ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
April 18, 2016, Washington, D.C.

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in Washington, D.C., on April 18, 2016. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever
Judge Gary S. Feinerman
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Michelle Morales, Esq.[1]
John S. Siffert, Esq.
James N. Hatten, Clerk of Court Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Rules Committee Officer and Secretary to the Committee on Practice and Procedure
Bridget M. Healy, Rules Office Attorney
Julie Wilson, Rules Office Attorney
Shelly Cox, Rules Committee Support Office
Laural L. Hooper, Federal Judicial Center
Margaret Williams, Federal Judicial Center

[1] Ms. Morales was joined at the meeting by Ms. Elizabeth Shapiro.

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy opened the meeting and thanked the reporters for their work in preparing the agenda book. He then asked members to introduce themselves, and he welcomed observers, including Peter Goldberger of the National Association of Criminal Defense Lawyers and Catherine M. Recker of the American College of Trial Lawyers. Judge Molloy also thanked all of the staff members who made the arrangements for the meeting and the hearings.

B. Minutes of September 2015 Meeting

A motion to approve the minutes having been moved and seconded, the Committee unanimously approved the September 2015 meeting minutes by voice vote.

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

The Committee's proposed amendments to Rules 4, 41, and 45 were submitted to the Supreme Court, which has until May 1 to transmit them to Congress. Ms. Womeldorf expressed the hope that the amendments would soon be sent to Congress.[2] Judge Molloy expressed his appreciation for the members' hard work on these amendments.

III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 49

Judge Feinerman, chair of the Rule 49 Subcommittee, acknowledged the reporters' assistance and thanked the subcommittee members for their time, thought, and effort. He then presented the subcommittee's recommended amendment and committee note.

Judge Feinerman began by providing an overview of the subcommittee's work, which grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. The subcommittee's work was guided by two imperatives, which were sometimes in tension: (1) the Advisory Committee's direction to draft a stand-alone rule on filing and service adapted to criminal litigation, and (2) the Standing Committee's direction to depart from the language of Civil Rule 5 only when justified by significant difference between civil and criminal practice. To achieve these objectives, the subcommittee worked closely with representatives of the Civil Rules Committee, who participated in the subcommittee's teleconferences and were in frequent communication with the reporters. Finally, the subcommittee received the advice of the style consultants.

[2] On April 28, 2016, the Supreme Court transmitted the amendments to Congress.

Judge Feinerman then provided a section-by-section analysis of the proposed amendment to Rule 49, inviting questions and comments from members as he presented each section.

49(a)(1). Judge Feinerman noted that subsection (a) (1) preserves much of the language from the current rule. The language regarding *what must be served* is retained from existing Rule 49(a): "any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper." Parties and courts know what the existing language means, no difficulties have arisen from the current language of the rule, and tinkering with it without a compelling reason could do more harm than good.

The subcommittee proposes, however, a change in the language governing *who must serve*, in order to reverse an unintended change that occurred when the rule was restyled from the passive to the active voice in 2002. That change inadvertently carved out nonparties. The subcommittee recommends a return to the passive construction used prior to 2002, so nonparties (as well as parties) will be required to serve the items described in (a).

Professor King noted that there had been a suggestion that the committee note might include a statement that the amendment did not modify or expand the scope of the rule or change the practice regarding concerning papers, such as discovery, that are disclosed but not necessarily filed or served. Concern had also been expressed about making clear that probation and pretrial services reports were not covered by the amended rule.

Professor Beale added that committee notes cannot change the meaning of the rule, and there is always a question how much explanation should be provided. The proposed committee note does not include language stating that the scope of the papers that must be served has not changed, or language stating that it does not apply to probation and pretrial services reports. Beale also noted that the change to the passive voice in subsection (a) was an example of a point on which the style consultants had yielded to the subcommittee because the passive voice was necessary for substantive reasons. Indeed, the discovery of —and opportunity to correct—the unintended change wrought by restyling was an unanticipated benefit of the current project.

Finally, Judge Feinerman noted that the rule explicitly covers only service "on a party." Although nothing in the existing (or pre-2002) Rule 49 addresses service on nonparties, this does not seem to have caused any problems. The parties generally use common sense in determining when to serve nonparties, and the subcommittee thought it best not to try, at this time, to craft a rule that would apply in all of the situations when a nonparty may file in a criminal case, perhaps causing unintended consequences.

Rule 49(a)(2). Judge Feinerman noted Rule 49(a)(2) was unchanged except for a minor matter of style.

Rule 49(a)(3). Judge Feinerman then moved on the Rule 49(a)(3), noting it was a completely new provision that distinguishes between electronic service and service by other means. The subcommittee felt it was very important to put electronic service, which is the dominant mode of

service, first. Professor King noted that the both the Civil and Criminal amendments now use the language referring to the "court's electronic filing system."

Professor King then drew attention to a difference between the Civil and Criminal proposals, which use different phrasing to describe a situation in which electronic service is ineffective. The Civil proposal says electronic service is ineffective if the server learns that "*it* did not reach the person to be served." In contrast, the subcommittee's proposal provides service is ineffective if the server learns that the person to be served did not receive "the notice of electronic filing" (NEF). The subcommittee thought this language was more accurate.[3]

Members were reminded that the current rule (as well as the proposed civil rule) now treats electronic service differently than other forms of service (such as mail or delivery to a person's office or dwelling). Because of concerns about the reliability of electronic service, Civil Rule 5 (which governs in criminal cases as well) provides that service is not effective if the serving party knows that the electronic service did not reach the party to be served. In contrast, all other forms of service are effective if the serving party takes the specified action (such as mailing), even if for some reason the party to be served does not receive service. The civil and criminal proposals retain this favorable treatment for electronic service, which focuses on the serving party's knowledge that electronic service was not effective.

Discussion turned to the appropriate scope of the exception. Mr. Hatten explained that the clerk's office does not receive bounce back messages, such as "out of office" notices. The clerks do, however, receive a notice if the CM/ECF system was unable to deliver the email, which occurs, for example, when the recipient's mailbox is full. In those cases, the clerk's office will follow up with the recipient of service. As a member noted, it would be a very rare instance in which the serving party learns that CM/ECF service was not effective. A lawyer member wondered if the proposed rule imposed too great a burden on defense lawyers, including those in small firms, who may have no one to monitor their emails. Mr. Hatten responded that in order to use the CM/ECF system lawyers had to agree to receive electronic service, and thus had to have in place a system to monitor their emails.

But a party may learn of and have access to papers that have been served even if the party never received the NEF. For example, a lawyer who did not receive a NEF (because, for example, of a changed email address that was not updated) might nonetheless learn of the document or order and access it from the docket. This would not constitute service under the subcommittee's proposal, which focuses exclusively on the server's knowledge of whether the party to be served received the NEF. (On this point, the phrasing of the Civil Rule, which uses "it," might allow the serving party to argue that the party to be served had received "it.")

The Committee concluded that if the party to be served has indeed received the document by some other means—whether by mail, email, or simply reading the docket—service should be deemed effective. A member moved to amend proposed Rule 49(a)(3)(A) to provide "service . . . is not

[3] This difference was later dropped as part of the effort to eliminate all unnecessary differences between the Criminal and Civil Rules. See note 4, infra.

effective if the serving party learns that neither the notice of electronic filing nor the paper reached the person to be served." The motion passed.[4] One member noted, however, that it might be difficult to determine the effective date of service if it became effective by some means other than receipt of the NEF, such as the party to be served reviewing the docket.

Professor Beale reminded the Committee of the importance of the use of uniform language in the Civil and Criminal Rules on filing and service, and she stated that the reporters would convey the Committee's view on this issue to the representatives of the Civil Rules Committee.

Rule 49(a)(4). Judge Feinerman noted that these provisions were drawn, verbatim, from Civil Rule 5. In general, the subcommittee recognized that it would not be helpful to tinker with the language because the Civil Rules Committee was satisfied with the language. For that reason, the subcommittee did not propose a change in the bracketed language on lines 35-36 unless the Civil Rules Committee would support a parallel amendment to Rule 5.

Rule 49(b)(1). Judge Feinerman noted that the major change from the current rule on filing was to restore the passive construction. He asked the reporters to draw the Committee's attention to key issues. Professor Beale noted that the subcommittee considered, but did not recommend, adding the qualifier "under this rule" between "served" and "together." She noted there are other rules that provide for service by specific means, such as the Committee's pending amendment to Rule 4 governing service on foreign corporations. The Subcommittee concluded that the phrase "under this rule" was not necessary. Where other rules identify specific means of service for certain documents or orders, it seems clear that the more general provisions of Rule 49 are not intended to override them. Moreover, adding the phrase "under this Rule" could engender confusion. The phrase is not included in the current rule, and its addition might suggest, misleadingly, that Rule 49 does not apply to a variety of items that other rules require to be served. Professor King noted that the rules specifying particular forms of service were Rule 4 (summons on corporations), Rule 41 (warrants), Rule 46 (sureties), and Rule 58 (appearances). Professor Beale explained that these rules will continue to coexist with Rule 49, which under (a)(1) governs service and filing of "any written motion . . . , written notice, designation of the record on appeal, or similar paper."

One other point that the subcommittee considered was whether to delete the requirement

[4] After the meeting, the reporters and chair consulted with representatives of the other committees working on parallel drafts concerning electronic filing and service. There was a consensus that time did not permit consideration of this proposal by other committees before submission to the Standing Committee. In light of the importance of consistency in the rules of electronic filing and service, the representatives of the Criminal Rules Committee agreed to delete the new language from the draft of Rule 49 submitted to the Standing Committee. As the representatives of the other committees noted, the proposal would be a change in current law. Before such a change is recommended, the committees should have an opportunity to consider the policy implications, and whether this approach, if adopted, should be applied to other forms of service. The committees can, however, take the proposal up again at a later date. As part of the later effort to reconcile differences between the various sets of rules, Judges Molloy and Feinerman and the Reporters also reviewed and approved a modification to Rule 49 to retain the language of the Civil Rule, that is, stating that service is ineffective if the serving party learns that "it" was not received.

that filing of any paper required to be served must occur "within a reasonable time after service." The subcommittee considered deleting this restriction. Members were not aware of any problem with untimely filing in criminal cases, but decided to retain this provision to parallel Civil Rule 5.

One question that had been left open, reflected in brackets on line 40, was whether the rule should refer at this point to "any person" or "any party." Professor King noted that the Civil Rules Committee had now approved a draft amendment using "any person," which would be adopted as well in the Criminal amendment.

Rule 49(b)(2). Judge Feinerman noted that here, as in (a), the subcommittee proposed places electronic filing first in (b) for the same reasons it placed electronic service first in Rule 49(a). Also, the Subcommittee reasoned, the subsection including the definition what it means to "file electronically" should precede the use of that term. (In contrast, the civil proposal retains the current order of Rule 5's subdivisions, which places nonelectronic filing first.) Professor King stated that there was still a minor styling issue to be resolved ("by using" or some alternative such as "by use of"), which would be resolved in favor of uniformity after consultation with the style consultants and the other reporters and chairs. Professor Beale noted that the Civil Rules Committee just completed its meeting three days earlier. She reminded the Committee that because of the emphasis on uniform language among the parallel proposed amendments, it would be essential for Judges Molloy and Feinerman (with the reporters) to have leeway to agree to necessary stylistic changes as the proposals advance to the Standing Committee. Judge Feinerman agreed, though he observed that if he and Judge Molloy were asked to make significant changes in the proposal approved by the Committee, they would consider seeking approval from the Committee.

Professor Beale also drew attention to the proposed provision regarding a filer's user name and password serving as an attorney's signature, which was closely related to the signature provision in (b)(4). In September, the Committee did not approve provisions on a signature block, which were phrased differently than the current proposal. The new proposal imports the language of Civil Rule 11(a). The subcommittee found it unnecessary to determine whether Civil Rule 11's signature provisions are presently included in Rule 49(d)'s directive to file "in a manner provided for in a civil action." If this requirement is not currently imported by Rule 49(d), the subcommittee thought it would be a desirable requirement as a matter of policy. Accordingly, the subcommittee decided to adopt the language of Rule 11 verbatim. A lawyer member questioned whether it was appropriate to incorporate the language of Civil Rule 11, which requires the attorney's signature in order to impose restrictions on counsel to certify the accuracy of the pleadings. He stressed that the role of defense counsel in civil and criminal cases is quite different: in criminal cases, the defense does not make representations but rather puts the government to its proof. He expressed concern that the signature requirement signaled an unfortunate drift towards the civil understanding of the lawyer's role. Professor King responded that the portions of Rule 11 that are relevant to this member's concern about good faith representations to the court are in Rule 11(b). The subcommittee's proposal, however, imports only the language of Rule 11(a). By importing only this language, the proposal does not bring in any requirements concerning counsel's representations.

Judge Feinerman also drew attention to one other aspect of proposed subdivision (b)(2)(A): the phrase "written or in writing." This language is now in Rule 49(e). The subcommittee favored retaining this language, rather than paring it down, because it captures the variety of phrases now used in the Rules of Criminal Procedure.

Rule 49(b)(3)(A) and (B). Noting that this provision creates a presumption that represented parties must file electronically, but that non represented parties must file by non-electronic means, Judge Feinerman invited the reporters to comment. Professor King reminded the Committee that the new presumption for electronic filing by represented parties was a central goal of the amendment process. It was the proper presumption for unrepresented parties that had originally divided the Civil and Criminal Rules Committees. This Committee took a strong stance that unrepresented parties in criminal cases should not file electronically unless specifically allowed by local rule or court order. The subcommittee's proposal implements that policy choice.

But even with a stand-alone amendment to Rule 49, the Civil Rules are still of concern to the Criminal Rule Committee because of their effect in habeas cases. Professor King noted that Rule 12 of the 2254 Rules, which govern state habeas cases, incorporates the Federal Rules of Civil Procedure unless they are inconsistent with the habeas rules. And the Rules Governing 2254 and 2255 actions are the responsibility of the Criminal Rules Committee.

The proposal just adopted by the Civil Rules Committee provides that unrepresented parties in civil cases may be permitted or required to file electronically by local rules or orders which permit reasonable exceptions. The Civil Rules Committee wanted to provide explicit authorization for existing programs in some districts that now require inmates to file 2254 pleadings electronically. The clerk of court liaison to the Civil Rules Committee is from a district that now has such a local rule, which was designed in cooperation with officials at a local prison. In that institution, prisoners are required to take their 2254 pleadings to the prison library, where the staff members PDF them and then email them to the court. The same system operates in a neighboring district. Officials in these courts and participating prisons are very pleased with the program. The proposed Civil amendment would allow the continuation of such programs. Although the Criminal Rules Committee has no formal role in the approval of the changes to Rule 5, the reporters requested discussion of the Civil Rule so that they could share the Committee's views with their Civil counterparts.

Professor Beale noted that the policy implications of the current Civil proposal are somewhat different from the issues previously discussed by the Committee. At its prior meetings, the Committee took a strong stand against a national rule that would override the current local rules in many districts that do not permit electronic filing by unrepresented criminal defendants. But the current proposal does not override any local rules. Instead, it permits districts to adopt local rules that require—with reasonable exceptions—that unrepresented inmates file electronically. She noted that some districts have large caseloads of inmate filings, and the Civil Rules Committee wants to allow them the option of requiring unrepresented inmates to file electronically.

The proposed Civil Rule states that a local rule requiring unrepresented civil parties to file

electronically must allow reasonable exceptions. This provision requiring reasonable exceptions was added at the subcommittee's request, and it provides some protection against a local rule or order that would otherwise impose an unreasonable burden on state habeas filers.

Mr. Hatten put the proposed Civil Rule into its historical context. The current CM/ECF system began as a program in a single district with a heavy caseload of asbestos cases. It was implemented nationally in waves, allowing changes to be made based on experience. The system was designed solely for courts and attorney filers, not for lay filers. The current resources are designed for those filers, and the clerks do not screen filings. From the clerk's perspective (staffing, resources, and work measurement), he said, lay filers present very different issues. He expressed concern that the proposed Civil Rule seemed poised to expand lay filing nationwide without any redesign of the system or sufficient testing in individual courts.

Professor Beale responded that the Civil Rules proposal allowing local rules requiring unrepresented parties to file could be seen as the kind of step-by-step process that had worked well for electronic filing by attorneys and the courts. At present, these are programs developed by individual districts in conjunction with local correctional officials. They seem to be working well. On the other hand, the reporters are not sure how these local rules mesh with the current Rules Governing 2254 and 2255 Proceedings, which refer to internal prison filing systems for legal mail and inmates depositing papers to be filed showing prepaid postage.

Professor King drew attention to several aspects of the current local rules regarding electronic filing by inmates that were of special concern to the Civil Rules Committee. The inmates do not receive individual access to the CM/ECF system. Rather, officials in the prison library receive the inmates' papers, convert them to PDFs, and then submit them to the court electronically. This has many advantages: it is cheaper and faster than using the mail, and it produces a record of when the paper was sent and received. We do not know exactly how other aspects of these programs work. For example, do inmates in these programs receive NEFs?

There was general agreement that these programs would not work everywhere, and electronic filing by inmates would not be possible in many districts. Justice Gilbertson stated that in South Dakota no state prisoners have access to electronic filing, and most prisoner filings are hand written. Requiring inmates to file electronically in his state would shut down inmate filing. At Judge Molloy's request, Justice Gilbertson agreed to make enquiries about other states through the National Center for State Courts.

A member asked who determines whether a local rule permits "reasonable exceptions," or what constitutes such a "reasonable exception." The reporters stated they had not researched this question, but they pointed out that this phrase is present in current Rule 49(e), as well as its Civil counterpart, Rule 5(d)(3). No one had noted any special problems in connection with the phrase. It seems likely that the proposed Civil rule would be given the same interpretation as the current rules.

Concluding the discussion, Judge Feinerman reiterated the importance of the Civil Rules Committee's inclusion of the requirement that any local rule requiring unrepresented parties to file

electronically must provide for reasonable exceptions. He expressed the hope that this language would accommodate due process concerns and prevent the imposition of unreasonable burdens on inmate filers. He also observed that courts are unlikely to adopt local rules requiring electronic filing by unrepresented inmates without first consulting with prison authorities to determine what is feasible.

Rule 49(b)(4). Judge Feinerman then turned to one feature of subsection (b)(4) that had not previously been discussed: the provision stating that verification of pleadings is not required unless a statute or rule specifically states otherwise. This provision was drawn from the Civil Rules. Judge Feinerman noted it might provide a useful reminder for 2255 filers, because the Rules Governing 2255 actions require verification. Professor Beale agreed that it might provide a useful clarification for filers in 2255 cases. Additionally, because this language is included in the Civil Rules, its exclusion from Rule 49 might lead to a negative implication. Since the language might have some value and could do no harm, she concluded that it seemed best to parallel the Civil Rules.

Rule 49(c). Judge Feinerman explained that this provision makes explicit that nonparties may file and serve in criminal cases. Unlike the other provisions already discussed, he pointed out, (c) does not distinguish between represented and unrepresented nonparties. All nonparties are presumptively required to file by nonelectronic means. He identified several reasons for requiring nonparties to file outside the CM/ECF system. First, the architecture of the CM/ECF system is designed to permit only the government or a defendant to file electronically. Even a registered attorney user cannot file in a criminal case unless the attorney indicates that he represents either the government or a defendant. Second, members had informed the Subcommittee that many nonparty filers prefer not to use the CM/ECF system. Finally, victims may file material that should not go into the system and be available to all parties. The rule does allow the court to permit a particular nonparty to file electronically (with the assistance of the clerk), and it gives districts the option of adopting local court rules that allow nonparties to file electronically.

Judge Feinerman noted that the proposed rule does not refer to filings by probation or pretrial services, which are neither parties nor nonparties ("neither fish nor fowl"). Because probation and pretrial services do file their reports electronically in some districts, he raised the question whether the committee note should be amended to make it clear they were not covered by Rule 49. Although there has been no question of the applicability of the current rule to probation and pretrial services, the addition of (c) now makes the application of the rule to nonparties clear. Members discussed the practice in their own districts. In some, probation and pretrial services did not use the CM/ECF system, but in others all of their reports were filed using CM/ECF (though presentence reports and some other documents were sealed). Professor Beale observed that everyone agreed that when the court issues an opinion, it is not governed by Rule 49. Since pretrial services and probation are arms of the court, the Subcommittee thought they were distinguishable from the parties and nonparties governed by the rule.

A motion was made to add language to the note stating that the rule was not applicable to the court or its probation and pretrial services divisions, but it was withdrawn after discussion. Professor

Coquillette reminded the Committee of the limited function of committee notes. A member noted that the Federal Defenders are also, as a matter of organization, a part of the court, but they are of course subject to Rule 49. Another member stated that he did not see a problem that required any change. Everyone understands that probation and pretrial services are part of the court and not covered by the Rule. The member who had made the motion withdrew it.

Rule 49(d). Judge Feinerman then turned to the last subsection of the proposed rule, which requires the clerk to serve notice of the entry of the court's order, and allows a party to serve the notice. He stated that the language in the Subcommittee draft was drawn from Civil Rule 77(d)(1), and its inclusion was consistent with the general presumption in favor of incorporating the relevant provisions of the Civil Rules. Professor Beale noted the interaction between the notice provisions and FRAP 4. FRAP 4(a) governs civil appeals, and 4(b) governs criminal appeals. Although the impact of the provision allowing a party to give notice would be somewhat different in civil and criminal cases, she observed that it seemed to have sufficient utility in criminal cases to justify its inclusion. Under FRAP 4(b), the notice given by a party might be relevant to a defendant's efforts to establish excusable neglect or good cause for a late filing. The Subcommittee had no strong feelings about this provision. Beale stated that in her view, since this provision was in the Civil Rule, might have some benefit in criminal cases, and would do no harm, it was appropriate to include it.

There was a motion to approve the Subcommittee draft, as amended, for transmission to the Standing Committee with the recommendation that it be published for public comment, with the provision that Judge Molloy, Judge Feinerman, and the reporters would need to work with the other committees, and it might be necessary to make minor changes for consistency with the other proposed amendments.

The Committee voted unanimously to approve the proposed amendments to Rule 49, as amended, to transmit them to the Standing Committee, and to recognize the authority of the Committee chair, Subcommittee chair, and reporters to make minor changes to conform to the language of parallel proposals from other committees.

Discussion of the committee note was deferred until after the lunch break, to allow the reporters to determine what revisions would be required in light of the amendment to proposed Rule 49(a)(3)(A).

Judge Feinerman turned next to the Subcommittee's proposal to amend Rule 45. He explained that Rule 45(c) currently refers to several subsections of Civil Rule 5 describing different means of filing. As part of creating a stand-alone rule on filing and service, the Subcommittee's proposal incorporated these forms of service into Rule 49. Accordingly, the Subcommittee proposed an amendment replacing the cross references to Rule 5 with the appropriate cross references in Rule 49. Ms. Womeldorf and Professor Coquillettee confirmed that because this would be a technical and conforming amendment, it was not necessary to publish it for public comment. On the other hand, failure to publish now with the Rule 49 proposal might lead to some confusion and produce comments suggesting the need for such an amendment. Publication would make it clear that the

Committee was aware that its proposed amendment to Rule 49 would require this technical and conforming amendment. Under these circumstances, the reporters recommended publication.

The Committee voted unanimously to approve and transmit the proposed amendment to Rule 45(c) to the Standing Committee with the recommendation that it be published for public comment.

Judge Kethledge presented the report of the Rule 12.4 Subcommittee. The current rule, he explained, provides that if an organization is a victim, the government must file a statement identifying the victim; if the organizational victim is a corporation, the government must file a statement identifying any parent corporation and any publicly held corporation that owns more than 10% of the victim corporation's stock, or stating that there is no such corporation. Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the committee note stated that the purpose of the disclosures required by Rule 12.4 is to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings."

In light of the amendment to the Code of Judicial Conduct, the Department of Justice asked the Committee to consider amending Rule 12.4 to restrict the scope of the government's required disclosures. It emphasized the difficulty of complying with the rule in cases with large numbers of organizational victims each of whom has sustained only a de minimus injury. The archetype, he said, was an antitrust prosecution where many victim corporations have paid a few cents more for a common product, such as a software program.

The Subcommittee agreed that the government had presented a persuasive case for bringing the rule in line with the change in the Code of Judicial Conduct in order to relieve the government of the burden of disclosure in such de minimus cases.

In drafting the language of its proposed amendment, the Subcommittee responded to feedback Judge Molloy had received from the Standing Committee. Standing Committee members stressed the importance of retaining judicial control. If the rule is to be revised, the court, not the government, should decide whether disclosure was needed in individual cases.

The Subcommittee recommended an amendment relieving the government of the burden of making the disclosures when it can show "good cause" for that relief. This standard, Judge Kethledge explained, retains judicial control and allows the court to balance the burden of disclosure against the risks of non-disclosure. Under a good cause standard, the court makes a holistic determination, rather than looking solely at the harm to the corporate victim.

The style consultants objected that "good cause" was a vague standard, but Judge Kethledge stated the Subcommittee strongly disagreed and viewed the matter as one of substance rather than mere style. Courts have a great deal of experience with the good cause standard,

which is used in many other Federal Rules of Criminal Procedure. In contrast, the standard suggested by the style consultants—"minor harm"—is not used in any other Federal Rule of Criminal Procedure, it is not used in the Code of Judicial Conduct, and it would not allow the court to look at the overall balance of the burden of disclosure against the risks of non-disclosure.

Professor Beale stated that similar language was under consideration by the Appellate Rules Committee; the reporter for that committee had consulted with the Criminal Rules reporters and participated in the Subcommittee's telephone conferences. However, the Appellate Rules provision concerning disclosures regarding corporate victims was a small part of a larger project which was not yet ready for presentation to the Standing Committee. She noted that the current draft under consideration by the Appellate Rules Committee included not only corporations, but also other "publicly held entities." Noting that the reporters were not sure precisely what that phrase would include, she asked if Judge Kethledge or others had a view on whether similar language should be added to Rule 12.4. Judge Kethledge stated that he had no strong view. Speaking for the Department of Justice, Ms. Morales stated that the Department was satisfied with the proposal as it stood, without that phrase.

Judge Kethledge then turned to the proposed amendment to Rule 12.4(b), explaining that it was a modest proposal that had merit but likely would not have advanced on its own. But if we do amend Rule 12.4, it would be useful to set a fixed time for the disclosures, and to make it clear that not only changed, but also new information should be disclosed. In response to a member's comment that the rules now generally state time in multiples of seven, Judge Kethledge and the reporters took this as a friendly amendment. Although 30 days falls just over the line into the longer time periods that do not have to be divisible by seven, it seemed desirable to revise the time period here to 28 days.

A member also expressed concern with the wording of the Subcommittee's proposed amendment to Rule 12.4, because it did not explicitly state that new information must be disclosed only if it falls within the scope of the disclosures required by the rule. Although that is implied, lawyers might argue for a broader interpretation. Members suggested various formulations, and a motion was made to revise (b) to require the government to provide a supplemental statement "if the party learns of *any* additional *required* information or any required information changes." The motion also contained the friendly amendment making the time for filing 28 days after the defendant's initial appearance. The motion passed unanimously. Professor Beale reminded the Committee that this language was subject to revision by the style consultants.

The Committee then unanimously approved the proposed amendment to Rule 12.4, as amended, for transmission to the Standing Committee with the recommendation that it be published for public comment.

Discussion then turned to the proposed committee note. Members suggested deleting two phrases—"in relevant cases" and "the government alleges." Judge Kethledge agreed that they

were not necessary, and accepted those suggestions on behalf of the Subcommittee. The proposed committee note was also revised to refer to 28, rather than 30, days.

The Committee voted unanimously to approve the committee note to Rule 12.4, as amended, for transmittal to the Standing Committee with the recommendation that it be published for public comment.

Following the lunch break, the reporters presented language amending the committee note to take account of the change in subsection (a)(3)(B) of the amendment to Rule 49. The proposed language stated that "(A) provides that electronic service is not effective if the serving party learns that neither "the notice of electronic filing" nor the paper to be served reached the person to be served."[5]

The Committee voted unanimously to approve the committee note to Rule 49, as amended, for transmittal to the Standing Committee with the recommendation that it be published for public comment.

Judge Dever, chair of the Rule 15 Subcommittee, informed the Committee that the Department of Justice had withdrawn its request for consideration of an amendment to address the inconsistency between the text of the rule and the committee note regarding the expenses of certain depositions requested by the defense. Ms. Morales explained that the Department was withdrawing its proposal because there had been so few instances in which the rule might create a problem that it did not seem possible to show a need for a rules change at this time. However, the Department intended to return to the Committee if it confronted a problem in a significant number of cases.

Introducing the next item on the agenda, Judge Molloy explained that, with the aid of a study prepared by the Federal Judicial Center (FJC), the Committee on Court Administration and Management (CACM) had studied the problem of threats and harm to cooperating defendants, and had endorsed recommendations that would necessitate changes in the Federal Rules of Criminal Procedure. After discussion at the January 2016 meeting of the Standing Committee, the matter was referred to the Criminal Rules Committee. Judge Molloy then appointed a subcommittee, chaired by Judge Lewis Kaplan, to consider the FJC study and CACM's recommendations.

Judge Kaplan reported on the Subcommittee's actions and sought input from members who are not on the Subcommittee. The starting point for the Subcommittee is that CACM concluded, based on the FJC study, that there is a national problem with cooperators being identified and then either the cooperator being threatened or harmed, or the cooperator's family being threatened or harmed, or others being deterred from cooperating. The FJC determined that to some degree the information used to identify these cooperators comes from court documents.

[5] Because the change to the proposed text of the rule that prompted this amendment to the note was later deleted, this change to the proposed Committee Note was deleted as well. See note 4, supra.

Accordingly, CACM concluded that a uniform national measure, including changes to the rules and a great deal of sealing, was required. CACM felt sufficiently strongly that it recommended these procedures be adopted as an interim measure by local district rules. The recommendations seek to prevent the identification of cooperators by making all plea agreements look identical, requiring every agreement to include an unsealed portion and a sealed portion that contains either the cooperation agreement or a statement that there is no cooperation agreement. Similarly, the minutes of all plea proceedings would also contain a sealed portion for any discussion of cooperation. Thus if someone examines the court records, there is no indication which cases involved cooperation.

After receiving CACM's recommendations, the FJC study, and a background memorandum from the reporters, the Subcommittee held a lengthy and productive telephone conference to get the initial reaction of members. Judge Kaplan summarized the Subcommittee discussion. First, there was agreement that any retaliation against cooperators is very serious, and the Committee should think very hard about any measures that would address it. However, other institutions, especially the Department of Justice and Bureau of Prisons, also have a role to play. Subcommittee members also voiced a variety of concerns and raised many questions:

- How widespread is the problem? The FJC study provided anecdotal evidence concerning 400-600 instances of harm or threats, but approximately 10,000 defendants receive credit for cooperation each year.
- To what extent would the cooperators be identified even if the sealing recommendations were followed? In other words, would the recommendation solve the problem?
- What impact would the CACM recommendations have on the defense function? The defense relies on research regarding cooperation to impeach and to argue for proportional sentencing.

The Subcommittee concluded by asking the reporters to gather additional information on the following questions:

- How big is the problem compared to the universe of cooperators?
- Do identifiable classes of cases account for most of the incidents?
- Are there important geographic variations?
- How does the incidence of problems compare with the widely varied approaches taken in different districts?

The reporters were also asked to prepare a memorandum on the First Amendment issues raised by CACM's recommendations. Judge Kaplan noted that in his circuit the court of appeals has severely restricted sealing practices.

Before the Subcommittee's next telephone conference in July, further information will be gathered from the FJC and the Department of Justice. The Subcommittee asked the Department

of Justice for its position regarding CACM's interim and long term proposals and requested additional information about the Department's practices.

Judge Kaplan then asked Committee members for their initial thoughts about the problem and CACM's recommendations.

Many members agreed that retaliation against cooperators is a serious problem, and that the Committee had a responsibility to consider potential solutions. One member described it as a moral obligation to do whatever we can to protect cooperators and not to implement or maintain procedures that could discourage cooperators. Another member noted that although he was not generally in favor of sealing, courts now seal for reasons such as the protection of trade secrets. Preventing harm to cooperators is certainly at least as pressing a reason for sealing. If our records are being used, we have to figure out what we can do to be part of the solution.

But members also raised a variety of concerns and questions about CACM's proposals.

Several members spoke of the need for more information about the scope of the problem and the degree to which it arises from court records. Several members noted that violent threats to cooperators were much more likely in certain kinds of cases (such as cases involving gangs, drugs, terrorism, and organized crime) than in white collar prosecutions. There may also be differences among districts. A member noted that in sparsely settled areas everyone knows who is cooperating, and sealing would have no effect. Members also expressed the need for more information about the connection between the records that could be sealed and the potential for threats and harm. One member stated that criminal defendants and inmates are resourceful, and they have many different ways to identify cooperating defendants without court records, including continuances, absences at status hearings, and Rule 35 motions. Other members agreed that it would be important to determine whether the recommended procedures would make a big difference in reducing threats and harm to cooperators. Members noted, however, that this will be difficult to determine for many reasons. Although we can identify cooperators who have been threatened or harmed, the threat or harm may have been the result of some interaction in the prison, not the cooperation. Similarly, family members may not know the reason for a threat or assault. It will be difficult to be certain how helpful a rule change would be.

A member noted that the experience in that member's district raised questions about the causal connection between sealing and threats/harm: that member's circuit was among those that most severely restricted sealing, but the member's district also had one of the lowest rates of threats/harm to cooperators.

Lawyer members expressed concern about the effect of CACM's proposal on their ability to represent their clients effectively. A member who represents both cooperating and non-cooperating defendants described various ways sealing would hamper the defense.

- Sealing would make it impossible to research disparity in sentencing. In the member's district, failure to conduct that research constitutes ineffective assistance of counsel.

- Sealing would make counseling clients much more difficult.
- Sealing would hamper the ability to challenge racial disparities.
- Sealing would limit access to exculpatory material, even when prosecutors try in good faith to comply with *Brady*.

Another lawyer member noted that there may be a serious problem of retaliatory threats/harm in certain kinds of cases, such as terrorism or gang cases, but a national rule requiring sealing in all cases would also make it more difficult to effectively represent defendants in white collar cases, which present no threat of violent retaliation.

A member agreed that the Committee would need to determine how much the current rules are contributing to the problem of threats/harm; consider whether a rules change could solve the problem; and address objections including ineffective assistance of counsel, *Brady*, and the First Amendment.

Another member added other issues that should be explored. The first is a comparing the effectiveness of sealing to other alternatives that might address the problem. It would be important to know if sealing would make a significant difference. Second, it would be helpful to understand exactly what the FJC counted as physical harm in order to gauge the seriousness of the problem.

A member who had participated in CACM's deliberations stated that the FCJ study and the findings made by Judge Clark after an evidentiary hearing demonstrated the existence of a problem. The member noted that CACM had raised many of the same questions now being asked by the Committee. It is important to determine the prevalence of the problem of threats/harm to cooperators and whether it is limited to certain kinds of cases or geographic areas. It would also be very helpful to have information about the experience of cooperating defendants from the District of Maryland, which already follows the procedures CACM is recommending. Has it solved the problem?

The Department of Justice representatives, Ms. Shapiro and Ms. Morales, stated that the Department has not determined its position on the CACM proposals for interim rules in the district courts and changes in the Rules of Criminal Procedure. Ms. Shapiro was a member of the privacy subcommittee of the Standing Committee, which held the Fordham conference in 2010. At that time the Department was unable to reach an internal consensus on the best approach. It surveyed the districts at that time and is updating that survey now. In 2010, practices in the districts varied, and judges in each district were committed to their own practices and thought them most effective.

Ms. Morales expressed the view that it would be very difficult to trace particular harms/threats to rules that could be amended. Even if we can identify cooperators who have been harmed, we won't know why they were injured. It could have been because of a dispute in the prison. We can identify the individuals who get Rule 35 or 5K sentencing reductions for cooperation, but they are only a subset of the cooperators. Many other individuals may have

cooperated at some point, but not to the degree necessary to get a Rule 35 or 5K reduction. So it will be hard to get enough information to feel comfortable that we can assess the impact of the current rules or of changes in the rules.

Professor Coquillette emphasized Judge Sutton's hope that the Subcommittee and the full Committee will take a broad view of the issue. If the Committee determines that it is not a problem that can be solved by amending the rules, it would be beneficial for it to remain engaged, be aware of what is being studied and considered by other constituencies, and be as helpful as possible.

Margaret Williams, who was one of the authors of the FJC report prepared for CACM, was present at the meeting and was asked to comment. She stated that the FJC data would permit an analysis of whether the frequency of threats/harms varies from district to district. But the FJC's data will not answer other issues that have been raised. The survey did not ask about the types of cases in which there had been threats/harm (though some respondents volunteered that information). As noted by a member, Maryland has sealing procedures like those recommended by CACM, but those procedures were already in place at the time of the FJC's study. So the FJC its data would not permit a "before and after" analysis of the effect of sealing.

Judge Kaplan thanked the members for their responses, and commented that it was likely there would be a lot of unknowns at the end of the Subcommittee's work.

The Committee turned next to new suggested amendments.

Professor Beale briefly described 15-CR-D, from Sai, which proposed multiple changes: (1) redaction of the last four digits of social security numbers in pleadings; (2) sealing of affidavits in support of applications for appointed counsel; (3) providing unpublished materials cited in pleadings to pro se litigants; and (4) electronic filing for pro se litigants. The suggestion had been addressed to all of the rules committees. The other committees had already held their spring meetings, and Professor Beale explained the actions they had taken.

Regarding the proposal to redact the last four digits of individual social security numbers, Professor Beale reported that the other committees had all agreed that the Rules Committees should not take this issue up. Rather, it should be referred to the Committee for Court Administration and Management, which made the policy decision reflected in the current rules, and is in the best position to do research and consider tradeoffs. Professor Beale noted that she and Professor King recommended that the Committee take the same approach.

With regard to the sealing of affidavits, Professor Beale noted that the Civil Rules Committee was not, at this time, moving forward with this suggestion. A member noted, however, that applications for appointments under the Criminal Justice Act are already filed ex parte under seal. So on the criminal side, no further action is needed.

With regard to requiring litigants to provide copies of unpublished opinions to pro se

litigants, the Civil Rules Committee had decided not to move forward at this time. This may be a good practice, but is not necessarily something that should be mandated in a national rule.

Finally, with regard to the question whether pro se litigants should be permitted to file electronically using the CM/ECF system, that proposal was at odds with the Committee's decision to preclude such filing in the proposed amendment to Rule 49 absent a court order or local rule.

After a brief discussion, the Committee concurred in the decision to refer the question of the last four digits of Social Security numbers to CAMC, and it decided to take no further action on the other proposals.

The next suggestion, 15-CR-E, from Robert Miller, also proposed that indigent parties be allowed to file in the CM/ECF system. Judge Molloy and Professor Beale agreed that like 15-CR-D, this proposal had been considered and rejected by the Committee's action in approving the current proposal to amend Rule 49.

The next suggestion, 15-CR-F, came from Judge Richard Wesley, who drew a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings to the Committee's attention. The Rule states that "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Some courts have held that the inmate who brings the 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts (and the committee note) treat this as a right.

Professor Beale solicited the advice of the style consultants on language that might respond to this split and clarify that the rule was intended to create a right to file. She noted that the consultants thought the rule's current language clearly creates a right, and there should be no need to clarify the language. But confronted by the split in the lower courts, they did suggest some language that might be employed to make this clearer.

Professor King noted the 2255 caseload is very heavy in some districts and courts must process these cases quickly. She surmised that the courts that ruled an inmate has no right to file may have been looking at pre-2004 precedents without realizing that the rule was modified in 2004 to provide for a right to reply. She summed up the reasons in favor of putting this proposal on the Committee's agenda for further study:

- A rule is causing a problem. Inmates in some courts are not being given the opportunity to file a reply as intended by the 2004 revision.
- Although the style consultants believe the text is clear now, the split in the lower courts demonstrates that courts are not finding it to be clear.
- The decisions not recognizing the right to file a response may seriously affect inmates who may have a persuasive response but are not permitted to file it.

Professor King acknowledged that we do not know precisely how many cases would be affected

by a clarification of the rule. However, the suggestion did come to the Committee from a member of the Standing Committee, which indicated that the Standing Committee might be receptive if the Criminal Rules Committee considered an amendment.

Judge Molloy informed the Committee of his intention to form a subcommittee to address Rule 5(d), and members were invited to make comments that might be helpful to it. Professor King noted that one issue for the subcommittee would be whether there was also a need to clarify the 2254 Rules. Another issue was whether the rule should specify a presumptive time for the filing of a reply. In 2004, the Committee felt there was no reason not to permit an inmate to file a reply to the government's response. But the Committee chose not to set a presumptive time for filing. The style consultants questioned this omission, noting that other rules specify time limits for filing.

Members discussed their practices concerning the time for filing a reply in 2255 cases. Several members set a briefing schedule giving the government 28 days to respond to the petition, and the inmate 21 or 28 days to respond. One judge who set such a schedule noted that he had never turned down a request for an extension of time. Several other members noted they typically set similar schedules: 28 days for the government and 28 for the respondent.

Later in the meeting, Judge Molloy announced that he was appointing the following to serve on the Rule 5 Subcommittee:

Judge Kemp, chair
Ms. Brook
Judge Dever
Justice Gilbertson
Mr. Hatten
Judge Hood
Ms. Morales (Department of Justice)

The next suggestion, 16-CR-A, came from James Burnham, who proposed that Rule 12(b)(3)(B)(v) be amended to make it clear that the standard for the dismissal of a criminal indictment is the same as the standard for the dismissal of a civil complaint under Civil Rule 12(b)(6). Professor Beale commented that the proposal presents the policy question whether criminal practice should be brought closer to the civil model.

A member who said he was "intrigued" by the proposal presented a recent example. Several elderly men had cut through several levels of security fences to gain entry to a nuclear facility, where they prayed. They did no other harm to the facility. After they refused to plead to a more minor offense, the government added a more serious charge that required an intent to harm the national defense. The defendant's conviction was reversed on appeal. The appellate court held that as a matter of law the facts established by the prosecution could not prove the necessary intent, and thus did not constitute sabotage. Although the appellate court concluded that the conduct in question did not, as a matter of law, constitute the offense charged, at the trial

court level there had been a jury trial and a lengthy sentencing hearing. The member, who noted that there is a slight difference in the language of the civil and criminal rules, acknowledged that he did not know whether there are also significant differences in the pleading rules in criminal and civil cases.

Judge Molloy observed that the pleading practices are set by the appellate rulings holding that an indictment is sufficient if it states the date and parallels the language of the offense that has been charged.

Another member expressed interest in the proposal but thought it was unlikely to be adopted. He noted that a mechanism to raise claims already exists. As amended in 2014, Rule 12 of the Rules of Criminal Procedure provides for a pretrial motion to challenge "a defect in the indictment or information, including . . . failure to state an offense." But circuit law determines what constitutes failure to state an offense. The Second Circuit will uphold a conviction if the proof is sufficient and not inconsistent with the indictment, which may be bare bones.

A member responded that minimal pleading in criminal cases is hundreds of years old, not something new. This looks like a proposal to return to the old common law pleading rules. He is sympathetic to the problem this poses for defendants, but it's a problem about the pleading standards.

A judge member stated that with indictments stated in broad general terms and very limited pretrial discovery he does have occasional cases in which defense counsel at the pretrial conference says that he or she still does not know what the defendant is being accused of. The issue is closely connected to discovery. The member expressed interest in exploring the question whether the government could be required to be more specific at some point: if not at the outset, then at some point before trial.

Speaking for the Department of Justice, Ms. Morales said that the Supreme Court has ruled that the pretrial notice requirements are met by an indictment issued by a grand jury. This proposal seeks to create new substantive rights, which is beyond the authority of the Rules Committee.

Judge Molloy asked whether Mr. Burnham's objections could be met by a rules change, or were really objections to how the courts have interpreted the rule. Two members responded. One noted that Burnham had proposed specific language to amend Rule 12. Another said this was not really a proposal about changing the language of Rule 12, and that it sought a substantive change that would raise issues under the Rules Enabling Act.

A member described how the rule works in cases brought under RICO, where the government is alleging a pattern of racketeering activity that may extend over a decade or more. According to the precedents, the government can meet the pleading requirements and avoid pretrial dismissal of the indictment with language paralleling the statute defining the offense and the dates involved. Prosecutors have an incentive to do that in order to avoid post trial claims of

some variance between the allegations in the indictment and the proof.

Some members returned to the idea that this is a sufficiency of the pleading issue. One stated that although Rule 7(c) requires a "plain, concise, and definite statement of the offense charged," the level of detail that courts accept in criminal cases is less than that required in civil cases. Another member stated that it appears more conclusory language is allowed in criminal than in civil cases.

A member stated that he was not in favor of moving forward with the proposal. He stated it would have significant implications of requiring more specificity for terrorism cases. The Department of Justice is reluctant to provide a high level of specificity in the charging documents that might reveal intelligence means and methods. During the pretrial period, under the Classified Information Procedure Act (CIPA), more specifics are provided in a manner that protects national security. Moreover, the proposal would invite in criminal cases the kind of costly, repetitive, and lengthy pretrial motions practice that now occurs in some kinds of civil cases, including big financial cases, antitrust cases, and securities class actions. If a judge needs to take control of a case to get to the core, the judge has ample tools to do so now.

Judge Molloy announced that he did not intend to set up a Subcommittee to pursue the proposed amendment to Rule 12.

Professor Beale presented 16-CR-B, from the National Association of Defense Lawyers (NACLD) and the New York Council of Defense Lawyers (NYCDL), which proposes that Rule 16 be amended to impose additional disclosure obligations on the government in complex cases. NACDL and NYCDL assert that prosecutorial discovery is a problem in complex cases that involve "millions of pages of documentation," "thousands of emails," and "more gigabytes of information." They based their proposal on orders frequently issued by courts in the Southern and Eastern Districts of New York. It provides a standard for defining a "complex case" and steps to create reciprocal discovery.

At Judge Molloy's request, the reporters briefly described the history of other attempts to amend Rule 16 to require the government to provide additional pretrial discovery. Professor Beale noted that proposals to amend Rule 16 have been defeated in the Criminal Rules Committee, in the Standing Committee, at the Judicial Conference, and in Congress. She reminded the Committee that the Rules Enabling Act process is, by design, conservative: it sets up multiple points at which a controversial proposal may be stopped. She also noted that the Department of Justice had strongly opposed amendments to Rule 16, but had itself implemented many non-rule solutions, including amendments to the U.S. Attorneys' Manual. She reminded the Committee that 18 U.S.C. § 3500 imposes serious limits on certain forms of pretrial disclosure and reflects many of the interests the Department was seeking to protect in its advocacy in the rules process. She briefly described two attempts to amend the rule during her time as reporter. The first time, after the Department took the unusual step of inviting Committee members to participate in its efforts to revise the U.S. Attorneys' Manual as an alternative to revising Rule 16, a sharply divided Committee approved an amendment that was

rejected by the Standing Committee. The second time, responding to a letter from Judge Sullivan after the Stevens prosecution, the Committee asked the Federal Judicial Center (FJC) to survey the views of judges, defense lawyers, and prosecutors concerning the need for an amendment. The responses from judges were sharply split, and the Committee, despite a great deal of effort, was unable to formulate a beneficial revision to Rule 16 that would not run afoul of 18 U.S.C. § 3500. Accordingly, the Committee pursued other alternatives, working with the Benchbook committee to encourage judges to supervise discovery.

Ms. Hooper, one of the FJC researchers who conducted the discovery study, stated that the survey found that district judges were evenly split on whether they perceived a problem with prosecutorial failure to disclose exculpatory evidence, 90% of defense lawyers perceived a problem, and prosecutors did not perceive a problem.

Judge Molloy asked whether the judicial members had standing orders similar to the NACDL/ NYCDL proposal. One judge member stated that although he had presided over many cases that would fall within the proposal, he did not have a standing order because every case is different. In a complex case, the trial judge has to require the government to make expedited discovery (which varies depending on the case) so that the defense has adequate time to absorb. Also, if the government has the information in a form that will facilitate the defense getting into it, it must be provided in that format, e.g., hard drives in a certain format. He has ordered CJA funds for technical people to organize the electronically stored information for the defense.

The member expressed the view that it is hard to legislate wisdom for trial judges. The trial judge must get into the case far enough to determine what's required for that case. And it's not appropriate to force a case with a huge amount of documents and witnesses to trial on the normal schedule. Experienced judges understand without being told, or given specific overbroad definitions. In some cases in which enormous quantities of information may be produced, but only a tiny fraction of that material will be relevant.

Other judicial members agreed that these issues are handled by judges on a case-by-case basis, and that it was not clear whether there was a need for rules and metrics. As the case proceeds, defendants and issues may be dropped and what could have been a complex case is no longer.

A practitioner member whose practice regularly includes complex cases responded that courts don't understand the defense perspective, and how hard it is for the defense in cases with, for example, 100,000 taped conversations, to identify specific pieces of evidence that are relevant to the government's theory and to your own case. The only way this can work is for the government to identify the data it will rely on to prove its case. He agreed, however, with the premise that no one-size-fits-all rule works for all cases. But many judges now take a one-size-fits-all approach, and that approach is simply to follow Rule 16. The Rule needs an escape clause for a small set of cases that require special treatment, not a routine application of Rule 16. Although the member did not agree with every provision in the NACDL/NYCDL proposal (which was more like a regulation than a rule), the main point is that an amendment is needed for

this subset of cases because some judges continue to apply Rule 16 in complex cases without any adjustment, which makes it impossible to mount a defense and forces defendants to plead guilty. The member reiterated that some judges do not understand what the defense must do in these cases, so they seek to move their dockets and are reluctant to impose a burden on the government.

The member advocated for something "simple" that would recognize a category of complex cases that require different treatment (e.g., requiring the government to identify its exhibits in advance) and allow the defense adequate time for preparation, but also require reciprocal defense discovery. The member was more concerned at this point about the concept of what is needed—special class of cases requiring special procedures—than the specifics.

Another member opposed moving forward with the proposal, because it was better to leave this to the discretion of judges than to try to legislate with the rules. He emphasized that the complexity of cases can vary on multiple dimensions, particularly the nature of the case and the makeup of the defense team (which could be two local lawyers or 50 lawyers in three law firms in different countries). He also predicted that the Department of Justice would strongly oppose the proposal because of the impact it could have in national security cases. He favored leaving this to judicial discretion, which is more flexible than a rule.

Another member urged consideration of the impact of complex cases on CJA lawyers, who do not have the resources of Federal Defender offices, noting that judges are not familiar with the situation CJA lawyers face in complex cases. The member strongly supported the creation of a subcommittee to try to develop an approach that would preserve judicial discretion but send a signal to judges to modify procedures in complex cases.

Speaking for the Department of Justice, Ms. Morales first stated that the Department distinguished between the current proposal and more general prior attempts to modify Rule 16. But the Department still does not think a rule is the best way to deal with these issues. The Department has worked hard with the defense bar to develop guidance for judges on electronic discovery, which led to a pocket guide. That kind of collaboration is nimble and can change quickly as the technology changes. Technology is a moving target. The Department favors a focus on developing best practices and guidance, not specific prescriptive rules.

A member agreed this is a significant issue, and is related to the broader issue of electronic data and discovery, which is being studied by another committee. That committee has been conducting hearings, and has heard repeatedly of the problems encountered by individual CJA lawyers, who lack the knowledge and resources of the Federal Defenders. He noted, however, that it was not yet clear whether this problem is a rules problem.

Judge Molloy announced the appointment of a Rule 16 Subcommittee to study the proposal and the more general issue:

Judge Kethledge, chair

Mr. Filip
Judge Feinerman
Mr. Kerr
Ms. Morales, for the Department of Justice
Mr. Siffert

Professor Beale introduced the last agenda item. She explained that in bankruptcy cases there are routine filings of containing large amounts of personal data that should be redacted. In some cases, a failure to redact has been discovered. Although bankruptcy courts have general taken action to redact material in such cases, the Bankruptcy Committee thought it would be desirable to add a rule providing for such retroactive redaction. When the Bankruptcy Committee presented this to the Standing Committee as an information item, the Standing Committee encouraged the Civil, Criminal, and Appellate Committees to consider whether a similar rule would beneficial.

The issue was being presented at this meeting to get members' initial reactions, with the expectation that it would be on the fall agenda for a more extended discussion. Professor Beale asked for initial reactions on several questions. Had members encountered cases in which information that should have been redacted was filed in a criminal case? If so, did they think a rules change to deal with those cases would be beneficial? And if members had not encountered the problem, might it be beneficial to adopt a rules change to parallel the Bankruptcy rule? This would provide a mechanism to deal with the few cases that might arise in the future, and would avoid the negative implication that might arise from a comparison with the Bankruptcy Rule authorizing retroactive redaction.

Several members said they had encountered failure to redact material in a few cases. In each case the court or the party that failed to make the required redaction took corrective action. In some cases the clerk of court restricted access to a document while corrective action was taken. Professor Beale summed up the responses: failure to redact as required by Rule 49.1 does occur occasionally in criminal cases, and courts have been dealing with it successfully. One judge expressed an interest, if a retroactive redaction procedure is developed, to include a requirement of an explanation of the failure to make the redaction and/or to discover the failure in a timely fashion. Professor Beale stated that the reporters would collaborate with their colleagues on the other committees on these issues. They would consider the argument that a rule providing guidance would be valuable, but also the fact that the issue arises only infrequently and courts have been dealing with it successfully.

Finally, Judge Molloy noted the next meeting of the Committee will be September 19-20 in Missoula, Montana. His tentative plan is to meet in the fall of 2017 in Chicago, and perhaps in New York in the fall of 2018. The next two spring meetings be in Washington, D.C.,

The meeting was adjourned.