government agents to forego written or recorded preservation of some of the most damaging evidence against the accused, thereby diminishing its reliability.[4] Finally, nondisclosure may entice government witnesses to fabricate and embellish from the witness stand, free from any concern that their own veracity, poor recall, and motives will be exposed to the jury.

Because non-disclosure of a criminal defendant's own statements is arguably unsupported by any legitimate public policy concern, the rationale for Rule 16(a)'s byzantine loopholes is difficult to discern. Ultimately they reflect federal resistance to the proposition that discovery in criminal cases advances the fair, prompt, and inexpensive administration of justice.[5]

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[3] *See United States v. Caldwell*, 543 F.2d 1333, 1352 n.93 (D.C. Cir. 1974) ("As applied to the accused's own damaging statements, the requirement of relevance 'seems superfluous in view of the obviously vital importance of the material sought.'") (quoting 8 J. MOORE, FEDERAL PRACTICE ¶ 16.05(1) at 16-32 (2d ed. 1965)).

[4] Inevitably, this practice prejudices not only the defense but also the prosecution. Any incentive to forego preservation of a witness's statements may ultimately hinder the prosecution's ability to refresh the witness's recollection, cabin the witness's statements to those which the government can verify and corroborate, and transfer the case to another prosecutor who may not have knowledge of unrecorded oral statements allegedly attributed to the accused.

[5] Fed. R. Crim. P. 2 requires all federal criminal procedural rules to be "interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."

This article examines the history of Rule 16(a), its current provisions, and the policy considerations for and against modifications to it. It then suggests how Rule 16(a) should be revised so that it produces the salutary effects of pre-trial discovery, without compromising the investigation and prosecution of crimes.

II. The History of Fed. R. Crim. P. 16(a).

A. The 1944 Adoption: Codifying a Limited Practice of Disclosure.

In 1944, Rule 16 was adopted against a backdrop of judicial concern that discovery in a criminal case might be impermissible, *see United States v. Rosenfeld*, 57 F.2d 74, 76-77 (2d Cir. 1932) (expressing doubt whether discovery rights in civil cases "could be stretched to cover criminal proceedings"), and was not mandated by the Constitution. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (concluding that "[t]here is no constitutional right to discovery in a criminal case"). Some courts, however, allowed the defendant to inspect his or her own seized documents and property on the theory that, but for the government's seizure, these items would have been available to the defendant. *See United States v. B. Goedde & Co.*, 40 F. Supp. 523, 534 (E.D. Ill. 1941) (allowing defendant access to and examination of her own documents before trial). "The entire matter [was] left within the discretion of the court." Fed. R. Crim. P. 16, Advisory Committee Notes, 1944 Adoption. As originally adopted, Rule 16, titled "Discovery and Inspection," provided:

> Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

There was no requirement that the government provide the defendant with his or her own statements in any form.[6]

B. The 1966 Amendment: Recognizing a Defendant's Proprietary Interests.

In 1966, Rule 16 was amended to permit, among other things, disclosure of a defendant's own written or recorded statements and grand jury testimony. The rule did not limit disclosure to statements made to a known government agent. It largely left the entire matter to the trial courts' discretion:

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence, may become known, to the attorney for the government, (2) [results of physical and mental exams]; and (3) recorded testimony of the defendant before a grand jury.

Fed. R. Crim. P. 16(a) (1966 Amendment). The 1966 amendment followed a wake of criticism regarding the limited discovery allowed in a federal criminal case. Acknowledging that, "[t]he extent to which pretrial discovery should be permitted in criminal cases is a complex and controversial issue[,]" the Advisory Committee noted that most of the recent legal literature had been "in favor of increasing the range of permissible discovery." Fed. R. Crim. P. 16, Advisory Committee Notes, 1966 Amendment (citing eleven articles on the subject). The Advisory Committee further observed that,"[d]iscovery of statements and confessions is in line with what

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[6] Courts, however, on occasion authorized disclosure of an accused's own grand jury testimony upon a showing of either "compelling circumstances" or "particularized need." *See United States v. Johnson*, 215 F. Supp. 300, 318 (D. Md. 1963) (ruling that one congressman was not entitled to disclosure of his own grand jury testimony because he failed to make the requisite showing, whereas other congressman's "poor physical condition at the time he testified [was] supported not only by his own affidavit but by the certificate of the attending physician to the Congress," thus demonstrating "a particularized need").

the Supreme Court has described as the 'better practice,' and with the law in a number of states." *Id.* (quoting *Cicenia v. LaGay*, 357 U.S. 504, 511 (1958)).[7]

According to the Committee, "[f]ull judicial exploration of the conflicting policy considerations" could be found in four New Jersey Supreme Court cases: *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953); *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958); *State v. Murphy*, 36 N.J. 172, 175 A.2d 622 (1961); and *State v. Moffa*, 36 N.J. 219, 176 A.2d 1 (1961). The New Jersey cases are instructive, as they reveal the slow accretion of judicial recognition that disclosure of an accused's own statements is not only fundamentally fair, but does nothing to tip the prosecution's hand or compromise its case.

In 1953, *Tune* examined whether a trial court judge abused his discretion by permitting an accused to examine his own confession. In affidavits, the defendant's attorneys averred that the defendant could not recall what he said and claimed his confession was the product of prolonged questioning, the use of force, and threats of violence, thus rendering it involuntary. The trial court authorized disclosure, observing that, "[n]o reasons appear for believing that the prosecutor will be hampered in his preparation for the trial or that there will be a failure of justice, or that the public interest will be adversely affected, if the inspection of defendant's confession is permitted." *Tune*, 13 N.J. at 221, 98 A.2d at 891.

In a 4 to 3 split, the New Jersey Supreme Court reversed, finding that the trial court's approach placed an unfair burden on the prosecution. *Id.* at 222, 98 A.2d at 891. It observed that the accused, rather than his attorneys, must provide an affidavit that supported his motion which

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[7] The Advisory Committee identified the following states as requiring disclosure: Delaware, Illinois, Maryland, Arizona, California, Louisiana, Michigan, Mississippi, New Jersey, and New York.

could thereafter be used against him at trial.[8] *Id.* at 224, 98 A.2d at 892. The majority cited with approval the withering jurisprudence of Judge Learned Hand, who described pre-trial discovery as an attempt to mollycoddle criminal defendants whose guilt was all but certain:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly and foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formulism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

Id. at 212-13, 98 A.2d at 886 (quoting *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923)).[9]

The *Tune* majority begrudgingly recognized that a defendant's own confession could hardly be regarded as the work product of the prosecution. *Id.* at 214, 98 A.2d at 886. It also

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[8] Some courts retain this requirement. *See United States v. Boone*, 2003 WL 21488021, at *6 (S.D.N.Y. June 27, 2003) (defendant's discovery request for all statements reduced to writing by police and made by him in debriefing session at police station prior to *Miranda* warnings was not supported by defendant's own affidavit and thus must be denied); *see also Cash v. Superior Court In and For Santa Clara Cnty.*, 346 P.2d 407, 408 (Cal. 1959) (allowing defendant to inspect and copy recordings or transcriptions of his statements made to an undercover officer upon a showing, supported by affidavit, that court should grant the request in the interest of a fair trial); *Kreuter v. United States*, 376 F.2d 654, 657 (10th Cir. 1967) (affirming denial of defendant's request for disclosure of all statements he made to government agents where affidavit in support of the motion only stated defendant was unable to remember his oral statement).

[9] As the *Tune* majority noted, Judge Hand's elevation to the Second Circuit did nothing to temper his views:

> The defendants seem to suppose that they had the privilege of roaming about at will among any memoranda made by the prosecution in preparation for trial: that indeed is not an uncommon illusion, but it has nothing whatever to support it.

Tune, 13 N.J. at 213, 98 A.2d at 886 (quoting *United States v. Dilliard*, 101 F.2d 829, 837 (2d Cir. 1938)).

noted that one state, Louisiana, mandated disclosure of an accused's confession, while "many other jurisdictions" allowed disclosure solely as a matter of judicial grace. *Id.* at 218, 98 A.2d at 889.[10] Concluding that "[t]o grant a defendant the unqualified right to inspect his confession before trial would be to give him an opportunity to procure false testimony and to commit perjury at the expense of society[,]" *id.* at 226, 98 A.2d at 893, and noting "long experience has taught the courts that often discovery will not lead to honest fact-finding, but on the contrary to perjury and the suppression of evidence," *id.* at 210, 98 A.2d at 884, the *Tune* court concluded that the trial court's disclosure order was an abuse of discretion.

Not surprisingly, the *Tune* dissent pointed out that the New Jersey courts had virtually no experience, much less "long experience," with discovery in criminal cases, and that the same parade of horribles beginning and ending with perjury was raised in opposition to civil discovery only to be shown, by long experience, to be baseless. *Id.* at 227, 98 A.2d at 894. The dissent decried the fundamental unfairness of denying an accused access to his or her own statements:

> It shocks my sense of justice that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied. . . . In the ordinary affairs of life we would be startled at the suggestion that we should not be entitled as a matter of course to a copy of something we signed, . . . [h]ow possibly can we say that counsel for the accused should be denied a copy in face of the affirmative findings by [the trial judge], certainly supported by what was before him, that neither the public interest nor the prosecution of the State's case will suffer? . . . It is said that the accused "better than anyone else knows its contents" and that his representation to his counsel that he does not is "unbelievable." Even if that is our belief, why are we to say that [the trial court's] contrary conclusion was not reasonably founded? I should think it was entirely reasonable for [the trial court]

[10] The *Tune* court rejected the defense's invitation to look across the pond for judicial guidance, observing that although England allowed "full discovery in criminal matters," it relied upon a system of private prosecution of crimes, had a far more advanced system of crime detection and investigation, and "the law-abiding instincts of the [English] population are in marked contrast to the disrespect for the law which has long characterized the American frontier and which has not yet disappeared as the criminal statistics indicate in certain segments of the population." *Tune*, 13 N.J. at 219, 98 A.2d at 889.

> not to disbelieve that assertion in face of the circumstances under which the confession was taken, the "conversations" over five hours of the early morning and the fact that it is not the accused's composition but the "narrative" written down by the police officer. . . . To shackle counsel so that they cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seriously imperils our bedrock presumption of innocence.

Tune, 13 N.J. at 234, 98 A.2d at 896-97 (Brennan, J., dissenting).

Five years after *Tune*, in *State v. Johnson*, a chastened New Jersey Supreme Court acknowledged that Justice William Brennan's dissent in *Tune* had been echoed by three law review articles that tacitly concluded that *Tune* had been wrongly decided. *See Johnson*, 28 N.J. at 136, 145 A.2d at 315 (citing 53 COL. L. REV. 1161, 1163 (1953); 29 N.Y.U. L. REV. 1140, 1141-1142 (1954); 39 VA. L. REV. 976, 978 (1953)).[11] Although purporting to follow *Tune*, the court announced that it would "start with the premise that truth is best revealed by a decent opportunity to prepare in advance for trial[,]" *id.*, and that "[i]t is difficult to understand why a defendant should be denied pretrial inspection of his own statement in the absence of circumstances affirmatively indicating disservice to the public interest." *Id.* at 137, 145 A.2d at 315.

In addition to its departure from *Tune*, *Johnson* reflected other major evolutions. First, the court acknowledged that the accused's own statements were likely to be the core of the state's case, and "[s]imple justice requires that a defendant be permitted to prepare to meet what thus looms as the critical element of the case against him." *Id.* at 137, 145 A.2d at 316. Second, the court conceded that it is "no answer to say that a defendant 'must remember' what he said" because as "every trial lawyer knows, witnesses do not recall their statements with precision or

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[11] As one commentator observed in reviewing *Tune*: "If the trial court's order was an abuse of discretion in this case, it is difficult to conjure a fact situation where a New Jersey judge could, in the exercise of his discretion, allow inspection of an accused's confession." *Pre-Trial Discovery of Criminal Defendant's Confession*, 53 COLUM. L. REV. 1161, 1163 (1953).

detail." *Id.* at 138, 145 A.2d at 316. Third, the court refused to allow the specter of perjury to color its decision, noting that "a defendant who will dispute a truthful confession hardly needs a preview to aid him." *Id.* And finally, after a criminal defendant makes an initial showing of need, the court found the burden of persuasion should shift to the state, which must demonstrate "extraordinary circumstances" in opposition to disclosure. *Id.* at 142, 145 A.2d at 318.

C. The 1974 Amendments & 1975 Enactment: A Sea Change With a Twist.

1974 and 1975 ushered in sweeping changes to discovery in a criminal case, largely in response to the American Bar Association's ("ABA") comprehensive and influential Project on Minimum Standards of Criminal Justice.[12] The ABA's House of Delegates' "Standards Relating to Discovery and Procedure Before Trial" served as the benchmark for the Advisory Committee's discussions regarding proposed amendments to Rule 16.

The ABA described its proposals as "revolutionary" and proposed "more permissive discovery practices for criminal cases than [was] provided by applicable law in any jurisdiction in the United States." ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARD RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 1 (tent. draft 1969) ("ABA Project for Minimum Standards"). Noting that its recommendations were unanimously approved, the ABA pointed out that "[w]hat united the . . . Committee was the view that broad pretrial disclosure of the prosecution's case was the key to satisfying procedural objectives of

[12] In 1963, the Institute of Judicial Administration at New York University Law School proposed to the ABA that it formulate minimum standards in the field of criminal justice, building upon a similar project that had occurred twenty-five years earlier. In early 1964, the Institute conducted a pilot study led by a committee headed by Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit. The committee authorized a three year project focused on "the entire spectrum of the administration of criminal justice, including the functions performed by law enforcement officers, by prosecutors and by defense counsel, and the procedures to be followed in the pretrial, trial, sentencing and review stages." ABA PROJECT ON MINIMUM STANDARDS at vi. Pre-trial discovery and pre-trial procedures were combined in a single study because of their interrelation. *Id.* at vii.

overriding significance to criminal justice." *Id.* at 1-2. These procedural objectives, in turn, were defined as the need to "lend more finality to criminal dispositions, to speed up and simplify the process, and to make more economical use of resources." *Id.* at 2.

In the course of its recommendations, the ABA "reappraised" traditional grounds for opposing broad discovery and concluded as follows:

> One, the advantages to the prosecution of surprise in the relatively few cases going to trial, was deemed an inappropriate consideration. Another, the fear of subversion of law enforcement by perjury, tampering with or intimidation of witnesses, or by premature disclosure of the identity of informants or details of ongoing investigations, was seen as a matter which occurred in only a minority of prosecutions and thus to be dealt with under the circumstances of particular cases, rather than serving as a barrier to discovery in all cases. Finally, the argument that some defense counsel are untrustworthy was viewed as exaggerated or anachronistic, and in any event as a matter more appropriately treated as a bar disciplinary problem than as a basis for deprivation of the values of discovery to the system.

Id. at 2-3. Accordingly, it proposed almost unlimited discovery in a criminal case:

> In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.

Id. at 34. The ABA recognized that this represented a sizable shift from the "grudging" approach to disclosure reflected in the federal rules and would require "disclosure of nearly everything, subject to certain narrow exceptions as to the type of information and to certain safeguards as they are needed in a particular case." *Id.* at 40. The ABA, however, rejected the notion that the accused's right to disclosure should be conditioned upon his or her disclosures to the prosecution. *Id.* at 43, 45 (rejecting reciprocal disclosure based on threat of "perjury or intimidation of witnesses" or on the notion that the "accused has every advantage" due to the government's burden of proving guilt beyond a reasonable doubt and the prohibition against inferring guilt from the accused's decision not to testify).

Compared to the ABA, the Advisory Committee and Congress approached the expansion of criminal discovery far more gingerly and with a decided twist. They accepted many of the ABA's recommendations, including that disclosure should be mandatory, not subject to a "good cause" requirement, and accomplished by the parties with limited judicial intervention. Fed. R. Crim. P. 16, Advisory Committee Notes, 1974 Amendment. However, they resisted any broader disclosure obligations by the prosecution without a commensurate expansion of the defendant's discovery obligations. *Id.* "The majority of the Advisory Committee [was] of the view that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution." *Id.*[13]

With regard to an accused's own statements, rather than impose a rule of broad disclosure, the Advisory Committee and Congress settled upon a series of loopholes and exceptions, leaving how to interpret and harmonize them to the courts.[14] Even the ubiquitous term "statement" was not defined.

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[13] This article does not address the constitutionality of requiring criminal defendants to provide discovery that may later be used against them. It focuses, instead, on the absence of a reasonable justification for denying a criminal defendant access to all of his or her allegedly incriminating statements, regardless of whether they are oral, written, or recorded, and regardless of to whom and in what circumstances they were made.

[14] The 1975 version of Rule 16(a) as enacted provided:

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged.

The Advisory Committee opted for an approach that limited disclosure to statements that fell within narrow exceptions, rather than the broad policy of disclosure advocated by the ABA, even though it acknowledged that the United States Supreme Court had observed that pre-trial disclosure of a defendant's statements "may be the better practice." *Id.* (citing *Cicenia*, 357 U.S. at 511). Indeed, it limited disclosure in the face of its own recognition of the salutary effects of pre-trial discovery:

> [D]iscovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence.

Id. As a result, contrary to a rising tide of opinion that broad discovery in criminal cases advanced rather than impeded the administration of justice, Rule 16(a) became riddled with exceptions with regard to disclosure of the defendant's own statements. Without imposing a straightforward *quid pro quo*, it also conditioned broader disclosure by the prosecution upon broader disclosure by the defendant.[15]

After the sea change in 1974 and 1975, only two amendments to Rule 16(a) have altered the scope of disclosure of an accused's own statements.

Fed. R. Crim. P. 16, Pub. L. No. 94-64, 89 Stat. 375.

[15] As the Advisory Committee explained, the revised rule:

> enlarges the right of government discovery in several ways: (1) it gives the government the right to discovery of lists of defense witnesses as well as physical evidence and the results of examinations and tests; (2) it requires disclosure if the defendant has the evidence under his control and intends to use it at trial in his case in chief, without the additional burden, required by the old rule, of having to show, in behalf of the government, that the evidence is material and the request is reasonable; and (3) it gives the government the right to discovery without conditioning that right upon the existence of a prior request for discovery by the defendant.

Id.

D. The 1991 & 1994 Amendments: A Small Step Forward.

With regard to written or recorded statements of the defendant, the 1991 amendments to Rule 16 eliminated the requirement that conditioned disclosure upon the prosecution's intention to offer the statement at trial. "The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements." Fed. R. Crim. P. 16(a), Advisory Committee Notes, 1991 Amendment. The revised rule also required the government to produce, upon the defendant's request, "that portion of any written record containing the substance of any oral statement" made by the defendant during interrogation. Finally, the revised rule compelled the prosecution to produce any relevant oral statement by the defendant that it intends to use at trial, even if only for impeachment.

Through its broad definition of "defendant," the 1994 amendments clarified that disclosure obligations run to and from organizational defendants. It also recognized that an organization may be bound by its agents' statements and is entitled to the prosecution's disclosure of all statements which the prosecution contends may be attributable to the organization's agents.

Together, the 1991 and 1994 amendments reflect the most recent revisions to Fed. R. Crim. P. 16(a)'s disclosure obligations insofar as they pertain to the defendant's own statements.

III. Examining Fed. R. Crim. P. 16(a)'s Loopholes.

Fed. R. Crim. P. 16(a) imposes upon the government an obligation to disclose three types of statements by the accused upon his or her request: (1) oral statements made to known government agents in response to interrogation; (2) written and recorded statements known to the

government and in its possession, custody, or control; and (3) grand jury testimony. All three categories require the statements to be "relevant."[16] All three categories contain loopholes.

A. Oral Statements Made to Known Government Agents.

Under Rule 16(a), the government must disclose, upon the defendant's request, "the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial." Fed. R. Crim. P. 16(a)(1)(A). Accordingly, the prosecution's disclosure obligation requires the presence of seven "triggers," each of which presents a corresponding loophole.

First, the defendant must request the statement. Second, the statement must be "relevant." Third, the defendant must make the statement either before or after arrest, and, at least arguably, not during.[17] Fourth, the defendant must make the statement in response to "interrogation." Fifth, a "government agent" must initiate the "interrogation." Sixth, the

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[16] In this context, "relevancy" is typically defined in accordance with Fed. R. Evid. 401 to mean "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993) (relevance is to be interpreted broadly so that the rule gives a "defendant virtually an absolute right to his own recorded statements in the absence of highly unusual circumstances that would otherwise justify a protective order.") (citing 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 253, at 46-47 (1982)) (internal quotation marks omitted); *see also* 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 16.05(1), at 16-32 (2d ed. 1965) (as applied to the accused's own damaging statements, the requirement of relevance "seems superfluous in view of the vital importance of the material sought.").

[17] According to Rule 16(a)'s plain language, the disclosure requirement pertains only to oral statements made "before or after arrest[.]" Fed. R. Crim. P. 16(a)(1)(A); *see also Smith v. United States*, 285 F. App'x 209, 211-12, 214 (6th Cir. 2008) (even though court found "incredible" police officer's trial testimony that defendant made an oral statement that she received gun "from her supplier" which officer thereafter failed to record, circuit court found statement was not made in response to functional equivalent of interrogation but was a statement "normally attendant to arrest and custody" and thus was not subject to Rule 16(a) disclosure) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

defendant must know the government agent is a "government agent."[18] And finally, the government must intend to use the statement at trial.

Rule 16(a) does not define the term "government agent." In the course of drafting this loophole, no explanation was given for requiring the statements to be given to a known government agent.[19] The courts typically define a "government agent" as a person employed by or acting on behalf of a *federal* agency after a *federal* prosecution or investigation has

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[18] This requirement alone provides fertile grounds for non-disclosure regardless of the statement's materiality and its use at trial. It also provides ample grounds for a factual dispute regarding what an accused knew. For example, in *United States v. Siraj*, 533 F.3d 99, 101-02 (2d Cir. 2008), in a case of first impression, the Second Circuit ruled that written police reports that memorialize oral statements made by a defendant to an undercover officer need not be produced where the defendant was unaware of the government agent's status at the time of making the statement. Similarly, in *United States v. Tavarez*, 518 F. Supp. 2d 600, 603 (S.D.N.Y. 2007), the defendant asked the government to provide the date, time, place, and circumstances that the government's complaint alleged that the defendant made a statement to a confidential source, as well as any written summaries of that statement. The court rejected the request without analysis, noting that the Second Circuit did not require disclosure of oral statements made to individuals who were, but who were not known to be, government agents. *Id.*; *see also United States v. Taylor*, 417 F.3d 1176, 1181-82 (11th Cir. 2005) (ruling criminal defendant was not entitled to disclosure of his alleged jailhouse confession to the charged offenses because it was not made to a government agent even though the government was aware of the alleged confession six months before the start of trial and called the federal prisoner to whom it was made as a witness at trial); *United States v. Singleton*, 53 F. App'x 384, 384 (7th Cir. 2002) (government is not required to disclose defendant's statement that he could also sell her crack cocaine to undercover officer during a cocaine sale, because he did not know at the time that officer was a government agent); *United States v. Johnson*, 562 F.2d 515, 518 (8th Cir. 1977) (finding no Rule 16 violation where no interrogation took place and government agent did not identify himself as such).

[19] "Neither the House Report nor the House Conference Report accompanying the amendments explain why disclosure was limited to only those oral statements made in response to interrogation [by] a person known to be a government agent. Two representatives objected, stating that '[t]here is no justification for this limitation: the defendant should be able to obtain any statement he made if the government intends to use it at trial.'" *United States v. Hoffman*, 794 F.2d 1429, 1431 n.3 (9th Cir. 1986) (citing H.R. REP. NO. 94-247, at 35 (1975), *reprinted in* 1975 U.S.C.C.A.N. 674, 707 (separate views of Ms. Holtzman and Mr. Drinan)).

commenced. *See United States v. Griggs*, 111 F. Supp. 2d 551, 554 (M.D. Pa. 2000).[20] Rule 16(a) thus arguably exempts from disclosure an accused's statements made to state, municipal, and local law enforcement officers. *Id.*; *see also United States v. Ramos*, 27 F.3d 65, 71-72 (3d Cir. 1994) (municipal police officers are not "governmental agents" under Rule 16(a), and the court may not order disclosure of accused's statements to them); *but see United States v. Burns*, 15 F.3d 211, 214 (1st Cir. 1994) (observing that "government agent" includes persons with law enforcement responsibilities and not just federal agents).

Pursuant to the plain language of Rule 16(a), the term "government agent" is not limited to those working on behalf of the *federal* government. Moreover, this imputed limitation is capable of working a senseless injustice. As the *Griggs* court observed:

> We are constrained to note, however, the fundamental unfairness which the operation of Rule 16(a)[ ] works in this case. If [the defendant] had made his statement to a DEA agent or an FBI agent [instead of a Pennsylvania state trooper], . . . it would be discoverable . . . . [T]his defendant is not entitled under Rule 16 to discovery material which would be available to other defendants in similar situations, with the only difference being the employer of the person to whom a statement is given. That is, another defendant may be arrested in the same manner as [the defendant], be charged with the same crime as [the defendant], give the same statement in response to the same questions during interrogation, and have the arresting agent take the same notes, and yet the notes are discoverable in one case and not the other.

Griggs, 111 F. Supp. 2d at 554-55.[21]

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[20] *See also United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir. 1997) (stating "possession of the government" for Rule 16 does not "normally extend to that of local law enforcement officers.") (internal quotation marks omitted); *Thor v. United States*, 574 F.2d 215, 220-21 (5th Cir. 1978) (denying defendant's Rule 16 discovery request because evidence "was not in the government's control, but in the control of the Oregon county police"); *United State v. Chavez-Vernaza*, 844 F.2d 1368, 1375 (9th Cir. 1987) (rejecting argument in a federal case initially investigated by state and federal authorities that Rule 16 requires prosecution to obtain items from state authorities even if prosecution was aware of the documents but they were not in federal agents' control or possession).

[21] The *Griggs* court ultimately held that, pursuant to its inherent authority, it would require the statements to be disclosed. 111 F. Supp. 2d at 555.

Rule 16(a) also does not define the term "interrogation." Courts typically define the term in accordance with *Rhode Island v. Innis* to refer "not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect[.]" 446 U.S. at 301. Accordingly, the government is not required to disclose an accused's spontaneous oral statements no matter how incriminating.[22]

Finally, Rule 16 does not define the term "statement," leaving the "development of a definition to the courts on a case-by-case basis." *In re United States*, 834 F.2d 283, 284 (2d Cir. 1987). In summary, in addition to grappling with undefined terms, a court must find all seven "triggers" present in order to find a duty to disclose. As a result, many of an accused's most incriminating statements that are indisputably the product of government initiated interrogation are immune from pre-trial discovery. In addition, at least one circuit has expressly held that the Rule 16(a) requires a *written record* of a defendant's oral statement made to a known government agent as a further precondition to disclosure even though the appellate court

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[22] *See United States v. Kusek*, 844 F.2d 942, 948-49 (2d Cir. 1988) (concluding "the government is not required to provide discovery of a defendant's unrecorded, spontaneous oral statements not made in response to interrogation" under Rule 16); *see also United States v. Cooper*, 800 F.2d 412, 416 (4th Cir. 1986) (government not required to disclose statement, "Not yet, I'm not finished," made by prisoner to correctional officer who ordered him to cease assaulting another inmate because statement was not made in response to interrogation); *United States v. Scott*, 223 F.3d 208, 212 (3d Cir. 2000) (defendant's post-arrest oral protestations of innocence regarding gun possession and "Oh, shit" response to bullet falling out his pants were not discoverable under Rule 16(a) as they were not made in response to interrogation); *United States v. Navar*, 611 F.2d 1156, 1158 (5th Cir. 1980) (holding defendant's statement "was made to a person known by the declarant to be a government agent, but it was voluntary, spontaneous, and not in response to interrogation, and thus did not come within Fed. R. Crim. P. 16(a)(1)(A)."); *United States v. Green*, 548 F.2d 1261, 1267 (6th Cir. 1977) (rejecting defendant's argument that the court should "equate his own spontaneous, unsolicited admissions, made within hearing of an undercover police officer, to a defendant's responses to direct questions posed by a government agent during a criminal investigation.").

acknowledged that Rule 16(a) does not expressly impose this requirement.[23] Rule 16(a) thus exempts from disclosure a vast array of oral statements made by criminal defendants, regardless of their evidentiary value to either side.[24]

B. Defendant's Written or Recorded Statements.

Under Rule 16(a), the government must disclose, upon the defendant's request, three categories of written or recorded statements by the defendant. The first category is "any relevant written or recorded statement by the defendant, if: [1] the statement is within the government's possession, custody, or control; and [2] the attorney for the government knows—or through due diligence could know—that the statement exists[.]" Fed. R. Crim. P. 16(a)(1)(B)(i). For such statements, there is no requirement that the statements be intended for use at trial.

There is also no requirement that the statements be the product of interrogation by a known government agent. *See United States v. Matthews*, 20 F.3d 538, 550 (2d Cir. 1994) ("Statements covered by Rule 16(a)(1)[B] include written correspondence to third persons that come into the possession of the government."); *Caldwell*, 543 F.2d at 1352-53 (duty to disclose extends to the defendant's letters to friends written from jail which were given to prosecution by a fellow inmate).

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[23] *See United States v. Fantoy*, 146 F. App'x 808, 817 n.5 (6th Cir. 2005) (holding government did not violate disclosure obligations when government agent testified to the contents of an unrecorded, undisclosed conversation with the defendant regarding defendant's participation in the narcotics trade because statement was not contained in a written record, even though court acknowledged its holding "is not entirely consistent with both the language and the purpose of current or prior Rule 16(a)(1)(A)."); *United States v. Holmes*, 975 F.2d 275, 284 (6th Cir. 1992) (Rule 16 "requires only that any written record of oral statements . . . be turned over to a defendant who so requests.").

[24] *United States v. Edwards*, 214 F. App'x 57, 63 (2d Cir. 2007) (holding criminal defendant is not entitled to disclosure of his own oral statements to co-conspirators even if they form the factual basis for the conspiracy charge against him).

Finally, "[t]he right of a defendant under Rule 16 to his own recorded statements is presumptive . . . [and] [h]e need not show that the statements are material or exculpatory." *United States v. Pesaturo*, 519 F. Supp. 2d 177, 189 (D. Mass. 2007).

Rule 16(a)'s second category of disclosure for written or recorded statements pertains to that "portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent[.]" Fed. R. Crim. P. 16(a)(1)(B)(ii). Accordingly, this provision of the rule requires: (1) a written record; (2) containing the substance of an oral statement; (3) made before or after an arrest; (4) in response to interrogation; (5) by a government agent; and (6) whom the defendant knew to be a government agent. Disclosure is further cabined by Rule 16(a)'s overarching relevancy requirement. By its terms, this provision of Rule 16(a) does not require the statements to be known to the attorney for government, or within the government's possession, custody, or control.[25] The rule also arguably does not require disclosure of statements made *during* arrest even if they are written or recorded.

The courts are not in agreement as to what types of "written records" are covered by the rule. *See United States v. Vallee*, 380 F. Supp. 2d 11, 13 (D. Mass. 2005) ("Notwithstanding the apparently clear command of the rule, there is a considerable diversity of opinion among the courts"). Practitioners appear to take equally divergent approaches, causing one court to illustrate the number of ways the rule is circumvented:

> The language of Rule 16 plainly, and unambiguously, requires the production of any handwritten notes of government agents containing the substance of anything

[25] Although it is likely that the government will be aware of a defendant's oral statements made to a government agent that are reflected in a writing, the duty of disclosure apparently exists even in the absence of such awareness and even if the government neither possesses nor has a ready means of acquiring an original or copy of the written record.

> said by the defendant during interrogation. Notably, the rule requires disclosure of "*any* written record" containing "the substance of *any* relevant oral statement." It is thus not limited to a typed, formalized statement. It is not limited to a verbatim or near-verbatim transcription. It is not limited to the clearest, most readable version of the defendant's statement. Nor does the rule contain any limitations on the nature of the statement (for example, that it be exculpatory) or its intended use (for example, that the government intends to use it at trial), other than the command that it be "relevant."

Id. at 12.

Other courts have required the production of *a* record containing the accused's statements but not *every* record,[26] even where there are minor discrepancies between the agent's handwritten notes and his or her report.[27] Still other courts have imposed requirements that have no arguable basis under Rule 16(a).[28]

With regard to an accused's oral and written statements, Rule 16(a) provides a labyrinth of triggers and loopholes requiring prosecutors, defense counsel, and courts to carefully parse whether disclosure is required for reasons that have little to do with the use of the statement, its materiality, the ease of disclosure, and its facilitation of a fair and just resolution of the case.

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[26] *See, e.g.*, *United States v. Brown*, 303 F.3d 582, 589-91 (5th Cir. 2002) (government complies with Rule 16(a) when it "discloses a . . . report that contains all of the information contained in the [government agent's] interview notes"); *United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997) ("A defendant is not entitled to an agent's notes if the agent's report contains all that was in the original notes.").

[27] *See United States v. Coe*, 220 F.3d 573, 583 (7th Cir. 2000) (concluding trial court did not err in denying discovery request where, despite "certain minor discrepancies between the notes and the report . . . the report was an adequate summation of the notes for Rule 16 purposes.").

[28] *See, e.g.*, *Boone*, 2003 WL 21488021, at *6 (defendant's discovery request for all statements reduced to writing and made by him in debriefing session by police at police station prior to *Miranda* warnings was not supported by defendant's own affidavit and thus must be denied).

Indeed, Rule 16(a)'s exceptions preserve the potential for unfair surprise at trial with no corresponding gain.[29]

C. Defendant's Grand Jury Testimony.

The final category of recorded or written statements required to be disclosed is refreshingly straightforward and unambiguous: "the defendant's recorded testimony before a grand jury relating to the charged offense." Fed. R. Crim. P. 16(a)(1)(B)(iii). As defendants who do not plan to cooperate with the government rarely testify before grand juries, such disclosures are relatively rare. However, in the event of cooperation, disclosure of grand jury testimony frequently proves useful as it may be used in plea negotiations to provide a factual basis for a plea. It is also useful at sentencing to determine drug quantities and other disputed factual issues and to establish the extent of a defendant's cooperation and substantial assistance to the government. No court has apparently found the burden upon the government imposed by this portion of the rule either onerous, unreasonable, or unfair.

Having examined Fed. R. Crim. P. 16(a)'s loopholes, their history and derivation, and how the courts have struggled to interpret and implement them, this article next examines whether there is a legitimate explanation for their continued existence.

IV. Revisiting Disclosure.

A. Pragmatic Considerations.

The first question to be answered in revisiting Fed. R. Crim. P. 16(a)'s loopholes is "why now?" From a purely pragmatic perspective, the present is a perfect time for undertaking this

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[29] Non-disclosure often becomes the subject of a request for a mistrial or at least a prolonged bench conference in the midst of trial *after* a witness has testified to the statement in question. Because there is no shortcut to determining whether an oral or written statement should have been disclosed and no panacea for remedying the potential prejudice if pre-trial disclosure should have occurred, the failure to disclose is inexorably disruptive.

effort. The federal government's correctional facilities are overburdened and underfunded.[30] The federal Judiciary, like all branches of government, is struggling with budget cuts in the face of increasing demands for its services. Federal judicial vacancies are being filled at a desultory pace, with some districts operating continuously in crisis mode. U.S. Attorney's Offices and Federal Public Defender's Offices are subject to a hiring freeze. Despite all of this, crime marches on. Any mechanism that speeds the processing of a criminal case without sacrificing the quality of the administration of justice should be examined. Here, the courts and commentators are in universal accord that pre-trial discovery aids in the prompt and just resolution of criminal cases. Indeed, over forty years ago, this was the primary rationale for the ABA's advocacy in favor of a policy of virtually unlimited pre-trial prosecutorial disclosure.

When considering the disclosure of an accused's own statements, the pragmatic advantages of more complete disclosure are even more compelling. Criminal defendants who are confronted with their statements as potential evidence against them are in a much better position to weigh the advantages and disadvantages of a negotiated plea and the risks and benefits of going to trial. Expanded pre-trial disclosure may thus enhance the likelihood that criminal defendants will engage in more meaningful and more timely plea negotiations, having seen the strengths of the government's case against them. It will also better ensure that such negotiations are the product of a fully informed decision, thereby reducing requests to vacate a plea, claims of ineffective assistance of counsel, or efforts to seek post-conviction relief as the result of a late discovered discovery violation.

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[30] As Justice John Paul Stevens recently observed: "In the years between 1972 and 2007, the nation's imprisonment rate more than quintupled—increasing from 93 to 491 per 100,000 people . . . these figures suggest to me that the current system of criminal law and enforcement (like too many of our citizens) has grown obese." Stevens, J., *Our "Broken System" of Criminal Justice*, N.Y. TIMES BOOK REVIEW, Nov. 17, 2011, at 56.

If plea negotiations are not successful, disclosure assists in flagging evidentiary issues before trial. The parties will then be able to fully brief those issues prior to trial. If an evidentiary hearing is required, the court may set it in a timely manner without carving into trial time. Disclosure also assists in more effective cross-examination. "And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). More expansive pre-trial disclosure of a defendant's own statements thus furthers the very objectives for which Rule 16(a) was promulgated:

> Rule 16's mandatory discovery provisions were designed to contribute to the fair and efficient administration of justice by providing the defendant with sufficient information upon which to base an informed plea and litigation strategy; by facilitating the raising of objections to admissibility prior to trial; by minimizing the undesirable effect of surprise at trial; and by contributing to the accuracy of the fact-finding process.

United States v. Lanoue, 71 F.3d 966, 976 (1st Cir. 1995), *abrogated on other grounds by United States v. Watts*, 519 U.S. 148 (1997).

Courts that discount these pragmatic considerations often grossly understate the disruption that inevitably occurs when a prosecutor fails to disclose an accused's statement pre-trial and then later uses the statement at trial. At a minimum, the court must generally stop the presentation of evidence and hear from both sides outside the presence of the jury. The court must then generally ascertain the nature and content of the statement in question, the circumstances in which it was made and to whom, its materiality, and any prejudice. It must thus analyze the byzantine contours of Rule 16(a) and decide whether, when, and how the government should have been disclosed it. It must also analyze whether there are other grounds for disclosure. In the majority of criminal cases, the *Brady* doctrine, set forth in *Brady v.*

Maryland, 373 U.S. 83 (1963),[31] the Jencks Act, 18 U.S.C. § 3500,[32] *Giglio v. United States*, 405 U.S. 150, 154 (1972),[33] and Fed. R. Crim. P. 16 "exhaust the universe of discovery to which the defendant is entitled." *United States v. Presser*, 844 F.2d 1275, 1285 n.12 (6th Cir. 1988). Thereafter, the court must make the necessary factual findings and conclusions of law regarding whether disclosure was required and by what rule or law. Properly performed, this is a time-consuming and painstaking process.

If the court determines that disclosure was mandated by Rule 16(a) or some other requirement of law, the court must then decide whether to grant a continuance, declare a mistrial, hold a suppression hearing if that is requested, impose sanctions, give a curative instruction,[34] or proceed by finding no prejudice. Rule 16(a) provides no guidance in determining how this analysis should proceed and further complicates the inquiry by failing to define critical terms, leaving such definitions to a highly divergent and ever changing body of case law.

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[31] The *Brady* doctrine requires the government to produce exculpatory evidence which is material to guilt or punishment. *See Brady*, 373 U.S. at 87.

[32] The Jencks Act requires the government to produce statements of a witness after the witness has testified on direct examination. Some courts hold that the Jencks Act actually prohibits a court from ordering disclosure of Jencks material before a witness has testified on direct examination. *See* 18 U.S.C. § 3500(a); *see also In re United States*, 834 F.2d at 284-86. Nothing precludes a prosecutor from turning over such material earlier. *See United States v. Watson*, 787 F. Supp. 2d 667, 674 (E.D. Mich. 2011) ("Given that the government has stipulated to turn over 'impeachment material' and Jencks Act material ten days before trial, there appears to be no basis for withholding any other material that would qualify as *Brady* material."). Fed. R. Crim. P. 26.2 imposes this duty of disclosure on both the prosecution and the defense.

[33] *Giglio* requires the government to produce evidence that may be used to impeach the credibility of any of the government's witnesses in time for effective use at trial. *Giglio*, 405 U.S. at 154.

[34] Which, in turn, poses the question of whether a court can fashion a curative instruction regarding non-disclosure that is fair to both the prosecution and the defense. If the court frames the instruction so that it reflects a violation of the prosecutor's duty, need the court also disclose whether the violation was in good or bad faith? Should the court note that the defendant is being confronted with this evidence for the first time and has not had an opportunity to test its accuracy? If the court imposes a sanction, should it be disclosed to the jury?

Post-conviction, a new trial will be ordered to cure a discovery violation only upon a showing of "substantial prejudice." *See Matthews*, 20 F.3d at 550 ("If the government has failed to meet its obligations under Rule 16(a)(1)(A), a new trial will be required only if the defendant can show that the failure to disclosure caused him substantial prejudice.") (citation and internal quotation marks omitted); *United States v. Thomas*, 239 F.3d 163, 167 (2d Cir. 2001) (ordering a new trial after a Rule 16 violation only if defendant shows "that the failure to disclose caused him substantial prejudice."); *United States v. Heath*, 580 F.2d 1011, 1021 (10th Cir. 1978) (finding no basis for a new trial where government's failure to disclose defendant's statement did not "constitute[] either direct or substantial prejudice"); *United States v. Enigwe*, 1993 WL 276966, at *9 (E.D. Pa. July 13, 1993) (refusing to order new trial where defendant failed to show substantial prejudice stemming from government's non-disclosure of Rule 16 material). Arguably, Rule 16(a)'s loopholes incentivize non-disclosure.

In summary, nonchalant observations that "[s]urprising moments and unexpected statements made from the witness stand are par for the course in any trial, and even more so in a relatively lengthy criminal proceeding," *United States v. Santiago*, 135 F. App'x 816, 821 (6th Cir. 2005) (excusing government's inadvertent failure to disclose recording of defendant's oral admissions that he sold cocaine), substantially understate the disruption caused by untimely disclosures, the complexity of the court's task at trial when the issue arises, and the enormity of the prejudice the accused inevitably experiences when he or she is confronted, for the first time, with his or her own materially incriminating statements. Rule 16(a) is thus unnecessarily difficult to interpret, inconsistently and arbitrarily implemented, and, if not followed, the ensuing prejudice is almost impossible to cure. From a purely pragmatic standpoint, this is an opportune time to eliminate its loopholes.

B. Policy Considerations.

A criminal defendant has a near absolute right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. In *Pointer*, the United States Supreme Court held "that the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding[.]" *Pointer*, 380 U.S. at 407. This is pointedly not the case with regard to a criminal defendant's own statements. Many states have long required the disclosure of the accused's own statements,[35] while federal courts limit disclosure to only those statements that make it through the gauntlet of Fed. R. Crim. P. 16(a)'s loopholes. An equal opportunity for pre-trial discovery in state and federal court reflects society's commitment to afford fundamental fairness to criminal defendants regardless of the forum in which they are prosecuted.

"Fundamental fairness" also requires heightened procedural safeguards when the information in question is "material in the sense of a crucial, critical, [or] highly significant factor." *Boykins v. Wainwright*, 737 F.2d 1539, 1544 (11th Cir. 1984) (addressing the exclusion of evidence at trial); *see also Caldwell*, 543 F.2d at 1353 ("We believe, too, that [disclosure of an accused's written communications with third parties] is dictated by the fundamental fairness of granting the accused equal access to his own words, no matter how the Government came by them."). It is hard to conceive of information that is more "crucial, critical, or highly significant" than the accused's own statements that tend to prove that he or she committed the offense charged. As the United States Supreme Court has observed: "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . . [T]he admissions of a defendant come from the

[35] *See supra* note 1.

actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.'" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968)). It borders on flippant to justify non-disclosure by asserting that the defendant must already know what he or she said,[36] or by permitting disclosure in the nation's state courts while prohibiting it in its federal courts.

Finally, there are few, if any, countervailing public policies served by nondisclosure. As the Ninth Circuit observed over forty years ago:

> When a person is attempting to discover his own statements some of the reasons for not allowing discovery are eliminated. There is no danger to government informants; there is no fishing expedition; there is no unfairness in giving the defendant the right to discovery (a right not available to the government because of the Fifth Amendment)[.]

Loux v. United States, 389 F.2d 911, 922 (9th Cir. 1968). Broad pre-trial discovery is the rule in civil cases.[37] Fundamental fairness supports equally broad pre-trial discovery with regard to a criminal defendant's own statements. There is no rational justification for a contrary approach.[38]

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[36] *See United States v. Jett*, 18 F. App'x 224, 237 (4th Cir. Sept. 18, 2001) (holding defendant was not substantially prejudiced by the nondisclosure of his own statements because he "could not have been 'unduly surprised' by the statements, since he himself made them"); *see also United States v. Rivera*, 944 F.2d 1563, 1566 (11th Cir. 1991) (concluding defendant was not prejudiced by nondisclosure of his own statement because the "testimony involved [defendant's] own statement which he should have had some knowledge of making.").

[37] *See Ramos*, 27 F.3d at 67-68 ("Criminal pretrial discovery is, of course, vastly different from discovery in civil cases. In contrast to the wide-ranging discovery permitted in civil cases, Rule 16 . . . delineates the categories of information to which defendants are entitled in pretrial discovery in criminal cases, with some additional material being discoverable in accordance with statutory pronouncements and the due process clause of the Constitution.").

[38] To the extent that witness protection is an issue, the Federal Rules of Criminal Procedure adequately address such concerns:

> The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: it can ask for a protective order under [Fed. R. Crim. P. 16](d)(1). . . . It can also move the court to allow the perpetuation of a particular witness's testimony for use at trial if the witness is unavailable or later

C. Judicial Uniformity.

Rule 16(a)'s loopholes should be eliminated for the further reason that the federal courts have demonstrated a marked inability to apply them uniformly. The rule was intended to minimize judicial intervention in pre-trial discovery. The abundance of case law attempting to harmonize the rule's various permutations suggests that this has not been the case.

Almost four decades ago, the Advisory Committee explained that "[t]he rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases." Fed. R. Crim. P. 16, Advisory Committee Notes, 1974 Amendment. Courts, however, even disagree regarding the permissible degree of departure from Fed. R. Crim. P. 16(a)'s express terms.

On the one hand, courts are deemed to have the inherent authority to order expanded criminal discovery and to alter the timelines for existing discovery obligations.[39] Rule 16 itself

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> changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury.

Fed. R. Crim. P. 16, Advisory Committee Notes, 1974 Amendment.

[39] *See, e.g.*, *Watson*, 787 F. Supp. 2d at 673 (ruling that *Brady* material and government's witness list must be disclosed before trial even in the absence of a right to such pre-trial disclosures); *United States v. Kendricks*, 623 F.2d 1165, 1168 (6th Cir. 1980) (per curiam) (district court may order pre-trial disclosure of government's witness even though "[it] is well recognized that defendants cannot obtain lists of prosecution witnesses as a matter of right[.]"); *United States v. Jackson*, 508 F.2d 1001, 1006 (7th Cir. 1975) (district court may order both parties to disclose witnesses before trial); *United States v. Baum*, 482 F.2d 1325, 1331 (2d Cir. 1973) (noting that "[o]rdinarily it is disclosure, rather than suppression that promotes the proper administration of justice," and in that case "[t]here were no valid considerations to justify the concealment of [a government witness's] identity as a prospective witness"); *United States v. Jordan*, 466 F.2d 99, 101 (4th Cir. 1972) (stating that "[t]he court in its discretion may order the government to produce such a list [of government witnesses] under Rule 16"); *United States v. Richter*, 488 F.2d 170, 174 n.15 (9th Cir. 1973) (recognizing "[t]he trend beyond the present [R]ule 16 appears to be toward even greater liberality. Proposed amendments to the rule would

provides that a court "may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." Fed. R. Crim. P. 16(d)(1).

On the other hand, the circuits are divided in determining whether a court may order prosecutorial disclosures beyond the confines of Rule 16(a). The Third Circuit has that held Rule 16 and various federal statutes identify what is discoverable in a criminal case, and a court has *no authority* to expand disclosure beyond them unless the failure to do so would violate Due Process.[40] The Ninth Circuit has taken a similar approach,[41] as has the Sixth Circuit.[42]

In contrast, the Fifth Circuit has held that a district court may take actions which are "reasonably useful to achieve justice" using its "supervisory powers" to "formulate procedural rules not specifically required by the Constitution or Congress . . . to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury." *United States v. Webster*, 162 F.3d 308, 339 (quoting *United States v. Hastings*, 461 U.S. 499, 505 (1983)); *see also Burns*, 15 F.3d at 214-15 n.2 (concluding

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further expand the scope of discovery. . . . Notably each of these proposals specifically provides for discovery of prosecution witnesses.") (internal citation omitted).

[40] *United States v. Scott*, 223 F.3d at 212 (noting trial court recognized its error in ordering disclosure beyond that authorized by Rule 16(a) and finding no governmental duty to disclose accused's statements).

[41] *See Hoffman*, 794 F.2d at 1432 (vacating suppression order where court's discovery order exceeded the parameters of Rule 16(a)(1)(A) by compelling disclosure of oral statements made by a defendant not in response to interrogation); *but see United States v. Bailleaux*, 685 F.2d 1105, 1115 (9th Cir. 1982) ("Ordinarily, a statement made by the defendant during the course of the investigation of the crime charged should be presumed to be subject to disclosure, unless it is clear that the statement cannot be relevant.").

[42] *See Presser*, 844 F.2d at 1285 ("[T]he discovery afforded by Rule 16 is limited to the evidence referred to in its express provisions," and "[t]he rule provides no authority for compelling the pre-trial disclosure of . . . any other evidence not specifically mentioned by the rule.").

Rule 16 was "intended to prescribe the minimum amount of discovery to which the parties are entitled.").

The courts are equally divided on the issue of how to address a Rule 16(a) violation once it has occurred. The options, all undesirable, include taking a recess during the trial to hold a hearing on the lack of disclosure,[43] prohibiting the government's use of the statement at trial (assuming it has not already been revealed to the jury),[44] giving a curative instruction if it has, granting a continuance, declaring a mistrial, or doing nothing.[45]

Appellate review is plagued with a similar selection of undesirable choices as appellate courts are forced to speculate as to how a trial may have been different if disclosure took place in accordance with the rule.[46] *Rivera*, 944 F.2d 1565-66, is instructive. There, the government failed to disclose, until the first day of trial, the defendant's statement to a customs inspector that a cocaine-laden suitcase belonged to the defendant. Although the appellate court recognized the importance of the statement, it

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[43] *See Kusek*, 844 F.2d at 947-48 (addressing potential Rule 16(a) violation by prosecution by holding an evidentiary hearing outside the presence of the jury after opening statements).

[44] *See* Fed. R. Crim. P. 16(d)(2) (court may prohibit party from introducing evidence not disclosed if the party "fails to comply with this rule.").

[45] *See United States v. Kimbrough*, 69 F.3d 723, 731 (5th Cir. 1995) ("We find that any prejudice or technical violation of Rule 16 is insufficient to comprise a deprivation of Kimbrough's constitutional rights.").

[46] *See United States v. Bryant*, 439 F.2d 642, 648 n.9 (D.C. Cir. 1971) (observing that it is not "possible to know whether revelation of the evidence would have changed the configuration of the trial—whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted. Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically."), *overruled on other grounds by Arizona v. Youngblood*, 488 U.S. 51 (1988).

placed the burden of proof on the defendant, faulted defense counsel for failing to anticipate the statement's existence, and found no reason for reversal of the defendant's conviction. The Eleventh Circuit explained:

> In order for this court to reverse a conviction based on the government's violation of a discovery order, a defendant must demonstrate that the violation prejudiced his substantial rights. Substantial prejudice is established when the defendant shows that he was unduly surprised and did not have an adequate opportunity to prepare a defense or that the mistake had a substantial influence on the jury. After a review of the record, we find that Rivera has failed to establish either of these requirements.
>
> We do not believe that Rivera could have been surprised by [the inspector's] testimony that Rivera had verbally claimed ownership of his suitcase, . . . In a trial in which all the issues revolved around whether the defendant[] knowingly possessed a cocaine-laden suitcase, it is doubtful that Rivera's counsel would not anticipate or contemplate that such a statement might exist. In addition, the belated disclosure of [the inspector's] testimony involved Rivera's own statement which he should have had some knowledge of making. More importantly, if Rivera had, in fact, been prejudiced by the delayed disclosure of this statement, he should have moved for a continuance. Rivera, however, did not do so and elected to proceed to trial.

Id. at 1566 (internal footnotes omitted). The error thus appeared to lie in the defense's lack of preparation rather than the prosecution's lack of disclosure. Such an approach renders a disclosure obligation close to meaningless even when it pertains to the most critical evidence at trial.

Because of a lack of judicial uniformity, criminal defendants in federal court have disparate rights to crucial pre-trial discovery which may have a direct and irremediable impact on the outcome of their cases depending upon how a particular circuit analyzes Rule 16(a). A simple and expansive rule of pre-trial disclosure of an accused's own statements would promote judicial uniformity, ensure all criminal defendants in federal court are afforded the same procedural rights, and eliminate disparities between state and federal practice which have no discernible basis in either logic or public policy.

D. Prosecutorial Uniformity and Increased Professionalism.

Simple, straightforward, and broad disclosure obligations provide an incentive for law enforcement to document evidence of a crime, including the often critically important statements of an accused. Documentation and preservation of an accused's statements by government agents enhances reliability of those statements at trial, making them less dependent upon the vagaries of memory, less prone to alteration in the face of trial pressures, and better tested through meaningful cross-examination as the result of pre-trial investigation. No rule of criminal procedure should reward lack of documentation as a trade-off for surprise at trial. As the D.C. Circuit Court of Appeals observed:

> The right at stake . . . is defendant's discovery of evidence gathered by the Government, evidence whose disclosure to defense counsel would make the trial more a "quest for truth" than a "sporting event." This safeguard of a fair trial is surely an important one; but here it was undercut at the pretrial period by bureaucratic procedures and/or discretionary decisions of Government investigative agents who made no effort to preserve discoverable material.

Bryant, 439 F.2d at 644 (footnote omitted). Anything that encourages professionalism and preservation of evidence at the investigative stage enhances the likelihood that a prosecution that unfolds thereafter will be based upon reliable evidence.

In turn, prosecutors who are tasked with a policy of broad disclosure of an accused's statements will gather and produce them at a time when they are more likely to be the product of accurate recall and less likely to be tainted by bias. By full disclosure, prosecutors also immunize themselves from accusations of misconduct and potential sanctions and eliminate the need for judicial intervention in discovery disputes. *See United States v. Johnson*, 525 F.2d 999, 1005 (2d Cir. 1975) (discussing whether to order sanctions and observing: "We think the government should be more careful in complying strictly with orders to produce a defendant's statements . . . [w]hen in doubt the

prosecutor should seek a ruling from the court on whether a particular paper is discoverable."). A criminal defendant's right to discover his or her statements prior to trial is thus likely to enhance the evidentiary value of those statements while safeguarding the defendant's right to fully confront them at trial.

E. Proposed Revision to Fed. R. Crim. P. 16(a).

A revision to Rule 16(a) that requires the prosecution to disclose, pre-trial, all statements of the defendant in the government's possession, custody, or control renders both the prosecution's and the court's task simple. It also provides a criminal defendant with the information necessary to engage in effective plea negotiations or prepare for trial. As currently drafted, Rule 16(a)'s loopholes transform what was intended to improve the quality and timeliness of the administration of criminal justice into a series of obstacles a defendant must be overcome in order to discover his or her own statements. "There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence." *Faretta v. California*, 422 U.S. 806, 822-23 (1975) (quoting 1 J. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 341-42 (1883)). The time to revisit Fed. R. Crim. P. 16(a)'s loopholes is now as there never was–as is not now–any rational justification for their existence.

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Introduction to Recommendations for ESI Discovery in Federal Criminal Cases

Today, most information is created and stored electronically. The advent of electronically stored information (ESI) presents an opportunity for greater efficiency and cost savings for the entire criminal justice system, which is especially important for the representation of indigent defendants. To realize those benefits and to avoid undue cost, disruption and delay, criminal practitioners must educate themselves and employ best practices for managing ESI discovery.

The Joint Electronic Technology Working Group (JETWG) was created to address best practices for the efficient and cost-effective management of post-indictment ESI discovery between the Government and defendants charged in federal criminal cases. JETWG was established in 1998 by the Director of the Administrative Office of the U.S. Courts (AOUSC) and the Attorney General of the United States. It consists of representatives of the Administrative Office of U.S. Courts' (AOUSC) Office of Defender Services (ODS), the Department of Justice (DOJ), Federal Defender Organizations (FDO), private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the United States Judiciary and other AOUSC offices.

JETWG has prepared recommendations for managing ESI discovery in federal criminal cases, which are contained in the following three documents:

1. **Recommendations for ESI Discovery in Federal Criminal Cases.** The Recommendations provide the general framework for managing ESI, including planning, production, transmission, dispute resolution, and security.

2. **Strategies and Commentary on ESI Discovery in Federal Criminal Cases.** The Strategies provide technical and more particularized guidance for implementing the recommendations, including definitions of terms. The Strategies will evolve in light of changing technology and experience.

3. **ESI Discovery Checklist.** A one-page Checklist for addressing ESI production issues.

The Recommendations, Strategies, and Checklist are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case. They are not intended for all cases. The Recommendations, Strategies, and Checklist build upon the following basic principles:

Principle 1: Lawyers have a responsibility to have an adequate understanding of electronic discovery. (See #4 of the Recommendations.)

Principle 2: In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI. (See #4 of the Recommendations.)

Principle 3: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue may be helpful. (See #5 of the Recommendations and Strategies.)

Principle 4: The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's

integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format. (See #6 of the Recommendations and Strategies.)

Principle 5: When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. (See #6 of the Recommendations and Strategies.)

Principle 6: Following the meet and confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case. (See #5(s) of the Strategies.)

Principle 7: The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted. (See #7 of the Recommendations and Strategies.)

Principle 8: In multi-defendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a Coordinating Discovery Attorney. (See #8 of the Recommendations and Strategies.)

Principle 9: The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI. (See #9 of the Recommendations.)

Principle 10: All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure. (See #10 of the Recommendations.)

The Recommendations, Strategies, and Checklist set forth a collaborative approach to ESI discovery involving mutual and interdependent responsibilities. The goal is to benefit all parties by making ESI discovery more efficient, secure, and less costly.

Recommendations for ESI Discovery Production in Federal Criminal Cases

1. Purpose

These Recommendations are intended to promote the efficient and cost-effective post-indictment production of electronically stored information (ESI) in discovery[1] between the Government and defendants charged in federal criminal cases, and to reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues, by creating a predictable framework for ESI discovery, and by establishing methods for resolving ESI discovery disputes without the need for court intervention.

ESI discovery production involves the balancing of several goals:

a) the parties must comply with their legal discovery obligations;

b) the volume of ESI in many cases may make it impossible for counsel to personally review every potentially discoverable item, and, as a consequence, the parties increasingly will employ software tools for discovery review, so ESI discovery should be done in a manner to facilitate electronic search, retrieval, sorting, and management of discovery information;

c) the parties should look for ways to avoid unnecessary duplication of time and expense for both parties in the handling and use of ESI;

d) subject to subparagraph (e), below, the producing party should produce its ESI discovery materials in industry standard formats;

e) the producing party is not obligated to undertake additional processing desired by the receiving party that is not part of the producing party's own case preparation or discovery production[2]; and

f) the parties must protect their work product, privileged, and other protected information.

The following Recommendations are a general framework for informed discussions between the parties about ESI discovery issues. The efficient and cost-effective production of ESI discovery materials is enhanced when the parties communicate early and regularly about any ESI discovery issues in their

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[1] The Recommendations and Strategies are intended to apply only to disclosure of ESI under Federal Rules of Criminal Procedure 16 and 26.2, *Brady*, *Giglio*, and the Jencks Act, and they do not apply to, nor do they create any rights, privileges, or benefits during, the gathering of ESI as part of the parties' criminal or civil investigations. The legal principles, standards, and practices applicable to the discovery phase of criminal cases serve different purposes than those applicable to criminal and civil investigations.

[2] One example of the producing party undertaking additional processing for its discovery production is a load file that enables the receiving party to load discovery materials into its software.

case, and when they give the court notice of ESI discovery issues that will significantly affect the handling of the case.

2. Scope: Cases Involving Significant ESI

No single approach to ESI discovery is suited to all cases. These Recommendations are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case.[3] In simple or routine cases, the parties should provide discovery in the manner they deem most efficient in accordance with the Federal Rules of Criminal Procedure, local rules, and custom and practice within their district.

Due to the evolving role of ESI in criminal cases, these Recommendations and the parties' practices will change with technology and experience. As managing ESI discovery becomes more routine, it is anticipated that the parties will develop standard processes for ESI discovery that become the accepted norm.

3. Limitations

These Recommendations and the accompanying Strategies do not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, or other federal statutes, case law, or local rules. They may not serve as a basis for allegations of misconduct or claims for relief and they do not create any rights or privileges for any party.

4. Technical Knowledge and Experience

For complex ESI productions, each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery. Lawyers have a responsibility to have an adequate understanding of electronic discovery.

5. Planning for ESI Discovery Production - The Meet and Confer Process

At the outset of a case involving substantial or complex ESI discovery, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. The parties should determine how to ensure that any "meet and confer" process does not run afoul of speedy trial deadlines. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue during the discovery phase may be helpful. In cases where it is authorized, providing ESI discovery to an incarcerated defendant presents challenges that should be discussed early. Also, cases involving classified information will not fit within the Recommendations and Strategies due to the unique legal procedures applicable to those cases. ESI that is contraband (*e.g.*, child pornography) requires special discovery procedures. The Strategies and Checklist provide detailed recommendations on planning for ESI discovery.

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[3] Courts and litigants will continue to seek ways to identify cases deserving special consideration. While the facts and circumstances of cases will vary, some factors may include: (1) a large volume of ESI; (2) unique ESI issues, including native file formats, voluminous third-party records, non-standard and proprietary software formats; and/or (3) multiple defendant cases accompanied by a significant volume of ESI.

6. Production of ESI Discovery

Production of ESI discovery involves varied considerations depending upon the ESI's source, nature, and format. Unlike certain civil cases, in criminal cases the parties generally are not the original custodian or source of the ESI they produce in discovery. The ESI gathered by the parties during their investigations may be affected or limited by many factors, including the original custodian's or source's information technology systems, data management practices, and resources; the party's understanding of the case at the time of collection; and other factors. Likewise, the electronic formats used by the parties for producing ESI discovery may be affected or limited by several factors, including the source of the ESI; the format(s) in which the ESI was originally obtained; and the party's legal discovery obligations, which may vary with the nature of the material. The Strategies and Checklist provide detailed recommendations on production of ESI discovery.

General recommendations for the production of ESI discovery are:

a. The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should, if possible, conform to industry standards for the format.[4]

b. ESI received from third parties should be produced in the format(s) it was received or in a reasonably usable format(s). ESI from the government's or defendant's business records should be produced in the format(s) in which it was maintained or in a reasonably usable format(s).

c. Discoverable ESI generated by the government or defense during the course of their investigations (*e.g.*, investigative reports, witness interviews, demonstrative exhibits, etc.) may be handled differently than in 6(a) and (b) above because the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, the parties' policies, and the parties' evolving technological capabilities.

d. When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. For example, the producing party need not convert ESI from one format to another or undertake additional processing of ESI beyond what is required to satisfy its legal disclosure obligations. If the receiving party desires ESI in a condition different from what the producing party intends to produce, the parties should discuss what is reasonable in terms of expense and mechanics, who will bear the burden of any additional cost or work, and how to protect the producing party's work product or privileged information. Nonetheless, with the understanding that in certain instances the results of processing ESI may constitute work product not subject to discovery, these

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[4] An example of "format of production" might be TIFF images, OCR text files, and load files created for a specific software application. Another "format of production" would be native file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases. ESI in a particular case might warrant more than one format of production depending upon the nature of the ESI.

recommendations operate on the general principle that where a producing party elects to engage in processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.

7. Transmitting ESI Discovery

The parties should discuss transmission methods and media that promote efficiency, security, and reduce costs. In conjunction with ESI transmission, the producing party should provide a general description and maintain a record of what was transmitted. Any media should be clearly labeled. The Strategies and Checklist contain detailed recommendations on transmission of ESI discovery, including the potential use of email to transmit ESI.

8. Coordinating Discovery Attorney

In cases involving multiple defendants, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek the appointment of a Coordinating Discovery Attorney[5] and authorize that person to accept, on behalf of all defense counsel, the ESI discovery produced by the government. Generally, the format of production should be the same for all defendants, but the parties should be sensitive to different needs and interests in multiple defendant cases.

9. Informal Resolution of ESI Discovery Matters

a. Before filing any motion addressing an ESI discovery issue, the moving party should confer with opposing counsel in a good-faith effort to resolve the dispute. If resolution of the dispute requires technical knowledge, the parties should involve individuals with sufficient knowledge to understand the technical issues, clearly communicate the problem(s) leading to the dispute, and either implement a proposed resolution or explain why a proposed resolution will not solve the dispute.

b. The Discovery Coordinator within each U.S. Attorney's Office should be consulted in cases presenting substantial issues or disputes.

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[5] Coordinating Discovery Attorneys (CDA) are AOUSC contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple defendant cases. The CDAs may be appointed by the court to provide in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document management assistance. They can serve as a primary point of contact for the U.S. Attorneys Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If a panel attorney or FDO is interested in utilizing the services of the CDA, they should contact the National Litigation Support Administrator or Assistant National Litigation Support Administrator for the Office of Defender Services at 510-637-3500.

c. To avoid unnecessary litigation, prosecutors and Federal Defender Offices[6] should institute procedures that require line prosecutors and defenders (1) to consult with a supervisory attorney before filing a motion seeking judicial resolution of an ESI discovery dispute, and (2) to obtain authorization from a supervisory attorney before suggesting in a pleading that opposing counsel has engaged in any misconduct, abuse, or neglect concerning production of ESI.

d. Any motion addressing a discovery dispute concerning ESI production should include a statement of counsel for the moving party relating that after consultation with the attorney for the opposing party the parties have been unable to resolve the dispute without court action.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

Criminal case discovery entails certain responsibilities for all parties in the careful handling of a variety of sensitive information, for example, grand jury material, the defendant's records, witness identifying information, information about informants, information subject to court protective orders, confidential personal or business information, and privileged information. With ESI discovery, those responsibilities are increased because ESI is easily reproduced and disseminated, and unauthorized access or disclosure could, in certain circumstances, endanger witness safety; adversely affect national security or homeland security; leak information to adverse parties in civil suits; compromise privacy, trade secrets, or classified, tax return, or proprietary information; or prejudice the fair administration of justice. The parties' willingness to produce early, accessible, and usable ESI discovery will be enhanced by safeguards that protect sensitive information from unauthorized access or disclosure.

All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access. They should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

During the initial meet and confer and before ESI discovery is produced, the parties should discuss whether there is confidential, private or sensitive information in any ESI discovery they will be providing. If such information will be disclosed, then the parties should discuss how the recipients will prevent unauthorized access to, or disclosure of, that ESI discovery, and, absent agreement on appropriate security, the producing party should seek a protective order from the court addressing management of the particular ESI at issue. The producing party has the burden to raise the issue anew if it has concerns about any ESI discovery it will provide in subsequent productions. The parties may choose to have standing agreements so that their practices for managing ESI discovery are not discussed in each case. The Strategies contains additional guidance in sections 5(f), 5(p), and 7(e).

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[6] For private attorneys appointed under the Criminal Justice Act (CJA), this subsection (c) is not applicable.

Strategies and Commentary on ESI Discovery in Federal Criminal Cases

1. Purpose

This commentary contains strategies for implementing the ESI discovery Recommendations and specific technical guidance. Over time it will be modified in light of experience and changing technology. Definitions of common ESI terms are provided in paragraph 11, below.

2. Scope of ESI Gathered

In order to promote efficiency and avoid unnecessary costs, when gathering ESI the parties should take into consideration the nature, volume, and mechanics of managing ESI.

3. Limitations

Nothing contained herein creates any rights or privileges for any party.

4. Technical Knowledge and Experience

No additional commentary.

5. Planning for ESI Discovery Production - The Meet and Confer Process

To promote efficient ESI discovery, the parties may find it useful to discuss the following:

a. **ESI discovery produced.** The parties should discuss the ESI being produced according to the following general categories:

i. **Investigative materials** (investigative reports, surveillance records, criminal histories, etc.)

ii. **Witness statements** (interview reports, transcripts of prior testimony, Jencks statements, etc.)

iii. **Documentation of tangible objects** (*e.g.*, records of seized items or forensic samples, search warrant returns, etc.)

iv. **Third parties' ESI digital devices** (computers, phones, hard drives, thumb drives, CDs, DVDs, cloud computing, etc., including forensic images)

v. **Photographs and video/audio recordings** (crime scene photos; photos of contraband, guns, money; surveillance recordings; surreptitious monitoring recordings; etc.)

vi. **Third party records and materials** (including those seized, subpoenaed, and voluntarily disclosed)

vii. **Title III wire tap information** (audio recordings, transcripts, line sheets, call reports, court documents, etc.)

viii. **Court records** (affidavits, applications, and related documentation for search and arrest warrants, etc.)

ix. **Tests and examinations**

x. **Experts** (reports and related information)

xi. **Immunity agreements, plea agreements, and similar materials**

xii. **Discovery materials with special production considerations** (such as child pornography; trade secrets; tax return information; etc.)

xiii. **Related matters** (state or local investigative materials, parallel proceedings materials, etc.)

xiv. **Discovery materials available for inspection but not produced digitally**

xv. **Other information**

b. **Table of contents.** If the producing party has not created a table of contents prior to commencing ESI discovery production, it should consider creating one describing the general categories of information available as ESI discovery. In complex discovery cases, a table of contents to the available discovery materials can help expedite the opposing party's review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.[1] Because no single table of contents is appropriate for every case, the producing party may devise a table of contents that is suited to the materials it provides in discovery, its resources, and other considerations.[2]

c. **Forms of production.** The producing party should consider how discoverable materials were provided to it or maintained by the source (*e.g.,* paper or electronic), whether it has converted any materials to a digital format that can be used by the opposing party without disclosing the producing party's work product, and how those factors may affect the production of discovery materials in electronic formats. For particularized guidance *see* paragraph 6, below. The parties should be flexible in their application of the concept

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[1] *See, e.g., U.S. v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009) (no *Brady* violation where government disclosed several hundred million page database with searchable files and produced set of hot documents and indices).

[2] A table of contents is intended to be a general, high-level guide to the categories of ESI discovery. Because a table of contents may not be detailed, complete, or free of errors, the parties still have the responsibility to review the ESI discovery produced. With ESI, particular content usually can be located using available electronic search tools. There are many ways to construct a general table of contents. For example, a table of contents could be a folder structure as set forth above in paragraph 2(a)(i-xv), where like items are placed into folders.

of "maintained by the source." The goals are to retain the ESI's integrity, to allow for reasonable usability, and to reasonably limit costs.[3]

d. **Proprietary or legacy data.** Special consideration should be given to data stored in proprietary or legacy systems, for example, video surveillance recordings in an uncommon format, proprietary databases, or software that is no longer supported by the vendor. The parties should discuss whether a suitable generic output format or report is available. If a generic output is not available, the parties should discuss the specific requirements necessary to access the data in its original format.

e. **Attorney-client, work product, and protected information issues.**[4] The parties should discuss whether there is privileged, work product, or other protected information in third-party ESI or their own discoverable ESI and proposed methods and procedures for segregating such information and resolving any disputes.[5]

f. **Confidential and personal information**. The parties should identify and discuss the types of confidential or personal information present in the ESI discovery, appropriate security for that information, and the need for any protective orders or redactions. *See also,* section 5(p) below.

g. **Incarcerated defendant.** If the defendant is incarcerated and the court or correctional institution has authorized discovery access in the custodial setting, the parties should consider what institutional requirements or limitations may affect the defendant's access to ESI discovery, such as limitations on hardware or software use.[6]

h. **ESI discovery volume.** To assist in estimating the receiving party's discovery costs and to the extent that the producing party knows the volume of discovery materials it intends to produce immediately or in the future, the producing party may provide such information if such disclosure would not compromise the producing party's interests.

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[3] For example, when the producing party processes ESI to apply Bates numbers, load it into litigation software, create TIFF images, etc., the ESI is slightly modified and no longer in its original state. Similarly, some modification of the ESI may be necessary and proper in order to allow the parties to protect privileged information, and the processing and production of ESI in certain formats may result in the loss or alteration of some metadata that is not significant in the circumstances of the particular case.

[4] Attorney-client and work product (*see, e.g.,* F.R.Crim.P. 16(a)(2) and (b)(2)) issues arising from the parties' own case preparation are beyond the scope of these Recommendations, and they need not be part of the meet and confer discussion.

[5] If third party records are subject to an agreement or court order involving a selective waiver of attorney-client or work product privileges (*see* F.R.E. 502), then the parties should discuss how to handle those materials.

[6] Because pretrial detainees often are held in local jails (for space, protective custody, cost, or other reasons) that have varying resources and security needs, there are no uniform practices or rules for pretrial detainees' access to ESI discovery. Resolution of the issues associated with such access is beyond the scope of the Recommendations and Strategies.

Examples of volume include the number of pages of electronic images of paper-based discovery, the volume (*e.g.,* gigabytes) of ESI, the number and aggregate length of any audio or video recordings, and the number and volume of digital devices. Disclosures concerning expected volume are not intended to be so detailed as to require a party to disclose what they intend to produce as discovery before they have a legal obligation to produce the particular discovery material (*e.g.,* Jencks material). Similarly, the parties' estimates are not binding and may not serve as the basis for allegations of misconduct or claims for relief.

i. **Naming conventions and logistics.** The parties should, from the outset of a case, employ naming conventions that would make the production of discovery more efficient. For example, in a Title III wire tap case generally it is preferable that the naming conventions for the audio files, the monitoring logs, and the call transcripts be consistent so that it is easy to cross-reference the audio calls with the corresponding monitoring logs and transcripts. If at the outset of discovery production a naming convention has not yet been established, the parties should discuss a naming convention before the discovery is produced. The parties should discuss logistics and the sharing of costs or tasks that will enhance ESI production.

j. **Paper materials.** For options and particularized guidance on paper materials *see* paragraphs 6(a) and(e), below.

k. **Any software and hardware limitations.** As technology continues to evolve, the parties may have software and hardware constraints on how they can review ESI. Any limitations should be addressed during the meet and confer.

l. **ESI from seized or searched third-party ESI digital devices.** When a party produces ESI from a seized or searched third-party digital device (*e.g.,* computer, cell phone, hard drive, thumb drive, CD, DVD, cloud computing, or file share), the producing party should identify the digital device that held the ESI, and, to the extent that the producing party already knows, provide some indication of the device's probable owner or custodian and the location where the device was seized or searched. Where the producing party only has limited authority to search the digital device (*e.g.,* limits set by a search warrant's terms), the parties should discuss the need for protective orders or other mechanisms to regulate the receiving party's access to or inspection of the device.

m. **Inspection of hard drives and/or forensic (mirror) images.** Any forensic examination of a hard drive, whether it is an examination of a hard drive itself or an examination of a forensic image of a hard drive, requires specialized software and expertise. A simple copy of the forensic image may not be sufficient to access the information stored, as specialized software may be needed. The parties should consider how to manage inspection of a hard drive and/or production of a forensic image of a hard drive and what software and expertise will be needed to access the information.

n. **Metadata in third party ESI.** If a producing party has already extracted metadata from third party ESI, the parties should discuss whether the producing party should produce the extracted metadata together with an industry-standard load file, or, alternatively,

produce the files as received by the producing party from the third party.[7] Neither party need undertake additional processing beyond its own case preparation, and both parties are entitled to protect their work product and privileged or other protected information. Because the term "metadata" can encompass different categories of information, the parties should clearly describe what categories of metadata are being discussed, what the producing party has agreed to produce, and any known problems or gaps in the metadata received from third parties.

o. **A reasonable schedule for producing and reviewing ESI.** Because ESI involves complex technical issues, two stages should be addressed. First, the producing party should transmit its ESI in sufficient time to permit reasonable management and review. Second, the receiving party should be pro-active about testing the accessibility of the ESI production when it is received. Thus, a schedule should include a date for the receiving party to notify the producing party of any production issues or problems that are impeding use of the ESI discovery.

p. **ESI security.** During the first meet and confer, the parties should discuss ESI discovery security and, if necessary, the need for protective orders to prevent unauthorized access to or disclosure of ESI discovery that any party intends to share with team members via the internet or similar system, including:

i. what discovery material will be produced that is confidential, private, or sensitive, including, but not limited to, grand jury material, witness identifying information, information about informants, a defendant's or co-defendant's personal or business information, information subject to court protective orders, confidential personal or business information, or privileged information;

ii. whether encryption or other security measures during transmission of ESI discovery are warranted;[8]

iii. what steps will be taken to ensure that only authorized persons have access to the electronically stored or disseminated discovery materials;

iv. what steps will be taken to ensure the security of any website or other electronic repository against unauthorized access;

v. what steps will be taken at the conclusion of the case to remove discovery materials from the a website or similar repository; and

vi. what steps will be taken at the conclusion of the case to remove or return ESI discovery materials from the recipient's information system(s), or to securely archive them to prevent unauthorized access.

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[7] The producing party is, of course, limited to what it received from the third party. The third party's processing of the information can affect or limit what metadata is available.

[8] The parties should consult their litigation support personnel concerning encryption or other security options.

Note: Because all parties want to ensure that ESI discovery is secure, the Department of Justice, Federal Defender Offices, and CJA counsel are compiling an evolving list of security concerns and recommended best practices for appropriately securing discovery. Prosecutors and defense counsel with security concerns should direct inquiries to their respective ESI liaisons[9] who, in turn, will work with their counterparts to develop best practice guidance.

q. **Other issues.** The parties should address other issues they can anticipate, such as protective orders, "claw-back" agreements[10] between the government and criminal defendant(s), or any issues related to the preservation or collection of ESI discovery.

r. **Memorializing agreements.** The parties should memorialize any agreements reached to help forestall later disputes.

s. **Notice to court.**

i. *Preparing for the meet and confer:* A defendant who anticipates the need for technical assistance to conduct the meet and confer should give the court adequate advance notice if it will be filing an *ex parte* funds request for technical assistance.

ii. *Following the meet and confer:* The parties should notify the court of ESI discovery production issues or problems that they anticipate will significantly affect when ESI discovery will be produced to the receiving party, when the receiving party will complete its accessibility assessment of the ESI discovery received,[11] whether the receiving party will need to make a request for supplemental funds to manage ESI discovery, or the scheduling of pretrial motions or trial.

6. **Production of ESI Discovery**

a. **Paper Materials.** Materials received in paper form may be produced in that form,[12] made available for inspection, or, if they have already been converted to digital format,

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[9] Federal Defender Organizations and CJA panel attorneys should contact Sean Broderick (National Litigation Support Administrator) or Kelly Scribner (Assistant National Litigation Support Administrator) at 510-637-3500, or by email: sean_broderick@fd.org, kelly_scribner@fd.org. Prosecutors should contact Andrew Goldsmith (National Criminal Discovery Coordinator) at Andrew.Goldsmith@usdoj.gov or John Haried (Assistant National Criminal Discovery Coordinator) at John.Haried@usdoj.gov.

[10] A "claw back" agreement outlines procedures to be followed to protect against waiver of privilege or work product protection due to inadvertent production of documents or data.

[11] *See* paragraph 5(o) of the Strategies, above.

[12] The decision whether to scan paper documents requires striking a balance between resources (including personnel and cost) and efficiency. The parties should make that determination on a case-by-case basis.

produced as electronic files that can be viewed and searched. Methods are described below in paragraph 6(b).

b. **Electronic production of paper documents.** Three possible methodologies:

i. *Single-page TIFFs.* Production in TIFF and OCR format consists of the following three elements:

(1) Paper documents are scanned to a picture or image that produces one file per page. Documents should be unitized. Each electronic image should be stamped with a unique page label or Bates number.

(2) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as image file.

(3) Load files that tie together the images and text.

ii. *Multi-page TIFFS.* Production in TIFF and OCR format consists of the following two elements:

(1) Paper documents are scanned to a picture or image that produces one file per document. Each file may have multiple pages. Each page of the electronic image should be stamped with a unique page label or Bates number.

(2) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as the image file.

iii. *PDF.* Production in multi-page, searchable PDF format consists of the following one element:

(1) Paper documents scanned to a PDF file with text generated by OCR included in the same file. This produces one file per document. Documents should be unitized. Each page of the PDF should be stamped with a unique Bates number.

iv. *Note re: color documents.* Paper documents should not be scanned in color unless the color content of an individual document is particularly significant to the case.[13]

c. **ESI production.** Three possible methodologies:

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[13] Color scanning substantially slows the scanning process and creates huge electronic files which consume storage space, making the storage and transmission of information difficult. An original signature, handwritten marginalia in blue or red ink, and colored text highlights are examples of color content that may be particularly significant to the case.

i. *Native files as received.* Production in a native file format without any processing consists of a copy of ESI files in the same condition as they were received.

ii. *ESI converted to electronic image.* Production of ESI in a TIFF or PDF and extracted text format consists of the following four elements:

(1) Electronic documents converted from their native format into a picture / image. The electronic image files should be computer generated, as opposed to printed and then imaged. Each electronic image should be stamped with a unique Bates number.

(2) Text from that original document is extracted or pulled out and stored without formatting in a generic format.

(3) Metadata (*i.e.,* information about that electronic document), depending upon the type of file converted and the tools or methodology used, that has been extracted and stored in an industry standard format. The metadata must include information about structural relationships between documents, *e.g.,* parent-child relationships.

(4) Load files that tie together the images, text, and metadata.

iii. *Native files with metadata.* Production of ESI in a processed native file format consists of the following four elements:

(1) The native files.

(2) Text from that original document is extracted or pulled out and stored without formatting in a generic format.

(3) Metadata (*i.e.,* information about that electronic document), depending upon the type of file converted and the tools or methodology used, that has been extracted and stored in an industry standard format. The metadata must include information about structural relationships between documents, *e.g.,* parent-child relationships.

(4) Load files that tie together the native file, text, and metadata.

d. **Forensic images of digital media.** Forensic images of digital media should be produced in an industry-standard forensic format, accompanied by notice of the format used.

e. **Printing ESI to paper.** The producing party should not print ESI (including TIFF images or PDF files) to paper as a substitute for production of the ESI unless agreed to by the parties.

f. **Preservation of ESI materials received from third parties**. A party receiving potentially discoverable ESI from a third party should, to the extent practicable, retain a copy of the

ESI as it was originally produced in case it is subsequently needed to perform quality control or verification of what was produced.

g. **Production of ESI from third parties.** ESI from third parties may have been received in a variety of formats, for example, in its original format (native, such as Excel or Word), as an image (TIFF or PDF), as an image with searchable text (TIFF or PDF with OCR text), or as a combination of any of these. The third party's format can affect or limit the available options for production as well as what associated information (metadata) might be available. ESI received from third parties should be produced in the format(s) it was received or in a reasonably usable format(s). ESI received from a party's own business records should be produced in the format(s) in which it was maintained or in a reasonably usable form(s). The parties should explore what formats of production[14] are possible and appropriate, and discuss what formats can be generated. Any format selected for producing discovery should, if possible and appropriate, conform to industry standards for the format.

h. **ESI generated by the government or defense.** Paragraphs 6(f) and 6(g) do not apply to discoverable materials generated by the government or defense during the course of their investigations (*e.g.,* demonstrative exhibits, investigative reports and witness interviews - *see* subparagraph i, below, etc.) because the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, and the parties' evolving technological capabilities. Thus, such materials may be produced differently from third party ESI. However, to the extent practicable, this material should be produced in a searchable and reasonably usable format. Parties should consult with their investigators in advance of preparing discovery to ascertain the investigators' ESI capabilities and limitations.

i. **Investigative reports and witness interviews.** Investigative reports and witness interviews may be produced in paper form if they were received in paper form or if the final version is in paper form. Alternatively, they may be produced as electronic images (TIFF images or PDF files), particularly when needed to accommodate any necessary redactions. Absent particular issues such as redactions or substantial costs or burdens of additional processing, electronic versions of investigative reports and witness interviews should be produced in a searchable text format (such as ASCII text, OCR text, or plain text (.txt)) in order to avoid the expense of reprocessing the files. To the extent possible, the electronic image files of investigative reports and witness interviews should be computer-generated (as opposed to printed to paper and then imaged) in order to produce a higher-quality searchable text which will enable the files to be more easily searched and cost-effectively utilized.[15]

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[14] An example of "format of production" might be TIFF images, OCR text files, and load files created for a specific software application. Another "format of production" would be native file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases.

[15] For guidance on making computer generated version of investigative reports and witness interview reports, *see* the description of production of TIFF, PDF, and extracted text format in paragraphs 6(b)(ii)(1) and (ii).

j. **Redactions**. ESI and/or images produced should identify the extent of redacted material and its location within the document.

k. **Photographs and video and audio recordings**. A party producing photographs or video or audio recordings that either were originally created using digital devices or have previously been digitized should disclose the digital copies of the images or recordings if they are in the producing party's possession, custody or control. When technically feasible and cost-efficient, photographs and video and audio recordings that are not already in a digital format should be digitized into an industry standard format if and when they are duplicated. The producing party is not required to convert materials obtained in analog format to digital format for discovery.

l. **Test runs.** Before producing ESI discovery a party should consider providing samples of the production format for a test run, and once a format is agreed upon, produce all ESI discovery in that format.

m. **Access to originals.** If the producing party has converted paper materials to digital files, converted materials with color content to black and white images, or processed audio, video, or other materials for investigation or discovery, it should provide reasonable access to the originals for inspection and/or reprocessing.

7. Transmitting ESI Discovery

a. ESI discovery should be transmitted on electronic media of sufficient size to hold the entire production, for example, a CD, DVD, or thumb drive.[16] If the size of the production warrants a large capacity hard drive, then the producing party may require the receiving party to bear the cost of the hard drive and to satisfy requirements for the hard drive that are necessary to protect the producing party's IT system from viruses or other harm.

b. The media should be clearly labeled with the case name and number, the producing party, a unique identifier for the media, and a production date.

c. A cover letter should accompany each transmission of ESI discovery providing basic information including the number of media, the unique identifiers of the media, a brief description of the contents including a table of contents if created, any applicable bates ranges or other unique production identifers, and any necessary passwords to access the content. Passwords should not be in the cover letter accompanying the data, but in a separate communication.

d. The producing party should retain a write-protected copy of all transmitted ESI as a preserved record to resolve any subsequent disputes.

e. **Email Transmission.** When considering transmission of ESI discovery by email, the parties' obligation varies according to the sensitivity of the material, the risk of harm

[16] Rolling productions may, of course, use multiple media. The producing party should avoid using multiple media when a single media will facilitate the receiving party's use of the material.

from unauthorized disclosure, and the relative security of email versus alternative transmission. The parties should consider three categories of security:

i. Not appropriate for email transmission: Certain categories of ESI discovery are never appropriate for email transmission, including, but not limited to, certain grand jury materials; materials affecting witness safety; materials containing classified, national security, homeland security, tax return, or trade secret information; or similar items.

ii. Encrypted email transmission: Certain categories of ESI discovery warrant encryption or other secure transmission due to their sensitive nature. The parties should discuss and identify those categories in their case. This would ordinarily include, but not be limited to, information about informants, confidential business or personal information, and information subject to court protective orders.

iii. Unencrypted email transmission: Other categories of ESI discovery not addressed above may be appropriate for email transmission, but the parties always need to be mindful of their ethical obligations.[17]

8. Coordinating Discovery Attorney

Coordinating Discovery Attorneys (CDA) are AOUSC contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple defendant cases. The CDAs may be appointed by the court to provide additional in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document management assistance. They can serve as a primary point of contact for the US Attorneys Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If you have any questions regarding the services of a CDA, please contact either Sean Broderick (National Litigation Support Administrator) or Kelly Scribner (Assistant National Litigation Support Administrator) at 510-637-3500, or by email: sean_broderick@fd.org, kelly_scribner@fd.org.

9. Informal Resolution of ESI Discovery Matters

No additional commentary.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

See sections 5(f) - Confidential and personal information, 5(p) - ESI security, and 7(e) - Email Transmission of the Strategies for additional guidance.

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[17] Illustrative of the security issues in the attorney-client context are ABA Op. 11-459 (Duty to Protect the Confidentiality of E-mail Communications with One's Client) and ABA Op. 99-413 (Protecting the Confidentiality of Unencrypted E-Mail).

11. Definitions

To clearly communicate about ESI, it is important that the parties use ESI terms in the same way. Below are common ESI terms used when discussing ESI discovery:

a. **Cloud computing.** With cloud computing, the user accesses a remote computer hosted by a cloud service provider over the Internet or an intranet to access software programs or create, save, or retrieve data, for example, to send messages or create documents, spreadsheets, or databases. Examples of cloud computing include Gmail, Hotmail, Yahoo! Mail, Facebook, and on-line banking.

b. **Coordinating Discovery Attorney (CDA).** An AOUSC contracted attorney who has technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple-defendant cases, and who may be appointed by a court in selected multiple-defendant cases to assist CJA panel attorneys and/or FDO staff with discovery management.

c. **Document unitization.** Document unitization is the process of determining where a document begins (its first page) and ends (its last page), with the goal of accurately describing what was a "unit" as it was received by the party or was kept in the ordinary course of business by the document's custodian. A "unit" includes attachments, for example, an email with an attached spreadsheet. Physical unitization utilizes actual objects such as staples, paper clips and folders to determine pages that belong together as documents. Logical unitization is the process of human review of each individual page in an image collection using logical cues to determine pages that belong together as documents. Such cues can be consecutive page numbering, report titles, similar headers and footers, and other logical cues.

d. **ESI (Electronically Stored Information).** Any information created, stored, or utilized with digital technology. Examples include, but are not limited to, word-processing files, e-mail and text messages (including attachments); voicemail; information accessed via the Internet, including social networking sites; information stored on cell phones; information stored on computers, computer systems, thumb drives, flash drives, CDs, tapes, and other digital media.

e. **Extracted text.** The text of a native file extracted during ESI processing of the native file, most commonly when native files are converted to TIFF format. Extracted text is more accurate than text created by the OCR processing of document images that were created by scanning and will therefore provide higher quality search results.

f. **Forensic image (mirror image) of a hard drive or other storage device.** A process that preserves the entire contents of a hard drive or other storage device by creating a bit-by-bit copy of the original data without altering the original media. A forensic examination or analysis of an imaged hard drive requires specialized software and expertise to both create and read the image. User created files, such as email and other electronic documents, can be extracted, and a more complete analysis of the hard drive can be performed to find deleted files and/or access information. A forensic or mirror image is not a physical duplicate of the original drive or device; instead it is a file or set of files that contains all of the data bits from the source device. Thus a forensic or mirror

image cannot simply be opened and viewed as if you were looking at the original device. Indeed, forensic or mirror images of multiple hard drives or other storage devices can be stored on a single recipient hard drive of sufficient capacity.

g. **Image of a document or document image.** An electronic "picture" of how the document would look if printed. Images can be stored in various file formats, the most common of which are TIFF and PDF. Document images, such as TIFF and PDF, can be created directly from native files, or created by scanning hard copy.

h. **Load file.** A cross reference file used to import images or data into databases. A data load file may contain Bates numbers, metadata, path to native files, coded data, and extracted or OCR text. An image load file may contain document boundary, image type and path information. Load files must be obtained and provided in software-specific formats to ensure they can be used by the receiving party.

i. **Metadata.** Data that describes characteristics of ESI, for example, the author, date created, and date last accessed of a word processing document. Metadata is generally not reproduced in full form when a document is printed to paper or electronic image. Metadata can describe how, when and by whom ESI was created, accessed, modified, formatted, or collected. Metadata can be supplied by applications, users or the file system, and it can be altered intentionally or inadvertently. Certain metadata can be extracted when native files are processed for litigation. Metadata is found in different places and in different forms. Some metadata, such as file dates and sizes, can easily be accessed by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Note that some metadata may be lost or changed when an electronic copy of a file is made using ordinary file copy methods.

j. **Native file.** A file as it was created in its native software, for example a Word, Excel, or PowerPoint file, or an email in Outlook or Lotus Notes.

k. **OCR (Optical Character Recognition).** A process that converts a picture of text into searchable text. The quality of the created text can vary greatly depending on the quality of the original document, the quality of the scanned image, the accuracy of the recognition software and the quality control process of the provider. Generally speaking, OCR does not handle handwritten text or text in graphics well. OCR conversion rates can range from 50 to 98% accuracy depending on the underlying document. A full page of text is estimated to contain 2,000 characters, so OCR software with even 90% accuracy would create a page of text with approximately 200 errors.

l. **Parent - child relationships.** Related documents are described as having a parent/child relationship, for example, where the email is the parent and an attached spreadsheet is the child.

m. **PDF.** "Portable Document Format." A file format created by Adobe that allows a range of options, including electronic transmission, viewing, and searching.

n. **TIFF.** "Tagged Image File Format." An industry-standard file format for storing scanned and other digital black-and-white, grey-scale, and full-color images.

ESI Discovery Production Checklist

- ☐ Is this a case where the volume or nature of ESI significantly increases the case's complexity?
- ☐ Does this case involve classified information?
- ☐ Does this case involve trade secrets, or national security or homeland security information?
- ☐ Do the parties have appropriate technical advisors to assist?
- ☐ Have the parties met and conferred about ESI issues?
- ☐ Have the parties addressed the format of ESI being produced? Categories may include:
    - ☐ Investigative reports and materials
    - ☐ Witness statements
    - ☐ Tangible objects
    - ☐ Third party ESI digital devices (computers, phones, etc.)
    - ☐ Photos, video and audio recordings
    - ☐ Third party records
    - ☐ Title III wire tap information
    - ☐ Court records
    - ☐ Tests and examinations
    - ☐ Experts
    - ☐ Immunity and plea agreements
    - ☐ Discovery materials with special production considerations
    - ☐ Related matters
    - ☐ Discovery materials available for inspection but not produced digitally
    - ☐ Other information
- ☐ Have the parties addressed ESI issues involving:
    - ☐ Table of contents?
    - ☐ Production of paper records as either paper or ESI?
    - ☐ Proprietary or legacy data?
    - ☐ Attorney-client, work product, or other privilege issues?
    - ☐ Sensitive confidential, personal, grand jury, classified, tax return, trade secret, or similar information?
    - ☐ Whether email transmission is inappropriate for any categories of ESI discovery?
    - ☐ Incarcerated defendant's access to discovery materials?
    - ☐ ESI discovery volume for receiving party's planning purposes?
    - ☐ Parties' software or hardware limitations?
    - ☐ Production of ESI from 3rd party digital devices?
    - ☐ Forensic images of ESI digital devices?
    - ☐ Metadata in 3rd party ESI?
    - ☐ Redactions?
    - ☐ Reasonable schedule for producing party?
    - ☐ Reasonable schedule for receiving party to give notice of issues?
    - ☐ Appropriate security measures during transmission of ESI discovery, *e.g.,* encryption?
    - ☐ Adequate security measures to protect sensitive ESI against unauthorized access or disclosure?
    - ☐ Need for protective orders, clawback agreements, or similar orders or agreements?
    - ☐ Collaboration on sharing costs or tasks?
    - ☐ Need for receiving party's access to original ESI?
    - ☐ Preserving a record of discovery produced?
- ☐ Have the parties memorialized their agreements and disagreements?
- ☐ Do the parties have a system for resolving disputes informally?
- ☐ Is there a need for a designated discovery coordinator for multiple defendants?
- ☐ Do the parties have a plan for managing/returning ESI at the conclusion of the case?

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