ADVISORY COMMITTEE
ON
CRIMINAL RULES

Chicago, IL
October 24, 2017

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October 24, 2017
Chicago, IL

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	Judge Pamela Pepper	***(Bankruptcy)***
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Liaisons for the Advisory Committee on Civil Rules	**Peter D. Keisler, Esq.**	***(Standing)***
	Judge A. Benjamin Goldgar	***(Bankruptcy)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaisons for the Advisory Committee on Evidence Rules	**Judge Jesse Furman**	***(Standing)***
	Judge Sara Lioi	***(Civil)***
	Judge James C. Dever III	***(Criminal)***

Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date	End Date
Donald W. Molloy Chair	D	Montana	Member: ---- Chair: 2015	2018
Kenneth A. Blanco*	DOJ	Washington, DC	----	Open
James C. Dever III	D	North Carolina (Eastern)	2014	2020
Donna Lee Elm	FPD	Florida (Middle)	2017	2020
Gary Scott Feinerman	D	Illinois (Northern)	2014	2020
Mark Filip	ESQ	Illinois	2013	2018
Denise Paige Hood	D	Michigan (Eastern)	2015	2018
Lewis A. Kaplan	D	New York (Southern)	2015	2018
Orin S. Kerr	ACAD	Washington, DC	2013	2019
Raymond M. Kethledge	C	Sixth Circuit	2013	2019
Joan L. Larsen	JUST	Michigan	2016	2019
Bruce J. McGiverin	M	Puerto Rico	2017	2020
John S. Siffert	ESQ	New York	2012	2018
Sara Sun Beale Reporter	ACAD	North Carolina	2005	Open
Nancy J. King Associate Reporter	ACAD	Tennessee	2007	Open

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TAB 1A

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ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 28, 2017, Washington, D.C.

I. Attendance

The Criminal Rules Advisory Committee ("Committee") met in Washington, D.C., on April 17, 2017. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Kenneth A. Blanco, Esq.
Carol A. Brook, Esq.
Judge James C. Dever III
Judge Gary Feinerman
Mark Filip, Esq. (by telephone)
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Justice Joan Larsen
John S. Siffert, Esq.
Jonathan Wroblewski, Esq.
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Judge David G. Campbell, Standing Committee Chair
Judge Amy J. St. Eve, Standing Committee Liaison
Professor Daniel Coquillette, Standing Committee Reporter (by telephone)

The following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Rules Committee Officer, Secretary, Standing Committee
Laural L. Hooper, Esq., Federal Judicial Center
Julie Wilson, Esq., Rules Support Office
Lauren Gailey, Esq., Law Clerk, Standing Committee
Shelly Cox, Rules Support Office
Frances Skillman, Rules Support Office

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy introduced the Committee's newest member, Justice Joan Larsen from the Michigan Supreme Court, and he welcomed Assistant Attorney General Kenneth Blanco.

After members had introduced themselves, Judge Molloy recognized two members for whom this is their last meeting: Carol Brook, who has served for six years, and Judge Terry Kemp, who is retiring. He asked each if they would like to make any comments.

Ms. Brook praised the experience of serving on the Committee, noting the fascinating and complex issues. She expressed gratitude for the privilege of working with people who were opening, welcoming, and listened to the defense concerns.

Judge Kemp said that although he was looking forward to retirement, he regretted leaving the committee. He noted the care the Committee takes with each word in the Rules and advisory committee notes to address problems substantively with clear rules that can be applied uniformly. The process also brings together many different perspectives and seeks consensus. Judge Kemp thought if people could see how the process works, they would read the rules and the comments differently.

Assistant Attorney General Blanco thanked the Committee for inviting him to participate and said he was looking forward to the discussion of issues of great importance to the Department.

The draft minutes of the fall meeting were approved unanimously by voice vote with no changes.

Judge Molloy noted that the minutes of the Standing Committee meeting were included in the agenda book and that the Supreme Court has approved the pending rules package. Absent any action by Congress, those rules will become effective Dec. 1, 2017.

Judge Molloy then asked Mr. Wroblewski to comment on legislative responses to the amendment of Rule 41. Mr. Wroblewski reminded the Committee that in December of 2016 an amendment to Rule 41 went into effect that permits a judge to issue a warrant for the remote electronic search of a computer within a district where a crime has occurred—rather than the district in which the computer is located—if anonymizing software has been used to disguise the computer's location. The amendment also allows a judge to issue a single warrant in a botnet situation when there are many computers in multiple districts. The process leading up to that amendment was contentious, and legislation was introduced to block the amendment. A similar bill is pending in the Senate, and the Department is following it carefully. Mr. Wroblewski informed the Committee that just a few weeks before the meeting the Department had taken down a botnet, using the amendment to get a warrant that applied to thousands of computers. The amendment was extremely helpful.

Judge Molloy asked Standing Committee chair Judge Campbell for any initial comments; Judge Campbell responded that he was pleased to be at the meeting.

Judge Molloy then turned the meeting over to Judge Kaplan, chair of both the Criminal Rules Subcommittee on Cooperators and the Cooperators Task Force. Judge Molloy complimented the Task Force, and especially Judge St. Eve, for the work they had completed.

Judge Kaplan agreed that Judge St. Eve had done a prodigious amount of work, with significant help from Judge Molloy, the reporters, and others on the Task Force. He stated that this was a progress report, and that the Subcommittee hopes to make its final report to Criminal Rules Committee in time for full consideration at the fall meeting. There is significant interaction between the Subcommittee and the Task Force. At the moment the Task Force is heavily focused on non-rules approaches to protecting cooperators, and the Subcommittee is focused on rules. Things that the Task Force has done very recently may affect the Subcommittee's tentative conclusions about what might or might not be done with the Rules, and this is likely to continue.

Judge Kaplan reminded the Committee of the background: the Committee on Court Administration and Court Management (CACM) has proposed a variety of measures to protect cooperators. The Subcommittee is working on changes to the rules that would implement CACM's specific recommendations, and it will make a recommendation to this Committee as to whether it thinks those changes should be adopted. The Subcommittee is also considering other rule changes that either go beyond or take a different approach than what CACM has suggested.

The Task Force has been gathering input from all the relevant constituencies, including the Bureau of Prisons (BOP) and the Marshal's Service. As the new administration takes hold, he said, we hope to have a good deal of input from the Department of Justice. When the Criminal Rules Committee makes its recommendation in the fall, the Task Force will be preparing a final report that will cover both Rules and non-rules subjects which we hope to have out at the end of the year.

Judge Kaplan drew the Committee's attention to the Subcommittee's side-by-side comparisons of two sets of possible rules amendments (Appendix A in the agenda book). The left column reflects the Subcommittee's initial draft of rules amendments necessary to implement CACM's approach. CACM has recommended that various documents and transcripts of what happens in court be sealed in every criminal case. In the course of the preparation of the left-hand column, the reporters identified a number of potential rule changes that were not specifically recommended by CACM, which they thought would be necessary to fully implement the premises underlying the CACM report. Some amendments in the left column fall into that category. Subcommittee discussions also identified other similar changes that are not reflected there. The Subcommittee is tentatively of the view that it will limit the left-hand column to amendments necessary to implement CACM's recommendations, but flag in its report all of the other things that probably should be considered if the ultimate decision is to implement the CACM sealing approach full bore.

Judge Kaplan explained that the rules in the right column were the result of his conversations with Judge Molloy and Judge Hodges, leading to the suggestion of another approach that would preserve confidentiality but not involve quite as much sealing as CACM's proposal. The idea was to take advantage of the historic confidentiality of Presentence reports (PSRs). PSRs have traditionally been viewed as internal to the judiciary. In many cases they are never filed, although they are available to an appellate court if needed. The amendments in the

right-hand column, drafted by the reporters, were an attempt to use the PSRs to accomplish as nearly as possible the end product that CACM sought to achieve.

The third approach (shown in Appendix B) being considered by both the Subcommittee and the Task Force, is limiting at least lay public access through PACER. This general approach could be used in combination with or in lieu of the other approaches. There is a good deal of at least anecdotal evidence that anonymous remote public access to PACER is a source of much of the information that gets into prisons about who is cooperating.

Judge Kaplan stressed that these are all preliminary drafts. The Subcommittee may end up recommending one, none, or some combination of them. The draft rules are still under consideration by the Subcommittee, which has already made one decision of significance that would result in substantial changes in the proposed rules in the right-hand column.

Turning to the Task Force, Judge Kaplan stated that the BOP/Marshal Service working group, chaired by Judge St. Eve, had produced a very substantial report to the Task Force, based on a huge amount of work by Judge St. Eve and Judge Molloy. It is enormously enlightening. It deals with what is going on in the prisons and what can be done to change what is going on there, and it is the most important document to be produced in the last year or so.

The information we have from BOP is based on interviews with BOP personnel conducted by Judges St. Eve and Molloy. BOP does not track cooperators when they are in custody as a category of inmate, nor does it link information on assaults and other adverse consequences affecting individual inmates to whether the inmate had cooperated in the past or was cooperating. Thus, BOP has no quantitative data about what is going on. However, the BOP has been tremendously cooperative, totally forthcoming, and made available everybody we wanted to talk to, which is important to recognize.

The BOP working group report describes widespread attempts by inmates to determine if someone newly designated to a particular facility has been a cooperator. In many places a newly arriving inmate is asked for "his papers" (whatever documents the inmate has, such as a PSR, sentencing minutes, judgment and commitment order, transcripts, etc.). If the inmate says he doesn't have his papers, he is told to get them. As a result, inmates ask people outside the prison, often their relatives, to get their papers. There have also been an increasing number of requests by inmates asking the district courts to send their papers to them in prison. The federal judiciary currently has no uniform practice for handling such requests. Some courts, such as the Northern District of Illinois and the Northern District of New York, have adopted practices, but others have not, and some documents are getting into prisons from the courts. The working group also learned that some inmates seeking cooperator information have developed form letters they give to the new inmates to sign and then send off to the court in which they were sentenced. Judge Kaplan said he had received one or two of these letters. There are certain institutions in which inmates, once they get their papers, are required to post them in their cells or outside their cells, so that they are freely available to anyone who wants to come and read them. We have no quantitative data of how frequently that happens, but it does happen. The transcript of a recent hearing before Judge Molloy provided an example of another facet of the problem. Although

inmates do not have access to PACER, they find it easy to call and ask people outside prison to do PACER searches to learn about the cooperator status of other inmates, and to report the information back into the prison by the telephone. This information is relevant to the option of limiting remote access to PACER, at least by lay people.

The BOP working group also found that the problem of physical assaults is not evenly distributed throughout the federal prison system: most assaults occur in high security penitentiaries, and to a lesser extent in medium security. They rarely occur at lower security level institutions.

Judge Kaplan drew attention to the important role of several BOP policies. For some time, BOP has, for most practical purposes, treated an inmate's PSR as contraband and made an inmate's possession of a PSR a disciplinary offense. If the inmate wants to see his own PSR, it can be exhibited to him in a secure environment, but not copied for him. That procedure has not been extended to all other sensitive papers, such as sentencing minutes and plea agreements. The Task Force is considering a recommendation for revisions in the BOP policies. For example, BOP currently has no policy restricting the posting of inmate papers. Another aspect of the problem is that the possession of PSRs is not restricted for pretrial detainees, because they need their PSRs to prepare for sentencing. And there are pretrial and post-conviction inmates in the same lockups. It will be critical to prevent papers not moving into the prison with inmates when they are convicted and designated.

The Task Force's interviews with special investigative agents from the BOP also yielded suggestions about how to reduce these problems. The agents thought limiting public access to PACER would be very helpful. They also favored punishing inmates who press others for their papers (which apparently is not done now).

Judge Kaplan reminded the Committee that the Task Force had not yet met to discuss the working group report, but he commented that it would be surprising if the Task Force did not make some strong and comprehensive recommendations about changes at the BOP.

The Task Force ECF working group, chaired by Judge Phillip Martinez, a member of CACM, has also been active. It is focused on possible changes to ECF that would make cooperation status opaque or nearly opaque to someone who gets access to the docket sheet. The working group has been considering six options.

(1) The first option would track a functionality that is presently available in the bankruptcy courts, but not the federal district courts. Bankruptcy courts have the ability today to make private entries on the docket sheet with an attached PDF document without assigning a sequential docket number to that private entry. The working group has not yet determined whether this function can be made available in the district court ECF system, or what the timetable would be.

(2) A second option would be to create two docket sheets for each criminal case. One would be publicly accessible, and the other would be a sealed docket for sealed entries. There would be sequential numbers assigned to sealed entries (sealed entry number 1, sealed entry

number 2, etc.). Because there would be no gaps in the sequential numbering of entries on the public docket sheet, someone looking at a docket sheet in a criminal case on PACER would not be able to tell if there are any sealed documents or what they might pertain to.

(3) An option used in the Northern District of New York is to lodge the PSR and the district court's statement of reasons—documents that would reveal cooperators status—with the U.S. Attorney's Office or Probation Officer. They would retain custody of the original document, which would not be filed. A variation of that is used in Judge Kaplan's court, the Southern District of New York.

(4) Another option in use in the Western District of Pennsylvania is to create a miscellaneous sealed case, one for every criminal case, which would be linked to the criminal case. All cooperation information would be placed on the miscellaneous sealed docket.

(5) Alternatively, a master sealed event could be created in each criminal case right after the initial entry on the docket sheet in a criminal case, and all cooperation related documents would go into that sealed event. The docket sheet looks identical in all criminal cases regardless of cooperation. This system is in use in the District of Arizona.

(6) The final option is the existing CACM proposal

The ECF working group is seeking to determine which options are feasible on a reasonable timetable.

Judge Kaplan said the Task Force is scheduled to meet on May 18. It will have the full report from the BOP working group and perhaps a full report from the ECF working group. The Task Force may come to tentative views about possible recommendations for non-rules changes, subject to the very important input of the Justice Department and more discussion between May and October after the Task Force has met again.

Judge Kaplan then summed up the progress made by the Subcommittee. The drafting for the CACM sealing recommendations is very far along, though the version in the agenda book may change if we remove the provisions that CACM did not recommend. As to the PSR approach, the Subcommittee met by telephone just before the April meeting, and there was a consensus that it would not support a PSR approach that would change what happens in the courtroom. The Subcommittee rejected a requirement that cooperation be discussed only at the bench, with a transcript added to the PSR. Thus the proposed amendment in the right-hand column will need significant revisions. Moreover, all of the options can affect one another. For example, if a judge seals sentencing minutes because there was a discussion of cooperation, it might be helpful to make a change in the ECF system so that the fact of sealing is not reflected on the docket.

Judge Molloy asked Judge St. Eve to add any comments she may have.

Judge St. Eve responded by thanking Judge Molloy for his assistance with the working group report, and noted that the BOP has been extremely helpful, making sure they had access to what they needed. We have to keep in mind that whatever recommendations we make for the

BOP will have to be negotiated with their union. That cannot be done very quickly, especially to the extent it will impact their employees, which some of our provisions certainly will. Another thing driving some of this is gang membership. This is not surprising, but they learned that the race of the gang has a significant impact on the consequences to cooperators. If the white Aryan brothers find out you are a cooperator, they won't give you a break, whereas other gangs may give the cooperator who is a member of their gang the opportunity to "walk off the yard." The consequences are hard to nail down because of the lack of data linking assaults to cooperators. In talking to investigators on the ground, assaults are certainly happening against cooperators at the higher security facilities. Additionally, we should not lose sight of the Special Housing Unit (SHU). Inmates who become fearful that they are going to be targeted because of cooperation often go into the SHU, and sentences in the SHU are a very different. If you are in the SHU, you are on lockdown, meaning you don't get the same outside exposure, and you don't get to participate in programs such as the GED or drug programs. It is a very different type of sentence.

Judge Molloy commented on several points. First, CACM's position is that whatever changes are made will likely be ineffective in the absence of a national rule, but the 94 district courts and 800 plus district judges all like to do things their own way. Second, the BOP was very supportive of having national policies for the federal prisons. Third, there is a tension between transparency and protecting cooperators. He referenced the reporters' memorandum about the First amendment, and emphasized that these are not simple problems. The more we get into it and learn more factual information, the more complicated the solution becomes.

Judge Campbell noted that the Standing Committee will inherit this problem, and it appreciates the efforts and work that is being done. The Task Force seems to be drilling down to find solutions to this, which is terrifically helpful. The Standing Committee will need to learn all it can from what you are doing. It was evident to him that these are really tough issues, especially when it comes to rulemaking. At this point, he said, he had more questions than helpful thoughts.

Assistant Attorney General Blanco characterized that this is one of the more important issues that the Department is facing. These are hard, important issues, and not something the Department can walk away from. We have to find a solution, though coming to a conclusion won't be easy because of the tension between transparency versus security and safety. What is that balance? Where is it appropriate? Should it be balanced in the judiciary, or is it better handled in the Justice Department? If our system is going to continue to function, this is an issue that must be resolved. He noted that the new Deputy Attorney General had just been sworn in, and these issues will be discussed with him and the Attorney General. Both will be extremely interested in the discussion here. Our system cannot function if we cannot provide safety for witnesses, both cooperators and others, so for the Department this is very critical. He had used cooperators and had them hurt and some killed, both here and abroad, and he emphasized this is a paramount issue. He stays awake at night worrying about people who have cooperated with the government and done the right thing; we need to be able to protect them. The BOP and the way we house our incarcerated people is a whole different world, and where we put our

cooperators must be resolved as well. But this is a tough issue, and it's got to get resolved, and the Committee will have the Department's support in resolving it. Mr. Blanco said that he and Mr. Wroblewski would provide their wholehearted support. He also noted that the new Deputy Attorney General and the Attorney General would have significant input.

Judge Molloy called for preliminary discussion and reactions to the draft amendments, noting it would be helpful to the Subcommittee and the Task Force to hear members' comments and questions.

Judge Campbell asked whether the prevalence of local efforts to protect cooperators reflects the existence of a consensus that justifies a national rule. He noted there seems to be a debate about whether there should an attempt to amend the criminal rules to implement some sort of uniform national policy, and that debate is concerned in part with First Amendment issues and the transparency of our judicial system. But it seems that every court in the country is trying to do something to protect cooperators, and most or all probably involve to some degree either sealing documents, keeping them out of the record in the hands of some other individual, or putting them in a master file of some sort. Although there are 94 different approaches, that seems to demonstrate that courts think that it's appropriate to do something with our dockets to protect cooperators. If that's true, what not adopt a uniform national rule, so that no one can tell from district to district who cooperators are? The First Amendment and transparency issues are already here, even though we lack a uniform national approach.

Professor Beale responded that the staff of the Administrative Office is helping CACM track what is going on in the 94 districts. There is a third approach in some districts, restricting remote access in criminal cases to protect cooperators. That approach can be found in Appendix B. Judge Dever's district, for example, uses that approach. Other districts have much more selective sealing. Courts have always sealed in individual cases where there is an identifiable problem. Some districts that are much more selective in sealing. They begin from a baseline of transparency and availability, but will seal in individual cases when there is a problem. So in fact the picture is more mixed than all 94 having essentially reached a consensus on this fundamental question. Instead there is quite a wide array of approaches, and we are close to transparency in some of the districts. There are less than a dozen that have adopted the CACM approach. So if your question is there a consensus on a particular approach where we see sealing in every case and inability to tell from the docket, it is certainly not unanimous.

Judge Kaplan responded that with respect to sealing there is a fundamental difference between a uniform national rule to seal certain kinds of documents in all cases and a judgment by an individual judicial officer to seal something in an individual case. From a constitutional and transparency point of view, the Supreme Court has said over and over again that sealing to protect an informant, for example, is acceptable based on particularized findings in that individual case. That's one thing. A determination to seal every plea agreement in every criminal case, just to take a rhetorical example, on the ground that in a few cases there is a real risk, is quite another thing. That is an initial reaction to your question, not a well thought out answer.

A member agreed with Judge Kaplan's comment, and emphasized that there is a national policy: the court can seal only when there is a showing of need in an individual case. The member noted that he had once been a prosecutor and now represents people who cooperate. Protecting cooperators is a terrible problem you do lose sleep over. You do not want to have on your hands responsibility for someone being threatened or losing their life. That said, he preferred to place his trust more in the individual judge to make that determination rather than a flat rule of secrecy. He likened a uniform national policy of sealing in all cases to having two sets of books, and warned that would erode public confidence in the judicial system. With a general sealing policy, the public will not understand why cases are progressing the way they are progressing, victims will not understand why certain rights aren't being vindicated more quickly. Knowing that people are cooperating and progress is being made helps create public confidence. It also allows defense lawyers to determine whether to advise a client whether to continue to fight the charges against him, or to cooperate. Helping the defense in these ways also helps the prosecution to resolve cases. He objected strongly to increasing secrecy in federal criminal proceedings, which is not progress and is not something the judiciary should be involved in. Rather, the judiciary should seek ways to enhance fairness and integrity of the judicial process. The agreement to come up with rules that implement CACM's proposals is wrong, and is a backwards approach. The problem should be solved first by the executive branch. There are no data about whether this is a uniform problem, or about what types of cases are affected, and no data that any of the solutions CACM has proposed would be effective. How could we say under those circumstances we're justified in proposing rules?

Mr. Blanco noted that placing a sealed item in the docket for each case was not inconsistent with the court making particularized findings; the findings could be made and included in a sealed document. That is a consistent approach, which he favored. Responding to the comment that this is an executive branch problem, he noted that judges raised the issue and are concerned about what is happening. The judiciary should be involved. These rules protect the integrity of the judicial system and people's willingness to participate in the judicial system. So the courts should think about whether the rules should be changed.

Judge Kaplan agreed that the sealed docket idea helps with public access to certain sensitive documents. But the essence of the CACM proposal is different. It seals all documents of particular kinds in all cases. CACM believes a sealed docket for items sealed after particularized finding is insufficient, because cooperators can be identified by a process of elimination. So you have to seal everything.

Judge Campbell noted that everyone likes their own system. His court, the district of Arizona, uses a master sealed event. Every third or fourth item on the docket sheet in every criminal case is a master sealed event. If you have access to sealed documents, as a judge does, you will see that the master event is empty in non-cooperator cases. But from the outside you can't tell. In cooperator cases, the judge makes individualized decisions, but the materials that would reflect the cooperation that would otherwise be sealed in a particular docket entry go into that master sealed event. So in the master sealed event in a cooperator case you can see the addendum to the plea agreement that is the cooperation agreement, the 5K1.1 motion, and the

sentencing memorandum that deals with cooperation. All cases are uniform to the outside viewer, but it is still a judge making individual sealed decisions.

Judge Kaplan asked what happens in a case where there are 57 defendants and some cooperators. Do you seal the plea agreements of all 57 or just the ones who are cooperating?

Judge Campbell responded that his court doesn't seal any of the plea agreements, but for cooperators there is a sealed addendum to the plea agreement. All plea agreements (for both cooperators and noncooperators) include a statement that "There may or may not be an addendum to this plea agreement." If there is a cooperation addendum, it is in the master sealed event, filed separately in the court's record. It is not left in the hands of the probation office (which raises concerns about taking documents out of the court's record). But someone who goes to the docket of criminal cases will see a master sealed event and a plea agreement in every one. They can't tell if there is a cooperation addendum, they can't tell if there was a 5K1.1 motion because it would be in the master sealed event, whereas in other courts it would be a separate sealed item. So you are creating uniformity but you are not sealing anything in a non-cooperation case that would otherwise be public.

Judge Kaplan asked how the Arizona district courts handle the situation when a case goes to trial with eight defendants, it is getting close to trial, and someone has cooperated? Everyone knows that one defendant has pleaded. The sentence is being deferred, and deferred. Everybody knows he's a cooperator, right?

Judge Campbell responded that he did not think we can solve that problem. If the cooperator is going to testify at trial, that will be public, the defendants will have the right of confrontation, they are going to see him, and the government has a *Brady* obligation to disclose information. We can't solve that problem. And CACM is not trying to. But what we can do is try to eliminate the clues to cooperator status that are apparent in the docket sheet, without sealing anything more than what is already being sealed in individual cooperation cases.

A member expressed the view that the number of cooperators against whom there are threats is very few. We have been told the BOP hasn't kept the data that would show what kind of cases and reprisals occur in prison as a result of cooperation. That's a big black hole. So why should there be a presumption that there should be sealing in all cases. This reverses the presumption of transparency. There is more public benefit of disclosure that there are cooperators than there is danger of bad consequences. If there is the risk of bad consequences, the judge now has the discretion to respond. And there are plenty of ways that the executive branch can protect cooperators.

A member asked Judge Campbell who has access to the documents in that master sealed file. Does the attorney for the defendant have access to them? Do other attorneys have access to them? And what do you do in court? Is it your court's practice when you take the plea to go through the terms of the plea agreement including cooperation with him? And if so, do you do that in open court?

Judge Campbell responded that the only people that would have access to the master sealed event are the people who would normally have access to the sealed document. It does not change who has access. It is really just a docket management tool to put everything in one location so you do not see the gaps. His court does not use the CACM approach in plea colloquies and sentencings where there is sidebar in every case. He expressed concern about the logistics of that procedure. His court seals the courtroom when they do a plea colloquy with a cooperator, and the judge does go over with the defendant the terms of the cooperation addendum, which can be pretty draconian if the defendant doesn't fulfill the terms. That is discussed on the record. The entire colloquy and the sentencing is sealed if it involves a cooperator. People are excluded from the courtroom so that cooperation can be discussed. It's not a perfect system, because if that person appeals, his plea colloquy and sentencing transcript will be sealed and go into the master sealed event, and somebody looking at the docket can look at the docket and say "Ah ha! You're on appeal but you don't have a sentencing transcript in docket, so you must be a cooperator." So we are not solving that problem with our system. But his court takes 7,000 pleas a year, and CACM's proposal for a bench conference in every case would be unworkable.

Judge St. Eve asked if his court got pushback from defense lawyers seeking to make 3553(a) disparity arguments, objecting that that they can't get the information about who is cooperating. That's one argument the Task Force has been hearing. If the defense counsel can't get access to sealed documents with information about who is cooperating, then they can't make those disparity arguments under 3553(a)(6).

Judge Campbell responded that although no objections were raised when the court adopted its policy in 2011, in some cases the argument is made that the defendant before the court is no more culpable than another defendant who has been given a reduced sentence. The implication is "I don't know if he's a cooperator, but you do judge." So the defense is without that information with some degree. But in many multi-defendant cases, people figure out who the cooperators are even with the Arizona system. So sometimes this will be discussed more by the defense attorneys. This does give less information to counsel for other defendants than in a case where there is information about who has cooperated. But that is also true in every case where there are judges sealing things. You can infer from the fact that the other defendant got a sealed document that he's probably a cooperator.

A member argued that there was no reason to impose this burden on the defense in white collar cases such as insider trading prosecution. For example, in white collar cases in the Southern District of New York, there is no threat to cooperators so it is not sealed. Often, counsel learns initially when one defendant refuses to join a joint defense agreement or later drops out. The member did not understand the need for a rule such as a master sealed event in all cases, and for all defendants, when in many cases there is no risk of threats. The idea of this rule is to protect against threat, and it overreaches substantially. Judges now have the power to give protection when there is a showing of need, and you are suggesting the adoption of rules that will apply in every case to every defendant in every district regardless of whether there is a risk.

Judge Campbell replied that in a system like Arizona's–where there is a master sealed event in every case and you can't tell by looking at the docket what has been sealed—cooperators have a choice. Those who want protection could have the documents put into the master sealed event, but a cooperator who doesn't want protection could tell the judge not to seal anything. When someone starts comparing dockets, they'll see some cooperators, such as white collar defendants in the 10b5 cases. But looking at all the other cases they can't tell who the cooperators are, and they can't see the sealed documents. He asked how that would be different than the current system.

In response, the member characterized the system described by Judge Campbell as one that allows an individual cooperating defendant to opt out of the master sealed event. That is not acceptable, because the burden should be on the government to keep information from the public the press and everybody else. It is the government's burden to show the necessity to seal. This burden is not insurmountable; it is surmounted every day in every district. Moreover, when you are talking about threats that occur in prison, that's a question of protecting the prisoners in prison.

Judge Molloy reminded the Committee that its charge is to come up with a proposed rule change to implement CACM's proposal, and then to make a recommendation to the Standing Committee whether the changes would be a good idea or a bad idea.

Judge St. Eve commented that although BOP doesn't track threats of harm to cooperators and thus cannot provide data, if you talk to the officers on the ground working at the facilities at the higher levels of risk, there are threats, they are pressuring inmates – some percentage of them – for their paperwork to prove they are not cooperators. However, at the lower level security facilities you don't see it. That makes it difficult to argue at sentencing that there will be a threat to a cooperating defendant. That's part of the tension.

Members discussed the significance of the information that the problem occurs largely at the maximum and medium security prisons. A member estimated that the percentage of prisoners in maximum security is less than half, so probably about 99% of defendants are not affected. Judge St. Eve said that more than one percent are threatened, and the member responded that is an important data point. Judge Molloy commented that there are thousands defendants who receive 5K1 departures per year, although there were some issues about what that represented.

A member returned to the question whether we already have something like the CACM system now. The member explained how much the proposals would change practice in the member's district, and how it would adversely affect the defense function. Defense counsel need information about cooperation to advocate for their clients. The member had just filed a brief in the Seventh Circuit using all the cases that could be located on the docket sheets. Defense counsel must also advise their clients about cooperation, and need to be able to tell them what to expect if they do or don't cooperate. This requires information about the sentences of persons who cooperated in similar cases. There are some cases counsel will not know about now, because some cooperation cases in the Northern District of Illinois are sealed, though not the

majority. The member expressed the view that the Seventh Circuit would never allow mass sealing. Everything must be unsealed within something like 90 days unless we have some good reason. The other consideration is prosecutorial fairness. The member emphasized that she was not casting any aspersions on the fairness of the U.S. Attorney's Office, but the member still wants to be able to see—and thinks the public should be able to see—what is happening in various cases, rather than having mass sealing.

Judge Kaplan noted that every time we have a discussion of this, he is struck by the fact that people approach the issue from the standpoint of what happens in their own court, which may be entirely different than what happens somewhere else. It was brought home to him again when Judge Campbell talked about the practice in his court, in which all plea agreements are on the public docket, and cooperation is in a sealed addendum. In contrast, in the Southern District of New York and some other districts, the cooperation agreement is part of the plea agreement. This raises the question whether the Justice Department is in a position to establish uniform national practices on that and other issues.

Second, every time these issues are discussed, a new idea emerges. A year ago we sought data in the FJC report about whether this was a problem that was unique or heavily concentrated in certain kinds of offenses, but it was not possible to differentiate. The current discussion suggests another possibility. It seems that the problem is concentrated in the high security, and to a lesser extent medium security, penitentiaries but not in lower security facilities. The BOP has designation criteria, and it might be possible to craft a rule-based approach that would say certain procedures are followed in cases meeting certain criteria that would be closely related to the designation criteria BOP uses. Perhaps the rule could say, if a case gets so many points on a scoring scale, or if a defendant is likely to go into a high security institution if convicted, one set of consequences follows, but otherwise a another set of consequences. This is at least worth thinking about.

Mr. Wroblewski commented that we have to differentiate questions about first, what is actually happening, what gets sealed what doesn't get sealed, and then second, what is transparent to the public, especially online. It seems that Judge Campbell is suggesting that as long as what is available online does not tip off people about whose is cooperating, then we have accomplished a huge amount there, even if some white collar defendants are willing to have that information made public.

A judicial member expressed very serious concerns about the full-bore CACM approach with blanket sealing in every case and the courtroom procedures with sidebars. It is not the business of the federal courts to have that degree of secrecy. In considering the distinction between blanket sealing provisions and individualized determinations to seal, he noted that if the individual sealing determinations are based solely on collaborator status, it's not clear how big the difference is in terms of secrecy—though the docket may look different. But if the determination is more specific to the danger presented to that particular defendant, if that danger is based on what happens inside a particular penitentiary, then the district judge won't know that until something bad has happened. He also noted that the remote access restrictions seem very

appealing. It might get a lot done with a modest impact on access to court information. The concern there is whether outsiders working in concert with prisoners would be able to go down to the courthouse, get the information, and be able to share it with inmates on the phone. Perhaps a little more protective approach would be to limit access, even in person, to counsel, lawyers, and the press. Someone could not walk in off the street and to see anyone's criminal docket and cooperator information. But a federal defender or a member of the press could see them.

A member said that she was unable to choose between the CACM and PSR approaches, because neither would allow the defense to be effective, and they diminish transparency, creating a closed system. That is just backwards. The member expressed interest in the remote access issue, but expressed concern about closing the system in a way that has unanticipated and unintended consequences. Even if lawyers and press will have remote access—and today almost anybody is a member of the press, if you are a blogger—we are in a time when transparency of the criminal justice system seems to be extremely critical. The member hoped the Committee would not do anything to make it less transparent.

Judge St. Eve expressed the view that the real problems are arising from remote public electronic access not what is going on in the courtroom. It is what is available on the docket to inmates and to family members who can easily get this information, and provide it to inmates.

Another member stated he had no direct experience, and was coming at this from a fresh but uninformed perspective. First, it is unfortunate we may not be able to have a better sense about how the access to information is occurring, and what the implications would be if we shut off one way of access, say the online access. Would people go to the courthouse or not? It is hard to respond to the problem without knowing. His instinct is that remote online access is the difficulty, because it is so easy to go online and get cooperator information. It has always been the case that someone can go to the courthouse and get these records, but few people have been willing to do that for a range of reasons, especially when they have a nefarious purpose. So his instinct would be that shutting off or restricting the online access might be a good first step, and we could see how much of a difference that would make. Some of it could be implemented rather easily without a massive change in practice, and it may have a significant impact. If it doesn't, then we can consider more draconian options. It struck him as a good first step. The online access just changes how public this information is. If anybody can go on and get access to these private records, it is the easy way anybody is going to take. It will be easier than having someone walk into the clerk's office and ask for the file.

Judge Molloy stated that one of the people interviewed at the BOP told them that after their release some inmates had set up a private business to check PACER and then communicate the information back.

A member said that this is not a problem in the member's state courts because they have nothing like PACER. It does seem that the immediate problem arises from the online PACER access to without any showing of need or taking the step to go to the courthouse. So it might make sense to explore limiting remote access as a first step. The member also thought it would

be useful to explore whether is a way to find out ex ante which defendants will be going to which facilities.

Another member observed that there is anecdotal evidence, and in some cases just intuition, that some people are being identified as cooperators based upon information that is available online on the courts' dockets. But there are many other ways that people get identified as cooperators, and we don't know how much of the retaliation is triggered when a cooperator has been identified completely independent of what's on the docket. That lack of hard information makes it difficult to evaluate any of these proposals. Every proposal we are looking at has costs—not only administrative costs to the clerk's office and to the judges and lawyers – but also a public informational cost. It is helpful to weigh the costs against the benefits, but we don't know what the benefits of these proposals are.

The member also stated that he concurred completely in the view that the PSR approach has very significant problems. It is a serious problem to give documents that are ordinarily maintained by the court on its court docket to someone else to maintain. One of the functions of the clerk's office is to maintain the integrity of any document used in a court proceeding. Transferring that responsibility to somebody else (even the probation office) jeopardizes some of that integrity. That is a real problem.

The member noted that CACM approach proposes changing the way things are done in open court, as well as how things are done in the docket, and characterized both as real issues. The Committee should not change the way things are done in open court. It is important that courtroom proceedings be as public and transparent as possible, consistent with the need to protect specific people from individual threats of harm. In response to Judge Campbell's question why not replace the efforts of individual districts with a national rule to protect cooperators, the member said we do have a system right now. As another member said earlier, the system is that if the government or defendant makes a sufficient showing of individual harm, then the judge can seal. That's the only system that has a constitutional seal of approval. There are courts that are going beyond those traditional limits, and some of them have been tested. For example, a judge in Ohio was sealing every plea agreement because some of them included information about cooperation, and if he didn't seal them all then it was a red flag about which defendants were cooperators. The member said the Sixth Circuit reversed that practice, holding that sealing required an individualized showing. This should not be a system in which individuals opt out and allow their records to be public. That's backwards, and the member expressed real concerns about the legality. If the anecdotal and intuitive evidence is that there is some problem being created by online access to the docket, then limiting access to that information may be a good first step. Before we had electronic dockets, anybody who wanted to see anything had to walk physically into the clerk's office and ask for the file. There are some concerns about taking a step backwards in this day of electronic information. But for two hundred years, that's the way it was. If we need to restore that system in order to eliminate some harm to cooperators, it doesn't seem to create any significant constitutional problem. The member expressed interest in hearing whether others think it would create other sorts of

problems for practicing lawyers or the press. At least as a starting point he was inclined to support limiting remote access.

Judge Molloy commented that when CM/ECF came online in 2003, CACM recommended that there not be public access to criminal docket sheets.

Mr. Hatten, the Committee's clerk of court liaison, noted that the ECF system is a user input system, which has implications for the resources of the clerks' offices. At present clerks don't control what the users put in or how they put it in. Given their current resources, clerks could not review every document to see whether it should not be filed, and any solution that was designed to have that oversight by clerk's office would probably be ineffective. They would have to change their procedures substantially to be sure that documents that are supposed to be sealed either universally or automatically are actually sealed. Mr. Hatten noted that an Eleventh Circuit case rejected the idea of a secret docket. So in his district nothing can be left off of the docket in a criminal case, but you can have a sealed entry. The sealed entry doesn't identify what the document is, but it does give the person a chance to challenge because he knows something is there. He had not seen anything that addresses the idea of a master sealed entry, and whether that would be considered a secret docket. At least in the Eleventh Circuit the clerk cannot leave anything off the docket, which was one of the things being considered by the Task Force.

Based on discussions with the U.S. Attorney's office and the public defender, Mr. Hatten agreed that limiting remote access would accomplish something, even if it would not eliminate all the means of determining if an individual had cooperated. Remote access is exponentially greater than in-person access. He objected to any proposal to take court documents and give them to other offices. Protecting the integrity of the court record is a core function of the clerk's office. The clerk has to deal with court reporters who create transcripts and have to certify their accuracy. He was unsure what problems might arise if you divide transcripts up. But he acknowledged there are practical problems with any solution.

A judicial member stated that his court limits remote access. When this issue first came up about eight years ago, it was seen as a way to mitigate the risk, which can never be eliminated totally. If we legislated that everybody has to have a tank car that only goes 5 miles an hour, you'd still have traffic deaths because somebody would still drive that tank car off a cliff. But you'd limit the number, reduce the number. After considering the issues associated with transparency, the First Amendment, *Brady*, *Giglio* material, and effective arguments about sentencing disparities, his court concluded that many of the people who want to use information from the docket to harm cooperators would not take the trouble to come to the courthouse. He noted they have to show identification to get into the courthouse (though not at the clerk's office).

The member commended Judge Sutton who set up the Task Force, as well as Judges Kaplan, St. Eve, and Molloy, who have done a wonderful job gathering information. The executive branch is principally responsible for the safety of those charged with crimes and those convicted of crimes. They have the principal responsibility. He said both the CACM approach

and the PSR approach would really be a sea change—not a positive one—would really not mitigate the risk, and raise some serious First Amendment and *Brady*/*Giglio* issues. He expected defense lawyers and judges to push back on those. Although we have not fine tuned the proposed language on page 229 of the agenda book, using Rule 49.1 would be consistent with what we already do to limit access to other types of information. This would go a long way to mitigating the risk without all of these other things that would cause a great deal more concern.

Another judicial member expressed concern about just allowing limitations on remote access, and wondered if there might be some other forward thinking about that. Certainly there are at least as many different approaches as there are districts, and probably more. In the member's experience very often people want to seal too much, but only a small portion needs to be sealed. So the member was interested in something that allowed us to seal only the part that really should be sealed, not the whole thing. The member also expressed concern about who keeps the record. Other agencies have different means by which they collect their information and send it off somewhere to be stored. That might not be the same as the court. So the court would want to have documents that have to do with sentencing for cooperation in its own file. If forced to choose between the CACM and PSR approaches, except for that one point about keeping the record in the court, the PSR approach appears a little more open. But the member was interested in seeing if you could seal only what actually needs to be sealed. The whole Rule 11 plea agreement doesn't need to be sealed. The rest should still be public.

Another member characterized limiting remote access (Appendix B) as the only approach that is not unwise. The member did not see much harm in that approach, not any big constitutional issue in limiting remote access. His proposal would be to push back and say let's only deal with this rule, and not try to refine all the other rules. It appears there is a pretty good consensus that the Committee will not embrace the CACM approach. So why should the Committee spend its time trying to refine the rules that would implement the CACM approach?

Another judicial member called this a very significant problem and said he was stunned when he saw the statistics, including 31 murders and several hundred assaults over the past three or four years. While this is not Columbia, it is really, really, bad. We can't eliminate the problem, either from the BOP perspective or from a rules perspective. But to the extent that our procedures and our facilities are being used to effectuate that harm, we have a moral obligation to do something about it. When it comes to balancing the very important considerations of access and the First Amendment against the very important essential need to protect cooperators, the member did not find that a hard balance. We need to protect cooperators. But we should not go to an extreme of government secrecy, and we should take a measured approach. But to the extent that our procedures or our facilities are being used to allow people to assault or kill cooperators, we need to do something about it.

That member said it's hard to know where to strike the balance, and even if we do strike the right balance, whether a rules change or a BOP policy change, it's hard to know whether operationalizing those changes would have an impact. He posed a hypothetical. Defendant A is a cooperator, and the relevant portions of the docket are sealed. Defendant B is convicted of a

similar crime, and B's federal defender wants to argue under 18 U.S.C. § 3553(a)(6), based on the need to avoid unwarranted sentence disparities. If the federal defender can't figure out why A got a big break off the bottom of the guidelines range, that may be good for the defense. A defender can tell the judge I'm representing B, and A got a huge break off the bottom of the guidelines range. You have to be consistent across cases, and B ought to get the same consideration. What does the U.S. Attorney do in that situation? He can say there's a difference because A was a cooperator, but B has a right to be present, would hear that explanation, and then the cat's out of the bag. So the U.S. Attorney may decline to explain what happened with A. Then the judge who may have also sentenced A has a dilemma. Should the judge give B a higher sentence? If the judge does so, that reveals A was a cooperator. But if the judge gives B a similar sentence to avoid revealing A's cooperation, that's not fair to A, who then got no benefit from cooperation. If the judge says there is a difference between A and B, the judge has to articulate that on the record. And when the judge articulates on the record that the reason I'm giving defendant B a higher sentence than Defendant A because A was a cooperator. Then of course defendant B, knows that and can tell all of his or her friends. That's why this is a hornets' nest, first to figure out where the balance is, but also in operationalizing it and making it effective.

Mr. Wroblewski described the process the Department of Justice would follow after the meeting. He had already spoken to Mr. Rosenstein, the new Deputy Attorney General, about the issues, and noted Rosenstein had been the U.S. Attorney for the District of Maryland, which follows the CACM approach. The Department will be engaging with his office over the next few weeks, leading up to the Task Force meeting, but our goal, both on Rule 16.1 and cooperators, is that by the June Standing Committee meeting—which the Deputy Attorney General will attend—the Department will have a definitive position.

Mr. Wroblewski also offered his own views. First, restricting remote access in a broad way does not recognize the world that we live in now, so he does not favor that approach. On the other hand, what he had heard made him very optimistic that the process is working towards a solution. Not a 100% solution, but an 80% or 90% solution. Significant changes at BOP will make a huge difference. The Department of Justice has to make changes so there is a uniform rule about what is in the plea agreement and what is in an addendum. That will not be easy lift, but it could be done and would make a huge difference. He expressed enthusiasm for the docket entry master file, which allows continued use of PACER without revealing cooperator status on the docket. Then, determining whether something actually is sealed or whether it's public is different than whether it's going to be masked on PACER. That can be a completely different, a case-by-case determination. Finally, he suggested something that had not yet been discussed. We should think about having all master files sent to the Sentencing Commission, which could issue reports on cooperation. Cooperation would not be a black hole. The public would know, on an aggregate (though not case-by-case) basis how much cooperation there is nationwide and in each district. The Commission's release of such data would add some transparency.

Mr. Blanco said that transparency is critical from the perspective of the Justice Department, and he agreed with Mr. Wroblewski that limiting remote access would be only a

band-aid for a problem that is going to get bigger and bigger. If motivated people can't get remote access, they will find a different way. If there is a way to physically get a record of cooperation and use it, they will do so. He agreed that it is the executive's duty to protect cooperators in prison, but emphasized that it could not do so without assistance from the judiciary. The U.S. Attorney's Manual (USAM) is the result of the culture in the individual districts. And many of the procedures used aren't procedures set forth in the USAM. They are set forth by the courts and the government follows those procedures. So without the judiciary this problem will not be solved. It requires both sides. We're asking the Committee to take a look at the rules, and the Department will come up with an approach as well and do as much as it can. Noting he had twenty-nine years of experience, Mr. Blanco commented that there are sophisticated people who want to do bad things. We should protect our judicial system by coming up with a solution, a solution not just today, but for what's also going to happen in the future, as people become more sophisticated, as you're seeing more with respect to cybercrime. Although he accepted the member's point that threats to cooperators may be more common in organized crime and drug cases, in cybercrime you see sophisticated people threatening each other online, over money and access. He expressed appreciation for the very informative discussion. There is no easy solution, and it will take everyone's best efforts.

Professor Beale observed that limiting remote access raises issues under the E-Government Act, which are discussed on p. 213 of the agenda book. The Act states a very strong policy of openness, though it also provides for exceptions. The Committee would need to conclude that any restrictions on remote access meet the standards for an exception. The E-Government Act does allow for privacy and security based exceptions to be promulgated under the Rules Enabling Act. That is why the current rules require redaction of social security numbers and the names of juveniles. Restricting remote access to all or part of all criminal cases would be a major exception. There are two sides to the problem. One side is that there are people who are cooperating; they may be identified from the courts records, or from other things, such as their in-court testimony or their refusal to join a joint defense agreement. The other side is what happens in the prisons. The BOP Task Force working group noted that the BOP is starting to create some institutions where there is a higher level of protection, not exclusively cooperators, but for people who need more protection from whatever reason. Imagine a world in which the high security and medium security cooperators were in all in prisons either with other cooperators or with people who have committed other kinds of offenses that make them likely to be attacked by other prisoners. Suddenly the problem goes away. The problem is created because people are cooperating, their cooperation can be identified, and they are housed with other people who are not cooperators and who want to do bad things to them.

The problem is not cooperators hurting each other, it is housing them together with non cooperators. Most cooperators who seek protection within an institution housing non cooperators have very limited options for education and other programs. BOP generally assigns inmates within a certain security level to particular institutions for various reasons such as keeping them near their family, but not to separate cooperators and non cooperators. That's half

of what is causing the problem: housing them together. And BOP seems to be slowly moving toward something that would respond to that.

Changes can be made in the rules, but there is also this other side to the equation. And in limiting remote access the question is how much to include from each set of options: only remote access to certain information? Finally, what's the first step on the judicial side, as opposed to all the steps on the BOP?

Professor King requested that members notify her if their courts have a policy for identifying who is a member of the press and who is not. She also asked for more information about any cases that might be similar to hypothetical codefendants A and B. For example, would that exchange take place in briefing, as opposed to in person in the courtroom? If so, how is that handled when these arguments are submitted in writing at the plea or sentencing stage?

Judge Molloy introduced the 16.1 agenda item. The New York Council of Defense Lawyers and the National Association of Criminal Defense Lawyers had proposed an amendment to the rule that would have incorporated a very lengthy change to the rules addressing complex cases.

Judge Kethledge reported that the Subcommittee he chaired had been asked to explore the concerns about what he called overwhelming discovery – the production of a massive quantity of documents or data to defense counsel sometimes shortly before trial. He cited two examples given by members: in one case the defense was given 500,000 audio tapes, and another more data than is housed in the Smithsonian. The problem is compounded because the prosecution has typically been investigating and working on the case for a long time, but defense counsel has to learn the case and understand the record in whatever time is available between production and trial. Although the NYCDL/NACDL proposal was far too complex and detailed, the Subcommittee agreed there was a real problem and we should see if we could come up with a reasonable response. The Subcommittee developed its own drafts, which were shared with the full committee at its fall meeting. These were "court-driven" proposals: the court would make a determination whether the case was "complex" (though what "complex" meant was not clear). Those proposals received a mixed reception, and Judge Campbell suggested that we hold a mini conference to get more information about the problems and possible solutions.

The Subcommittee held an extremely helpful mini conference in February, bringing together fourteen invitees from the defense and prosecution, including lawyers dealing with these issues in the field and the drafters of the so-called ESI (electronically stored information) protocol. Although the ESI protocol is very helpful, the Subcommittee learned that counsel's awareness of it is uneven, and adherence varies within and between districts. But where it is being followed it is helpful and things seem to be going pretty well.

The defense lawyers at the meeting were unanimous and emphatic about the existence of a problem with overwhelming discovery, and with the need to do something about it. There is a need for a rule at least to recognize the problem and to encourage some process in the litigation to address it. We reached a consensus triggered by Mr. Wroblewski's lucid summation. The sea

change was to shift from the court-directed process to a party-directed process. The people who were most concerned—the defense lawyers—strongly supported the idea that the parties know the case better than the court does. They ought to take the first look at the case and talk to each other about whether the case warrants some departure from the rules that would normally apply (under Rule 16 or a standing order or the practices in that district). They should be considering whether there should be some departure or modification given the particular record that's going to be produced in this case. The Department of Justice representatives, some line lawyers and some from Washington, also seemed supportive of the idea of the party-directed approach.

We had two Subcommittee calls after the mini conference to reduce this general concept to a proposal we could bring to the full committee. Our reporters did an excellent job of drafting language that is for the most part before you today. The proposal requires the parties to confer and try to reach agreement about the timing and manner of discovery. They have to meet within 14 days of arraignment and try to reach that agreement. If they do reach it, and if their agreement would require a modification of the order or practices that would otherwise apply in the case in the district, then they can move under subsection (b) to have the district court modify those procedures accordingly. If they don't agree, the party that is unhappy with the background status quo, the applicable procedures, can go to the district court under subsection (b) and seek a modification. Then the court decides what to do. So it is a process initiated by the parties, but it is ultimately controlled by the district court.

Judge Kethledge drew attention to proposed changes by the style consultants, and expressed the view that he stylists' revisions inadvertently made several substantive changes. One was brought to his attention before the meeting by a judicial member who pointed out that the proposal would take control of the discovery process away from the district court and give it to the parties. This was certainly not the Subcommittee's intention. The Subcommittee's draft provided that one or both parties may request that the court determine or modify the time, manner, or other aspects of disclosure to facilitate preparation for trial As restyled, subsection (b) said "the parties may ask the court to modify the agreed-upon timetable and procedures for disclosure …" So in the restyled version the court is modifying what the parties did. This implies that absent such a modification the parties' agreement has its own effect. That is not what the Subcommittee intended. The Subcommittee concluded that its version of (b) was much better than the restyled version. Relatedly, the member who raised the concern also suggested some language for the committee note that would expressly say that the Rule is not intended to divest the district judge of any control over the discovery process.

In summary, Judge Kethledge said, we started with a very prescriptive proposal, we moved on to a less prescriptive but court-driven proposal, and now our proposal starts with the parties. They have to confer and try to reach agreement. Whether they do or don't, if they need changes they can go to the district court. There is no need to define a "complex" case, and the rule does not attempt to prescribe procedures or specify factors will still be appropriate in ten years. The Subcommittee hopes this modest step will do some good in this area. It has the Subcommittee's unanimous support.

Professor Beale noted that when we scheduled the mini conference we did not think we would have a proposal ready for publication at this point, but given the consensus that developed the Subcommittee believes its proposal is ready for publication—though there are still some issues to be worked out with the style consultants. The Subcommittee saw this as a modest but useful change. Subcommittee members learned that discovery issues are becoming more and more common, and are not limited to a few complex cases. Many apparently simple cases now have lots of electronically stored information, and that will not become less frequent. Everyone has a cell phone, and the cell phone is pinging off of the cell phone towers and so forth. So this is likely to become a more common problem, and should be addressed in this relatively uncontroversial way.

Professor Beale requested that subsections (a) and (b) be discussed separately, because the style proposals for (a) were not controversial. The reporters viewed the suggested changes in (a) as style, not substance. Style suggested "try" instead of "attempt," i.e., "try to agree" instead of "attempt to agree" In contrast, the reporters agreed that the proposed changes to (b) would be substantive.

After a motion to accept restyled Rule 16.1(a) was made and seconded, members discussed the provision.

Mr. Wroblewski thanked Judge Kethledge and reporters for helping to build consensus. He reminded the Committee of several points. First there was initially a divergence as to whether or not this should focus on complex cases. One idea was that we need a calibration for proportionality, as is done in the Civil rules. But Professor Kerr suggested that we focus exclusively on ESI issues. The Department's focus was being sure any amendment to Rule 16 did not impact on *Brady*, §3500, and other issues that had come before this committee before. We tried to steer clear of all of that, and have come up with a proposal that has support from both prosecutors and defense lawyers from all parts of the country. The ABA, which is currently considering Rule 16, likes the meet and confer aspect of our proposal. He praised the Committee Note, which says to look to best practices and cites the ESI protocol but is not limited to it. He has advised the ABA committee that if they want to have an impact, then they should develop best practices protocols. The Committee note sets for the ESI protocol as the only best practices example, but as other groups produce more examples they will be cited by the parties. That's what we need. We need to tell judges this is an appropriate way to proceed, because sometimes people accustomed to doing something one way may not realize that this particular case requires that they pause and handle it differently. The proposed rule is a great framework for doing that.

A judicial member commented that this is sort of a criminal procedure parallel to Civil Rule 26(f) conference where the parties are required to get together and attempt to agree on a schedule. Rule 26(f)(2) says the attorneys should attempt in good faith to agree. If we are trying to keep some parallel, it says "attempt" rather than "try," and it also refers to "good faith." He wondered if that was intentionally omitted from the proposed rule because it's implied. Those who had participated in the Subcommittee discussion stated that they had discussed and rejected that language.

In response to the question whether the Standing Committee would favor including "good faith" in to parallel Rule 26(f), Judge Campbell noted that Civil Rule 26(f) includes a lot more than proposed Rule 16.1. Given the limited objective of this rule, he doubted that anyone would suggest that it was necessary to incorporate all of the 26(f) procedures into criminal cases. If we're not mimicking 26(f) in new Rule 16.1, then he doubted there would be much concern about how parallel the language is. Certainly the absence of the reference to good faith should not be taken by anybody as suggesting that they can participate in bad faith. He did not see the need to be parallel on that one point if we aren't going to parallel everything else.

Professor Coquillette agreed there was no need to include "good faith" in if we are not acting in parallel with 26(f).

A judicial member asked if the attorneys meet and agree on a timetable, when do they come to the court? Judge Kethledge responded that if the court has a standing order, or the parties have agreed to a departure from the procedures that would otherwise govern, they have to come to the court. A practitioner member offered an example. The lawyers might bring a joint motion, saying given the amount of documents to review, we ask that instead of the six months your honor allocated for review, we ask that you give us 18 moths, and that we'll identify all of these exhibits by this date and all the other exhibits by __ date. Several speakers agreed that if what the parties have agreed to is consistent with the court's standing procedures or prior orders in the case, then they do not need to come back to the court.

Another judicial member stated that he did not have a problem with 16(a) or with the Subcommittee's version of 16.1(b), but he suggested adding language at the end of line 14 of the Committee Note, agenda book p. 174 to make clear what the intention had already been. He proposed adding "or limit the authority of the district judge to determine the timetable and procedures for disclosure." Judge Kethledge expressed support for that suggestion.

Professor Coquillette expressed approval for pointing to examples of best practices in the Committee Note, but he cautioned that it is very important not to put anything in the note that actually changes the operation of the rule. Judge Kethledge said that addition would not change the operation of the rule as drafted by the Subcommittee.

A judicial member asked whether there is any value to the parties in having this conference before the arraignment. If so, she noted a recent case about exactly this language, "within x days after the arraignment," in which the action had taken place before the arraignment. On appeal the issue was whether disclosure before arraignment complied. The member suggested that if the rule is intended to allow the parties to meet and confer before arraignment, it should be clarified to avoid litigation.

Discussion focused on whether there are cases where the parties want to meet and confer before arraignment. A practitioner member said that sometimes judges send timetables for motions to the magistrate judges at the bond hearing, so defense counsel would be talking to the government earlier than arraignment, especially in cases with a lot of discovery. Another

practitioner expressed doubt that the change was necessary, but said he had no objection to changing it to "no later than."

A participant noted that the issue comes up in his district most often in complex cases, typically after all of the defense counsel have been identified, which usually happens at arraignment. They get together, and as a defense team, they talk about what they're going to need and then the group or a designated individual goes to talk to the prosecutor. He doubted that would happen within 14 days of the first defendant's arraignment, and he would not want the rule to force the parties to have premature discussions, before everybody is on board and can have a more meaningful discussion. Should the rule say "within a reasonable time"?

In response to an alternative suggestion that the rule might say "or as such as is designated by the court," the member who had raised the issue said he would not want the parties coming to the court in every case to ask if they could have more than 14 days. So the question is whether we are to trying to require this to happen early in the case. Or can we say you need to do it and you need to do it within a reasonable time?

A member responded that part of the problem is that often this meeting and discussion doesn't happen. When these meetings are not occurring, it would not be helpful to specify "a reasonable time."

Judge Molloy brought up the relationship to Speedy Trial issues. If there will be a request to extend the time for trial, setting a time for this conference 14 days after the arraignment will set the stage for making the determination under Speedy Trial Act. A member observed that (b) does not require that the parties go to the court within 14 days. Rather, within 14 days they have to meet and try to agree. But they can then take the time needed for their discussions and report to the court when they are ready.

A judicial member stated that in his district the U.S. Attorney's policy on their website is that it will provide exculpatory evidence and their Rule 16 disclosures within 21 days after indictment or initial appearance whichever comes later. District practices around the country vary, and this may not be unusual. So to avoid disrupting local rules and practices, the "not later than" is an important change. Because they do it a lot earlier than this rule contemplates in our district in every case.

Professor King stated that defense attorneys at the mini conference expressed concern that they were not able to get the Assistant U.S. Attorneys to talk to them, and that they needed some sort of push from the rules. The response to the concern about 14 days being too soon was that in cases in which 14 days is too early to know what to do with specific pieces of information, the parties can have a quick early conversation, which satisfies the rule, then continue their discussions as they learn more. She noted that the ESI protocol provides for an ongoing continuing dialogue.

Professor Beale said if there is a multi-defendant case where some of the defendants haven't been arraigned or don't have their lawyers, but two defendants are coming up to the 14 days, counsel could pick up the phone and say here's what we're seeing now but we think we

should wait for the rest of the defendants. A quick conversation would be enough, kicking the can down the road to have the further meeting. But if the lawyers said actually I need to know right now, that discussion would be teed up by the fact that there is a deadline. The reporters were not sure if 14 days was the right number. Some local rules had a 7-day period, which is even shorter, so the reporters put 14 days in brackets to focus discussion. It would be fine to have it "no later than" because that was the intent. For example, if there is a codefendant who hasn't been arraigned yet but he knows he's in the case and he's got the lawyer, he may want to join the group that is meeting and conferring. That would fall within the "no later than."

A member moved to amend line 3 of 16.1(a), agenda book p. 173, to substitute "not later than" for "within." The motion as seconded and passed unanimously by voice vote.

In response the Judge Molloy's query whether all members were comfortable with 14 days, there was general agreement that this was satisfactory and that the brackets should be removed.

A member asked whether the Subcommittee discussed a question that came up at the mini conference: should the meet and confer requirement include "motions and other pretrial matters"? Professor Beale and Judge Kethledge responded that the Subcommittee focused, for the time being, on discovery, the issue upon which it had consensus.

In response to a query from Judge Molloy about the Department's position, Mr. Wroblewski said that so far the Department did not object. He also noted the Committee should remember Rule 17.1. So this will not be the only pretrial conference.

There was a motion to approve restyled Rule 16.1(a) as modified, it was seconded, and approved unanimously by voice vote. The Committee then turned to proposed subsection (b).

Professor Beale noted several changes recommended by the style consultants. They broke up "modify and determine," and their version seems to allow the court to modify the agreed-upon timetable only if the parties come to the court. That would restrict the authority of the judge. If the parties agree, they don't come into the judge; it's done. But that is not at all what the Subcommittee meant. And style suggests the court can "determine if the parties didn't agree," which is not what the Subcommittee agreed to and is not a good idea. The court should retain control. That sends us back to the Committee's version. The earlier suggestion of an amendment to the Committee Note, on page 174 line 14, would highlight the fact that the rule doesn't limit the authority of the district judge. The parties have to request that the court "determine or modify" aspects of discovery that would otherwise be governed by local court rules or an order to the parties at arraignment. Those are the background assumptions, and the parties are asking for a "modification." The parties are saying this case requires something different from the ordinary, and they are asking the court to make an adjustment. That is the purpose of (b). Does it require any additional clarification for everyone to understand that's all it's doing?

Professor King returned to an earlier question by a member who was not clear what the judge was being asked to do as well as concerns about the style consultants' apparent

misunderstanding of what the Subcommittee had intended. She suggested some clarifying language, but also noted the problems of trying to do drafting "on the fly."

A judicial member who had raised this issue earlier said he favored retaining the Subcommittee's language in the text, but revising the committee note. He reiterated his proposal that at the end of line 14, agenda book p. 174. After the word requirements, he would insert "or limit the authority of the district judge to determine the timetable and procedures for disclosure." He expressed concern that, as drafted, the rule might be susceptible of arguments about its meaning over who has the ultimate control, because it speaks in terms of the parties requesting that the court determine the timing. That might be read as implying unless the parties make a request the court doesn't have a say. The Committee Note, at line 13, says the rule does not displace local rules or standing orders. But suppose what we're talking about is the judge giving the parties the schedule for their case at the first appearance with disclosure to be completed by x date. By not referring to the district court's authority, the Committee Note could be read to allow displacing the court's original order. That is not what's intended. If the note is modified, there is no problem.

Members discussed whether to omit the word "determine," and a practitioner member urged that it be retained because many judges do not have the practice of setting a schedule at the beginning of a case, so the parties are asking the judge to do this for the first time. Some judges don't have preemptive rules. They don't have the schedule at the arraignment. So it is important the rule includes both "determine" and "modify."

Professor Coquillette endorsed making the rule itself explicit, rather than putting this in the Note though he acknowledged that that the problem here was caused by the Note itself rather than by the text.

Judge Kethledge stated that if there are downsides to removing "determine," he favored retaining it. A member expressed concern about the draft Committee Note, which said that the rule does not displace standing rules and local orders. That might implicitly be read to allow it to displace a judge's scheduling order unique to that case, which is neither a standing order or a local rule. The member expressed a preference to leave (b) as the Subcommittee drafted it (including "determine or modify"), and add language to the Note that removes the implication that was inadvertently created by lines 13 and 14. He favored adding this language: "or limit the authority of the district judge to determine the timetable and procedures for disclosure."

Another member moved that the Committee approve subsection (b) as drafted by Subcommittee, with addition the amendment 14 of the Committee Note, and the motion was seconded.

Judge Campbell noted his approval of several aspects of the Subcommittee's version of subsection (b), but he questioned whether it was necessary to include "other aspects of disclosure to facilitate preparation for trial" because the parties may seek modifications for other reasons (e.g., reducing the expense of production or avoiding a scheduling conflict with another case). So why limit the reasons for which a modification may be sought?

One member responded that the original defense proposal arose from the difficulty of preparing for trial in what the proposal had called complex cases. This language captures the idea of preparation for trial and being able to defend the case effectively. The defense needs to know what it's up against

Members suggested alternatives such as "preparation for trial or another reasons," "otherwise promote the efficiency of the litigation," or "in the interests of justice." Professor King noted her impression that for the defense bar the language "to facilitate preparation for trial" was essential. It was the whole reason for the rule. She noted, however, that this language could be moved within the rule. Some members expressed concern about the emphasis on preparation for trial, since more than 90% of cases are resolved by guilty plea.

There was a motion to revise the amendment to allow determination or modification "to facilitate preparation for trial or in the interests of justice." A member expressed concern with the breadth of this phrase and noted that Rule 16.1 isn't intended to control all of litigation. An attorney who has a trial somewhere else will make a motion to continue the trial. Rule 16.1 is not going to deal with that. He cautioned against trying to add too much to the proposed rule. He was also concerned that we don't know what the phrase "interests of justice" means. It could create an incentive to use this rule to resolve all sorts of issues.

Professor Beale urged the Committee to return to the reason that the amendment is being proposed, and not load other things in there. Counsel have been going to the court forever asking for delay because they have another trial. Those things are already occurring and don't need to be included in the amendment.

In response to a comment, Judge Kethledge reiterated that (b) just describes what the parties may ask to court to do. It does not circumscribe the district court's authority. Judge Campbell said this is describing the basis on which the parties can come to the court. He did not want it to have the appearance that they are limited to doing it only in situations where it will facilitate trial preparation. There are other reasons that they should be able to come in. We could just make clear with another sentence there that these are not words of limitation, there are other reasons that would justify.

Judge Molloy called for any motions to amend.

The first motion was to change "may request that" on line 9 to "may ask the court to." This change was included in the version proposed by the style consultants. It was seconded and passed unanimously.

The second proposal was to amend line 11 by omitting "to facilitate preparation for trial." Judge Kethledge emphasized the importance of this language to the defense, and urged that it be retained in the text of the rule. Wroblewski noted that his concern had been about broadening the rule to include open ended language such as "in the interests of justice," not this phrase. Mr. Blanco agreed that it was desirable to keep the rule narrow. Judge Campbell favored leaving the language in the rule because of its significance to the defense members. Perhaps it is so obvious

that the parties can ask to have the schedule extended that we can just leave it as it is. So he withdrew his suggestion.

There was a motion to approve (b) as presented in the agenda book with the style change on line 9. It was seconded and approved by voice vote.

Discussion turned to the Committee Note, and the proposed amendment to line 14, was approved. The suggestion to change "judge" to "court" was accepted as a friendly amendment, and the note, as amended, was approved unanimously.

Judge Feinerman then presented the Rule 49 amendments.

The Committee had approved the amendments for publication as part of a cross committee effort to update the rules on e-filing. The Criminal Rules Committee decided to delink Criminal Rule 49 from Civil Rule 5 for several reasons, including eliminating the need for those using the Rule to toggle back and forth between the two sets of rules, and more importantly, to accommodate the differences for e-filing between the criminal and civil contexts. Pro se criminal defendants, the Committee decided, should not have presumptive access to the CM/ECF system. The architecture of CM/ECF allows for filing by the defendant and the government and nobody else in criminal cases, unlike the civil context. The proposed amendments were published last fall, we received comments, and the Civil Committee received comments that our Committee will have to consider as well so that we can keep the amendments as uniform as possible.

The first set of comments dealt with the e-signature provision. Three commenters regarded the amendment as ambiguous, possibly requiring a filer to add her user name and password to the filing. But of course that was not what was intended. Together with the other three committees we came up with new language that will make it very clear:

> An authorized filing [made] through a person's electronic-filing account, together with the person's name on a signature block, serves as the person's signature.

Professor Beale also added that the Civil Committee has deleted the brackets around the word "made," in that language, which we should consider as well so that the amendments are uniform. A motion to approve the new language (not including the brackets) was made, seconded, and approved unanimously without further discussion.

The next set of comments addressed who should receive presumptive permission to e-file. Three comments took issue with the policy judgment under the amendment as published that only represented parties receive that presumption, and others may e-file only with permission from the court. One commenter wanted inmates to be able to presumptively file electronically, another wanted non-parties, and another wanted all pro se filers. The Subcommittee discussed the comments, and it decided to stick with the original conclusion that in criminal cases presumptive electronic filing should be limited to the lawyer for the

government and the lawyer for the defendant, and not expanded to these other categories. Respectfully disagreeing with these public comments, the Subcommittee suggested no change be made to the published version.

Judge Molloy asked if anyone disagreed with that position, and no one did. In response to an inquiry about whether the commenters would receive a letter, Ms. Womeldorf explained that the Rules Office does not usually follow up.

Judge Feinerman turned to the comments on the Civil Rule that would impact our Rule as well. The published versions of both rules said that service is not effective if the serving party learns that the service was not effective. Some court clerks were concerned that this language might be read to place an obligation on the clerk's office to let the party know if the clerk of the court found out that the person to be served somehow wasn't served. They were concerned that the rule not suggest that they have an obligation to let the serving party know. The Civil Rules reporter addressed this concern by suggesting language for the Note.

Professor Beale explained that we were able to accept the sentence proposed by the Civil Rules, though a difference in the structure of the Civil and Criminal Rules is reflected in another portion of the note. The Subcommittee thought that it was unlikely that this language, which had long been included in Civil Rule 5, would suddenly be interpreted to impose a duty on the clerk. However, when the Civil Rules Committee decided to include new language in the note accompanying Rule 5, it was appropriate to include it in the note to the Criminal Rule as well. The proposed change to the note after publication must be approved by the Committee.

A member asked whether there was any concern that the clerk's office might feel that this language created an obligation to notify the party for whom the failed communication was intended? He related a case that dealt with the consequences of the failed receipt of a notice of appeal that divested his client of a right of appeal. It came about because the lawyer did not update his ECF registration to include his changed email address and he argued that should be ignored because his correct address was on some paper filed in the case and the clerk should have known and should have told him. Should the note say something like "the rule does not make the court responsible for notifying *any person* if an attempted transmission by the system fails"?

Professor Beale noted that Rule 49 as published tracks the language of Rule 5, and that would be difficult at this point to go back and alter that.

Judge Campbell stated the Civil Rules clerk liaison was not concerned that this language would place a general obligation on clerks to go track down people whose contact information is outdated. They were concerned only about letting the serving party know.

Mr. Hatten, the Criminal Rules clerk of court liaison, explained that the clerk gets a bounce-back message if the receiving party does not receive it, and they generally try to follow up. But they do not turn around and let the sending party know. Users of the CM/ECF system have an obligation to maintain their updated information.

Judge Campbell noted the issues raised by the number of users and bounce-back messages. An email to all users in his district, which is relatively small, goes to about 60,000 people and produces more than 5,000 bounce-backs. So a significant percentage is always out of date. Requiring the clerk to notify the lawyers every time they get a bounce-back it would be a huge burden. And the bounce-back often is not from the lawyer or the party but from a legal assistant or paralegal. So there was a good reason for this change.

Judge Feinerman moved that the Committee accept the new language for the Note; the motion was seconded and approved unanimously by the Committee without further discussion.

Judge Feinerman added that in at least one district, the Northern District of Illinois, the clerk's office puts something on the docket indicating there was a bounce-back so the serving party would know. But there is no obligation for other districts to do that.

He then turned to public comments received on the portion of the published amendment dealing with whether a certificate of service is required when a paper is e-filed, and whether others connected with the case have been served. In drafting the amendment, we implicitly assumed that if you e-file you don't need a certificate of service. A comment to the Civil Rules asked whether this should be made explicit. The proposal before the Committee would amend the published version to make this clear. As revised, the amendment would state:

(**b) Filing.**

(1) ***When Required; Certificate of Service.*** Any paper that is required to be served must be filed within a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system.

Prof. Beale noted that the language was drafted to make it clear for anyone using the rule, not just lawyers.

A motion to adopt the proposed change (lines 58-63 on p. 104 of the agenda book) was made and seconded, and passed unanimously without further discussion.

The next change, to the same section (lines 63-66), pertains to certificates of service when there is a non e-filer in the case (a pro se criminal defendant, a non-party, or a lawyer who was able to opt out of e-filing). The rule as published said that when a paper is served by other means, a certificate of service must be filed "within a reasonable time after service or filing, whichever is later."

Professor King explained that the Civil Rules Committee had decided to revise the published language because there may be simultaneous filing of the paper and the certificate of service. They proposed to revise the language to allow the certificate to be served "with it, or within a reasonable time after service." After a clarifying question by one member, Professor Beale indicated that she believed the language has been accepted by the other committees as well as style.

Judge Feinerman moved for approval of the revised language for this sentence: "When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service." The motion was seconded and adopted unanimously, without further discussion.

Finally, Judge Feinerman returned to the first sentence of proposed Rule 49(b)(1), which stated "Any paper that is required to be served must be filed within a reasonable time after service." He expressed concern that a reasonable person could read this as barring what happens 95% of the time. It seems to say that any paper required to be served must be filed after service. But that's not what happens. The problem is serving non-e-filers. It is conceivable that the filing would be made before service was made. If service occurred after filing, that would violate the rule. It is also common practice in serving a non-e-filer to first file the paper using the electronic filing system, print off the CM/ECF version with the docket number at the top, copy it, and then serve the copy on the non-e-filer. Again this would be service after filing. Because the language could be read as mandating that the filing must occur after service, he proposed that the Committee replace "after" with "of" or "not later than."

Professor Beale noted that the published language had been drawn from current Civil Rule 5, which presently governs in criminal cases as well. Given the effort to coordinate the Rules, this would require Civil to make the same change. So the question is whether the Criminal Rules Committee wants to make this change and try to convince the other committees to adopt it as well to maintain uniformity.

Judge Campbell advised the Committee to do what it thought was correct, and to delegate authority to chair and reporters to coordinate before the proposed amendment gets to the Standing Committee. Although the language could be read as Judge Feinerman suggested, Judge Campbell doubted it would cause a judge to reject something because it was filed before service.

A motion to substitute the word "of" for the word "after" was made and seconded.

A member questioned the need to make the change. The Civil Rule has been in effect for many years, apparently no one has raised this issue, and if someone did raise the issue they presumably would have to show some prejudice. Since this is a rule about notice, and they just got notice too early, one wonders whether there would ever be relief, even if technical violation of a possible interpretation of the rule. Since this is a long standing rule and there are no problems, why change it? The member also expressed concern that this could create a negative implication problem with other provisions.

Judge Feinerman responded that he would agree if this were the only change being made in Rule 49. But "we have the body on the operating table," so to speak, and while we are operating on it we should take the opportunity to make the change. The Committee Note could say this is a clarification, and no change in meaning is intended.

A member agreed that since the language is technically wrong and the provision is being amended, the Committee should correct it.

Judge Campbell commented that because the Committee is writing a new criminal rule, it should do what it thinks is right. If you have a better way to write it, do that. Maybe it would cause the Civil Rule Committee to make a parallel change. It would tee up the issue for the other committees to consider. Of course it might then be changed by the style consultants.

The motion to change "after" to "of" in the revised language passed unanimously.

Professor Beale asked the Committee to recognize that the reporters would need to revise the Committee Note to reflect the changes just made, subject to review by Judge Feinerman and Judge Molloy, as well as review by the reporters and chairs from the other committees. Last minute changes may be made before the Rule goes to the Standing Committee. And there will be another wave of style changes. Judge Molloy said this was consistent with the Committee's prior practice.

Prof. Beale said no changes were suggested for Rule 45. There was a motion to approve and send to Standing as published the changes to Rule 45. The motion was seconded and approved unanimously without further discussion.

Judge Molloy recognized Judge Kethledge to introduce the discussion of Rule 12.4.

Judge Kethledge, chair of the Rule 12.4 Subcommittee, reminded the Committee that amendments to the rule were published in the fall. The amendment was originally requested by the Department of Justice because the existing rule was burdensome in particular cases, such as those with a large numbers of corporate victims all suffering very small losses. The amendment addressed this problem in Rule 12.4(a), but it also included changes in Rule 12.4(b).

Professor Beale explained that the amendment as published made three changes to Rule 12.4(b). The first was adding a 28-day period for filing. The second replaced the term "supplemental" with "later" because if there is no initial filing, a later filing does not "supplement" anything. No comments were received on these first two changes. A third revision made it clear that the government must file a statement not only when there was a change in earlier information, but also when there was "additional" information. During the review period the Subcommittee learned that making that third change was problematic because it altered language that was common to other rules, particularly Civil Rule 7.1(b)(2). The Subcommittee agreed that creating this inconsistency would be undesirable, and that Rule 12.4 should be parallel to and consistent with the Civil Rule.

Judge Kethledge said there were two public comments. The National Association of Criminal Defense Lawyers said the proposed amendment was "unobjectionable." The Pennsylvania Bar Association suggested that good cause should be explicitly limited to cause bearing on judicial recusal. The Subcommittee thought that was already clear and declined that suggestion.

A motion to revise the published language to track the Civil Rule, as shown in the agenda book, p. 124, lines 24-27, was made, seconded, and unanimously approved without further discussion.

A final motion to send the amendment to the Standing Committee was made, seconded, and unanimously approved. Mr. Wroblewski indicated that the Justice Department was grateful for the Rules Committee's attention to this.

Judge Molloy recognized Judge Kemp to introduce the discussion of Rule 5.

Judge Kemp, chair of the Rule 5 Subcommittee, presented the proposed amendments to Rule 5 of the 2255 rules and Rule 5 of the 2254 rules. These amendments grew out of a dispute about the meaning of this rule, which was intended to make it clear that there is a right to file a reply. The Committee decided that part of the problem was that judges were relying upon outdated precedent and also that the current rule was ambiguous, because some were construing it to allow a reply only if the judge fixes a time to do that. To address this problem, the Committee asked the Subcommittee to separate the two parts of the sentence. That is the proposal before the Committee. The Subcommittee discussed whether to replace the word "may" in the current rule with something such as "is entitled to," but "may" appears in many of the Rules, and changing it in one rule might cause problems. Separating the two sentences makes this much clearer, and the Committee Note is explicit. Judge Kemp thanked the reporters for their work.

Discussion focused on the Committee Note. Professor King added that the note to the 2254, at p. 137 of the agenda book, contains two errors that will be changed: the reference to 2255 should be changed to 2254, and the reference to (d) will be changed to (e). Further, Judge Campbell's suggestion that "throughout" was intended to be "through" was accepted as a friendly amendment. Professor Coquillette advised the Committee that notes are not subject to review by the style consultants.

Judge Molloy asked why the 2255 rules use "moving party" and 2254 uses "petitioner." Professor Beale indicated that that this is the language of the current rules, and the terminology was not being changed.

Judge Campbell noted that the proposed note refers to the court's discretion "to set the time" for filing a response, which could still read to mean to set or not to set a time. Should it be changed to "in setting or determining" a time for reply? Members offered other suggestions for rewording the note, and the Committee agreed that the Reporters, in consultation with Judge Kemp, should revise the language to prevent misunderstanding.

A motion to approve Rule 5(d) amendments was made, seconded, and unanimously approved, with the understanding that changes to the note will be made to address members' concerns.

A motion to approve parallel changes to Rule 5(e) for 2254 proceedings was made, seconded, and unanimously approved, with the understanding that parallel changes will be made to the note for the 2255 rules, plus the two additional corrections noted by Professor King.

The proposed amendments will be presented to the Standing Committee with the recommendation that they be published for public comment.

The next item on the agenda was discussion of our suggestion that the Federal Judicial Center (FJC) prepare a manual for complex criminal litigation. Judge Jeremy Fogel, the Director of the FJC, has asked the Committee to develop a list of the five to ten issues it would be most important to cover. An email from one of those at the mini-conference suggested some topics, largely related to discovery, including funding of discovery assistance for Criminal Justice Act (CJA) attorneys and others.

A member suggested it would be important for the FJC to reach out to the CJA Review Committee. Judges have lots of budgetary issues, and in these cases the CJA lawyers don't always get the appointment they need early enough, or the money they need to get the experts they need. If that alone could be covered in this manual, that would be a huge help. Members also noted that there are a handful of coordinating attorneys that handle these issues, but there are not enough of the specialists to handle all of the cases.

Ms. Hooper stated that she would be happy to take a list of topics back to Judge Fogel, and noted that the FJC would also be likely to reach out to other judges and experts. A member agreed that it would be important to get information from the federal defenders, support analysts, and CJA lawyers to find out what kind of problems they have.

Judge Molloy asked the Rule 16.1 Subcommittee, chaired by Judge Kethledge, to develop a list of the most important topics to be included in a FJC manual for handling complex criminal cases, and to present the list for discussion at the next meeting. If any member has suggestions, they should contact Judge Kethledge.

Judge Campbell suggested that the Rule 16.1 Subcommittee reach out to several Judicial Conference committees: defense services, criminal law, and CACM.

Judge Molloy asked Mr. Wroblewski to present the next information item. Mr. Wroblewski explained that the Department of Justice has new software that tracks grand jury subpoenas and their return. An issue was raised regarding whether the software complies with Rule 17. CACM said it does comply. The Department is still responding to questions and concerns from some clerks of court, and the criminal chiefs from the U.S. Attorney's Offices will report any problems that require a rules amendment to him. Mr. Wroblewski concluded that he thought the issue was being resolved, and there will be no need for an amendment.

Judge Molloy announced that the fall meeting will be in Chicago on October 24, 2017.

In closing, Judge Molloy thanked the reporters for their extraordinary work and the amount of time they put in. He also thanked the staff of the Administrative Office and the FJC, who provided wonderful help. And he extended a final thanks to Ms. Brook and Judge Kemp, who have been great contributors to the work of the Committee.

TAB 1B

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 12-13, 2017 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee") held its fall meeting at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., on June 12-13, 2017. The following members participated:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Gregory G. Garre, Esq.
Daniel C. Girard, Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Amy St. Eve
Professor Larry D. Thompson
Judge Richard C. Wesley
Judge Jack Zouhary

The advisory committees were represented by their chairs and reporters:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter

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

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

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

Deputy Attorney General Rod J. Rosenstein represented the Department of Justice along with Elizabeth J. Shapiro, Deputy Director of the DOJ's Civil Division.

Present to provide support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Bridget Healy	Attorney Advisor, RCS
Scott Myers	Attorney Advisor, RCS
Julie Wilson	Attorney Advisor, RCS
Dr. Emery G. Lee III	Senior Research Associate, FJC
Dr. Tim Reagan	Senior Research Associate, FJC
Lauren Gailey	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed the participants. He announced this as the final meeting for Judge Wesley, Professor Thompson, and Greg Garre, who have been "invaluable contributors" to the rules committees. Judge Wesley called his appointment to the Committee an "incredible assignment" and thanked Judge Campbell and his predecessor, Judge Jeffrey S. Sutton, for their leadership. Mr. Garre expressed thanks for the "great privilege" of serving on the Committee. Professor Thompson thanked his fellow Standing Committee members, especially the judges, for their service, and was "happy to be just a small part" of the Committee's work.

Judge Campbell acknowledged a number of other recent and impending departures. He thanked Judge Sessions, whose term as Chair of the Evidence Rules Advisory Committee is coming to an end, for his "quiet but very effective leadership." Judge Campbell explained that former Standing Committee member Justice Robert P. Young recently stepped down from the bench to accept a position in private practice, and Bankruptcy Judge Michelle Harner left her position as Associate Reporter to the Bankruptcy Rules Advisory Committee upon her appointment to the bench. Another notable departure is that of Associate Justice Neil M. Gorsuch of the United States Supreme Court, who left his position as Chair of the Appellate Rules Advisory Committee upon his confirmation in April 2017.

Judge Campbell introduced Deputy Attorney General Rod Rosenstein, who was also confirmed in April 2017. DAG Rosenstein expressed his "deep appreciation" for the judiciary and thanked his colleague Betsy Shapiro, a career DOJ attorney whose duties for a number of years have included attending and participating in rules committee meetings, for her contributions.

Rebecca Womeldorf reported on the Judicial Conference session held on March 14, 2017, in Washington, D.C. Typically, the Standing Committee submits proposed rules amendments to the Judicial Conference for final approval at its September session. Approved rules are then submitted to the Supreme Court for consideration. Rules that the Court adopts are transmitted to

Congress by May 1 of the following year. Absent any action by Congress, the amendments go into effect on December 1 of that year.

This year, a "special circumstance"—the Bankruptcy Rules Advisory Committee's rules package implementing the new national Chapter 13 plan form—necessitated a different timetable. The Standing Committee decided to expedite the approval of the Chapter 13 rules package so it could go into effect at the same time as the proposed changes approved at the Judicial Conference's September 2016 session, which affect Bankruptcy Rules 1001, 1006(b), and 1015(b) and Evidence Rules 803(16) (the "ancient document" rule) and 902 (concerning self-authenticating evidence) (see Agenda Book Tab 1B).

At its January 2017 meeting, the Standing Committee approved the Chapter 13 package, consisting of proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113. The Judicial Conference approved those amendments at its March 2017 session, along with technical amendments to Appellate Rule 4(a)(4)(B) and Civil Rule 4(m). The proposed amendments were submitted to the Supreme Court, which approved them on an expedited basis and transmitted them to Congress on April 27, 2017. If Congress does not take action, these amendments will take effect on December 1, 2017.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee approved the minutes of the January 3, 2017 meeting (see Agenda Book Tab 1A).**

INTER-COMMITTEE COORDINATION

Many provisions of the four procedural rule sets use near-identical language to address similar issues. For that reason when an advisory committee proposes an amendment to a rule with analogous provisions in other rule sets, and the other advisory committees determine that it is practical and worthwhile to make a parallel amendment, the advisory committees attempt to use identical or similar language unless issues specific to a rule set would justify diverging. The Standing Committee considered a number of these coordination items at the June 2017 meeting (see Agenda Book Tab 7B), including: electronic service and filing, stays of execution, disclosure rules, and redaction of personal identifiers.

Electronic Service and Filing: Civil Rule 5, Appellate Rule 25, Bankruptcy Rules 5005 & 8011, and Criminal Rules 45 & 49

The Appellate, Bankruptcy, Civil, and Criminal Rules contain a number of similar provisions addressing service and filing, many of which needed to be updated to account for the use of electronic technology. Professor Cooper added that the number of interrelated provisions involved made for "a lot of moving parts," but the advisory committees worked together to achieve "maximum desirable uniformity" in their amendments. Any remaining differences in "structure and expression" can be attributed to "the context of the individual rule set."

Civil Rule 5. Professor Cooper presented the proposed changes to Civil Rule 5, which governs service and filing in civil cases (see Agenda Book Tab 4A, pp. 416-30).

Current Civil Rule 5(b)(2)(E) requires the written consent of the person to be served if a paper is to be served electronically. The proposed amended version would permit a paper to be served by filing it with the court's electronic filing system ("CM/ECF"), which automatically sends an electronic copy to the registered users associated with that particular case, without consent. Consent in writing would still be required for methods of electronic service other than CM/ECF. This amended rule would abrogate Civil Rule 5(b)(3), which permits use of the court's facilities to file and serve via CM/ECF if applicable local rules allow. These proposed amendments generated "very little comment." In response to a concern raised by a clerk of court, a sentence was added to the committee note to clarify that the court is not required to notify the filer in the event that an attempted CM/ECF transmission fails.

Although the current version of Civil Rule 5(d)(1) requires a certificate of service, the proposed amendments would lift this requirement in part. The published version provided that, for documents filed through CM/ECF, the automatically-generated notice of electronic filing would constitute a certificate of service. Professor Cooper explained that after publication, the Civil Rules Advisory Committee followed the Appellate Rules Advisory Committee's lead in revising Rule 5(d)(1)(B) to provide "simply that no certificate of service is required" for papers served through CM/ECF. For other papers, amended Rule 5(d)(1)(B) also addresses whether a certificate of service must be filed. "[T]he committees . . . are in accord" that if a paper is filed nonelectronically, "a certificate of service must be filed with it or within a reasonable time after service." In civil practice, however, many papers, including "a very large share of discovery papers," are exchanged among the parties but not filed. "Unique to Civil Rule 5," therefore, is the "separate provision" stating that if a paper is not filed, a certificate of service generally need not be filed.

The proposed amendment to Civil Rule 5(d)(3) would make electronic filing mandatory for parties represented by counsel, except when nonelectronic filing is allowed or required by local rule or permitted by order for good cause. The proposed amendment would continue to give courts discretion to permit electronic filing by pro se parties, as long as the order or local rule allows for reasonable exceptions. The Civil Rules Advisory Committee elected not to require pro se parties to file electronically; while many pro se parties are willing and able to use CM/ECF, the Advisory Committee had "some anxiety" about the possibility of effectively denying access to those who are not. The Advisory Committee declined, in response to a public comment, to grant pro se litigants a right to file electronically.

A proposed new subparagraph, Civil Rule 5(d)(3)(C), establishes a uniform national signature provision. As published, the rule provided that "[t]he user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." During the public comment period, concerns were raised that the first clause, read literally, required attorneys to place their usernames and passwords in the signature block. The advisory committees worked together to clarify the language, replacing that clause with, "An authorized filing made through a person's electronic filing account."

Initially, the Bankruptcy Rules Advisory Committee omitted the word "authorized" from its version, citing an ambiguity as to whether the court was to authorize the filing, or "the attorney was authorizing someone else to do the filing" (the intended reading). The Appellate Rules Advisory Committee was inclined to omit the term as well. Because their concerns were not unique to a particular rule set, and "merely a question of wording," Judge Campbell encouraged the advisory committees to adopt a uniform, mutually-agreeable solution at the Standing Committee meeting. The Standing Committee, advisory committee chairs and reporters, and style consultants worked together to refine the language, settling on, "A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature." The Standing Committee agreed to use this language in the parallel provisions of all four rule sets.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Civil Rule 5, with the revisions made during the meeting.**

Appellate Rules 25 and 26. Judge Chagares and Professor Maggs presented the proposed changes to appellate e-filing and service under Appellate Rule 25 (see Agenda Book Tab 2A, pp. 89-95; Agenda Book Supplemental Materials, pp. 2-3, 5-17).

Proposed amended Appellate Rule 25(a)(2)(B)(i) requires represented persons to file papers electronically but allows exceptions for good cause and by local rule. Appellate Rule 25(a)(2)(B)(iii), addressing electronic signatures, incorporates the uniform national signature provision developed in consultation with the other advisory committees (see discussion of Civil Rule 5(d)(3)(C), *supra*). Like the analogous Civil Rules provisions concerning electronic service, Appellate Rule 25(c)(2) has been amended to permit electronic service through the court's CM/ECF system, or by other electronic means that the person to be served consented to in writing. The proposed amendment to Appellate Rule 25(d)(1) also omits the requirement of a certificate of service for papers filed via CM/ECF (see discussion of Civil Rule 5(d)(1)(B), *supra*).

The Advisory Committee made a number of revisions in response to public comments. Some criticized the proposed electronic signature provision, which subsequently incorporated the language drafted during the Standing Committee meeting (see discussion of Civil Rule 5(d)(3)(C), *supra*). To clarify that there are two available methods of electronic service under proposed Appellate Rule 25(c)(2), the Advisory Committee placed them in separate clauses: a paper can be served electronically by "(A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing." Like the other advisory committees, the Appellate Rules Advisory Committee discussed but declined to make changes in response to a comment suggesting that pro se parties should have a right to file electronically.

The proposed amendment to Appellate Rule 25(a)(2)(C), which addresses inmate filings, was revised to incorporate amendments that took effect in December 2016. Professor Maggs added that that the amended rules' subheadings have also been altered to match the Civil Rules' subheadings.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rule 25, with the revisions made during the meeting.**

After the Standing Committee meeting, the Advisory Committee recognized the need for technical and conforming changes to Appellate Rule 26(a)(4)(C), which contains references to Rules 25(a)(2)(B) and 25(a)(2)(C), and Appellate Form 7, which contains a note referring to Rule 25(a)(2)(C). The proposed amendments discussed above renumbered subparagraphs (B) and (C) as Rule 25(a)(2)(A)(ii) and 25(a)(2)(A)(iii), respectively, and the Advisory Committee recommended updating the references in Rule 26 and Form 7 accordingly. The Standing Committee approved the proposed amendments.

Bankruptcy Rules 5005 and 8011. Judge Ikuta presented the proposed amendments to Bankruptcy Rules 5005(a)(2) and 8011, governing electronic filing and signing in bankruptcy cases (see Agenda Book Tab 3A, pp. 192-94, 204).

The proposed amendments to Bankruptcy Rule 5005 generally track the proposed amendments to Civil Rule 5 (see discussion *supra*). When proposed amended Rule 5005 was published, most of the comments concerned the wording of new subparagraph (a)(2)(C), the electronic signature provision. Despite the Bankruptcy Rules Advisory Committee's initial concern about the term "authorized filing," it adopted the revised text drafted by the Standing Committee, which clarified that the attorney, not the court, is to authorize the filing (see discussion of Civil Rule 5(d)(3)(C), *supra*). Another comment opposed the presumption against electronic filing by pro se litigants, but, like the other advisory committees, the Bankruptcy Rules Advisory Committee declined to give pro se parties the right to e-file.

When the Advisory Committee recommended publication of proposed amendments to Bankruptcy Rule 5005, it overlooked the need for similar amendments to Rule 8011, its bankruptcy appellate counterpart. Accordingly, the Advisory Committee subsequently recommended amendments conforming Bankruptcy Rule 8011 to Civil Rule 5 and Appellate Rule 25 without publication, so all of the e-filing amendments can take effect at the same time. For consistency with the other rules, minor changes will be made to Rule 8011's captions as originally drafted. Revisions will also be made to the committee notes.

The proposed amendments to the Bankruptcy Rules regarding electronic filing and service are not identical to the other rule sets' parallel provisions. Beyond bankruptcy-specific language derived from the Bankruptcy Code—e.g., use of the term "individual" rather than "person," and "entity" to describe a litigant represented by counsel—the amendments phrase their incomplete-service provisions differently. Instead of deeming electronic service complete unless the sender or filer "learns" or "is notified" that the paper was not received, the Bankruptcy Rules use the phrase "receives notice" to prevent litigants from "purposely ignor[ing] notice" to avoid "learning . . . that the document was not received." Because these linguistic disparities have existed since the various rule sets were adopted, the reporters agreed the provisions did not need to be reconciled.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Bankruptcy Rules 5005 and 8011, with the revisions made during the meeting.**

Criminal Rules 45 and 49. Professor Beale explained that the inter-committee effort to develop rules for electronic filing, service, and notice necessitated more substantial changes to Criminal Rule 49 (see Agenda Book Tab 5A, pp. 652-53, Tab 5B, pp. 665-80). The proposed amendments to Civil Rule 5 mandating electronic filing directly affect Criminal Rule 49(b) and (d) (service and filing must be done in the manner "provided for a civil action") and Criminal Rule 49(e) (locals rule may require electronic filing only if reasonable exceptions are allowed). Although, as Professor King said, the Advisory Committee "worked diligently" to track the changes to the Civil Rules where possible, it concluded that the proposed default rule requiring represented parties to file and serve electronically could be problematic in criminal cases, where prisoners and unrepresented defendants often lack access to CM/ECF. In light of these differences, the Advisory Committee decided to draft and publish a stand-alone Criminal Rule to address electronic filing and service. Professor Beale explained that because the Advisory Committee would essentially be starting from scratch, it decided to take the opportunity "to more fully specify how [electronic filing and service were] going to work."

There are a number of substantive differences between proposed Criminal Rule 49 and proposed Civil Rule 5. Instead of allowing courts to require by order or local rule (with reasonable exceptions) unrepresented parties to e-file, proposed Criminal Rule 49(b)(3)(B) requires them to file *non*electronically, unless permitted to e-file. Proposed subsection (c) also makes nonelectronic filing the default rule for all nonparties, whether they are represented or not. Proposed Criminal Rule 49(b)(4) borrows language from the signature provision of Civil Rule 11(a), and the text of Civil Rule 77(d)(1) regarding the clerk's duty to serve notice of orders replaces current Criminal Rule 49(c)'s direction that the clerk serve notice "in a manner provided for in a civil action." A conforming amendment to Criminal Rule 45 would update its cross-references accordingly (see Agenda Book Tab 5B, pp. 681-82).

The changes were not controversial. The Criminal Rules Advisory Committee considered a comment regarding extending electronic filing privileges to pro se parties (other than inmates, as well as inmates and nonparties) but, like the other advisory committees, declined to do so.

Following the public comment period, the Advisory Committee replaced the phrase "within a reasonable time after service" in Criminal Rule 49(b)(1) with "*no later than* a reasonable time after service," to make clear that certain papers may be filed before they are served. Similarly, text addressing papers served by means other than CM/ECF now requires a certificate of service to "be filed with [the paper] or within a reasonable time after service or filing." Paragraph (b)(1) was also revised to state explicitly that no certificate of service is required for papers served via CM/ECF. Like the Civil Rules Advisory Committee, the Criminal Rules Advisory Committee added a sentence to the committee note to Rule 49(a)(3) and (4) to make clear that the court is not responsible for notifying the filer that an attempted CM/ECF transmission failed (see discussion of Civil Rule 5(b), *supra*). The Advisory Committee adopted

the revisions made at the Standing Committee meeting to its electronic signature provision in proposed Criminal Rule 49(b)(2), with conforming changes to the committee note (see discussion of Civil Rule 5(d)(3)(C), *supra*).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Criminal Rule 49 and conforming amendment to Criminal Rule 45, with the revisions made during the meeting.**

Stays of Execution:
Civil Rules 62 & 65.1; Appellate Rules 8, 11, & 39; and
Bankruptcy Rules 7062, 8007, 8010, 8021, & 9025

Civil Rules 62 and 65.1. The proposed amendments to Civil Rule 62, which governs stays of proceedings to enforce judgments, are the product of a joint subcommittee of the Civil Rules and Appellate Rules Advisory Committees known as the "Civil/Appellate Subcommittee."

The proposed amendments make three changes (see Agenda Book Tab 4A, pp. 524-27). First, the automatic stay period is extended to eliminate a gap in the current rule between the length of the current automatic-stay period under Rule 62(a) and the length of a stay pending disposition of a post-judgment motion under Rule 62(b). This discrepancy arose when the Time Computation Project set the expiration of an automatic stay under Civil Rule 62(a) at 14 days after entry of judgment, and the time for filing a post-judgment motion under Rules 50, 52, or 59 at 28 days after entry of judgment. The unintended result was a "gap": the automatic stay expires halfway through the time allowed to make a post-judgment motion. The proposed amendment to Civil Rule 62(a) addresses this gap by extending the automatic stay period to 30 days and providing that the automatic stay takes effect "unless the court orders otherwise." In response to a judge member's question, Judge Bates confirmed that the court has discretion to extend the stay beyond 30 days.

Second, the proposed amendments make clear that a judgment debtor can secure a stay that lasts from termination of the automatic stay through final disposition on appeal by posting a continuing security, whether as a bond or another form (see discussion of Appellate Rules 8(a), 11(g), and 39(e), *infra*). The amendments allow the security to be provided before the appeal is taken, and permit any party, not just the appellant, to obtain the stay. Third, subdivisions (a) through (d) have been rearranged, carrying forward with only a minor change the current provisions for staying a judgment in an action for an injunction or a receivership, or directing an accounting in a patent infringement action.

The proposed amendment to Civil Rule 65.1 reflects the expansion of Civil Rule 62 to include forms of security other than a bond (see Agenda Book Tab 4A, pp. 524, 528-29). Following the comment period, the Advisory Committee made additional changes to Civil Rule 65.1 for consistency with the proposed amendments to parallel Appellate Rule 8(b), substituting the terms "security" and "security provider" for "bond," "undertaking," and "surety" (see discussion *infra*). The Advisory Committee decided shortly before the Standing Committee

meeting to change the word "mail" in the last sentence to "send," and will adopt the parallel Appellate Rule's committee note language.

Judge Campbell noted that the proposed amendments to Civil Rules 62 and 65.1 represent "a real improvement" by eliminating the gap, replacing "arcane language," and clarifying the structure. He thanked the Civil/Appellate Subcommittee, chaired by Judge Scott M. Matheson, Jr. of the Civil Rules Advisory Committee, for its efforts.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Civil Rules 62 and 65.1.**

Appellate Rules 8, 11, and 39. Judge Chagares and Professor Maggs presented the Appellate Rules Advisory Committee's proposed amendments to Appellate Rules 8 (stays or injunctions pending appeal), 11 (forwarding the record), and 39 (costs) (see Agenda Book Tab 2A, pp. 83-86). Also developed by the Civil/Appellate Subcommittee, they would conform Appellate Rules 8(a), 11(g), and 39(e) to proposed amended Civil Rule 62 by eliminating the "antiquated" term "supersedeas bond," instead allowing an appellant to provide "a bond or other security." The Advisory Committee also replaced "surety" with "security provider" and "a bond, a stipulation, or other undertaking" with the generic term "security"—the same changes made to proposed amended Civil Rule 65.1 (see discussion *supra*). The Advisory Committee also changed the word "mail" to "send" to conform Rule 8(b) to the proposed amendments to Appellate Rule 25. The committee note has been modified accordingly.

A judge member noted that the amended rule is consistent with current practice, as "other forms of security," such as letters of credit, have long been used to secure stays or injunctions pending appeal. Another judge member pointed out that the proposed amendments use the phrase "gives security," while "*provides* security" is used in practice and elsewhere in the rules. Professor Maggs explained that the Advisory Committee deliberately decided not to use "provides security" to avoid implying that a security provider—as opposed to a party—must provide the security.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rules 8, 11, and 39.**

Bankruptcy Rules 7062, 8007, 8010, 8021, and 9025. Judge Ikuta presented the Bankruptcy Rules Advisory Committee's proposed conforming amendments to Rules 7062 (stays of proceedings to enforce judgments), 8007 (stays pending appeal), 8010 (transmitting the record), 8021 (costs), and 9025 (proceedings against sureties). Consistent with proposed amendments to Civil Rules 62 and 65.1 and Appellate Rules 8, 11, and 39, the proposed conforming amendments to the Bankruptcy Rules would broaden and modernize the terms "supersedeas bond" and "surety" by replacing them with "bond or other security" (see Agenda Book Tab 3A, pp. 204-06).

Because Bankruptcy Rule 7062 currently incorporates all of Civil Rule 62 by reference, this new terminology will automatically apply in bankruptcy adversary proceedings when Rule 62 goes into effect. However, the Bankruptcy Rules Advisory Committee did not adopt the amendment to Civil Rule 62(a) that lengthens the automatic stay period from 14 to 30 days (see discussion of Civil Rule 62, *supra*). As a judge member pointed out, the deadline for filing post-judgment motions in bankruptcy is 14 days, not 28—there is "no gap." Accordingly, amended Rule 7062 would continue to incorporate Civil Rule 62, "except that proceedings to enforce a judgment are stayed for 14 days after its entry."

Publication was deemed unnecessary because, as Professor Gibson explained, the proposed amendments simply adopt other rule sets' terminology changes and "maintain[] the status quo" with respect to automatic stays in the bankruptcy courts.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for final approval without publication the proposed conforming amendments to Bankruptcy Rules 7062, 8007, 8010, 8021, and 9025.**

Disclosure Rules:

Criminal Rule 12.4 and Appellate Rules 26.1, 28, & 32

Criminal Rule 12.4. Criminal Rule 12.4 governs disclosure statements. Judge Molloy explained that when the rule was adopted in 2002, the committee note stated that it was intended "to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.'" The note quoted a provision of the 1972 judicial ethics code that treated all victims entitled to restitution as "parties" for the purpose of recusal. This is no longer the case. As amended in 2009, the Code of Conduct for United States Judges now requires disclosure only when a judge has an "interest that could be affected substantially by the outcome of the proceeding."

In response to a suggestion from the DOJ, the proposed amendment to Criminal Rule 12.4(a) would align the scope of the required disclosures with the 2009 amendments to the Code by relieving the government of its obligation to make the required disclosures upon a showing of "good cause" (see Agenda Book Tab 5A, pp. 653-54, Tab 5B, pp. 683-86). In essence, the revised rule allows the court to use "common sense" to decline to require burdensome disclosures when numerous organizational victims exist, but the impact of the crime on each is relatively small. Criminal Rule 12.4(b) would also be amended, to specify in paragraph (b)(1) that the disclosures must be made within 28 days after the defendant's initial appearance, and to replace paragraph (b)(2)'s references to "supplemental" filings with "later" filings. The final version of Rule 12.4(b)(2), which is modeled after language used in Civil Rule 7.1(b)(2), requires certain parties to "promptly file a later statement if any required information changes."

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Criminal Rule 12.4.**

Appellate Rules 26.1, 28, and 32. Under Appellate Rule 26.1, corporate parties and amici curiae must file disclosure statements to assist judges in determining whether they have an interest in a related corporate entity that would disqualify them from hearing an appeal. Because some local rules require more information to be disclosed than Appellate Rule 26.1 does, the Advisory Committee considered whether the federal rule should be similarly amended and sought approval to publish proposed amendments for public comment.

The Advisory Committee proposed adding a new subdivision (b) to require disclosure of organizational victims in criminal cases (see Agenda Book Tab 2A, pp. 102-06), generally conforming Appellate Rule 26.1 to the amended version of Criminal Rule 12.4(a)(2). New subdivision (c) would require disclosure of the name(s) of the debtor(s) in a bankruptcy appeal if not included in the caption (as in some appeals from adversary proceedings, such as disputes among the debtor's creditors). New subdivision (d) would require a "person who wants to intervene" to make the same disclosures as parties. At the Standing Committee meeting, the committee note was also revised to require "persons who want to intervene," rather than "intervenors," to "make the same disclosures as parties."

The Advisory Committee moved current subdivisions (b) and (c), which address supplemental filings and the number of copies, to the end and re-designated them (e) and (f) to clarify that they apply to all of the preceding disclosure requirements. Because proposed new subdivision (d) makes the rule applicable to those seeking to intervene as well as parties, the Standing Committee rephrased subdivisions (e) and (f) in the passive voice to account for the possibility that non-parties may also be required to file disclosure statements. In addition to these revisions to subdivisions (d), (e), and (f), the Standing Committee made minor wording changes to proposed subdivision (c).

Current Appellate Rule 26.1(b) (redesignated (e)), like Criminal Rule 12.4(b), uses the term "supplemental filings." The Appellate Rules Advisory Committee, aware that the Criminal Rules Advisory Committee was revising Rule 12.4(b) (see *supra*), considered amending Rule 26.1 to conform to a preliminary draft. The Criminal Rules Advisory Committee, however, informed the Appellate Rules Advisory Committee of its intention to scale back its draft amendments to Rule 12.4(b) and recommended no conforming changes to Appellate Rule 26.1(b).

The proposed change of Appellate Rule 26.1's heading from "Corporate Disclosure Statement" to "Disclosure Statement" will require additional minor conforming amendments to Appellate Rules 28(a)(1) (cross-appeals) and 32(f) (formal requirements for briefs and other papers) and accompanying notes.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Appellate Rules 26.1, 28(a)(1), and 32(f), subject to the revisions made during the meeting.**

Bankruptcy Rule 8012. Scott Myers (RCS) reported that the Bankruptcy Rules Advisory Committee will examine Bankruptcy Appellate Rule 8012, which governs disclosures in bankruptcy appeals, to

determine whether conforming changes are necessary in light of the proposed amendments to Appellate Rule 26.1.

Redacting Personal Identifiers:
Bankruptcy Rule 9037

The Bankruptcy Rules Advisory Committee sought approval to publish for comment proposed new Bankruptcy Rule 9037(h), which would provide a procedure for redacting personal identifiers in documents that were not properly redacted prior to filing (see Agenda Book Tab 3A, pp. 213-15). In response to a suggestion from the CACM Committee, new subdivision (h) lays out the steps a moving party must take to identify a document that needs to be redacted under Rule 9037(a) and for providing a redacted version (see Agenda Book Tab 3B, App'x B, pp. 385-88). When such a motion is filed, the court would immediately restrict access to the original document pending determination of the motion. If the motion is granted, the court would permanently restrict public access to the original filed document and provide access to the redacted version in its place.

The other advisory committees considered but declined to adopt similar privacy rules. A reporter explained that CACM's suggestion was specifically directed toward bankruptcy filings, which pose "a problem of a different order of magnitude." For example, when improperly-redacted documents are filed in a civil case, the filer and the clerk's office typically work together to address the problem "quickly" and "effectively." In bankruptcy cases, however, creditors often "make multiple filings, sometimes in different courts." Professor Gibson added that, although the other advisory committees were willing to add privacy rules for the sake of uniformity, they ultimately decided that bankruptcy's special circumstances warranted different treatment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendment to Bankruptcy Rule 9037.**

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report of the Advisory Committee on Criminal Rules, which met on April 28, 2017, in Washington, D.C. In addition to final approval of inter-committee amendments to three rules, the Advisory Committee sought permission to publish a new rule and proposed amendments to two others. It also presented two information items.

Action Items

Inter-Committee Amendments. The Standing Committee approved for submission to the Judicial Conference amendments to three Criminal Rules with inter-committee implications: Criminal Rules 12.4, 45, and 49 (see "Inter-Committee Coordination," *supra*).

New Criminal Rule 16.1 – Disclosures and Discovery. Proposed new Criminal Rule 16.1 would set forth a procedure for disclosures and discovery in criminal cases. It originated from a suggestion submitted by two criminal defense bar organizations to amend Criminal Rule 16, which currently governs the parties' respective duties to disclose, to address cases involving voluminous information and electronically stored information ("ESI"). The Rule 16.1 Subcommittee was formed to consider this suggestion, but determined that the "lengthy" and "complicated" original proposal, which focused on district judges' procedures, was unworkable.

The Subcommittee concluded, however, that a need might exist for a narrower, more targeted amendment. "[A]fter a great deal of discussion" at the fall 2016 meeting, the Advisory Committee decided at Judge Campbell's suggestion to hold a mini-conference to obtain the views of various stakeholders on the problems and "complexities" posed by large volumes of digital information. The mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from large and small firms, public defenders, prosecutors, DOJ attorneys, discovery experts, and judges.

All participants agreed that (1) ESI discovery problems can arise in both small and large cases, (2) these issues are handled very differently between districts, and (3) most criminal cases now include ESI. In 2012, the DOJ, AO, and the Joint Working Group on Electronic Technology in the Criminal Justice System developed a set of "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases," known as the "ESI Protocol." The defense attorneys and prosecutors at the mini-conference reached a consensus that there is a general lack of awareness of the ESI Protocol, and more training on it would be useful.

The major initial point of disagreement at the mini-conference was whether a rule amendment was necessary and desirable. The prosecutors were not convinced of the need for a rule change. The defense attorneys strongly favored one, but acknowledged problematic threshold questions: Would the rule only apply in "complex" cases? And if so, what *is* a complex case? For example, even "the simplest" criminal case can become "complicated" when it involves electronic evidence such as cell-phone tower location information. None of the attendees supported a rule that would require defining or specifying a "type" of case. A consensus emerged that any rule the Subcommittee might draft should (1) be simple and place the principal responsibility for implementation on the lawyers rather than the court, and (2) encourage use of the ESI Protocol. The prosecutors and DOJ felt strongly that the rule must be flexible in order to address variation between cases.

Guided by the "really helpful information and perspective" shared at the mini-conference, as well as existing local rules and orders addressing ESI discovery, the Subcommittee drafted and the Advisory Committee unanimously approved proposed new Criminal Rule 16.1 (Pretrial Discovery Conference and Modification) (see Agenda Book Tab 5A, pp. 654-56, Tab 5C, pp. 689-90). Subdivision (a) requires that, in every case, counsel must confer no more than 14 days after the arraignment and "try to agree" on the timing and procedures for disclosure. Subdivision (b) emphasizes that the parties may seek a modification from the court to facilitate preparation. Because technology changes rapidly, proposed Rule 16.1 does not attempt to specify standards for the manner or timing of disclosure. Rather, it provides a process that

encourages the parties to confer early in the case to determine whether the standard discovery procedures should be modified and neither "alter[s] local rules nor take[s] discretion away from the court." So far, the proposal has been "satisfactory" to all, including the groups who made the initial suggestion.

Judge members asked why the new language has been added as a proposed stand-alone rule rather than an addition to Rule 16. Professors Beale and King responded that, while Rule 16 specifies *what* must be disclosed, Rule 16.1 concerns the timing of and procedures for disclosure. Whereas Rule 16 is a discovery rule, the new rule addresses activity that occurs prior to discovery. Judge Molloy added that, unlike Rule 16(d), the new rule governs the behavior of lawyers, not judges.

Several members wondered whether the rule's directive that the parties confer "in person or by telephone" excluded other "equally effective" modes of communication, such as live videoconferencing, that are either currently in use or will come into use as technology progresses. Judge Molloy responded that the rules define "telephone" broadly enough to encompass other means of live electronic communication, and Professors Beale and King explained that the Subcommittee consciously chose that language in order to promote live interaction. A reporter noted that removing the language would more closely track parallel Civil Rule 26(f), and Judge Campbell added that the term "confer" already implies real-time communication. A judge member moved to delete the phrase "in person or by telephone" from the proposed rule, the motion was seconded, and the Standing Committee unanimously voted in favor of the motion. The Advisory Committee and Standing Committee will pay attention to this issue during the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 proposed new Criminal Rule 16.1, as modified by the Standing Committee.**

Rules 5 of the Section 2254 and Section 2255 Rules – Right To File a Reply. In response to a conflict in the case law identified by Judge Wesley, the Advisory Committee proposed an amendment to Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts to make clear that a petitioner has the right to file a reply. The Advisory Committee also proposed amending the parallel provision in Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts (see Agenda Book Tab 5A, pp. 657-58, Tab 5C, pp. 691, 693).

The current text of those rules provides that the petitioner or moving party "may submit a reply . . . within a time period fixed by the judge." Although this language was intended to create a right to file a reply, a significant number of district courts have read "fixed by the judge" to allow a reply only if the judge determines that a reply is warranted and sets a time for filing. Reasoning that this particular reading was unlikely to be corrected by appellate review, the Subcommittee formed to study the issue proposed an amendment that would confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence: "The moving party may file a reply to the respondent's answer or other pleading. The judge must set the time to file, unless the time is already set by local rule." The

proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

The word "may" was retained because it used in many other rules, and the Advisory Committee did not want to cast doubt on its meaning. However, to prevent the word "may" from being misread, the following sentence was added to the committee note: "We retain the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'"

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts.**

Information Items

Manual on Complex Criminal Litigation. The FJC has confirmed that it has received approval to publish a manual for trial judges on complex criminal litigation (see Agenda Book Tab 5A, p. 662). The Advisory Committee has formed a subcommittee to determine which subjects to include.

Cooperators. In response to an FJC study concluding that hundreds of criminal defendants had been harmed after court documents revealed that they had cooperated with the government, the Judicial Conference Committee on Court Administration and Case Management ("CACM") in 2016 released "interim guidance" to the district courts on managing cooperation information. The CACM guidance requires, for example, every plea agreement to include a sealed addendum for cooperation information and a bench conference to be held to discuss cooperation during every plea hearing, whether or not the defendant is actually cooperating.

Judge Jeffrey S. Sutton, then Chair of the Standing Committee, directed the Criminal Rules Advisory Committee to consider rules changes that would implement the recommendations in the CACM guidance, before making a normative recommendation as to whether some, all, or none, of those changes should be adopted. Recognizing the breadth of the cooperator-harm issue, Judge Sutton encouraged that other stakeholders, such as the DOJ and Bureau of Prisons, be included in the discussion. In response, Director James C. Duff of the Administrative Office of the U.S. Courts ("AO") created a Task Force on Protecting Cooperators, consisting of CACM and Criminal Rules Advisory Committee members, as well as a variety of experts and advisors.

The Advisory Committee has since formed a Cooperator Subcommittee, which continues to explore possible rules amendments to mitigate the risks that access to information in case files poses to cooperating witnesses. In addition to rules that would implement the CACM guidance, the Subcommittee is also considering alternative approaches. The Subcommittee intends to present its work to the full Advisory Committee at the fall 2017 meeting. The Advisory Committee will then make its recommendation to the Task Force, which plans to issue its report and recommendations—including any amendments to the Criminal Rules—in 2018 (see Agenda

Book Tab 5A, pp. 658-62).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Maggs provided the report of the Advisory Committee on Appellate Rules, which met on May 2, 2017, in Washington, D.C. Judge Chagares succeeded Justice Gorsuch as chair in April 2017. The Advisory Committee sought approval of several action items and presented a list of information items.

Action Items

Inter-Committee Amendments. The Standing Committee approved for submission to the Judicial Conference proposed amendments to Appellate Rules 25 (electronic filing and signing), 8, 11, and 39 (stays and injunctions pending appeal), and approved proposed amendments to Appellate Rules 26.1, 28, and 32 (disclosures) for publication in August 2017 (see "Inter-Committee Coordination," *supra*).

Appellate Rules 28.1 and 31 – Time To File a Reply Brief. Rules 28.1(f)(4) and 31(a)(1) currently set the time to file a reply brief at 14 days after service of the response brief. Until the 2016 amendments eliminated the "three day rule" for papers served electronically, however, parties effectively had 17 days because Appellate Rule 26(c) allowed three additional days when a deadline ran from service that was not accomplished same-day as well as service completed electronically. The Advisory Committee concluded that "shortening" this period from 17 days to 14 could hinder the preparation of useful reply briefs. Accordingly, the Advisory Committee proposed extending the time to file a reply to 21 days, the next seven-day increment (see Agenda Book Tab 2A, pp. 81-82). The Advisory Committee received two comments in support of the published amendments and recommended approval without further changes.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rules 28.1 and 31.**

Appellate Form 4. Question 12 of Appellate Form 4 currently asks litigants seeking permission to proceed in forma pauperis to provide the last four digits of their social security numbers. Due to privacy and security concerns, the Advisory Committee asked its clerk representative to investigate whether this information was necessary for administrative purposes. When the clerks who were surveyed reported that it was not, the Advisory Committee recommended deleting the question (see Agenda Book Tab 2A, pp. 82-83). The proposed amendment received two positive comments when it was published, and the Advisory Committee recommended no further changes.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Form 4.**

Appellate Rule 29 – Limitations on Amicus Briefs Filed by Party Consent. Appellate Rule 29(a) currently permits an amicus curiae to file a brief either with leave of the court or with the parties' consent. Several courts of appeals, however, have adopted local rules forbidding the filing of an amicus brief that could result in the recusal of a judge. Of particular concern is the use of "gamesmanship" to try to affect the court's decision by forcing particular judges to recuse themselves. Given the arguable merit of these local rules, the Advisory Committee proposed adding an exception to Appellate Rule 29(a) providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification" (see Agenda Book Tab 2A, pp. 87-89).

The Advisory Committee received six comments opposing the proposed amendment. The commenters argued that the proposed amendment is unnecessary because amicus briefs that force the recusal of a judge are rare. In any event, the amicus curiae could not be expected to predict who the panel judges would be at the time the brief is filed and would have no recourse if the court strikes the brief—wasting time and money through no fault of the amicus curiae or its counsel. The Advisory Committee considered these comments, but determined that the interests in preventing gamesmanship and resolving the conflict among local rules outweighed the concerns.

The Advisory Committee made two revisions at its May 2017 meeting. First, to match the 2016 amendments renumbering Rule 29's subparts and adding new rules governing amicus briefs at the rehearing stage, the Advisory Committee moved the exception from the former subdivision (a) to new paragraph (a)(2) and added the exception to the new paragraph (b)(2) regarding rehearing. Second, the Advisory Committee rephrased the exception from "strike or prohibit the filing of" to "prohibit the filing of or . . . strike" to make it more chronological without changing its meaning or function.

Discussion during the Standing Committee meeting was robust. An attorney member recommended deleting from paragraph (b)(2) the proposed language regarding prohibiting or striking briefs at the rehearing stage, reasoning that the court already had discretion to do so, existing local rules would continue to stand under either version of the proposal, and republication would not be required. A judge member disagreed, arguing that the language in (b)(2) would at least give an amicus curiae an indication as to why its brief had been barred. The Standing Committee reached a compromise: the language would be deleted from (b)(2), but the committee note would explain that the court already has discretion to strike an amicus brief at the rehearing stage if it could cause recusal, and confirm that local rules and orders allowing such briefs to be barred are permissible. The language "such as those previously adopted in some circuits" would be deleted from the note.

The Standing Committee accepted a style consultant's recommendation to replace "except that" with "but" in paragraph (a)(2). A member repeated a commenter's suggestion to change the phrase "amicus brief" to "amicus-curiae brief" for accuracy, but the Advisory Committee and style consultants preferred to continue to use "amicus" as an adjective and "amicus curiae" as a noun for consistency with the other rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rule 29, subject to the revisions made during the meeting.**

Appellate Rule 41 – Stays of the Mandate. The Advisory Committee proposed amendments to Appellate Rule 41, which governs the contents, issuance, effective date, and stays of the mandate. Among other changes, the Advisory Committee initially added a sentence to Rule 41(b) permitting the court to extend the time to issue the mandate "only in extraordinary circumstances" (see Agenda Book Tab 2A, pp. 95-99).

The proposed amendments were published in August 2016, and the Advisory Committee made several revisions to account for the five comments received. In response to observations that a court might wish to extend the time for good cause in circumstances that are not "extraordinary," the Advisory Committee deleted the proposed sentence from Rule 41(b). The Advisory Committee also added subheadings, renumbered subparagraph (d)(2)(B) as (d)(2), and, in response to a comment warning of a potential gap in the rule, added a clause that would extend a stay automatically if a Supreme Court Justice extends the time for filing a petition for certiorari. The Advisory Committee made further revisions after its May 2017 meeting (see Agenda Book Supplemental Materials, pp. 3-4, 18-24).

As shown here, at the Standing Committee meeting the style consultants and an attorney member suggested additional changes to Appellate Rule 41(d)(2)(B) ((d)(2) as amended), which prohibits a stay from exceeding 90 days unless "the party who obtained the stay ~~files a petition for the writ and so~~ notifies the circuit clerk in writing within the period of the stay: (i) that the time for filing a petition ~~for a writ of certiorari in the Supreme Court~~ has been extended, in which case the stay continues for the extended period; or (ii) that the petition has been filed, in which case the stay continues until the Supreme Court's final disposition."

Three appellate judge members pointed out that unlike most courts of appeals, which circulate opinions to the full court prior to publication, their courts instead have the option to place a "hold" on the mandate while the full court reviews a panel's decision and considers whether to rehear the case en banc. They disagreed among themselves as to whether Rule 41(b)'s new provision allowing the court to extend the time to file the mandate "by order" was an appropriate solution, as it was unclear whether a standing order or clerk's order (as opposed to an order issued by an individual judge) would suffice. Satisfied that it would, and that the rule did not impose a time limit for issuing the order, the Standing Committee approved the rule as modified. Accordingly, the first sentence of the committee note would be revised as follows: "Subdivision (b) is revised to clarify that an order is required for a stay of the mandate ~~and to specify the standard for such stays~~."

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Appellate Rule 41, subject to the revisions made during the meeting.**

Technical Amendments to Rules 3(d) and 13 – References to "Mail." In light of the proposed changes to Appellate Rule 25 to account for electronic filing and service (see "Inter-

Committee Coordination," *supra*), the Advisory Committee recommended eliminating the term "mail" from other provisions (see Agenda Book Tab 2A, pp. 100-02).

Appellate Rule 3(d) concerns the clerk's service of the notice of appeal. The Advisory Committee changed "mailing" and "mails" to "sending" and "sends" in paragraphs (d)(1) and (3), and eliminated the mailing requirement from the portion of paragraph (d)(1) that directs the clerk to serve a criminal defendant "either by personal service or by mail addressed to the defendant." Instead, the clerk will determine whether to serve a notice of appeal electronically or nonelectronically based on the principles of revised Rule 25. The Standing Committee modified the committee note as follows: "Amendments to Subdivision (d) change the words 'mailing' and 'mails' to 'sending' and 'sends,' and delete language requiring certain forms of service, to ~~make~~ allow electronic service ~~possible~~."

Amended Rule 13, which governs appeals from the Tax Court, currently uses the word "mail" in its first and second sentences. The Advisory Committee recommended changing the reference in the first sentence to allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail, but not the second sentence, which expresses a rule that applies to notices sent by mail.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Appellate Rules 3(d) and 13, subject to the revisions to the committee note made during the meeting.**

Information Items

At its spring 2017 meeting, the Advisory Committee declined to move forward with several unrelated suggestions: (1) amending Appellate Rules 32.1 and 35 to require courts to designate orders granting or denying rehearing as "published" decisions, (2) adding a provision similar to Appellate Rule 28(j) to the Civil Rules, (3) addressing certain types of subpoenas in Appellate Rules 4 and 27, and (4) prescribing in Appellate Rule 28 the manner of stating questions presented in appellate briefs.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta and Professor Gibson presented the report of the Advisory Committee on Bankruptcy Rules, which met on April 6-7, 2017, in Nashville, Tennessee. The Advisory Committee sought approval of thirteen action items and shared two information items.

Action Items

Inter-Committee Amendments. The Standing Committee approved for submission to the Judicial Conference proposed amendments to Bankruptcy Rules 5005 and 8011 (electronic filing and signing) and 7062, 8007, 8010, 8021, and 9025 (stays and injunctions pending appeal), and approved for publication in August 2017 a proposed new subdivision to Rule 9037 (redaction of

personal identifiers) (see "Inter-Committee Coordination," *supra*).

Bankruptcy Rule 3002.1 – Home Mortgage Claims in Chapter 13 Cases. In chapter 13 cases in which a creditor has a security interest in a debtor's home, Bankruptcy Rule 3002.1(b) and (e) imposes noticing requirements on the creditor that enable the debtor or trustee to make mortgage payments in the correct amount while the bankruptcy case is pending (see Agenda Book Tab 3A, pp. 191-92). The proposed amendments to subdivisions (b) and (e) create flexibility regarding a notice of payment change for home equity lines of credit; create a procedure for objecting to a notice of payment change; and expand the category of parties who can seek a determination of fees, expenses, and charges owed at the end of the case.

The proposed amendments were published in August 2016. A comment noted that, although the amendments purported to prevent a proposed payment change from taking effect in the event of a timely objection, under the time-counting rules the deadline for filing the objection would actually be later than the payment change's scheduled effective date. The Advisory Committee revised the proposed amendment to eliminate this possibility and clarify that "if a party wants to stop a payment change from going into effect, it must file an objection *before* the change goes into effect" (see Agenda Book Tab 3B, App'x A, pp. 223-24).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Bankruptcy Rule 3002.1.**

Conforming Amendments to the Bankruptcy Part VIII Appellate Rules and Related Forms. The proposed amendments to Bankruptcy Part VIII Appellate Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022; Official Forms 417A and 417C; and the new Part VIII Appendix conform the Bankruptcy Rules to the December 1, 2016 Appellate Rules amendments (see Agenda Book Tab 3A, pp. 194-97). Because the Bankruptcy Appellate Rules generally follow the Appellate Rules, the Advisory Committee tracked the Appellate Rules absent a bankruptcy-specific reason not to.

Bankruptcy Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), list the post-judgment motions that toll the time for filing an appeal. The 2016 amendment to Appellate Rule 4(a)(4) added an express requirement that, in order to toll this deadline, the motion must be filed within the time period the rule the motion is made under specifies. The Bankruptcy Rules Advisory Committee published a similar amendment to Rule 8002(b) in August 2016 and received no comments.

Bankruptcy Rules 8002(c) (time to file a notice of appeal) and 8011(a)(2)(C) (filing, signing, and service) contain inmate-filing provisions virtually identical to the parallel provisions of Appellate Rule 4(c) and rule currently numbered Appellate Rule 25(a)(2)(C). The proposed amendments would conform to those rules by treating inmates' notices of appeal and other papers as timely filed if they are deposited in the institution's internal mail system on or before the last day for filing. The new inmate-declaration form designed to effectuate this rule is replicated by a director's form for bankruptcy appeals, and an amendment to Official Form 417A would direct inmate filers to the director's form.

The 2016 Appellate Rules amendments also affected the length limits in Bankruptcy Rules 8013, 8015, 8016, and 8022 and Official Form 417C, and necessitated the new Part VIII Appendix. Amended Appellate Rules 5, 21, 27, 35, and 40 converted page limits to word-count limits for documents prepared using a computer and reduced the existing word limits for briefs under Appellate Rules 28.1 (cross-appeals) and 32 (principal, response, and reply briefs). Appellate Form 6, the model certificate of compliance, was amended accordingly. Amended Appellate Rule 32(e) authorizes the court to vary the federal rules' length limits by order or local rule, Rule 32(f) lists the items that may be excluded from the length computation, and a new appendix collecting all of the length limits in one chart was added. The Bankruptcy Rules Advisory Committee proposed parallel amendments to Rules 8013(f) (motions), 8015(a)(7) and (f) (briefs), 8016(d) (cross-appeals), and 8022(b) (rehearing), along with Official Form 417C (model certificate of compliance). It also proposed an appendix to Part VIII similar to the Appellate Rules appendix.

Bankruptcy Rule 8017, addressing amicus filings, is the bankruptcy counterpart to Appellate Rule 29, which was amended in 2016 to address for the first time amicus briefs filed in connection with petitions for rehearing. The 2016 amendment does not require courts to accept amicus briefs at the rehearing stage, but provides guidelines for briefs that *are* permitted. In August 2016, the Appellate Rules Advisory Committee published an additional amendment to Appellate Rule 29(a) that would authorize a court of appeals to prohibit the filing of or strike an amicus brief that could cause the recusal of a judge (see discussion *supra*). To maintain consistency, the Bankruptcy Rules Advisory Committee proposed and published a parallel amendment to Rule 8017.

A commenter pointed out that, because amicus briefs are usually filed before a panel is assigned, an amicus curiae could not possibly predict whether its brief could lead to a recusal. The Advisory Committee rejected this comment because the proposed amendment does not *require*, but merely permits, the brief to be struck. Another comment suggested a more extensive and detailed rewrite that was beyond the scope of the proposed amendment. The Bankruptcy Rules amendments and committee note will be conformed to the revisions made to Appellate Rule 29 at the Standing Committee meeting (see discussion *supra*).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Bankruptcy Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022; Official Forms 417A and 417C; and the new Part VIII Appendix; subject to the conforming revisions to Bankruptcy Rule 8017 made during the meeting.**

Additional Bankruptcy Appellate Rules Amendments: Rules 8002, 8006, and proposed new Rule 8018.1. In addition to the conforming amendments to the Part VIII rules, amendments to Bankruptcy Appellate Rules 8002, 8006, and 8023 and new Bankruptcy Appellate Rule 8018.1 were published in August 2016 and received no comments. Following discussion of these amendments at the spring 2017 meeting, the Advisory Committee recommended final approval of Rules 8002, 8006, and 8018.1 as published (see Agenda Book Tab 3A, pp. 197-200), but sent Rule 8023 back to a subcommittee for further consideration (see Information Items,

infra).

Bankruptcy Rule 8002(a) generally requires a notice of appeal to be filed within 14 days of the entry of judgment. The proposed amendment would add a new paragraph (a)(5), which defines "entry of judgment" for this purpose. It would also clarify that, in contested matters and adversary proceedings where Civil Rule 58 does not require the entry of judgment to be filed as a separate document, the time for filing the notice of appeal begins to run when the judgment, order, or decree is entered on the docket (see Agenda Book Tab 3B, App'x A, pp. 237-43). In adversary proceedings where Civil Rule 58(a) *does* require a separate document, the time for filing a notice of appeal generally runs from when the judgment, order, or decree is docketed as a separate document or, if no separate document is prepared, 150 days from docket entry.

Bankruptcy Rule 8006 implements 28 U.S.C. § 158(d)(2)(A), which permits all parties to jointly certify a proceeding for direct appeal to the court of appeals. Because, as Professor Gibson explained, this "somewhat odd procedure" gives the parties the option to certify an appeal, new paragraph 8006(c)(2) authorizes the bankruptcy court, district court, or Bankruptcy Appellate Panel to, Judge Ikuta reported, "provide its views about the merits of such a certification to the court of appeals" (see Agenda Book Tab 3B, App'x A, pp. 245-46). Professor Gibson added that the proposed amendment was intended as "the counterpart" to existing rules that allow the parties to file a statement when the judge certifies an appeal: "If the parties get to comment on the judge's certification, the judge ought to be able to comment on the parties' [certification]." The judge would not be required to do so, and the court of appeals still has discretion to decide whether to accept the appeal.

Proposed new Rule 8018.1 addresses district court review of a judgment that the bankruptcy court lacked constitutional authority to enter under *Stern v. Marshall*, 564 U.S. 462 (2011), which held that certain claims, now dubbed "*Stern* claims," must be decided by an Article III court rather than a bankruptcy court. In *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), the U.S. Supreme Court held that bankruptcy judges may hear *Stern* claims and submit proposed findings of fact and conclusions of law, but they lack the authority to enter judgment on them; the district court is empowered to enter judgment after a de novo review. Under the existing rules, when a district court that determines that the bankruptcy court has entered final judgment in a *Stern* claim despite its lack of constitutional authority to do so, the case must be remanded to the bankruptcy court so the judgment can be recharacterized as proposed findings of fact and conclusions of law. New Bankruptcy Rule 8018.1 would bypass this process by authorizing the district court to simply treat the bankruptcy court's judgment as proposed findings and conclusions that it can review de novo (see Agenda Book Tab 3B, App'x A, pp. 289-90).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Bankruptcy Rules 8002 and 8006 and new Bankruptcy Rule 8018.1.**

Official Form 309F – Notice of Chapter 11 Bankruptcy Case (Corporations and Partnerships). The instructions at line 8 of Form 309F currently require a creditor seeking to

have its claim excepted from the discharge under § 1141(d)(6)(A) of the Bankruptcy Code to file a complaint by the stated deadline. But because the applicability of the deadline is unclear in some circumstances, the proposed revision to the instructions would allow the creditor to decide whether the deadline applies to its claims. When the proposed amendment was published in August 2016, a commenter pointed out that it necessitated a similar change to line 11 of the form (see Agenda Book Tab 3A, pp. 200-02). Accordingly, the Advisory Committee amended the last sentence of line 11 in a manner similar to the amendment to line 8 and recommended both changes for final approval.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Official Form 309F.**

Official Forms 25A, 25B, 25C, and 26 – Chapter 11 Small Business Debtor Forms and Periodic Report. Most bankruptcy forms have been modernized over the past several years through the Forms Modernization Project, but the Advisory Committee deferred consideration of Official Forms 25A, 25B, 25C, and 26, which relate to chapter 11 cases. The Advisory Committee has now reviewed these forms extensively, revised and renumbered them, and published them for comment in August 2016 (see Agenda Book Tab 3A, pp. 202-04).

The small business debtor forms, Forms 25A, 25B, and 25C, are renumbered as Official Forms 425A, 425B, and 425C (see Agenda Book Tab 3B, App'x A, pp. 315-59). Official Forms 425A and 425B contain an illustrative form plan of reorganization and a disclosure statement, respectively, for chapter 11 small business debtors. Official Form 425C is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee. Official Form 26, renumbered as Official Form 426 and rewritten and formatted in the modernized form style, requires periodic disclosures by chapter 11 debtors concerning the value, operations, and profitability of entities in which they hold a substantial or controlling interest (see Agenda Book Tab 3B, App'x A, pp. 361-73).

The Advisory Committee made "minor, non-substantive" changes in response to the three comments received, the "most substantial" of which was to add a section to Form 425A where the parties can address whether the bankruptcy will retain jurisdiction of certain matters after the plan goes into effect (see Agenda Book Tab 3B, App'x A, p. 318).

Upon motion, seconded by a member, and by voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Official Forms 25A, 25B, 25C, and 26 (renumbered respectively as 425A, 425B, 425C and 426).**

Conforming Amendments to Official Forms 309G, 309H, and 309I – Notices to Creditors in Chapter 12 and 13 Cases. Bankruptcy Rule 3015 governs the filing, confirmation, and modification of chapter 12 and chapter 13 plans. Absent contrary congressional action, as of December 1, 2017, an amendment to Rule 3015 adopted as part of the chapter 13 plan form package will no longer authorize a debtor to serve a plan summary, rather than a copy of the plan itself, on the trustee and creditors. This change will affect Official Forms 309G, 309H, and 309I,

the form notices sent to creditors to inform them of the hearing date for confirmation of the chapter 12 or 13 plan and the associated objection deadlines. The current versions of the forms also indicate whether a plan summary or the full plan is included with the notice. In accordance with the pending changes to Bankruptcy Rule 3015, the proposed amendments to Official Forms 309G, 309H, and 309I remove references to a "plan summary," which will no longer be an available option (see Agenda Book Tab 3A, p. 206, Tab 3B, App'x A, pp. 301-08). The Advisory Committee recommended approval of these conforming changes without publication so that they can take effect at the same time as the pending change to Rule 3015.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval without publication the proposed conforming amendments to Official Forms 309G, 309H, and 309I.**

Bankruptcy Rule 4001 – Obtaining Credit. Bankruptcy Rule 4001(c) governs the process by which a debtor in possession or a trustee can obtain credit outside the ordinary course of business while a bankruptcy case is pending. Among other things, the rule outlines eleven different elements of post-petition financing that a motion for approval of a post-petition credit agreement must address. These detailed disclosure requirements, which are intended supply the kind of specific information necessary for credit approval in chapter 11 business cases, are unhelpful and unduly burdensome in chapter 13 consumer bankruptcy cases, where typical post-petition credit agreements involve loans for items such as personal automobiles or household appliances. Accordingly, the Advisory Committee sought approval to publish for public comment a new paragraph to Rule 4001(c) that would make the disclosure provision inapplicable in chapter 13 cases (see Agenda Book Tab 3A, pp. 207-08, Tab 3B, App'x B, p. 379). Judge Ikuta reported that "many bankruptcy courts have already adopted [similar] local rules that impose less of a burden on chapter 13 debtors."

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Bankruptcy Rule 4001.**

Bankruptcy Rules 2002 & 9036 and Official Form 410 – Electronic Noticing. The proposed amendments to Bankruptcy Rules 2002(g) (Addressing Notices) and 9036 (Notice by Electronic Transmission) and Official Form 410 (Proof of Claim) are part of the Advisory Committee's effort to reduce the cost and burden of notice. Section 342 of the Bankruptcy Code gives creditors in chapter 7 and chapter 13 cases the right to designate an address to receive service. As part of the rules committees' efforts to ensure that the rules are consistent with modern technology, the Advisory Committee originally considered an opt-out provision under which electronic notice would be the default, but rejected it due to concerns that it might run afoul of § 342 or be incompatible with creditors' existing systems for processing notice by mail.

Instead, the proposed amendments make three changes that would allow creditors to opt in to electronic notice. First, a box has been added to Official Form 410, the proof-of-claim form, that creditors who are not CM/ECF users can check to receive notices electronically (see Agenda Book Tab 3B, App'x B, p. 389). Second, the proposed change to Rule 2002(g) would expand the rule's references to "mail" to include other means of delivery and delete "mailing"

before "address" so creditors can receive notices by email (see Agenda Book Tab 3B, App'x B, pp. 377-78). Third, amended Rule 9036 would allow registered users to be served via the court's CM/ECF system, and non-CM/ECF users by email if they consent in writing (see Agenda Book Tab 3B, App'x B, pp. 383-84).

A judge member wondered whether it was appropriate for the rules to refer to documents sent electronically as "papers." The Standing Committee determined to continue to use the term "papers," which is generic and is already used throughout the rules with respect to both electronic and hard-copy documents.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Bankruptcy Rules 2002 and 9036 and Official Form 410.**

Bankruptcy Rule 6007 – Motions To Abandon Property. Under § 554(a) and (b) of the Bankruptcy Code, only the trustee or debtor in possession has authority to abandon property of the estate. A hearing is not mandatory if the abandonment notice or motion provides sufficient information concerning the proposed abandonment; is properly served; and neither the trustee, debtor, nor any other party in interest objects. Bankruptcy Rule 6007, which concerns the service of abandonment papers under § 554, treats notices to abandon property filed by the trustee under subdivision (a) and motions filed by the parties in interest to compel the trustee to abandon property under subdivision (b) inconsistently (see Agenda Book Tab 3A, pp. 211-13). Specifically, Rule 6007(a) identifies the parties the trustee is required to serve with its notice to abandon, but Rule 6007(b) is silent regarding the service of a motion to compel abandonment.

"So that the procedures are essentially the same in both cases," the proposed amendment to Rule 6007(b) would specify the parties to be served with the motion to abandon and any notice of the motion, and establish an objection deadline. The proposed amendment would also make clear that, if the motion to abandon is granted, the abandonment is effected without further notice, unless the court directs otherwise (see Agenda Book Tab 3B, App'x B, pp. 381-82).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Bankruptcy Rule 6007.**

Information Items

Bankruptcy Rule 2002 – Noticing in Chapter 13 Cases. The current version of Bankruptcy Rule 2002(f)(7) requires the clerk to give notice to the debtor and all creditors of the "entry of an order confirming a chapter 9, 11, or 12 plan," but not a chapter 13 plan. The committee note identifies no reason for treating chapter 13 plans differently, and the Advisory Committee's meeting minutes are silent as to why it rejected a 1988 effort to make Rule 2002(f) applicable to a plan under any chapter. Seeing no reason to continue to exclude chapter 13 plans, the Advisory Committee intends to propose an amendment to Bankruptcy Rule 2002(f) (see Agenda Book Tab 3A, pp. 215-16).

Similarly, the Advisory Committee will propose an amendment expanding to chapter 13 cases the exception to Rule 2002(a)'s general noticing requirements. Current Rule 2002(h) allows a court to limit notice in a chapter 7 case to, among others, creditors holding claims for which proofs of claim have been filed. The Advisory Committee has concluded that the cost and time savings generated by limiting notices under Rule 2002(h) in chapter 13 cases support an amendment (see Agenda Book Tab 3A, p. 216).

Because the time provisions of Rule 2002(f)(7) will also need to be amended when a pending 2017 amendment to Rule 3002 changes the deadline for filing a proof of claim, the Advisory Committee decided to wait to publish the amendments to the noticing provisions in subdivisions (f) and (h) so that they can be proposed as a package along with the timing changes in 2018.

Bankruptcy Rule 8023 – Voluntary Dismissal. In response to a comment submitted after the publication of the Part VIII amendments (see *supra*), the Advisory Committee proposed an amendment to Bankruptcy Appellate Rule 8023 that would add a cross-reference to Bankruptcy Rule 9019, which provides a procedure for obtaining court approval of settlements. The amendment was intended as a reminder that, when dismissal of an appeal is sought as the result of a settlement, Rule 9019 might require the settlement to be approved by the bankruptcy court (see Agenda Book Tab 3A, pp. 216-17).

No comments were submitted when the proposed amendment to Rule 8023 was published in August 2016. At the spring 2017 meeting, the Advisory Committee's new DOJ representative raised a concern that, although Rule 9019 is generally interpreted to require court approval of a settlement only when a trustee or debtor in possession is a party to it, amended Rule 8023 can be read to suggest that no voluntary dismissal of a bankruptcy appeal in the district court or BAP may be taken without the bankruptcy court's approval. Other Advisory Committee members wondered whether amended Rule 8023's reference to Rule 9019 could be read to require district and BAP clerks to make a legal determination as to whether Rule 9019 applies to a particular voluntary dismissal and, if so, whether the bankruptcy court has jurisdiction to consider the settlement while the appeal is pending. A question was also raised about whether the current version of Rule 8023, which does not state that it is subject to Rule 9019, has caused any problems. After discussing these issues, the Advisory Committee decided to send the Rule 8023 amendment "back to the drawing board" for further consideration by a subcommittee. The Advisory Committee expects to "suggest[] a different change" and will discuss the matter further at its fall 2017 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which met on Tuesday, August 25, in Austin, Texas. In addition to two sets of inter-committee amendments, the Advisory Committee sought approval of one action item—proposed amendments to Civil Rule 23—and presented two information items.

Action Items

Inter-Committee Amendments. The Advisory Committee submitted proposed amendments to Civil Rules 5 (electronic filing and signing) and 62 and 65.1 (stays and injunctions pending appeal) for final approval. The Standing Committee approved the amendments for transmission to the Judicial Conference, subject to the revisions made during the meeting (see "Inter-Committee Coordination," *supra*).

Civil Rule 23 – Class Actions. The proposed amendments to Civil Rule 23 (see Agenda Book Tab 4A, pp. 431-51) are the product of more than five years of study and consideration by the Civil Rules Advisory Committee and its Rule 23 Subcommittee. The effort was motivated by a number of factors: (1) the passage of time since Rule 23 was last amended in 2009; (2) the development of a body of case law on class action practice; and (3) recurring interest in Congress, including the 2005 adoption of the Class Action Fairness Act. In developing the proposed amendments, members of the Subcommittee attended nearly two dozen meetings and bar conferences and held a mini-conference in September 2015 to gather additional feedback from a variety of stakeholders.

After extensive consideration and study, the Subcommittee narrowed the list of issues to be addressed and published these proposed amendments (see Agenda Book Tab 4A, pp. 431-41):

- Rule 23(c)(2) has been updated to recognize contemporary means of providing notice to individual class members in Rule 23(b)(3) class actions.
- The amendments to Rule 23(e)(1) clarify that the parties must supply information to the court to enable it to decide whether to notify the class of a proposed settlement, that the court must direct notice if it is likely to be able to approve the proposal and certify the class, and that class notice triggers the opt-out period in Rule 23(b)(3) class actions.
- Amended Rule 23(e)(2) identifies substantive and procedural "core concerns"—as opposed to a "long list of factors" like those some courts use—for the parties to address and the court to consider in deciding whether to approve a settlement proposal.
- Rule 23(e)(5) has been amended to address "bad faith" class-action objectors. Specifically, the proposed amendments require that specific grounds for the objection be provided to the court, the person on whose behalf the objection is being made be identified, and the court approve payment or other consideration received in exchange for withdrawing an objection.
- Amended Rule 23(f) makes clear that there is no interlocutory appeal of a decision to send class notice under Rule 23(e)(1).
- At the suggestion of the DOJ, the amendments to Rule 23(f) extend to 45 days the time to seek permission for an interlocutory appeal when the United States is a party.

The Advisory Committee considered but declined to address other topics, such as issue classes and ascertainability.

Almost all of the comments received during the August 2016 public comment period concerned the Rule 23 proposals. Most addressed the modernization of notice methods under Rule 23(c)(2) and the handling of objections to proposed settlements. Some comments proposed additional topics, while others urged reconsideration of topics the Subcommittee had decided not to pursue. After carefully considering the comments, the Advisory Committee and Subcommittee made minor changes to the proposed rule text and clarified and shortened the committee note. The Advisory Committee has concluded that "the community is very satisfied" with the proposed amendments, which are "important improvements" but "not dramatic changes."

A judge member asked whether a litigant could argue that the court had not adequately reviewed the settlement proposal if it did not consider one of the "core concerns" under Rule 23(e)(2). Professor Marcus explained that the Subcommittee initially considered requiring the court to find that each factor was satisfied, but ultimately decided "to introduce the considerations" but not *require* the court to find each one in order to approve the settlement. The rule does not require the trial judge to "make findings" or address each factor on the record—the judge need only "consider" the information the parties supply under Rule 23(e)(1)(A) and any objections under Rule 23(e)(5). A judge member added that district courts should be given broad discretion to review these factors.

Another judge member raised the possibility of adding a "catchall" category to those listed in Rule 23(e)(2) and (e)(2)(C). Professor Marcus clarified that the list is not intended to require a judge to ignore important factors that should obviously be considered in a given situation, and the judge member agreed that the current language allows sufficient flexibility. A different judge member added that the four general categories set out in the amended rule are a "good compromise" between the need to add structure and guidance to the settlement-approval process on one hand, and the "long lists of factors" identified by the courts of appeals on the other.

Judge Campbell commended the Rule 23 Subcommittee, chaired by Judge Robert M. Dow, Jr., for its work.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously voted to recommend the proposed amendments to Civil Rule 23 to the Judicial Conference for approval**.

Information Items

Social Security Disability Review Cases. The Administrative Conference of the United States ("ACUS") recently submitted a suggestion to the Judicial Conference that a uniform set of procedural rules be developed for district court review of final administrative decisions in Social Security cases under 42 U.S.C. § 405(g), which provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." The suggestion was referred to the Civil Rules Advisory Committee, which is responsible for studying and recommending rules governing civil actions in the district courts (see Agenda Book Tab 4A, pp. 532-50).

More than 17,000 Social Security review cases are brought in the district courts every year, accounting for "a fairly large numerical proportion"—about seven percent—of civil filings. The national average remand rate is approximately forty-five percent, ranging from twenty percent in some districts to seventy percent in others—sometimes even within a single circuit. Different districts use a use a variety of procedures and standards in reviewing these actions.

The Advisory Committee first discussed the ACUS suggestion at the spring 2017 meeting. Although judges might be apprehensive about the possibility of a "special set of rules" for Social Security cases, the Advisory Committee will explore "whether, and if so, how" rule changes could address the problems that have been identified: the high remand rate, delays in the process, and a lack of uniformity among the district courts. The Advisory Committee plans to gather more information and form a subcommittee to fully consider various options, including a new Civil Rule addressing these types of cases or even a separate set of rules.

Professor Cooper welcomed input from the members of the Standing Committee. Judge members suggested examining circuit law and local rules addressing Social Security issues. Another judge proposed asking the DOJ to formulate a position as to whether district court review procedures should be modified. Although some members felt that more uniformity in the rules might help to reduce variance among the remand rates, a professor member cautioned that the variance might be attributable to the substantive law (such as the treating physician rule, a judge noted), rather than differences in the rules. A reporter added that a change in district court review procedures would be unlikely to affect how administrative law judges review Social Security cases. There was a general consensus that the rules committees should not attempt to "fix the [Social Security] system generally." The Civil Rules Advisory Committee will continue to study and discuss these issues.

Civil Rule 30(b)(6) – Organizational Depositions. In April 2016, the Advisory Committee formed a Rule 30(b)(6) Subcommittee chaired by Judge Joan N. Ericksen to consider whether reported problems with Rule 30(b)(6) depositions can be addressed by rule amendment (see Agenda Book Tab 4A, pp. 555-86). The Subcommittee initially focused on drafting provisions that might address the problems attorneys claim to encounter. Guided by feedback from the Advisory Committee and Standing Committee, and equipped with additional legal research, the Subcommittee continues to narrow the issues that could feasibly be remedied by rule amendment.

Specifically, the Subcommittee has solicited comment about six potential amendment ideas through a posting on the federal judiciary's rulemaking website (see Agenda Book Tab 4A, pp. 557-59): (1) including Rule 30(b)(6) depositions among the topics for discussion at the Rule 26(f) conference and in the Rule 16 report, (2) confirming that a 30(b)(6) deponent's statements do not function as "judicial admissions" (an issue which, a judge member added, is a source of much of the "angst" surrounding these depositions), (3) requiring and permitting supplementation of Rule 30(b)(6) testimony, (4) forbidding contention questions, (5) adding a provision for objections, and (6) addressing the applicability to Rule 30(b)(6) of limits on the duration and number of depositions. Members of the Subcommittee continue to gather feedback by participating in bar conferences around the country.

When a district judge observed that litigants do not frequently approach him with Rule 30(b)(6) disputes, another judge added that active case management cures many of the problems that do arise. An attorney member who finds the current version of the rule useful cautioned the Advisory Committee not to change Rule 30(b)(6) so much that the problem it was designed to resolve—"hiding the ball"—has room to recur. Professor Marcus, reporter to the Rule 30(b)(6) Subcommittee, explained that the old problem of "bandying" has been replaced by a new one: 30(b)(6) notices listing numerous deposition topics are sent at the last minute, just before the close of discovery, to "imped[e] preparation for trial." The potential for abuse of the Rule 30(b)(6) process can therefore cut in both directions, and although case management may be the only workable solution, the subcommittee will continue to explore possible rule changes.

Pilot Projects Update. Judge Bates updated the Standing Committee on the Civil Rules Advisory Committee's two ongoing pilot projects, Mandatory Initial Discovery Pilot ("MIDP") and Expedited Procedures Pilot ("EPP") (see Agenda Book Tab 4A, pp. 587-89). The MIDP, which is designed to explore whether mandating the production of robust discovery prior to traditional discovery will reduce costs, burdens, and delays in civil litigation, is "well underway" in two districts and expects to add another one to two courts. Judge Campbell reported that the MIDP began in the District of Arizona on May 1, 2017, and Dr. Emery Lee and the FJC were already monitoring 170 cases filed on or after that date. The district's judges have all agreed to participate and will become personally involved at the case management conference stage. The MIDP began in the Northern District of Illinois one month later, on June 1.

The EPP, which is intended to confirm the benefits of active judicial management of civil cases, "has hit a few roadblocks." At this time, only the U.S. District Court for the Eastern District of Kentucky has agreed to participate; vacancies, workloads, and other factors have hindered efforts to recruit participating courts. If more courts do not join despite renewed recruitment efforts, the Eastern District of Kentucky will be moved to the MIDP, and the EPP will be delayed.

Judge Campbell thanked Judge Paul W. Grimm, Chair of the Pilot Projects Working Group and a former member of the Civil Rules Advisory Committee, for his "tremendous effort," and the FJC and Rules Committee Support Office for their contributions.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which met on April 21, 2017, in Washington, D.C. The Advisory Committee presented one action item and two information items.

Action Item

Evidence Rule 807 – Residual Exception. The Advisory Committee has considered possible changes to Evidence Rule 807, the residual exception to the hearsay rule, for two years. One approach would involve broadening the residual exception, which is invoked "narrowly and

infrequently." After extensive deliberation the Advisory Committee decided to pursue a more "conservative," less "dramatic" approach that does not expand the hearsay exception.

Instead, the proposed amendment is intended to "improve[]" current Rule 807 in a number of ways (see Agenda Book Tab 6A, pp. 736-41, Tab 6B, pp. 749-54). First, it no longer defines "trustworthiness" in terms of the "equivalent circumstantial guarantees" of the Rule 803 and 804 exceptions; because those rules contain no such "circumstantial guarantees," there is "no unitary standard" of trustworthiness. Under amended Rule 807, the court would simply determine whether the residual hearsay is supported by sufficient guarantees of trustworthiness. Second, the proposed amendment resolves a conflict among the courts by making clear that corroborating evidence may be considered in determining trustworthiness. Third, current Rule 807(a)'s requirements that the residual hearsay relate to a "material fact" and "serve the purposes of the[] rules and the interests of justice" have proved "meaningless" and will be deleted. "[I]nterests of justice" has been particularly troublesome, as some courts have relied on it to expand their discretion to admit hearsay evidence under Rule 807. Removing the phrase reinforces that the Advisory Committee does not "advocat[e for] the use of 807 more broadly."

"Most important" was the Advisory Committee's decision to continue to require under Rule 807(a)(3) that the residual hearsay be "more probative . . . than any other evidence" the proponent can reasonably obtain. The "more probative" requirement ensures that the rule will be used only when necessary, reinforcing the Advisory Committee's intent to refine but not broaden the residual exception. The Advisory Committee has made clear in amended subdivision (a)(1) that the proponent cannot invoke the residual exception unless the proffered hearsay is not otherwise admissible under any of the Rule 803 or 804 exceptions.

The Advisory Committee has also proposed "significant" amendments to Rule 807's notice requirement. Currently, Rule 807(b) does not include a good-cause exception for untimely notice, creating a conflict as to whether courts may excuse notice when a proponent has acted in good faith. Adding a good-cause provision would authorize district judges to admit evidence under these circumstances during trial, as well as conform Rule 807 to the Evidence Rules' other notice provisions. Other changes include replacing the confusing word "particulars" with "substance," requiring notice to be given in writing, and deleting the requirement that the proponent provide the declarant's address.

A judge member warned that the language of proposed amended Rule 807(a)(1) describing the hearsay statement as "not specifically covered by a hearsay exception in Rule 803 or 804" could be interpreted as requiring the judge to make a finding of inadmissibility under Rules 803 and 804. Professor Capra argued that the language is not new, but has merely "dropp[ed] down" from its existing position in the current version of the rule. In any event, some courts have interpreted the *current* text to require such a finding. Professor Capra explained that the amended language was simply intended "to get the parties to explain to the court why they're not using 803 and 804." Another judge member wondered whether removing the provision now would inadvertently "signal" to district judges that the analysis under Rules 803 and 804 is unimportant when, in fact, "the whole point of this provision is to get them to look [to Rules 803 and 804] first." The Advisory Committee will pay attention to this issue during the public comment period and will consider addressing it in the committee note.

A judge member asked whether the language, "after considering . . . any evidence corroborating the statement," in revised paragraph (a)(2) was intended to require courts to "heavily weigh" corroborating evidence, thus "effectively narrow[ing]" the rule. She proposed instead, "evidence, if any, corroborating the statement"—language the DOJ and U.S. Attorneys had supported during the drafting process. Professor Capra reported that the Advisory Committee had considered "the existence or absence of any" corroborating evidence, but were satisfied with that the word "any" in the current draft, coupled with the committee note, made sufficiently clear that "you don't have to have [corroborating evidence], but it's good to have." Judge Sessions and Professor Capra agreed to add "if any" to the published version of the proposed amendments. Another judge member asked whether the amended rule implied that the corroborating evidence must be admitted at trial; Professor Capra clarified that it did not, and will consider making that clear in the note. The Advisory Committee will continue to discuss the topic of corroborating evidence in the future.

A reporter wondered what "negative implications" removing the term "material," or equating materiality with relevance, could have for other rules. Professor Capra explained that Rule 807's use of "material," which does not appear anywhere else in the Evidence Rules, is a historical anomaly: Congress added paragraph (a)(2) when the Evidence Rules were first enacted, despite the Advisory Committee's deliberate decision not to use the word "material." Courts struggled to define the term, finally equating materiality with relevance for the purposes of Rule 807. In Professor Capra's opinion, these complications were "all the better reason to take it out."

On the subject of the notice provision, a judge member emphasized that lawyers and judges would "*vastly* prefer" the residual hearsay to be proffered before—rather than during—trial to give the court adequate time to rule on its admissibility. She suggested that the Advisory Committee make clear in the committee note that use of "the good-cause exception will be unusual or rare." Although, as Judge Sessions added, the timing of the proffer is a factor "inherent within good cause," the Advisory Committee will consider emphasizing the importance of timely notice in reducing surprise and promoting early resolution of the issue.

Two members raised issues related to deleting the requirement of the declarant's address from the notice provision. Citing privacy concerns, an academic member proposed removing the requirement of the declarant's name as well. Judge Sessions and Professor Capra felt that this would not give sufficient notice; whereas a known declarant's address is easily obtainable from other sources, the declarant would be virtually impossible to identify without a name. And in any event, a protective order can be sought in the event of security concerns. An attorney member wondered whether removing the address requirement, which forces the proponent to exercise care in confirming the declarant's identity, might create practical problems. He suggested soliciting input from attorneys as to potential unintended consequences. Professor Capra said that the Advisory Committee had already done so in the New York area and had not received any negative feedback, but will monitor the issue during the comment period. He added that the committee note makes clear that an attorney in need of an address can seek it through the court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Evidence Rule 807, subject to the modification made during the meeting.**

Information Items

Evidence Rule 801(d)(1)(A) – Audio-Visual Recordings of Prior Inconsistent Statements. Evidence Rule 801(d)(1) exempts certain out-of-court statements from the rule against hearsay—making them admissible as substantive evidence rather than for impeachment only—when the witness is present and subject to cross-examination. Prior inconsistent statements, which raise reliability concerns, are deemed "not hearsay" under Rule 801(d)(1)(A) if they were made "under penalty of perjury at a trial, hearing, or other proceeding or in a deposition."

The Advisory Committee is considering whether to expand Rule 801(d)(1)(A)'s exemption for prior inconsistent statements beyond those made under oath during a legal proceeding (see Agenda Book Tab 6A, pp. 741-42). The Advisory Committee has already rejected one approach used in some states—admitting *all* prior inconsistent statements—due to concerns that, absent more, there is no way to ensure their reliability. Instead, it is considering a more "modest," "conservative" approach: broadening Rule 801(d)(1)(A) to include prior inconsistent statements recorded audio-visually. The advantages of this approach are that the audio-visual record confirms that the statement was, in fact, made, and the possibility of using statements as substantive evidence should encourage law enforcement to record interactions with suspects. The DOJ has also proposed making prior inconsistent statements admissible substantively when the witness acknowledges having made the statement. The Advisory Committee is in the process of seeking comments from stakeholders on the practical effect of more liberal admission of prior inconsistent statements and will continue to discuss the issue.

Evidence Rule 606(b) – Juror Testimony after Peña-Rodriguez. Evidence Rule 606(b) generally prohibits jurors from testifying about "any statement made or incident that occurred during the jury's deliberations," subject to limited exceptions. On March 6, 2017, the U.S. Supreme Court held in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), that an analogous state rule had to yield so the trial court could consider the Sixth Amendment implications of a juror's "clear statement" that he "relied on racial stereotypes or animus to convict [the] criminal defendant." The Advisory Committee is considering whether and how to amend Evidence Rule 606(b) in light of *Peña-Rodriguez* (see Agenda Book Tab 6A, pp. 742-43).

Evidence Rule 404(b) – "Bad Acts" Evidence. The current version of Rule 404(b)(2) requires the prosecution to give reasonable notice of evidence of crimes, wrongs, or other "bad acts" that will be introduced at trial—but only if the defendant so requests. Because this requirement disproportionately affects inmates with less competent counsel, "all sides agree" that it should be revisited (see Agenda Book Tab 6A, pp. 743-44). "More controversial," especially for the DOJ, is a proposal that would require the proponent of propensity evidence to set forth in a notice the chain of inferences showing that the evidence is admissible for a permissible purpose under Rule 404(b)(2). This issue will be considered at future meetings.

Upcoming Symposium – Rule 702 and Expert Evidence. In conjunction with its fall 2017 meeting, the Advisory Committee will host a symposium on scientific and technological developments regarding expert testimony, including challenges raised in the last few years to forensic expert evidence, which might justify amending Evidence Rule 702 (see Agenda Book Tab 6A, pp. 744-45). The symposium will take place on Friday, October 27, 2017, at Boston College Law School.

Judge Sessions reminded the Standing Committee that this meeting would be his last as chair and that he would be succeeded by Judge Debra A. Livingston, a current member of the Advisory Committee. Professor Capra and the members of the Standing Committee commended Judge Sessions for his work.

LEGISLATIVE REPORT

Julie Wilson delivered the Legislative Report, which summarized RCS's efforts to track legislation implicating the federal rules. The 115th Congress has introduced a number of bills that would either directly or effectively amend the Civil Rules, Criminal Rules, and Section 2254 Rules (see Agenda Book Supplemental Materials, pp. 30-35). The Standing Committee discussed two bills that have already passed the House of Representatives, the *Lawsuit Abuse Reduction Act of 2017 ("LARA")* and the *Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*.

CONCLUDING REMARKS

Judge Campbell thanked the Standing Committee members and other attendees for their preparation and their contributions to the discussion before adjourning the meeting. The Standing Committee will next meet on January 4-5, 2018, in Phoenix, Arizona.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 1C

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Agenda E-19 (Summary)
Rules
September 2017

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 2–7

2. a. Approve the proposed amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and new Part VIII Appendix, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve proposed revisions effective December 1, 2017 to Bankruptcy Official Forms 25A, 25B, 25C, 26 (renumbered respectively as 425A, 425B, 425C, and 426), 101, 309F, 309G, 309H, and 309I, and approve proposed revisions effective December 1, 2018 to Official Forms 417A and 417C, to govern all proceedings in bankruptcy cases commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 10-21

3. Approve the proposed amendments to Civil Rules 5, 23, 62, and 65.1, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law. ..... pp. 24-29

4. Approve the proposed amendments to Criminal Rules 12.4, 45, and 49, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 31-35

The remainder of this report is submitted for the record and includes information on the following for the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee) met in Washington, D.C. on June 12–13, 2017. All members were present.

Representing the advisory rules committees were: Judge Michael A. Chagares, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, and Professor S. Elizabeth Gibson, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge William K. Sessions III, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Support Staff; Lauren Gailey, Law Clerk to the Standing Committee; and Dr. Tim Reagan and Dr. Emery G. Lee III, of the Federal Judicial Center. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, with a recommendation that they be approved and transmitted to the Judicial Conference. Proposed amendments to these rules were circulated to the bench, bar, and public for comment in August 2016.

Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs)

The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term "supersedeas bond" and makes plain an appellant may provide either "a bond or other security." One comment was filed in support of the proposed amendment.

The advisory committee recommended no changes to the published proposals to amend Rules 8(a), 11(g), and 39(e), but recommended minor revisions to Rule 8(b). First, to conform proposed amendments with Civil Rule 65.1, the advisory committee recommended rephrasing the heading and the first sentence of Rule 8(b) to refer only to "security" and "security provider" (and not to mention specific types of security, such as a bond, stipulation, or other undertaking). Second, the advisory committee changed the word "mail" to "send" in Rule 8(b) to conform Rule 8(b) to the proposed amendments to Rule 25. The advisory committee modified the Committee Note to explain these revisions. The Standing Committee approved the proposed amendments to Rules 8(a) and (b), 11(g), and 39(e).

Rule 25 (Filing and Service)

The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. The proposed amendment to

Rule 25(a)(2)(B)(i) requires a person represented by counsel to file papers electronically, but allows exceptions for good cause and by local rule.

The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures and, in consultation with other advisory committees, establishes a uniform national signature provision. The proposed amendment to subdivision (c)(2) addresses electronic service through the court's electronic filing system or by using other electronic means that the person to be served consented to in writing. The proposed amendment to subdivision (d)(1) requires proof of service of process only for papers that are not served electronically.

After receiving public comments and conferring with the other advisory committees, the advisory committee recommended several minor revisions to the proposed amendments as published. First, minor changes were needed to take into consideration amendments to subdivision (a)(2)(C) that became effective in December 2016 and altered the text of that section. Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). The advisory committee recommended replacing the language published for public comment with a new provision drafted jointly with the other advisory committees. Third, another comment revealed an ambiguity in the clause structure of the proposed Rule 25(c)(2), which was addressed by separating the two methods of service using "(A)" and "(B)."

The advisory committee received several comments arguing that unrepresented parties should have the same right to file electronically as represented parties. These comments noted that electronic filing is easier and less expensive than filing non-electronically. The advisory committee considered these arguments at its October 2016 and May 2017 meetings, but decided against allowing unrepresented parties the same access as represented parties given potential difficulties caused by inexperienced filers and possible abuses of the filing system. Under the

proposed amendment, unrepresented parties have access to electronic filing by local rule or court order.

The Standing Committee approved the proposed amendments to Rule 25, as well as the electronic filing rules proposed by the other advisory committees, after making minor stylistic changes.

Rule 26 (Computing and Extending Time)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for technical, conforming changes to Rule 26. Rule 26(a)(4)(C) refers to Rules 25(a)(2)(B) and 25(a)(2)(C). The recent amendments to Rule 25 have renumbered these subdivisions to be Rule 25(a)(2)(A)(ii) and 25(a)(2)(A)(iii). Therefore, the references in Rule 26 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Rule 26.

Rules 28.1 (Cross-Appeals) and 31 (Serving and Filing Briefs)

The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the "three day rule" (JCUS-SEP 15, pp. 28-30). These rules currently provide only 14 days after service of the response brief to file a reply brief. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 28.1(f)(4) and 31(a)(1). The advisory committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. To maintain consistency in measuring time periods in increments of seven days when possible, the advisory committee proposed that the time period to file a reply should be extended to 21 days.

The advisory committee received two comments in support of the published proposal. The advisory committee recommended approval of the proposed amendments without further

changes. The Standing Committee approved the proposed amendments to Rules 28.1(f)(4) and 31(a)(1).

Rule 29 (Brief of an Amicus Curiae)

Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." Several courts of appeals, however, have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. Given the arguable merit of these local rules, the advisory committee proposed to add an exception to Rule 29(a) providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification."

At its May 2017 meeting, the advisory committee revised its proposed amendment to Rule 29 in two ways. First, amendments that went into effect in December 2016 renumbered Rule 29's subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. To match the renumbering, the advisory committee moved the exception from the former subdivision (a) to the new subdivision (a)(2) and copied the exception into the new subdivision (b)(2). Second, the advisory committee rephrased the exception authorizing a court of appeals to "prohibit the filing of or strike" an amicus brief (rather than "strike or prohibit the filing of" the brief), making the exception more chronological without changing the meaning or function of the proposed amendment.

The advisory committee received six comments in opposition to the proposed amendment. These commenters asserted that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further asserted that the amendment could prove wasteful if an amicus curiae pays an attorney to write a brief which the court then strikes. The amicus curiae likely would not know the identity of the judges on the

appellate panel when filing the brief and would have no options once the court strikes the brief. The advisory committee considered these comments, but concluded that the necessity of the amendment was demonstrated by local rules carving out the exception and that the merits of the amendment outweigh the concerns.

One commenter observed that the proposed amendment should not change "amicus-curiae brief" to "amicus brief." The advisory committee understands the criticism but recommended the change for consistency with the rest of Rule 29.

The Standing Committee approved the proposed amendment to Rule 29, after making minor revisions to the proposed rule and committee note.

Rule 41 (Mandate: Contents; Issuance and Effective Date; Stay)

In August 2016, the Standing Committee published proposed amendments to Rule 41. Five public comments were received, which prompted the advisory committee to recommend several revisions.

First, in response to commenters' observations that a court might wish to extend the time for good cause even if exceptional circumstances do not exist, the advisory committee deleted the following sentence: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." Second, the advisory committee recommended renumbering subdivision (d)(2)(B) to subdivision (d)(2). In response to a comment regarding a potential gap in the rule, the advisory committee added a proposed new clause that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

The Standing Committee approved the proposed amendments to Rule 41, after making minor revisions to the proposed rule and committee note.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

In August 2016, the Standing Committee published for public comment a proposed amendment to Appellate Form 4. Litigants seeking permission to proceed *in forma pauperis* must complete Form 4, question 12 of which currently asks litigants to provide the last four digits of their social security numbers. The advisory committee undertook an investigation and determined that no current need exists for this information. Accordingly, the advisory committee recommended deleting this question.

The advisory committee received two comments in support of the proposal and recommended no changes to the proposed amendment. The Standing Committee approved the proposed amendments to Form 4.

Form 7 (Declaration of Inmate Filing)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for a technical, conforming change to Form 7. Form 7 contains a note that refers to Rule 25(a)(2)(C). The recent amendments to Rule 25 have renumbered this subdivision as Rule 25(a)(2)(A)(iii). The reference in the note on Form 7 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Form 7.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Appellate Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Appellate Procedure are set forth in Appendix A, with an excerpt from the advisory committee's report.

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 3(d), 13, 26.1, 28(a)(1), and 32(f) with a request that they be published for comment in August 2017.

Rules 3 (Appeal as of Right—How Taken) and 13 (Appeals from the Tax Court)-

In light of the proposed changes to Rule 25, the advisory committee recommended changes to Rules 3(d) and 13(a) regarding the use of the term "mail."

Rule 3(d) concerns the clerk's service of the notice of appeal. The advisory committee concluded that subdivisions (d)(1) and (3) require two changes, changing the words "mailing" and "mails" to "sending" and "sends" to make electronic filing and service possible. In addition, the portion of subdivision (d)(1) providing that the clerk must serve the defendant in a criminal case "either by personal service or by mail addressed to the defendant" is deleted to eliminate any requirement of mailing. The clerk will determine whether to serve a notice of appeal electronically or non-electronically based on the principles in revised Rule 25.

Rule 13 concerns appeals from the Tax Court, and currently uses the word "mail" in both its first and second sentences. Changing the reference in the first sentence of the rule would allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. The second sentence expresses a rule that applies when a notice is sent by mail, which is still a possibility. Accordingly, the advisory committee does not recommend a change to the second sentence.

Rules 26.1 (Corporate Disclosure Statement), 28 (Briefs), and 32 (Form of Briefs, Appendices, and Other Papers)

Rule 26.1 currently requires corporate parties and amici curiae to file corporate disclosure statements. These disclosure requirements assist judges in making a determination whether they have any interest in a party's related corporate entities that would disqualify them from hearing an appeal.

Various local rules require disclosures that go beyond the current requirements of Rule 26.1, and the advisory committee considered whether the national rules should be similarly amended.

The advisory committee proposes adding a new subdivision (b) requiring disclosure of organizational victims in criminal cases. This new subdivision (b) conforms Rule 26.1 to the amended version of Criminal Rule 12.4(a)(2) that was published for public comment in August 2016. The only differences are the introductory words "[i]n a criminal case" and the reference to "Rule 26.1(a)" instead of Criminal Rule 12.4(a)(1).

The advisory committee proposes adding a new subdivision (c) requiring disclosure of the name of the debtor or debtors in bankruptcy cases when they are not included in the caption. The caption might not include the name of the debtor in appeals from adversary proceedings, such as a dispute between two of the debtor's creditors.

The advisory committee recommended moving current subdivisions (b) and (c) to the end of Rule 26.1 by designating them as subdivisions (e) and (f). These provisions address supplemental filings and the number of copies that must be filed. Moving the subdivisions will make it clear that they apply to all of the disclosure requirements. The advisory committee also considered amending current subdivision (b) to make it conform to the proposed amendments to Criminal Rule 12.4(b). The Criminal Rules Advisory Committee, however, informed the advisory committee of its intention to scale back its proposed revision of Criminal Rule 12.4(b), obviating the need for corresponding changes to Appellate Rule 26.1(b).

Changing Rule 26.1's heading from "Corporate Disclosure Statement" to "Disclosure Statement" will require minor conforming amendments to Rules 28(a)(1) and 32(f). References to "corporate disclosure statement" must be changed to "disclosure statement" in each rule.

The Standing Committee unanimously approved all of the above amendments for publication in August 2017.

Information Items

At its May 2017 meeting, the advisory committee declined to move forward with several suggestions under consideration. First, the advisory committee considered a proposal to amend Rules 32.1 and 35 to require courts to designate orders granting or denying rehearing as "published" decisions. Second, the advisory committee considered a new proposal regarding an amendment to the Civil Rules to include a provision similar to Appellate Rule 28(j). Third, the advisory committee declined to move forward with a proposal to amend Rules 4 and 27 to address certain types of subpoenas. Finally, the advisory committee determined not to accept an invitation to amend Rule 28 to specify the manner of stating the question presented in appellate briefs.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, new Part VIII Appendix, and Official Forms 25A, 25B, 25C, 26, 101, 309F, 309G, 309H, 309I, 417A, and 417C, with a recommendation that they be approved and transmitted to the Judicial Conference.

Most of these proposed changes were published for comment in 2016, and the others were recommended for final approval without publication. The Standing Committee recommended Rule 7004 and Official Form 101 for final approval at its January 2017 meeting, and recommended the remaining rules and forms for final approval at its June 2017 meeting.

Rules and Official Forms Published for Comment in 2016

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence). Rule 3002.1(b) and (e) apply with respect to home mortgage claims in chapter 13 cases. These provisions impose notice requirements on the creditor to enable the debtor or trustee to make mortgage payments in the correct amount during a pending bankruptcy case.

There were three comments submitted in response to the publication. The commenters each expressed support for the amendments, with some suggested wording changes. One commenter noted that although the published rule purported to prevent a proposed payment change from going into effect if a timely objection was filed, under time counting rules the deadline for filing the objection was actually later than the scheduled effective date of the payment change. The advisory committee revised the proposed amendment to eliminate this possibility.

Rule 5005 (Filing and Transmittal of Papers). Rule 5005(a)(2) addresses filing documents electronically in federal bankruptcy cases. The amendments published for public comment in August 2016 sought consistency with the proposed amendments to Civil Rule 5(d)(3), which addresses electronic filing in civil cases. The publication of changes to Bankruptcy Rule 5005 and Civil Rule 5 were coordinated with similar proposed changes to the criminal and appellate electronic filing rules: Criminal Rule 49 and Appellate Rule 25.

The advisory committee received six comments on the proposed amendments to Rule 5005(a)(2). Most comments addressed the wording of subdivision (a)(2)(C), the intent of which was to identify who can file a document and what information is required in the signature block. Other advisory committees received similar comments with respect to the parallel

provision in their rules, and the advisory committees each worked to coordinate language to clarify the provisions.

In addition, the advisory committee received one comment (also submitted to the other advisory committees) opposing the default wording in the rule that pro se parties cannot file electronically. Along with the other advisory committees, the Bankruptcy Rules Committee chose to retain a default against permitting electronic filing by pro se litigants. It reasoned that under the published version of the rule pro se parties would be able to request permission to file electronically, and courts would be able to adopt a local rule that mandated electronic filing by pro se parties, provided that such rule included reasonable exceptions.

The Standing Committee approved the proposed amendments to Rule 5005(a)(2), as well as the electronic filing rules proposed by the other advisory committees, after making minor stylistic changes.

Proposed amendments to conform Bankruptcy Appellate Rules to recent or proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"). A large set of FRAP amendments went into effect on December 1, 2016. The amendments to Bankruptcy Rules, Part VIII, Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022, Official Forms 417A and 417C, and the Part VIII Appendix discussed below bring the Bankruptcy Rules into conformity with the relevant amended FRAP provisions. One additional amendment to Rule 8011 was proposed to conform to a parallel FRAP provision that was also published for comment last summer.

- Rules 8002 (Time for Filing Notice of Appeal) and 8011 (Filing and Service; Signature), and Official Form 417A (Notice of Appeal and Statement of Election).

Bankruptcy Rules 8002(c) and 8011(a)(2)(C) include inmate-filing provisions that are virtually identical to, and are intended to conform to, the inmate-filing provisions of Appellate Rules 4(c) and 25(a)(2)(C). These rules treat notices of appeal and other papers as timely filed

by inmates if certain specified requirements are met, including that the documents are deposited in the institution's internal mail system on or before the last day for filing. To implement the FRAP amendments, a new appellate form was adopted to provide a suggested form for an inmate declaration under Rules 4 and 25. A similar director's form was developed for bankruptcy appeals, and the advisory committee published an amendment to Official Form 417A (Notice of Appeal and Statement of Election) that will alert inmate filers to the existence of the director's form.

Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), set out a list of post-judgment motions that toll the time for filing an appeal. The 2016 amendment to Appellate Rule 4(a)(4) added an explicit requirement that the motion must be filed within the time period specified by the rule under which it is made in order to have a tolling effect for the purpose of determining the deadline for filing a notice of appeal. A similar amendment to Rule 8002(b) was published in August 2016.

No comments were submitted specifically addressing the proposed amendments to Rule 8002, Rule 8011, or Official Form 417A.

- Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), 8016 (Cross-Appeals), and 8022 (Motion for Rehearing), Official Form 417C (Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements), and Part VIII Appendix (length limits). The 2016 amendments to Appellate Rules 5, 21, 27, 35, and 40 converted page limits to word limits for documents prepared using a computer. For documents prepared without using a computer, the existing page limits were retained. The FRAP amendments also reduced the existing word limits of Rules 28.1 (Cross-Appeals) and 32 (Briefs).

Appellate Rule 32(f) sets out a uniform list of the items that can be excluded when computing a document's length. The local variation provision of Rule 32(e) highlights a court's authority (by order or local rule) to set length limits that exceed those in FRAP. Appellate Form 6 (Certificate of Compliance with Rule 32(a)) was amended to reflect the changed length limits. Finally, a new appendix was adopted that collects all the FRAP length limits in one chart.

The advisory committee proposed parallel amendments to Rules 8013(f), 8015(a)(7) and (f), 8016(d), and 8022(b), along with Official Form 417C. In addition, it proposed an appendix to Part VIII that is similar to the FRAP appendix.

In response to publication, no comments were submitted that specifically addressed the amendments to these provisions or to the appendix.

- Rule 8017 (Brief of an Amicus Curiae). Rule 8017 is the bankruptcy counterpart to Appellate Rule 29. The recent amendment to Rule 29 provides a default rule concerning the timing and length of amicus briefs filed in connection with petitions for panel rehearing or rehearing en banc. The rule previously did not address the topic; it was limited to amicus briefs filed in connection with the original hearing of an appeal. The 2016 amendment does not require courts to accept amicus briefs regarding rehearing, but it provides guidelines for such briefs as are permitted. The advisory committee proposed a parallel amendment to Rule 8017.

In August 2016 the Appellate Rules Advisory Committee published another amendment to Appellate Rule 29(a) that would authorize a court of appeals to prohibit or strike the filing of an amicus brief if the filing would result in the disqualification of a judge. The Bankruptcy Rules Advisory Committee proposed and published a similar amendment to Rule 8017 to maintain consistency between the two sets of rules.

Two comments were submitted in response to publication of Rule 8017. One commenter opposed the amendment because amicus briefs are usually filed before an appeal is assigned to a

panel of judges, and thus the amicus and its counsel would not know whether recusal would later be required. The advisory committee rejected this comment because the proposed amendment merely permits, but does not *require*, striking amicus briefs in order to address recusal issues. The other commenter opposed the wording of the amendment, suggesting instead a more extensive and detailed rewrite of the rule. The advisory committee rejected this comment as beyond the scope of the proposed amendment.

Additional Amendments to the Bankruptcy Appellate Rules. In addition to the conforming amendments to Part VIII rules discussed above, amendments to Bankruptcy Appellate Rules 8002, 8006, and 8023 and new Bankruptcy Appellate Rule 8018.1 were published last summer. None of the comments submitted in response to publication specifically addressed these amendments. Following discussion of the amendments at its spring 2017 meeting, the advisory committee recommended final approval of each rule as published, except for Rule 8023, which the advisory committee sent back to a subcommittee for further consideration.

- Rule 8002 (Time for Filing Notice of Appeal). The proposed amendment to Rule 8002(a) adds a new subdivision (a)(5) defining entry of judgment. The proposed amendment clarifies that the time for filing a notice of appeal under subdivision (a) begins to run upon docket entry in contested matters and adversary proceedings for which Rule 58 does not require a separate document. In adversary proceedings for which Rule 58 does require a separate document, the time commences when the judgment, order, or decree is entered in the civil docket and either (1) it is set forth on a separate document, or (2) 150 days have run from the entry in the civil docket, whichever occurs first.

- Rule 8006 (Certifying a Direct Appeal to the Court of Appeals). The proposed amendment to Rule 8006 adds a new subdivision (c)(2) that authorizes the bankruptcy judge to

file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.

- Rule 8018.1 (District Court Review of a Judgment that the Bankruptcy Court Lacked Constitutional Authority to Enter). New Rule 8018.1 authorizes a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determines that the bankruptcy court lacked constitutional authority to enter a final judgment. The procedure would eliminate the need to remand an appeal to the bankruptcy court merely to recharacterize the judgment as proposed findings and conclusions.

Additional Amendments to Official Forms.

- Official Form 309F (Notice of Chapter 11 Bankruptcy Case—For Corporations or Partnerships). As published, the proposed amendment to Official Form 309F would change the instructions at line 8 of the form. The instructions currently require a creditor who seeks to have its claim excepted from the discharge under § 1141(d)(6)(A) of the Bankruptcy Code to file a complaint by the stated deadline. The applicability of the deadline is in some circumstances unclear, however, so the proposed revision leaves it to the creditor to decide whether the deadline applies to its claim.

Two comments were submitted in response to publication of the amendment. One supported adoption of the amendment, while the other pointed out that the proposed change necessitated a similar change at line 11 of the form. The advisory committee voted unanimously to amend the last sentence of line 11 in a manner similar to the amendment to line 8, and recommended both changes for final approval.

- Official Forms 25A, 25B, 25C, and 26 (Small Business Debtor Forms and Periodic Report Regarding Value, Operations and Profitability). Most bankruptcy forms have been modernized over the past several years through the Forms Modernization Project, but the

advisory committee deferred consideration of four forms relating to chapter 11 cases—specifically, Official Forms 25A, 25B, 25C, and 26. After reviewing each of these forms extensively and revising and renumbering them, the advisory committee obtained approval to publish the revised versions in August 2016. The small business debtor forms—Forms 25A, 25B, and 25C—are renumbered as Official Forms 425A, 425B, and 425C. Official Forms 425A and 425B set forth an illustrative form plan of reorganization and disclosure statement, respectively, for chapter 11 small business debtors. Official Form 425C is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee.

Official Form 26 (renumbered as Official Form 426 and rewritten and formatted in the modernized form style) requires periodic disclosures by chapter 11 debtors concerning the value, operations, and profitability of entities in which they hold a substantial or controlling interest.

The advisory committee received three comments proposing some suggested changes in response to the forms' publication. The advisory committee made minor changes in response to the comments and recommended final approval of the four forms.

Conforming Changes Proposed without Publication

Rules and Forms Considered at the January 2017 Committee Meeting. At the Standing Committee's January 2017 meeting, the advisory committee recommended final approval without publication of technical conforming amendments to Rule 7004(a)(1) and Official Form 101.

- Rule 7004 (Process; Service of Summons, Complaint). Rule 7004 incorporates by reference certain components of Civil Rule 4. In 1996, Rule 7004(a) was amended to incorporate by reference the provision of Civil Rule 4(d)(1) addressing a defendant's waiver of service of a summons.

In 2007, Civil Rule 4(d) was amended to change, among other things, the language and placement of the provision addressing waiver of service of summons. The cross-reference to Civil Rule 4(d)(1) in Rule 7004(a), however, was not changed at that time.

Accordingly, the advisory committee recommended an amendment to Rule 7004(a) to refer to Civil Rule 4(d)(5). Based on its technical and conforming nature, the advisory committee also recommended that the proposed amendment be submitted to the Judicial Conference for approval without prior publication.

- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy).

The advisory committee identified a need to amend question 11 on Official Form 101, the voluntary petition for individual debtors, to make the wording consistent with § 362(*l*)(5)(A) of the Bankruptcy Code and thereby fix an inadvertent error introduced into the form when it was revised as part of the forms modernization project in 2015. Question 11 currently only requires debtors who wish to remain in their residences to provide information concerning an eviction judgment against them. The Bankruptcy Code, however, requires that such information be reported regardless of whether the debtor wishes to stay in the residence.

The advisory committee recommended amending question 11 on Form 101 to correct this error. Based on the technical and conforming nature of the proposed change, the advisory committee recommended that the proposed amendments be submitted to the Judicial Conference for approval without prior publication.

Rules and Forms Considered at the June 2017 Standing Committee Meeting. At the Standing Committee's June 2017 meeting, the advisory committee recommended that the changes described below to Rules 7062, 8007, 8010, 8011, 8021, and 9025, and Official Forms 309G, 309H, and 309I, be approved and transmitted to the Judicial Conference.

- Rule 8011 (Filing and Service; Signature). Rule 8011 addresses filing, service, and signatures in bankruptcy appeals. At the time the advisory committee recommended publication of the proposed amendments to Rule 5005 regarding electronic filing, service, and signatures in coordination with the other advisory committees' e-filing rules, it overlooked the need for similar amendments to Rule 8011. It accordingly recommended that conforming amendments to Rule 8011 consistent with the e-filing changes to Rule 5005 and its counterpart, Appellate Rule 25, be approved without publication so that all of the e-filing amendments could go into effect at the same time. The Standing Committee accepted the advisory committee's recommendation, approving amendments to Rule 8011 after incorporating stylistic changes it made to the other e-filing amendments at the meeting.

- Rules 7062 (Stay of Proceedings to Enforce a Judgment), 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings), 8010 (Completing and Transmitting the Record, 8021 (Costs), and 9025 (Security: Proceedings Against Sureties). The advisory committee recommended conforming amendments to Rules 7062, 8007, 8010, 8021, and 9025, consistent with proposed and published amendments to Civil Rules 62 (Stay of Proceedings to Enforce a Judgment) and 65.1 (Proceedings Against a Surety) that would lengthen the period of the automatic stay of a judgment and modernize the terminology "supersedeas bond" and "surety" by using instead the broader term "bond or other security." The Advisory Committee on Appellate Rules also published amendments to Appellate Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs) that would adopt conforming terminology.

Because Bankruptcy Rule 7062 incorporates the whole of Civil Rule 62, the new security terminology will automatically apply in bankruptcy adversary proceedings when the civil rule goes into effect. Rule 62, however, also includes a change that would lengthen the automatic stay of a judgment entered in the district court from 14 to 30 days. The civil rule change

addresses a gap between the end of the judgment-stay period and the 28-day time period for making certain post-judgment motions in civil practice. Because the deadline for post-judgment motions in bankruptcy is 14 days, however, the advisory committee recommended an amendment to Rule 7062 that would maintain the current 14-day duration of the automatic stay of judgment. As revised, Rule 7062 would continue incorporation of Rule 62, "except that proceedings to enforce a judgment are stayed for 14 days after its entry."

Because the amendments to Rules 7062, 8007, 8010, 8021, and 9025 simply adopt conforming terminology changes from the other rule sets that have been recommended for final approval, and maintain the status quo with respect to automatic stays of judgments in the bankruptcy courts, the advisory committee recommended approval of these rules without publication.

- Official Forms 309G, 309H, and 309I. The advisory committee recommended minor amendments to each of the notice forms that are sent to creditors upon the filing of a chapter 12 or chapter 13 case. The proposed form changes conform to a pending amendment to Rule 3015 scheduled to take effect on December 1, 2017, absent contrary congressional action.

Rule 3015 governs the filing, confirmation, and modification of chapter 12 and chapter 13 plans. The pending amendment to the rule eliminates the authorization for a debtor to serve a plan summary, rather than a copy of the plan itself, on the trustee and creditors. This change was made as part of the adoption of a national chapter 13 plan form or equivalent local plan form. Official Forms 309G, 309H, and 309I are the form notices that are sent to creditors to inform them of the hearing date for confirmation of the chapter 12 or 13 plan, as well as objection deadlines. The forms also indicate whether a plan summary or the full plan is included with the notice. The proposed changes to Official Forms 309G, 309H, and 309I remove references to the inclusion of a "plan summary," as that option will no longer be available. The

advisory committee recommended approval of these conforming changes without publication so that they could take effect at the same time as the pending change to Rule 3015.

The Standing Committee voted unanimously to support the recommendations of the advisory committee.

Recommendation: That the Judicial Conference:

a. Approve proposed amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and the new Part VIII Appendix, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve proposed revisions effective December 1, 2017 to Bankruptcy Official Forms 25A, 25B, 25C, 26 (renumbered respectively as 425A, 425B, 425C, and 426), 101, 309F, 309G, 309H, and 309I, and approve proposed revisions effective December 1, 2018 to Official Forms 417A and 417C, to govern all proceedings in bankruptcy cases commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revisions to the Official Bankruptcy Forms are set forth in Appendix B, with excerpts from the advisory committee's reports.

Rules and Official Form Approved for Publication and Comment

The advisory committee submitted proposed amendments to Bankruptcy Rules 2002, 4001, 6007, 9036, and 9037 and Official Form 410 for public comment in 2017. The Standing Committee agreed with all recommendations.

Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements).

The proposed amendment to Rule 4001(c) governs the process for a debtor in possession or a trustee to obtain credit outside the ordinary course of business in a bankruptcy case. Among other things, the rule outlines eleven different elements of post-petition financing that must be

explained in a motion for approval of a post-petition credit agreement. The suggestion was made that because Rule 4001(c) is designed to provide needed information for approval of credit in chapter 11 business cases, its application in chapter 13 consumer bankruptcy cases was unhelpful, where typical post-petition credit agreements concern loans for items such as personal automobiles or household appliances. The advisory committee agreed and proposed an amendment to Rule 4001(c) that removes chapter 13 from the bankruptcy cases subject to the rules' requirements.

Rules 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee) and 9036 (Notice by Electronic Transmission), and Official Form 410 (Proof of Claim)

The proposed amendments to Rules 2002(g) and 9036 and Official Form 410 are part of the advisory committee's ongoing review of noticing matters in bankruptcy. The proposed amendments would enhance the use of electronic noticing in bankruptcy cases in a number of ways. The amendment to Official Form 410 would allow even creditors who are not registered with the court's case management/electronic case files (CM/ECF) system the option to receive notices electronically, instead of by mail, by checking a box on the form. The proposed change to Rule 2002(g) would expand the references to "mail" to include other means of delivery and delete "mailing" before "address," thereby allowing a creditor to receive notices by email. And the amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to other persons by electronic means that the person consents to in writing.

Rule 6007 (Abandonment or Disposition of Property)

The proposed amendment to Rule 6007(b) addresses a suggestion that the advisory committee received concerning the process for abandoning estate property under § 554 of the Bankruptcy Code and Bankruptcy Rule 6007. The suggestion highlights the inconsistent

treatment afforded notices to abandon property filed by the bankruptcy trustee under subdivision (a) and motions to compel the trustee to abandon property filed by parties in interest under subdivision (b). Specifically, Rule 6007(a) identifies the parties that the trustee is required to serve with its notice to abandon, but Rule 6007(b) is silent regarding the service of a party in interest's motion to compel abandonment. In order to more closely align the two subdivisions of the rule, the proposed amendment to Rule 6007(b) would specify the parties to be served with the motion to abandon and any notice of the motion, and establish an objection deadline. In addition, the proposed amendment would clarify that, if a motion to abandon under subdivision (b) is granted, the order effects the abandonment without further notice, unless otherwise directed by the court.

Rule 9037 (Privacy Protection For Filings Made with the Court)

New subsection (h) to Rule 9037 would provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements. The proposed amendment responds to a suggestion from the Committee on Court Administration and Case Management that a uniform national procedure is needed for belated redaction of personal identifiers. The proposed new subdivision (h) sets forth a procedure for a moving party to identify a document that needs to be redacted and for providing a redacted version of the document. Upon the filing of such a motion, the court would immediately restrict access to the original document pending determination of the motion. If the motion is ultimately granted, the court would permanently restrict public access to the originally filed document and provide access to the redacted version in its place.

The Standing Committee unanimously approved all of the above amendments for publication in August 2017.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Civil Rules 5, 23, 62, and 65.1, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2016.

Rule 5 (Serving and Filing Pleadings and Other Papers)

The proposed amendments to Civil Rule 5 are part of the inter-advisory committee project to develop rules for electronic filing and service.

Proposed amendments to Rule 5(b)(2)(E) address electronic service. The present rule allows electronic service only if the person to be served has consented in writing. The proposal deletes the requirement of consent when service is made on a registered user through the court's electronic filing system. Written consent is still required when service is made by electronic means outside the court's system (*e.g.*, discovery materials).

Proposed amendments to Rule 5(d) address electronic filing. Present Rule 5(d)(3) permits papers to be filed, signed, or verified by electronic means if permitted by local rule; a local rule may require electronic filing only if reasonable exceptions are allowed. In practice, most courts require registered users to file electronically. Proposed Rule 5(d)(3)(A) recognizes this reality by establishing a uniform national rule that makes electronic filing mandatory for parties represented by counsel, except when non-electronic filing is allowed or required by local rule, or for good cause.

Proposed Rule 5(d)(3)(B) addresses filings by pro se parties. Under the proposal, courts would retain the discretion to permit electronic filing by pro se parties through court order or local rule. Any court order or local rule requiring electronic filing for pro se parties must allow

reasonable exceptions. While the advisory committee recognizes that some pro se parties are fully capable of electronic filing, the idea of *requiring* a pro se party to electronically file raised concerns that such a requirement could effectively deny access to persons not equipped to do so.

Proposed Rule 5(d)(3)(C) establishes a uniform national signature provision. Commentators found ambiguity in the published language regarding whether the rule would require that the attorney's username and password appear on the filing. In response, the advisory committee, in consultation with the other advisory committees, made revisions to increase the clarity of this amendment.

Finally, the proposal includes a provision addressing proof of service. The current rule requires a certificate of service but does not specify a particular form. The published version of the rule provided that a notice of electronic filing generated by the court's CM/ECF system constitutes a certificate of service. Following the public comment period, the advisory committee revised the proposal to provide that no certificate of service is required when a paper is served by filing it with the court's system. The proposal also addresses whether a certificate of service is required for a paper served by means other than the court's electronic filing system: if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service, and if the paper is not filed, a certificate of service is not required to be filed unless required by local rule or court order.

Rule 23 (Class Actions)

The proposed amendments to Rule 23 are the result of more than five years of study and consideration by the advisory committee, through its Rule 23 subcommittee. As previously reported, the decision to take up this effort was prompted by several developments that seemed to warrant reexamination of Rule 23, namely: (1) the passage of time since the 2003 amendments to Rule 23 went into effect; (2) the development of a body of case law on class

action practice; and (3) recurrent interest in Congress, including the 2005 adoption of the Class Action Fairness Act. In developing the proposed amendments to Rule 23, the subcommittee attended nearly two dozen meetings and bar conferences with diverse memberships and attendees. In addition, in September 2015, the subcommittee held a mini-conference to gather additional input from a variety of stakeholders on potential rule amendments.

After extensive consideration and study, the subcommittee narrowed the list of issues to be addressed in proposed rule amendments. The proposed amendments published in August 2016 addressed the following seven issues:

1. Requiring earlier provision of information to the court as to whether the court should send notice to the class of a proposed settlement (known as "frontloading");
2. Making clear that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f);
3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions;
4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions;
5. Addressing issues raised by "bad faith" class action objectors;
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2); and
7. A proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.

The majority of the comments received during the public comment period for all the proposed Civil Rules amendments—both written and in the form of testimony at three public hearings—addressed the Rule 23 proposals. The advisory committee received some comments

urging it to reconsider topics it had determined not to pursue, as well as comments urging it to consider additional topics not previously considered. As to those topics that were included in the proposals published for public comment, most comments addressed the modernization of notice methods and the handling of class member objections to proposed class action settlements.

The subcommittee and advisory committee carefully considered all of the comments received. Minor changes were made to the proposed rule language, and revisions to the committee note were aimed at increasing clarity and succinctness.

Rules 62 (Stay and Proceedings to Enforce a Judgment) and 65.1 (Proceedings Against a Surety)

The proposed amendments to Rule 62 and Rule 65.1 are the product of a joint subcommittee with the Advisory Committee on Appellate Rules. The advisory committee received three comments on the proposed amendments, each of which was supportive.

The proposed amendments to Rule 62 make three changes. First, the period of the automatic stay is extended to 30 days. This change would eliminate a gap in the current rule between automatic stays under subsection (a) and the authority to order a stay pending disposition of a post-judgment motion under subsection (b). Before the Time Computation Project, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rules 50, 52, or 59, or 60. The Time Computation Project reset at 28 days the time for motions under Rules 50, 52, or 59. It also reset the expiration of the automatic stay in Rule 62(a) at 14 days after entry of judgment. An unintentional result was that the automatic stay expired halfway through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay "pending disposition of any of" these motions. The proposed amendment to Rule 62(a) addresses this gap by extending the time of an automatic stay to 30 days. The proposal further provides that the automatic stay takes effect "unless the court orders otherwise."

Second, the proposed amendments make clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through final disposition on appeal. The former provision for securing a stay on posting a supersedeas bond is retained, without the word "supersedeas." The right to obtain a stay on providing a bond or other security is maintained with changes that allow the security to be provided before an appeal is taken and that allow any party, not just an appellant, to obtain the stay.

Third, subdivisions (a) through (d) are rearranged, carrying forward with only a minor change the provisions for staying judgments in an action for an injunction or a receivership, or directing an accounting in an action for patent infringement.

The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond. Additional changes were made following the public comment period in order to conform Rule 65.1 to the proposed amendments to Appellate Rule 8(b). As discussed above, the Advisory Committee on Appellate Rules has proposed amendments to the Appellate Rules to conform those rules with the amendments to Civil Rule 62, including amendments to Appellate Rule 8(b). Appellate Rule 8(b) and Civil Rule 65.1 parallel one another. The proposed amendments to Rule 65.1 imitate those to Appellate Rule 8(b), namely, removing all references to "bond," "undertaking," and "surety," and substituting the words "security" and "security provider."

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Civil Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 5, 23, 62, and 65.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Civil Procedure are set forth in Appendix C, with an excerpt from the advisory committee's report.

Information Items

Rule 30(b)(6) (Depositions of an Organization)

The advisory committee continues its consideration of Rule 30(b)(6), the rule addressing deposition notices or subpoenas directed to an organization. As previously reported, a subcommittee was formed in April 2016 and tasked with considering whether reported problems with the rule should be addressed by rule amendment.

In its initial consideration, the subcommittee worked on initial drafts of possible amendments that might address the problems reported by practitioners. The subcommittee—guided by feedback it received on the initial draft rule amendments from both the Standing Committee and the advisory committee, as well as ongoing research—continues to evaluate which issues could feasibly be remedied by rule amendment. As part of that evaluation, the subcommittee solicited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;
2. Clarifying that statements of the 30(b)(6) deponent are not judicial admissions;
3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;
4. Forbidding contention questions in Rule 30(b)(6) depositions;
5. Adding a provision for objections to Rule 30(b)(6); and
6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

The advisory committee posted the invitation for comment on the federal judiciary's rulemaking website and asked for submission of any comments by August 1, 2017. Members of the subcommittee continue to participate in various conferences around the country to receive input from the bar.

Social Security Disability Review Cases

Recently added to the advisory committee's agenda is the consideration of a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." The suggestion was referred to the advisory committee, as it is the appropriate committee to study and to advise about rules for civil actions in the district courts.

By way of background, 42 U.S.C. § 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." Every year, 17,000 to 18,000 of these review cases are brought in the district courts and account for approximately 7 percent of all civil filings. The national average remand rate is about 45 percent, a figure that includes rates as low as 20 percent in some districts and as high as 70 percent in others. Different districts employ widely differing procedures in deciding these actions.

The advisory committee's consideration of the suggestion is in the beginning stages. For now, the advisory committee has determined that more information and data need to be collected, and there are plans to form a subcommittee to fully consider various options, including either developing a separate set of rules or addressing social security cases in more detail within the Civil Rules. Discussion of the suggestion and its possible implications occurred at both the

spring 2017 meeting of the advisory committee and the June 2017 meeting of the Standing Committee.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 12.4, 45, and 49, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and public for comment in August 2016.

Rule 12.4 (Disclosure Statement)

Criminal Rule 12.4 governs the parties' disclosure statements. When Rule 12.4 was added in 2002, the committee note stated that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

When Rule 12.4 was promulgated, the Code of Conduct for United States Judges treated all victims entitled to restitution as parties. As amended in 2009, the Code no longer treats any victim who may be entitled to restitution as a party, and requires disclosure only when the judge has an "interest that could be affected substantially by the outcome of the proceeding." The proposed amendment to Rule 12.4(a) aims to make the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments. The proposed amendment allows the court to relieve the government's burden of making the required disclosures upon a showing of "good cause." The amendment will avoid the need for burdensome disclosures when numerous organizational victims exist, but the impact of the crime on each is relatively small.

Rule 12.4(b) would also be amended. First, the proposed amendments specify that the time for making the disclosures is within 28 days after the defendant's initial appearance.

Second, it revises the rule to refer to "later" (rather than "supplemental") filings. As published, the proposal included a third amendment adding language to make clear that a later filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Two public comments were submitted. One stated that the proposed changes were unobjectionable. The other suggested that the phrase "good cause" should be limited to "good cause related to judicial disqualification." The advisory committee fully considered this suggestion, but concluded that in context the amendment was clear as published.

Following the public comment period, the advisory committee learned that the proposed clarifying language in subsection (b) would be inconsistent with language used in Civil Rule 7.1(b)(2). To make the language in the parallel rules consistent, the advisory committee revised its proposed amendment to Rule 12.4(b)(2) to require a party to "promptly file a later statement if any required information changes."

Rules 49 (Serving and Filing Papers) and 45 (Computing and Extending Time)

The proposed amendments to Criminal Rule 49 and a conforming amendment to Rule 45(c) are part of the inter-advisory committee project to develop rules for electronic filing, service, and notice. The decision by the Advisory Committee on Civil Rules to pursue a national rule mandating electronic filing in civil cases required reconsideration of Criminal Rule 49(b) and (d), which provide that service and filing "must be made in the manner provided for a civil action," and Rule 49(e), which provides that a local rule may require electronic filing only if reasonable exceptions are allowed.

In its consideration of the issue, the advisory committee concluded that the default rule of electronic filing and service proposed by the Advisory Committee on Civil Rules could be problematic in criminal cases. Therefore, with the approval of the Standing Committee, the

advisory committee drafted and published a stand-alone criminal rule for filing and service that included provisions for electronic filing and service.

Substantive differences between proposed Criminal Rule 49 and proposed Civil Rule 5 include the provisions regarding unrepresented parties—under proposed Rule 49, an unrepresented party must file non-electronically, unless permitted to file electronically by court order or local rule. In contrast, under proposed Civil Rule 5, an unrepresented party may be required to file electronically by a court order or local rule that allows reasonable exceptions. Proposed Rule 49 also contains two provisions that do not appear in Civil Rule 5, but were imported from other civil rules: it incorporates the signature provision of Civil Rule 11(a); and substitutes the language from Civil Rule 77(d)(1), governing the clerk's duty to serve notice of orders, for the direction in current Rule 49 that the clerk serve notice "in a manner provided for in a civil action."

Proposed Rule 49 also requires all nonparties, represented or not, to file and serve non-electronically in the absence of a court order or local rule to the contrary. If a district decides that it would prefer to adopt procedures that would allow all represented media, victims, or other filers to use its electronic filing system, that remains an option by local rule.

A conforming amendment to Rule 45 eliminates cross-references to Civil Rule 5 that would be made obsolete by the proposed amendments to Rule 49. The proposed conforming amendment replaces those references to Civil Rule 5 with references to the corresponding new subsections in Rule 49(a).

Following the public comment period, the advisory committee reviewed both the public comments on Rule 49 specifically, as well as the comments that implicated the common provisions of the electronic service and filing across the federal rule sets. In response to those

comments, the advisory committee revised two subsections in the published rule and added a clarifying section to another portion of the committee note.

The first changes after publication concern subsection (b)(1), which governs when service of papers is required, as well as certificates of service. These changes responded to comments addressed to the proposed amendment to Civil Rule 5 and to other issues raised during inter-committee discussions. The published criminal rule, which was based on Civil Rule 5(d)(1), stated that a paper that is required to be served must be filed "within a reasonable time after service." Because "within" might be read as barring filing before the paper is served, "no later than" was substituted to ensure that it is proper to file a paper before it is served. Subsection (b)(1) was also revised to state explicitly that no certificate of service is required when the service is made using the court's electronic filing system. Finally, the published rule stated that when a paper is served by means other than the court's electronic filing system, the certificate must be filed "within a reasonable time after service or filing, whichever is later." Because that might be read as barring filing of the certificate with the paper, subsection (b)(1) was revised to state that the certificate must be filed "with it or within a reasonable time after service or filing."

The second change revised the language of the signature provision in proposed Rule 49(b)(2) to respond to public comments expressing concern that the published provisions on electronic signatures were unclear and could be misunderstood to require inappropriate disclosures. In consultation with the other advisory committees, minor revisions were made to clarify this provision.

In response to concerns expressed by clerks of court, a clarifying sentence was added to the committee note to Rule 49(a)(3) and (4) stating that "[t]he rule does not make the court

responsible for notifying a person who filed the paper with the court's electronic filing system that an attempted transmission by the court's system failed."

The advisory committee also considered, but declined to adopt, recommendations by some commentators that it extend the default of electronic filing to inmates, nonparties, or all pro se filers other than inmates. The policy decision to limit presumptive access to electronic filing was considered extensively during the drafting process and after publication. The advisory committee adhered to its policy decision and made no further changes following publication.

The Standing Committee voted unanimously to support the recommendations of the advisory committee.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 12.4, 45, and 49 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are set forth in Appendix D, with an excerpt from the advisory committee's report.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted a proposed new Criminal Rule 16.1, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, with a request that they be published for comment in August 2017. The Standing Committee unanimously approved the advisory committee's recommendations.

<u>New Rule 16.1 (Pretrial Discovery Conference and Modification)</u>

The proposed new rule originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and electronically stored information (ESI). While the

subcommittee formed to consider the suggestion determined that the original proposal was too broad, it determined that a need might exist for a narrower, targeted amendment.

Following robust discussion at the fall 2016 meeting, the advisory committee determined to hold a mini-conference to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and get focused comments and critiques of specific proposals. The mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges.

There was not unanimity among the mini-conference participants on the threshold question of whether a rule amendment is warranted—the private practitioners and public defenders expressed strong support for a rule change, and the prosecutors were not initially convinced there was a need for a rule change. All participants agreed, however, on the following points: ESI discovery problems can arise in both small and large cases; ESI issues are handled very differently among districts; and most criminal cases now include ESI.

Discussion quickly focused on the ESI Protocol and whether it was sufficient to solve most problems encountered by practitioners.[1] Defense attorneys reported that some prosecutors and judges are neither aware of the ESI Protocol nor the problems some disclosures pose for the defense. While the prosecutors and Department of Justice attorneys who attended the mini-conference were not initially convinced a rule was needed, they did agree with the defense attorneys that there is a lack of awareness of the ESI Protocol and that more training would be useful.

[1]The "ESI Protocol" is shorthand for the "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" published in 2012 by the Department of Justice and the Administrative Office in connection with the Joint Working Group on Electronic Technology in the Criminal Justice System.

Consensus eventually developed during the mini-conference regarding what sort of rule was needed. First, the rule should be simple and place the principal responsibility for implementation on the lawyers. Second, it should encourage the use of the ESI Protocol. Participants did not support a rule that would attempt to specify the type of case in which this attention was required. The prosecutors and Department of Justice attorneys also felt strongly that any rule must be flexible in order to address variation among cases.

Guided by the discussion and feedback received at the mini-conference, as well as examples of existing local rules and orders addressing ESI discovery, the subcommittee drafted proposed new Rule 16.1. The proposed rule has two sections. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.

Because technology changes rapidly, proposed Rule 16.1 does not attempt to specify standards for the manner or timing of disclosure. Rather, it provides a process that encourages the parties to confer early in each case to determine whether the standard discovery procedures should be modified.

Two factors support the decision to place the new language in a new Rule 16.1 rather than in Rule 16. First, the new rule addresses activity that is to occur shortly after arraignment and well in advance of discovery. Second, unlike Rule 16(d), the new rule governs the behavior of lawyers, not judges.

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply)

Proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for

the United States District Courts make clear that the petitioner has an absolute right to file a reply.

As previously reported, a subcommittee was formed to consider a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings. That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases—provides that the petitioner/moving party "may submit a reply . . . within a time period fixed by the judge." The committee note and history of the rule make clear that this language was intended to give the petitioner a right to file a reply, but the subcommittee determined that the text of the rule itself is contributing to a misreading of the rule by a significant number of district courts. Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the reference to filing "within a time fixed by the judge" as allowing a petitioner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The proposed amendment confirms that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence: "The moving party may file a reply to the respondent's answer or other pleading. The judge must set the time to file, unless the time is already set by local rule."

The word "may" was retained because it is a word used in other rules, and the advisory committee did not want to cast doubt on its meaning. However, to address any possible misreading of the rule due to the use of "may," the following sentence was added to the committee notes: "We retain the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'" The proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

Information Item

The advisory committee, through its cooperator subcommittee, continues its mandate to develop possible rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. The subcommittee is considering what rules amendments would be required to implement the specific recommendations of the Judicial Conference Committee on Court Administration and Case Management (CACM) in its guidance issued in June 2016. The subcommittee is also considering alternative approaches and rules amendments other than those contemplated in the CACM guidance.

The subcommittee will present its work to the full advisory committee in the fall. The advisory committee will share its initial conclusions with the AO's Task Force on Protecting Cooperators. The Task Force on Protecting Cooperators plans to issue its report and recommendations to the AO Director in 2018. If the recommendations include proposals to amend the Criminal Rules, such proposals will be considered through the Rules Enabling Act process, including opportunity for public comment.

FEDERAL RULES OF EVIDENCE

Rule Approved for Publication and Comment

The Advisory Committee on Rules of Evidence submitted a proposed amendment to Rule 807 (Residual Exception), with a request that it be published for comment in August 2017.

This proposed amendment caps more than two years of study concerning possible changes to Rule 807—the residual exception to the hearsay rule. After extensive deliberation, including a symposium held at the Pepperdine University School of Law, the advisory committee decided against expansion of the residual exception, but concluded several problems with current Rule 807 could be addressed by rule amendment. First, the requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions

is exceedingly difficult to apply, because no unitary standard of trustworthiness exists in the Rule 803 and 804 exceptions. Given the disutility of the "equivalence" standard, the advisory committee determined that a better, more user-friendly approach is simply to require the judge to find that the hearsay offered under Rule 807 is supported by sufficient guarantees of trustworthiness.

Second, uncertainty exists regarding whether courts should consider corroborating evidence in determining whether a statement is trustworthy. The advisory committee determined that a clarifying amendment would promote uniformity in the evaluation of trustworthiness under the residual exception. The proposed amendment specifically allows a court to consider corroborating evidence in evaluating trustworthiness.

Third, the requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" and consistent with the "purpose of the rules" have not served any good purpose. The advisory committee determined that the rule would be improved by deleting the references to "material fact," "interest of justice," and "purpose of the rules."

In addition, the proposed amendment addresses several issues with the current notice requirements. The current rule makes no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court has the power to excuse untimely notice, no matter how good the cause. Other notice provisions in the evidence rules contain good cause provisions, so adding such a provision to Rule 807 promotes uniformity. The requirement in the current rule that the proponent disclose "particulars" has led to confusion and is eliminated. A requirement that notice be in writing has been added to eliminate disputes about whether notice was ever provided. Finally, the proposed amendment eliminates as nonsensical the current requirement that the proponent disclose the declarant's

address when the witness is unavailable—which is usually the situation in which residual hearsay is offered.

The advisory committee retained the requirement from the original Rule 807 that the proponent must establish that the proffered hearsay is more probative than any other evidence the proponent can reasonably obtain to prove the point. Retaining the "more probative" requirement indicates an intent to improve the residual exception, not to expand it. The "more probative" requirement ensures that the rule will be invoked only when it is necessary to do so. Furthermore, under the amendment the proponent cannot invoke the residual exception unless the court finds that the proffered hearsay is not admissible under any of the Rule 803 or 804 exceptions.

The Standing Committee voted unanimously to approve the proposed amendment to Rule 807 for publication in August 2017.

Information Items

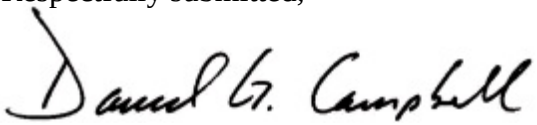
As part of its fall 2017 meeting, the advisory committee will host a symposium on Rule 702 and developments regarding expert testimony, including the challenges raised in the last few years to forensic expert evidence. The advisory committee is also seeking comments from stakeholders on the practical effect of more liberal admission of audio-visual records of prior inconsistent statements under Rule 801(d)(1)(A).

JUDICIARY STRATEGIC PLANNING

Judge William Jay Riley, the judiciary's planning coordinator, asked each committee of the Judicial Conference for an update on strategic initiatives being implemented in support of the *Strategic Plan for the Federal Judiciary*. On July 5, 2017, the Standing Committee provided

Judge Riley a written update on two initiatives—Implementing the 2010 Civil Litigation Conference and Evaluating the Impact of Technological Advances.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Gregory G. Garre	Rod J. Rosenstein
Daniel C. Girard	Amy J. St. Eve
Susan P. Graber	Larry D. Thompson
Frank M. Hull	Richard C. Wesley
Peter D. Keisler	Jack Zouhary

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)
Appendix B – Federal Rules of Bankruptcy Procedure and Revisions to the Official Bankruptcy Forms (proposed amendments and supporting report excerpts)
Appendix C – Federal Rules of Civil Procedure (proposed amendments and supporting report excerpt)
Appendix D – Federal Rules of Criminal Procedure (proposed amendments and supporting report excerpt)

TAB 1D

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Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017	**H.R. 985** *Sponsor:* Goodlatte (R-VA) *Co-Sponsors:* Sessions (R-TX) Grothman (R-WI)	CV 23	**Bill Text (as amended and passed by the House, 3/9/17):** https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf **Summary (authored by CRS):** (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless: · in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; · no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and · in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief. No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members. Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons. A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.	· 3/13/17: Received in the Senate and referred to Judiciary Committee · 3/9/17: Passed House (220–201) · 3/7/17: Letter submitted by AO Director (sent to House Leadership) · 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) · 2/15/17: Mark-up Session held (reported out of Committee 19–12) · 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) · 2/9/17: Introduced in the House

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice. Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action. Appeals courts must permit appeals from an order granting or denying class certification. (Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs. A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements. (Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried. **Report:** https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf	

Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	**H.R. 720** *Sponsor:* Smith (R-TX) *Co-Sponsors:* Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	**Bill Text (as passed by the House without amendment, 3/10/17):** https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf **Summary (authored by CRS):** (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question. The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf	· 3/13/17: Received in the Senate and referred to Judiciary Committee · 3/10/17: Passed House (230–188) · 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) · 1/30/17: Introduced in the House
	S. 237 *Sponsor:* Grassley (R-IA) *Co-Sponsor:* Rubio (R-FL)	CV 11	**Bill Text:** https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf **Summary (authored by CRS):** This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question. The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.	· 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) · 1/30/17: Introduced in the Senate; referred to Judiciary Committee

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** None.	
Stopping Mass Hacking Act	**S. 406** *Sponsor:* Wyden (D-OR) *Co-Sponsors:* Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf **Summary:** (Sec. 2) "Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016." **Report:** None.	· 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 1110 *Sponsor:* **Poe (R-TX)** *Co-Sponsors:* **Amash (R-MI)** **Conyers (D-MI)** **DeFazio (D-OR)** **DelBene (D-WA)** **Lofgren (D-CA)** **Sensenbrenner (R-WI)**	CR 41	**Bill Text:** https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf (Sec. 2) "(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016. (b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant." **Summary (authored by CRS):** This bill repeals an amendment to rule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances. **Report:** None.	· 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations · 2/16/17: Introduced in the House; referred to Judiciary Committee

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Back the Blue Act of 2017	**S. 1134** *Sponsor:* **Cornyn (R-TX)** *Co-Sponsors:* Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	· 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 2437 *Sponsor:* Poe (R-TX) *Co-Sponsors:* Graves (R-LA) McCaul (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	· 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations · 5/16/17: Introduced in the House; referred to Judiciary Committee

Pending Legislation
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Report: None.	

TAB 2

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TAB 2A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Cooperators Subcommittee

DATE: September 29, 2017

Following the Committee's April meeting in Washington, the Cooperators Subcommittee held teleconference calls in July, August, and September. To assist the Subcommittee, the reporters prepared research memoranda and draft amendments taking a variety of alternative approaches.

After careful consideration of a set of rules that would implement the CACM Guidance, the Subcommittee voted unanimously (with the Department of Justice abstaining[1]) to oppose the adoption of the CACM rules. Judge Kaplan, the chair of the Subcommittee and the Task Force, did not vote. Members concluded that the sweeping changes required to implement the CACM Guidance are not warranted, at least at this time, and objected to those changes for a variety of reasons. The Subcommittee was also unanimous in declining to support any of the alternative approaches that would implement all or part of CACM's Guidance. Finally, the Subcommittee deferred final action on an alternative approach that would limit remote electronic access in order to reduce the likelihood that judicial records would be misused to identify and harm cooperators.

This memoranda briefly summarizes the Subcommittee's conclusions and its recommendations. We also include updated versions of the memoranda considered by the Subcommittee, including draft amendments. In the final section of this memorandum, we address briefly a recent case from the Ninth Circuit, *United States v. Doe*, No. 15-50259, 2017 WL 3996799, at *1 (9th Cir. Sept. 12, 2017).

[1] Mr. Wroblewski advised the Subcommittee that although the issues had been the subject of extensive discussion within the Department, he had been asked not to take any position during the call.

I. Amendments to Implement CACM's June 2016 Guidance

The Subcommittee's first task was to develop draft amendments that would implement CACM's Guidance, and then to provide a recommendation on whether those amendments should be implemented. The elements of the CACM Guidance that would require changes in the Criminal Rules are:

- bench conferences at all plea and sentencing hearings;
- sealed supplements to all plea and sentencing transcripts containing the bench conferences;
- sealed supplements to all plea agreements;
- sealed supplements to all sentencing memoranda;
- sealing all Rule 35(b) motions; and
- continuing this sealing indefinitely unless otherwise ordered by the court.

The Subcommittee concluded that implementation of these elements would require amendments to the following rules: Rule 11(c)(2) and (3); Rule 11(g); Rule 32(g); Rule 32(i); and Rule 35(b).

After reviewing and editing drafts prepared by the reporters and edited by the style consultants, the Subcommittee was unanimous in concluding that the draft amendments to Rules 11, 32, and 35 provided at the end of this memorandum would implement CACM's Guidance.

The Subcommittee then turned to the question whether it could endorse and recommend the adoption of these amendments or other alternative amendments. The Subcommittee considered several variations that altered one or more features of the Guidance. Three variations are shown side-by-side in Appendix A (included at Tab 2B): one that omitted the burdensome requirement that bench conferences be conducted in each case, another that sealed the full documents addressed by the Guidance, thus eliminating the need to bifurcate and file sealed supplements, and a third that provided that plea agreements, sentencing memoranda, and other documents that might reveal cooperation would be submitted to the court but must not be filed.[2] Finally, the Subcommittee considered a slate of amendments that added provisions addressing items that might contain information about cooperation that were not addressed by CACM's Guidance (CACM Plus). These provisions appear in Appendix B (included at Tab 2B).

[2]The Subcommittee did not pursue the idea, suggested earlier, of including all of the cooperator information in the PSRs. A variety of concerns were expressed about this approach. It would reduce transparency, alter the character of the PSR, and impose new responsibilities and burdens on Probation Officers. Additionally, some of the documents including information about cooperation (such as plea documents, transcripts and Rule 35 materials) are normally produced and filed after the Probation Officer completes the PSR.

The reporters' memorandum of August 24, 2017[3] provided below, (1) describes the advantages and disadvantages of each of these options, and (2) discusses possible objections under the First Amendment, the common law right of access to judicial documents, and a number of statutes.

As noted, with the Department of Justice representative abstaining, the Subcommittee voted unanimously to oppose adoption of the amendments implementing the CACM Guidance. It also rejected each of the various alternatives presented in Appendices A and B. Members agreed that the sweeping and fundamental changes required to implement the CACM Guidance through any of the alternative approaches in Appendix A and B would also be objectionable.

Members emphasized a variety of concerns that can be discussed at the October meeting. Some members suggested that changes by the Bureau of Prisons are likely to reduce threats and harm to cooperating inmates, thus reducing the need for sweeping changes in public access to judicial proceedings and documents. And members noted that the Task Force may recommend other changes that would alter the CM/ECF system to address the problem as well. There was also opposition on principle to sweeping restrictions on public access to judicial proceedings and documents, and concern about the legality of the various restrictions in light of the First Amendment and common law right of access.

II. An Alternative Approach: Limiting Remote Public Access

The Subcommittee also considered, but deferred a final action on, an amendment taking a different approach to reducing the use of judicial documents to identify and harm cooperators: preserving full public access to any unsealed documents at the courthouse but limiting remote public access to documents that might reveal cooperation. The Subcommittee concluded it would be premature to move forward with this proposal before the Task Force reaches a decision on changes in the CM/ECF system now under consideration. The Subcommittee also deferred its decision about who should be exempt from the proposed restriction on remote electronic access: any attorney who has filed an appearance in a criminal case, all attorneys, or all registered users of the CM/ECF system. The model upon which the reporters initially based the amendment provided remote access only to the parties and their attorneys, but that restriction may be too sweeping for criminal cases. For example, lawyers in other criminal cases may need access to plea and sentencing materials in other cases in order to provide effective assistance of counsel (e.g., making an argument under 18 U.S.C. § 3553(a)(6) that a sentence would create an unwarranted sentencing disparity). The Subcommittee considered a proposal, based on a procedure now in place in the Eastern District of North Carolina, to allow lawyers representing other defendants to have remote access to materials upon the filing of a certificate of need. It also considered providing access to all criminal defense attorneys without requiring a certificate

[3]This memorandum has been corrected and updated for inclusion in the agenda book.

of need, but it was not clear exactly how to define that class and whether this would be feasible. And that option would not allow remote access by many other attorneys who have a justifiable need to research such documents (e.g., those monitoring certain cases that might affect clients who have not yet been charged or clients involved in related civil litigation). One final option was allowing remote access to all registered users of the CM/ECF system (though limiting lay access on PACER). Members were not sure whether that option would provide enough additional protection to cooperators to be justified. The Subcommittee would appreciate feedback from the Committee on this issue.

The reporters' memorandum of August 24, 2017 includes a discussion of some issues concerning the proposed no-remote-access rule, which is also discussed in the reporters' memorandum of September 5, 2017, included below.

III. The *Doe* Decision

In *United States v. Doe*, the Ninth Circuit addressed the CACM Guidance in a case decided after we prepared our August 24 memorandum. This decision may be of interest because of its discussion of the dangers to cooperators and the CACM Guidance. However, the court applies a traditional case-specific analysis under the First Amendment, and suggests that district courts consider adopting some variation of the procedures recommended by CACM on a case-by-case basis, rather than the across the board approach recommended by CACM.

Doe held that the district court erred in denying a motion to seal materials related to the government's 5K1.1 motion and to strike references to 5K1.1 in the docket entry text. The court assumed without deciding that the First Amendment would be applicable, but concluded it would not be violated by the sealing at issue given the facts of the case and the probability of harm to Doe. In finding that the district court abused its discretion, the appellate court emphasized a variety of case-specific factors, including the government's conclusion that the defendant faced heightened risk because of his cooperation in providing information against an international drug cartel.[4] The court also concluded that the record established that there were no adequate

[4]The defendant alleged that someone in the cartel told him that he should not play dirty with them because they knew where his family was. *Id*. at *5. The government had described the defendant as someone who faced "heightened" risk because of a variety of factors, including that his offenses involved a large international drug cartel, he had lost a load of methamphetamine with a street value of more than $500,000, and he had provided information about individuals with who he was incarcerated in trial and others he saw and recognized during court proceedings (who presumably could also recognize him). *Id.* The court noted that the government was in the best position to assess the likelihood of harm. *Id.* at *6. And disclosure would also affect the government's legitimate interest in future investigations, and the court concluded that "[u]nder the circumstances of this case, it was error to second-guess the government's asserted interest in future criminal investigations and the potential harm that disclosing Doe's cooperation could cause to those investigations." *Id.* at *7.

alternatives in Doe's case. *Id.* at 18. Redacting would not be sufficient, because it would flag the filings and a reference to 5K would be readily identifiable given the context. *Id.*

The court also made several comments regarding the CACM Guidance. The panel noted that CACM had found remote public access significantly increased the potential for harm,[5] and this undercut some aspects of the district court's reasoning. The opinion concluded with a section discussing the "grave threats" highlighted in the CACM report. *Id.* at *8. Recognizing prior circuit decisions holding that a qualified First Amendment right attaches to a plea colloquy transcript and a Rule 35 motion, the panel stated that nothing in the circuit's precedent "prevents the district courts from adopting some variation of the practices recommended by the CCACM Report, as long as the district courts decide motions to seal or redact on a case-by-case basis." *Id.* at *8. It concluded with a statement that the court was not suggesting that district courts take any particular course of action to protect cooperators, and that "[t]he CCACM Report simply describes one alternative." *Id.*

[5]It noted that the district court had not had the benefit of the CACM Guidance, which "verifies that orally pronouncing a sentence, including references to § 5K1.1, does not jeopardize defendants in the same way as memorializing someone's cooperation in publicly accessible documents that easily may be viewed online." *Id.* at *6.

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Rule 11. Pleas

* * * * *

(c) Plea Agreement Procedure.

* * * * *

(2) ***Disclosing and Filing a Plea Agreement.***

(A) *Disclosure in Open Court*. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(B) *Bench Conference Required*. [In every case,] The disclosure must include a bench conference at which the government must disclose any agreement by the defendant to cooperate with the government or must state that there is no such agreement.

(C) *Filing the Agreement*. The parties must file the plea agreement. The agreement must include a public part and a sealed supplement that contains any discussion of or references to the defendant's cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until the court orders otherwise.

* * * * *

(g) Recording the Proceedings.

(1) ***In General.*** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.

(2) ***Inquiries and Advice***. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

3) ***Bench Conference.*** If the bench conference required by Rule 11(c)(2) is transcribed, the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.

Rule 32. Sentencing and Judgment

* * * * *

(g) Submitting the Report; Written Memoranda.

(1) ***Report.*** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(2) ***Memoranda.*** If a written sentencing memorandum is filed with the court, it must have a public part and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The supplement must contain:

(A) any discussion of or reference to the defendant's cooperation, including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1 or

(B) a statement that there has been no cooperation.

* * * * *

(i) Sentencing.

* * * * *

(4) Opportunity to Speak.

* * * * *

(C) ~~*In Camera*~~ *Proceedings in Camera or at the Bench.*

(i) In General. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(ii) Bench Conference Required. [In every case,] Sentencing must include a bench conference for discussion of the defendant's cooperation or lack of cooperation with the government. The transcript of this conference must be filed as a sealed addendum to the sentencing transcript. The addendum must remain under seal indefinitely until the court orders otherwise.

* * * *

Rule 35. Correcting or Reducing a Sentence

* * * * *

(b) Reducing a Sentence for Substantial Assistance.

* * * * *

(3) ***Sealing the Motion.*** A motion under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.

~~***(3)***~~***(4)*** ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

~~***(4)***~~***(5)*** ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

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(As of September 18)

Rule 49.2. Limitations on Access to Electronic Files.

(a) *In General.* Unless these rules or a court order provides otherwise, access to an electronic file is authorized only as provided in (b), (c), and (d)..

(b) *By the Parties and Their Attorneys.* A party[, including a codefendant,] and the party's attorney may have remote electronic access to any part of the case file that is not under seal or another restriction that bars access by that party.

(c) *By an Attorney in Another [Criminal] Case.* An attorney who is a registered user of the court's electronic-filing system [and has filed a notice of appearance in any federal criminal case] may have remote electronic access to any part of the case file that is not under seal or another restriction that bars access by that attorney.

(d) *By Others.* Any other person may have the following access to a document that is not under seal or another restriction that bars access by that person:

(1) [electronic] access to any part of the case file at the courthouse, after providing the clerk with identification [as required by local court rule] [consistent with any standards established by the Judicial Conference of the United States], and

(2) remote [electronic] access only to:

(i) the docket maintained by the court;

(ii) the indictment or information; and

(iii) an opinion, order, judgment, or other disposition of the court.

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TAB 2B

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MEMO TO: Cooperators Subcommittee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

DATE: August 24, 2017 (revised September 2017)

The Subcommittee has been charged with providing the full Committee with (1) a set of amendments that would implement CACM's recommendations, (2) its view on whether those amendments—or alternative Rules amendment(s)—should be recommended to the Standing Committee for adoption, and (3) any other new rules for cooperators it recommends. This memorandum provides several draft rules for discussion at the Subcommittee's next conference call on August 31 at 10:15 EST.

As a preliminary matter we note, but do not discuss, two factors that may affect the Subcommittee's decisions.

First, CACM's recommendations, even if fully implemented, cannot fully eliminate the danger to cooperators, and there is no way to be certain how successful these recommendations would be in reducing threats and harm. The recommendations address only some, but not all of the myriad of ways that those interested in identifying cooperators learn who has and who has not assisted the government. These include, for example, plea and sentencing documents obtained by the defendant from his attorney then shared with others,[1] information about cooperation in documents that are not covered by CACM's Guidance, information from family or associates outside the court and corrections systems, testimony by the defendant or others in open court, *Brady* and *Giglio* disclosures, the defendant's removal from prison or jail to meet with prosecutors or appear in court, changes in the defendant's litigation strategy (such as withdrawal from joint defense agreement or refusal to cooperate informally with co-defendants), a revised charging document that omits or reduces charges, delayed sentencing, the imposition of a sentence below the applicable mandatory minimum or below the Guideline range, or a post-sentencing reduction of punishment.

Second, the Task Force is exploring means other than rules changes that may reduce the threat to cooperators, though it is also uncertain how effective those efforts will be. Some of the

[1] For example, Rule 32(e)(2) provides that "the probation officer must give the presentence report to *the defendant*, the defendant's attorney, and an attorney for the government . . . ." (emphasis added). Also, defense attorneys have told us they believe it is their ethical obligation to provide plea and sentencing documents to their clients. The Agenda for the Committee's October meeting will include consideration of problems that have arisen under Rule 32(e)(2). Revisions might include an amendment requiring the probation officer to provide the presentence report only to the defense attorney to share with the defendant. This might allow a defense attorney to meet ethical obligations without allowing the client to retain a copy.

Task Force initiatives (particularly those for changes by the Bureau of Prisons) are fairly advanced and show significant promise. Perhaps the largest unknown—which has tremendous implications for proposals to amend the Criminal Rules—is what, if anything, can be done with the CM/ECF dockets to reduce the extent to which they communicate information about cooperation.

Appendix A presents the first four options side by side in a chart. All begin with the CACM Guidance, which is then modified in Columns 2 to 4.

- **Column 1 (Full CACM procedures)** provides amendments intended to fully implement CACM's Guidance, with no additional provisions that might carry further CACM's approach. The core recommendations are:
    - appending a sealed supplement to every plea agreement and sentencing memorandum;
    - requiring a bench conference in every case at the plea and sentencing stages where cooperation, or lack of cooperation, is discussed;
    - sealing the transcripts of the bench conferences; and
    - sealing all Rule 35 motions.
- **Columns 2 and 3** provide alternatives based on the CACM sealing approach; both omit CACM's requirement of bench conferences at the plea and sentencing stage in every case (and sealed transcripts of those portions of the hearing). They differ, however, in their treatment of the plea, sentencing, and Rule 35 documents that might mention cooperation.
    - **Column 2 (CACM/sealing with no courtroom restrictions)** incorporates CACM's requirements for sealed supplements to plea agreements and sentencing materials in all cases. The omission of mandated bench conferences is the only departure from CACM's recommendations.
    - **Column 3 (Whole document sealing/no courtroom restrictions)** includes neither CACM's requirement for bench conferences nor its requirement of sealed supplements for plea and sentencing documents in all cases. Instead, it seals the entirety of the critical documents.
- **Column 4 (no document filing; no courtroom restrictions)** likewise omits the requirement of bench conferences in each case, and prevents public access not by sealing documents that may discuss cooperation but by providing that those document not be filed with the court.

Appendix B also begins with the CACM Guidance. Column 1 shows the Full CACM approach from Appendix A. The second column shows additional amendments with protections that might be necessary to implement fully CACM's goals (CACM Plus), addressing items that may contain information about cooperation but that are not included in CACM's Guidance. The third column contains a brief explanation of the additions.

Appendix C provides new Rule 49.2, to implement the no-remote-access approach. This is an entirely different option that permits remote access to the record for parties only, retaining public and press access in person at the courthouse after showing identification. Like Civil Rule 5.2(c), on which it is modeled, the new Rule 49.2 recognizes that sealed documents would not be available at the courthouse absent a court order.

We begin with a discussion of the arguments for and against the elements of the CACM Guidance, and any problems posed by those proposals. For each element of the Guidance identified below, we add a discussion of any alternative approaches we have identified, including alternatives in Columns 2-4 of Appendix A.

We then turn to the alternative in Appendix C: limiting remote access. We present new Rule 49.2, and discuss the advantages and disadvantages of this approach.

I. Rules Based on the CACM Guidance

Our discussion of the elements of the CACM Guidance will proceed as follows:

A. Bench conferences at all plea and sentencing hearings;

B. Sealed supplements to all plea and sentencing transcripts containing the bench conferences;

C. Sealed supplements to all plea agreements;

D. Sealed supplements to all sentencing memoranda;

E. Sealing all Rule 35(b) motions; and

F. Continuing this sealing indefinitely unless otherwise ordered by the court.

A. Bench Conferences at Plea and Sentencing Proceedings

Restricting discussion of cooperation at both the plea and sentencing phase to a bench conference and requiring these bench conferences in every criminal case is a foundational element of the CACM Guidance. <u>This aspect of the CAMC Guidance is reflected in the amendments to Rule 11(c)(2)(B) and Rule 32(i)(4)(C)(ii) shown in Column 1 of Appendix A.</u> In this section of the memo, we focus exclusively on the recommended courtroom procedure, turning to the closely related requirement of sealing the transcripts of these sessions in the next section.

<u>Arguments in favor.</u>

Moving the discussion from open court to a bench conference would prevent disclosure of an individual's cooperation to those present in the courtroom in an individual case, and sealing the transcript (discussed below) would prevent others from gleaning that information later from the court's records.

If bench conferences were used only for cooperators, the procedure itself would be a red flag to courtroom observers. By requiring a bench conference in every case, CACM's Guidance would produce uniform courtroom procedures nationwide regardless of whether a defendant had cooperated. This uniform nationwide procedure would prevent observers of hearings at the plea and sentencing stage from overhearing discussions that could identify cooperators.

The rules already authorize confidential consultations with the parties during these proceedings, for good cause. Rule 11 allows the parties to disclose the plea agreement in camera for good cause, and Rule 32 allows the court to hear in camera any allocution by victim, defendant, or government "upon a party's motion and for good cause." If reducing the risk of threats and harm to suspected cooperators is good cause in a single case, it might be argued that the need for uniformity in order to disguise the cases involving cooperation is good cause for conducting bench conferences in every case.

Arguments against.

The Subcommittee previously discussed this element of the CACM Guidance, noting several serious problems that were sufficient to warrant a tentative conclusion that the Subcommittee would not support the proposed restriction on courtroom procedures.

First, requiring this time-consuming procedure in every case (the vast majority of which do not involve cooperation[2]) would put a substantial burden on the courts' resources, especially in districts with very large criminal dockets. For example, the District of Arizona has 7,000 cases per year, and the magistrate judges in that district think the CACM in-court sidebars would make it difficult to process their caseload. Also, the separate bench conferences are required for sentencing in every case, even guilty pleas without agreements or trials.

Second, the procedure might not prevent courtroom observers from learning who is cooperating. If the parties approached the bench only briefly to say "no cooperation" in most cases, observers would have no difficulty identifying the cases in which a longer bench colloquy indicated that cooperation had occurred and was being discussed. In theory courts could respond by making it their practice to keep the parties at the bench for several minutes in every case, even when there had been no cooperation, but that charade (if it could be carried out effectively) would impose an even greater burden on judicial resources.

Some judges also raised security concerns, because defendants have a presumptive right to be present for the discussion of the facts concerning their cooperation and would need to approach the bench. Judge Campbell stated that in his district a deputy marshal would need to accompany defendants to the bench. He expressed concern that the bench conferences would require three marshals in order to bring multiple defendants into the courtroom for sentencings, so that two marshals could remain with the other defendants.

[2] In Fiscal Year 2016, 11.1% of defendants (7,443 individuals) received downwards departures for substantial assistance under U.S.S.G. § 5K1.1. U.S. Sentencing Comm'n, 2016 Sourcebook of Federal Sentencing Statistics, *Table N* (2016). That number does not, however, include all individuals who provided some sort of cooperation.

Moreover, the proposed regulation of courtroom advocacy would have a significant negative effect on the defense function. The most effective advocacy for a defendant in plea and sentencing proceedings will frequently weave references to cooperation (or the reasons for not cooperating) throughout the arguments, rather than restricting them to a brief discussion at the bench. This procedure would also restrict the representation of other defendants in several ways. For example, counsel might wish to attend (or read the transcripts of) the plea or sentencing proceedings in other cases to determine whether the court was receptive to arguments or approaches counsel was considering in the representation of another defendant. Counsel might also wish to rely on a comparison to the court's resolution of other cases in making arguments in favor of a current client. Indeed, because 18 U.S.C. § 3553(a)(6) requires the court to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," research of this nature may be a required element of effective assistance of counsel.

Finally, there could be a serious constitutional challenge to shifting part of the plea and sentencing phase to a bench conference in every case. As described in more detail in our First Amendment memorandum, the public and press enjoy a presumptive right of access to any proceeding, hearing, filing, or document within that right's scope.[3] It is now well established that the First Amendment right of public access applies to both the plea[4] and sentencing phases[5] of a

[3] *See* Memorandum from Sara Sun Beale & Nancy King to Cooperator Subcommittee, First Amendment Right of Access & CACM Guidance on Cooperator Safety, 3 (Jul. 21, 2016) (revised) (on file with authors) (explaining "[i]n addition to the trial itself, the right of access also applies to other stages of criminal adjudication. Whether a particular proceeding falls within the right's scope depends on a two-part inquiry that analyzes "considerations of experience and logic." *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 9 (1986). The 'experience and logic' test asks: (1) 'whether the place and process has historically been open to the press and general public' (experience) and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question' (logic). *Id.* at 8.")

[4] *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989) ("[M]embers of the public . . . may attend proceedings at which pleas are taken and inspect the transcripts, unless there is strong justification for closing them."; "Public access to them reveals the basis on which society imposes punishment, especially valuable when the defendant pleads guilty while protesting innocence"); *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) ("[W]e conclude there is a right of access to plea hearings and to plea agreements."); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("[W]e hold that the First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves.").

[5] *In re Hearst Newspapers, LLC*, 641 F.3d 168, 176 (5th Cir. 2011) ("[T]he public and press have a First Amendment right of access to sentencing proceedings."); *United States v. Biagon*, 510 F.3d 844, 848 (9th Cir. 2007) (applying First Amendment closure analysis to sentencing hearing); *United States v. Alcantara*, 396 F.3d 189, 199 (2d Cir. 2005) ("[A]s with plea proceedings, a qualified First Amendment right of public access attaches to sentencing proceedings."); *United States v. Eppinger*, 49 F.3d 1244, 1253 (7th Cir. 1995) (quoting *United States v Carpentier*, 526 F. Supp. 292, 294–95 (E.D.N.Y 1981) ("The public has a strong First Amendment claim to access evidence admitted in a public sentencing hearing."); *United States v. Kooistra*, 796 F.2d 1390, 1391 (11th Cir. 1986) (remanding for tailoring findings where district judge closed sentencing proceedings); *United States v. Santarelli*, 729 F.2d 1388, 1390 (11th Cir. 1984) ("[T]he public has a First Amendment right to see and hear that which is admitted in evidence in a public sentencing hearing."). One D.C. Circuit opinion assumed without deciding that the right applies at sentencing. *United States v. Brice*, 649 F.3d 793, 794 (D.C. Cir. 2011). *See also United States v. Thompson*, 713 F.3d 388, 393–96 (8th Cir. 2013) (holding the Sixth Amendment right to public access attaches at sentencing, upholding closure that was narrowly tailored and justified by case-specific findings of need).

criminal case. If a court denies public access, it must do so in a manner narrowly tailored to serve a compelling governmental interest, and the court must make specific findings on both the interest advanced and the alternatives considered and rejected as inadequate. Our memo summarized the four-part constitutional enquiry as follows:

> First, closure must serve an interest that is "compelling," *Globe Newspaper*, 457 U.S. at 607, or "overriding," *Richmond Newspapers*, 448 U.S. at 581, that "outweighs the value of openness," *Press–Enterprise I*, 464 U.S. at 509. Second, there must be a "substantial probability" that openness would undermine that interest and that closure would preserve it. *Press-Enterprise II*, 478 U.S. at 14. Third, closure is only appropriate if "reasonable alternatives" cannot protect the interest. *Id*. *Finally, a court that ultimately decides a proceeding or document should remain secret must articulate the interest invoked and make "findings specific enough that a reviewing court can determine whether the closure order was properly entered*." *Id.*[6]

The presumptive First Amendment right of access at the plea and sentencing stage does not, however, preclude the district courts from exercising their traditional discretion to conduct bench or in camera conferences in individual cases.[7] For example, Rules 11(c)(2) and 32(i)(4)(C) authorize such conferences for good cause. Similarly, the Supreme Court recognized the trial court has discretion during jury selection in a rape trial to allow an individual juror to request an opportunity to speak to the judge *in camera* but with counsel present and on the record to discuss private and extremely sensitive issues such as a prior sexual assault on the prospective juror or member of her family.[8]

But the cases and Rules that recognize the authority to conduct *in camera* or bench conferences generally involve case-by-case determinations that excluding the public is necessary, rather than a procedural rule mandating bench conferences at two critical points in all

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[6] *Press-Enterprise II*, 478 U.S. at 16 (footnotes omitted and emphasis added).

[7] *See e.g.*, *United States v. Valenti*, 987 F.2d 708, 713–15 (11th Cir. 1993) (approving closed bench conferences before trial). In *Valenti*, the court recognized (albeit in passing) that the trial courts retain this traditional authority to conduct such conferences, and some lower court decisions have discussed the need to "accommodate the public's right of access and the long recognized authority of the trial court to conduct bench conferences outside of public hearing." *Id.* at 713 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (recognizing discretion to protect victim is "discretion is consistent with the traditional authority of trial judges to conduct *in camera* conference"). *Valenti* also cited *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n.23 (Brennan, J. concurring in judgment (citation omitted):

> "The presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interests of decorum. Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.").

See also WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 23.1(d) text accompanying nn.167–79 (4th ed. 2015).

[8] *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 512 (1984).

criminal cases. As explained in our First Amendment memo,[9] that distinction is critical for constitutional purposes. In ruling on requests to seal, the trial courts have consistently recognized the need to make case-specific findings, even in cases involving cooperation. They recount facts that show a specific threat to the individual cooperator. For example, courts have upheld sealing where a defendant cooperated in a case involving a complex criminal organization where many international participants had not yet been apprehended,[10] and where a defendant who had infiltrated an international criminal syndicate as a confidential informant reasonably feared retaliation (though he had not received a direct threat).[11] Similarly, where the government requested that the trial court seal the courtroom, seal the transcript, and use the name John Doe in the caption of a terrorism case, the government did not rely on a bald assertion, but the government explained the national security concerns to the district court under seal.[12] This provided a sufficient basis to deny a journalist's motion to unseal.[13] And even if courts find a sufficient basis to seal some documents, they may unseal other documents or portions of documents in order to meet the narrowly tailoring requirement.[14]

In contrast, under CACM's Guidance the courts will not make an *individualized* determination, but instead conduct bench conferences at the plea stage whenever there is a plea agreement, and at the sentencing stage in every case, even in cases that go to trial and cases involving "open" pleas, none of which include plea agreements.

In our view, it is doubtful whether a rule of blanket closure of a portion of the plea and sentencing proceeding without a case-specific showing of need could survive a First Amendment challenge. For example, the Second Circuit held that a district court had erred in conducting plea and sentencing proceedings in its robing room because it had failed to make "specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[15] An across-the-board policy on bench conferences also denies the press and public of their right of advance notice, so that they may have the opportunity to object to closure.[16] It would also undermine important functions served by public access in these proceedings.[17]

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[9] *See* Beale and King, *supra* note 3, at 15–20 (quoting *Press-Enterprise I*, 464 U.S. at 510) (explaining that "the qualified right of access amounts to a 'presumption of openness' that may be overcome if access restrictions are essential to preserving a "compelling governmental interest, and [the restrictions are] narrowly tailored to serve that interest." (citations omitted)).
[10] *United States v. Sonin*, 167 F. Supp. 3d 971, 978–83 (E.D. Wis. 2016).
[11] *United States v. Doe*, 63 F.3d 121, 129–30 (2d Cir. 1995).
[12] *United States v. Doe*, 629 F. App'x 69, 72–73 (2d Cir. 2015).
[13] *Id.* When necessary, the order discussing the specific reasons for sealing may be sealed. *See In re Motion for Civil Contempt by John Doe*, No. 12-mc-0557 (BMC), 2016 WL 3460368, at *1, *5–6 (E.D.N.Y., June 22, 2016).
[14] *See, e.g.*, *id.* at *1, 6 (noting that various items had been sealed and some later unsealed).
[15] *Alcantara*, 396 F.3d at 199 (quoting *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988)).
[16] *E.g.*, *In re Hearst Newspapers, LLC*, 641 F.3d 168, 182, 184–85 (5th Cir. 2011) (holding that court improperly closed portion of sentencing proceeding without giving newspaper notice and an opportunity to be heard before closing, stating, "courts of appeals that have addressed the question of whether notice and an opportunity to be heard must be given before closure of a proceeding or sealing of documents to which there is a First Amendment right of

Alternatives.

Case-by-case determination whether to have a bench conference or close the courtroom. The main alternative for protecting proceedings from public access is the traditional procedure of conducting proceedings at the bench or sealing the courtroom only on a case-by-case basis when the parties demonstrate good cause, including a danger to the individual defendant. Although this procedure prevents courtroom observers from learning the details of a defendant's cooperation in individual cases, it also creates a potential red flag for those observers.

Informal measures, such as scheduling. Some courts have tried informally to reduce the likelihood that cooperation will be revealed in the courtroom during plea or sentencing proceedings by scheduling proceedings at which cooperation will be discussed when it is unlikely that observers will be present.[18] Although this may be effective in certain cases, we see no way it could be implemented as a general practice by a rules amendment.

Minimizing courtroom discussion of cooperation. Courts may also avoid or minimize discussion of cooperation in open court. For example, if a plea agreement includes cooperation,

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access, have uniformly required adherence to such procedural safeguards") (collecting authority); *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993) (holding "in determining whether to close a historically open process where public access plays a significant role, a court may restrict the right of the public and the press to criminal proceedings only after (1) notice and an opportunity to be heard on a proposed closure; and (2) articulated specific 'findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest'" (citations omitted)). Although the Rules Enabling Act procedure would provide advanced notice and an opportunity to be heard on the general policy of sealing in all future cases, it does not provide the opportunity for case specific notice and an opportunity to be heard before closure in an individual case as contemplated by these cases.

It is unclear whether a protocol recently adopted by the judges in the District of New Jersey would provide adequate notice. The protocol, which will go into effect Sept. 1, 2017, provides that parties submitting sentencing materials will not file them on the CM/ECF system, but must file a notice of submission. Then anyone who wishes to obtain a copy of any sentencing materials has only two days to make a request for disclosure; such a request triggers a redaction process. A requestor who wishes to challenge the redactions may do so. *See* United States District Court for the District of New Jersey, Notice of Resolution Regarding Protocol for Sentencing Materials, June 22, 2017, available: http://www.njd.uscourts.gov/sites/njd/files/Protocol%20for%20Disclosure%20of%20Sentencing%20Materials_0.pdf .

[17] *See also In re Washington Post Co.*, 807 F.2d at 389 ("[P]ublic access [at plea and sentencing hearings] serves the important function of discouraging either the prosecutor or the court from engaging in arbitrary or wrongful conduct. The presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to obtain a guilty plea by coercion or trick, or to seek or impose an arbitrary or disproportionate sentence.").

[18] In a survey of district court clerks conducted for the Task Force, clerks in numerous districts reported using scheduling to protect cooperators. Memorandum from Larry Baerman to the Task Force on the Protection of Cooperators Subcommittee on Docket Issues at 2 (Mar. 15, 2017) (on file with authors) (responses to Question 1). For example, the District of Puerto Rico reported that "no other criminal proceedings are scheduled for the same time to avoid having cooperators and noncooperators in a courtroom at the same time. *Id.* If, for any reason, this separation is not possible, plea proceedings of cooperators are held without making any explicit mention of the terms and conditions of the cooperation." *Id.* The Southern District of New York reported that "[a]t times defense counsel will make an application to hold a plea proceeding in a Courtroom with less public traffic." *Id.* In addition, the Middle District of Pennsylvania reported, "If there is no member of the public in the courtroom, the cooperator proceeding is held before the regular plea proceeding; otherwise the sealed cooperator proceeding is done in chambers, with the Court going through a complete colloquy in both locations/portions of the proceedings." *Id.*

the court may not mention cooperation at the plea colloquy, but ask the defendant only in general terms whether his counsel discussed the plea agreement with him and whether he understands its terms.[19] The practice of not mentioning cooperation in open court seems to be common in a number of districts.[20]

This strategy runs counter to the general practice in some—but not all—courts of discussing each term in the plea agreement on the record at the plea hearing to ensure that the plea is knowing and voluntary.[21] The Second Circuit has expressed doubts about this procedure, despite concerns about the safety of cooperators:

> [T]here is an understandable reluctance during plea hearings to refer openly to a cooperation agreement. Advances in technology and the advent of the Federal PACER system make us ever mindful of the significant public safety risks to cooperating defendants or the hazards to ongoing government investigations that exposing even the fact of cooperation may pose. But we find it difficult to reconcile the tactic of remaining completely silent about such an agreement with the judicial obligation to ensure that the defendant understands the range of possible consequences of his plea and to "determine that the plea is voluntary and did not result from . . . promises[ ]other than promises in a plea agreement[ ]." Fed. R. Crim. P. 11(b)(2). For example, where a cooperation agreement that states that the Government may make a motion to reduce the defendant's sentence is never referenced during the plea colloquy, the defendant will be unable to answer accurately the critical question of whether additional promises have been

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[19] *See United States v. Rodriguez*, 725 F.3d 271, 278, 278 n. 4 (2d Cir. 2013) (suggesting this as a possible means of preventing disclosure of a defendant's cooperation). *But see United States v. Tarbell*, 728 F.3d 122, 127 (2d Cir. 2013) ("[T]he better practice in these circumstances would have been for the District Court to use one of the 'various tools at [its] disposal to reduce if not eliminate the risks that may arise from fulfilling [its] obligation to ensure that the defendant understands the range of potential penalties,' rather than simply 'remaining completely silent about such [a] [cooperation] agreement.' These tools include closing the courtroom during plea proceedings, sealing the transcript of such proceedings, and issuing rulings under seal." (citations omitted)).

[20] For example, the clerk in the Southern District of New York reported that "The Assistant U.S. Attorney or defense counsel may request that the Judge not make any reference to the defendant's cooperation during the plea proceeding." Baerman, *supra* note 18 (responses to Question 1). The Districts of Oregon and New Jersey, the Northern District of Texas, and the Eastern and Western Districts of Wisconsin all reported that there is no discussion of cooperation (or substantial assistance) in the plea proceedings. *Id.*

[21] The amendment takes no position on the question whether the present rule generally requires the terms of plea agreements to be discussed in open court, as is the case in some districts, or instead may be satisfied by providing the judge with a written copy of the agreement, either in chambers or on the bench. Neither the text nor the Committee Notes squarely address this issue. Although some courts and commentators have expressed the view that all terms must be stated on the record, we have found no precedent squarely on point either way. The checklist in the Benchbook for U.S. District Court Judges provides:

> B. If it has not previously been established, [the court should] determine whether the plea is being made pursuant to a plea agreement of any kind. If so, [the court should] require disclosure of the terms of the agreement (or if the agreement is in writing, require that a copy be produced for your inspection and filing). *See* Fed. R. Crim. P. 11(c)(2).

§ 2.01 (6th ed. 2013), https://www.fjc.gov/sites/default/files/2014/Benchbook-US-District-Judges-6TH-FJC-MAR-2013.pdf .

> made to him concerning his sentence, and the district judge will have failed to ensure that the defendant truly understands the range of applicable penalties. Indeed, here, Rodriguez was put in just such a quandary and answered "no" to that question, notwithstanding the existence of a separate agreement.[22]

Exempting cases without plea agreements. To avoid restrictions on access to sentencing information and proceedings in cases that go to trial or involve "open" pleas with no plea agreements, the amendments to Rule 32(i)(4)(C)(ii) in Column 1 of Appendix A could be more narrowly tailored. One option would be to add to the first sentence the following text shown in brackets: "In every case [resolved by a plea of guilty or nolo contendere/plea agreement], sentencing must include a conference at the bench for discussion of the defendant's cooperation or lack of cooperation . . . ."

B. Sealing Transcripts of Bench Conferences

CACM's Guidance requires courts to seal the transcript of the bench conference that would be required in each plea proceeding involving a plea agreement and every sentencing hearing. This aspect of the CAMC Guidance is reflected in the amendments to Rule 11(c)(g)(iii) and Rule 32(i)(4)(C)(ii) shown in Column 1 of Appendix A. The requirement for the bench conferences and for sealing complement one another. Because the sealing requirement is applicable only to the bench conference, it cannot be implemented unless such conferences are conducted.

Advantages.

Coupled with the requirement of a bench conference in every case, sealing this portion of the transcript in every case would completely block one critical source of information that could be used to identify cooperators for purposes of retaliation. It would fulfill two important goals: (1) preventing the release of specific information about cooperation that is discussed in the courtroom, and (2) making the docket of all cases identical, so that there are no actual (or apparent) red flags in individual cases.

Disadvantages.

Since the requirement for sealing depends on the requirement of bench conferences in each case, all of the problems with that requirement would also be barriers to the adoption of this aspect of the CACM Guidance. If the bench conference requirement were adopted, the related sealing proposal would raise three additional concerns.

First, segmenting the transcript of every plea and sentencing hearing and sealing a portion of each transcript would impose an administrative burden. It is unclear whether this burden would be borne by the parties or court staff.[23]

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[22] *United States v. Rodriguez*, 725 F.3d 271, 278 (2d Cir. 2013).

[23] Our clerk of court liaison, Mr. Hatten, noted that in his district court reporters are normally responsible for filing their transcripts, but if the transcripts are sealed the reporters must bring them to one of the sealed pleadings clerks for filing. If a uniform system could be developed that exactly identifies for every trial that portion of the transcript

Second, a blanket restriction on public access to key portions of the transcript in every criminal case would face challenges under both the First Amendment and the common law right of access to judicial documents. As noted above, mandating a bench conference at which cooperation or lack of cooperation is discussed in every case, including sentencings after trial, is itself subject to challenge under the First Amendment. But assuming arguendo that the conferences themselves are valid, there is a division of authority on the question whether the public has a presumptive right of access to the transcripts of such conferences.

Media representatives have argued that "the First Amendment operates to require disclosure of the transcripts of sidebar or in-chambers conferences 'contemporaneously or at the earliest practicable times,' absent a judicial finding of a need to seal such transcripts under the rigorous First Amendment standards of *Press-Enterprise II*."[24] The lower courts are divided on the proper analysis of such claims, and several positions have emerged. Some courts have concluded that when a bench or in-chambers conference falls within the traditional use of such conferences, that tradition negates not only a First Amendment right to presence at the conference, but also a First Amendment right of access to the transcript of the proceeding. Other courts, however, have suggested that the First Amendment claim has merit when the court has made an evidentiary or other substantive ruling at the bench conference,[25] or after the trial or when the danger that prompted the confidential conference has passed.[26] Other approaches have also been noted.[27]

The absence of both a prior opportunity for interested parties to object and case-specific findings in favor of sealing would be problematic. The Second and Ninth Circuits have held that

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to be sealed (a system in which no discretion on the part of the court reporter is required), he thought his court reporters could handle the redaction and proper filing. But he would oppose placing responsibility on court reporters if they were responsible for identifying what needed to be sealed. If a discretionary judgment must be made, he suggested that the redaction required by Fed. R. Crim. P. 49.1 and Civil Rule 5.2 might provide one model. In his district, an unredacted version of the transcript is provided by the court reporter to the parties, who are responsible for filing a redacted version within twenty-one days.

He also noted it would be beneficial to have separate transcripts for the bench conference and the remainder of proceeding. Otherwise, transcripts for cooperators might have 125 numbered lines missing while transcripts for non-cooperators have only twenty-five numbered lines excerpted, or transcripts for cooperators might be ten pages longer than transcripts for non-cooperators. One transcript document containing everything except the bench conference would be filed electronically by the court reporters on the public docket and would contain language along the following lines: "Bench conference took place at this time." The second transcript document would be filed under seal with a title page identifying it as the bench conference transcript. Given that every trial would have these two documents, he thought the court reporters would almost certainly need the authority to file documents under seal electronically.

[24] LAFAVE ET AL., *supra* note 7, § 23.1(d) at text accompanying note 174.

[25] *United States v. Smith*, 787 F.2d 111, 113 (3d Cir. 1986) (applying common law right of access, but also citing the First Amendment).

[26] *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) ("transcripts of properly closed proceedings must be released when the danger of prejudice has passed"); *In re Associated Press*, 172 F. App'x 1, 6 (4th Cir. 2006) (assuming constitutional or common law interest in eventual release of transcripts of bench conferences, "this right is amply satisfied by prompt post-trail release of transcripts").

[27] LAFAVE ET AL., *supra* note 7, § 23.1(d) at text accompanying notes 177–97.

sentencing hearing transcripts must not be sealed without prior notice and opportunity to object (generally by the public docketing of a motion to seal),[28] and the Second Circuit has also suggested that even a sealing decision based on compelling interest in an individual case should not necessarily be permanent.[29]

Alternatives.

Case-by-case sealing. As with other aspects of the CACM Guidance, one option is to approach the potential for threats to cooperators by sealing on a case-by-case basis, applying the traditional constitutional standards discussed in our First Amendment memo.[30] This approach involves tradeoffs: it protects the specifics of the cooperation in these cases and is clearly consistent with the First Amendment and the general policy of transparency of judicial proceedings. But it provides substantially less protection to cooperators than CACM's approach, where sealed entries on the docket create a red flag for those who search the PACER database. Indeed, there is a Catch-22 element of the tradeoffs between the constitutional rights of the press and public, on the one hand, and the protection of cooperators. Sealing or redacting transcripts or documents only in cases that involve cooperation would likely survive any challenge under the First Amendment or the common law right to public access to judicial records, but it creates a red flag for those seeking to identify cooperators by viewing the docket sheet. An across-the-board approach to sealing in every case eliminates this red flag, but raises the most significant First Amendment concerns. The Task Force is trying to develop other solutions to the docket/red flag problem, but to date we have received no information about what, if any, options it may find to be technically feasible for the existing electronic-filing system. Moreover, removing or disguising items on the docket sheet, or creating separate public and a private docket sheets would raise First Amendment issues.[31]

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[28] *Alcantara*, 396 F.3d at 202–03 (holding plea and sentencing proceedings in robing room infringed on First Amendment right of access "and could be justified only if the District Court complied with the notice requirements set forth in *Herald* and also made "specific, on the record findings . . . demonstrating that closure [was] essential to preserve higher values and [was] narrowly tailored to serve that interest."); *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 949 (9th Cir. 1998) ("[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible.").

[29] *United States v. Doe*, 356 F. App'x 488, 490 (2d Cir. 2009) ("[E]ven if total and permanent sealing is unjustified, it may be possible to protect the 'compelling interest' at issue here by sealing the sentencing transcript in a way that is *less than total and permanent*.")

[30] *See* Beale and King, *supra* note 3.

[31] For example, routinely disguising the existence and location of motions, transcripts, and other documents by placing them in a sealed entry or separate sealed docket may run afoul of the First Amendment or common law rights of access. *See, e.g.*, *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) ("[D]ocket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment . . . [T]he docketing of a hearing on sealing provides effective notice to the public that it may occur."); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (sealed docket that hid closed pretrial bench conferences and the filing of in camera pretrial motions from public view could "effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences," and "is an unconstitutional infringement on the public and press's

Master sealed event. One method of disguising sealed docket items is already in use in the District of Arizona. There, a master sealed event is placed on the docket sheet in every criminal case after the initial entry, and all cooperation-related documents go into that sealed event. The public cannot access cooperation-related documents in the master sealed event, and all criminal cases look the same on PACER. Thus, there are no red flags on the docket sheet that might identify cooperators.

This procedure could be challenged on the ground that the press and public First Amendment right of access extends to docket sheets.[32] The Eleventh Circuit has held that the maintenance of a public and a sealed docket is inconsistent with the public's right of access.[33] Citing the decision of the Eleventh Circuit, the Second Circuit agreed that there is a qualified First Amendment right of access to docket sheets.[34] These decisions emphasized several points. First, as a practical matter, sealing all or part of the docket in a criminal case frustrates the ability of the press and public to inspect documents (such as transcripts) that are presumptively open, and it may thwart appellate review of sealing decisions concerning particular documents.[35] Sealing the docket is also contrary to the historical practice of maintaining public docket sheets, which experience demonstrates enhances both basic fairness and the appearance of fairness.[36] Finally, a sealed docket (or in this case, a sealed master event) prevents the public from presenting objections to the sealing of individual documents.[37]

No bench conferences: sealing or redacting portions of the transcript dealing with cooperation. Even without a bench conference at which all references to cooperation must occur, it would still be possible to redact or seal only those portions of the hearing transcript that contain references to cooperation. One court favoring redaction over sealing commented: "wholesale suppression of those documents cannot overcome the press's and public's strong interest in monitoring sentencing decisions. A sledgehammer is unnecessary where a pick will do. Careful redactions can appropriately balance the interests of confidentiality, a free press, and an informed citizenry."[38] However, redaction would require significant resources for a close reading of the transcript, making the question who would have this responsibility even more critical. In addition, as with all redaction, it is possible that mistakes would occur, allowing references suggesting cooperation to remain in the unsealed transcript. Although this process could be facilitated by focusing all discussion of cooperation at some point in the hearing, references to it might still occur, even in passing, at other points. Redaction in individual cases would still raise a red flag, though it would not be obvious from the docket sheet like sealing all

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qualified right of access to criminal proceedings"); s*ee also United States v. Mendoza*, 698 F.3d 1303, 1306–07 (10th Cir. 2012) (discussing history of open and public dockets).

[32] *See* sources collected *supra* note 31. *See generally* Meliah Thomas, Comment, The First Amendment Right of Access to Docket Sheets, 94 Cal. L. Rev. 1537 (2006).

[33] *United States v. Valenti*, 987 F.3d 708, 715 (11th Cir. 1993).

[34] *Hartford Courant Co.*, 380 F.3d at 96.

[35] *Id.* at 93–94.

[36] *Id.* at 95–96.

[37] *Id.* at 96 (*citing Valenti*, 987 F.3d at 96).

[38] *United States v. Munir*, 953 F. Supp. 2d 470, 478 (E.D.N.Y. 2013).

or part of the transcript. A PACER user would see no distinction among cases from the docket sheet, and would have to review the transcript to determine whether there had been any redactions.

No bench conferences: sealing the entire transcript. Another option if bench conferences are not required in every plea and sentencing proceeding would be to seal the entire transcript of all plea and sentencing proceedings. In Column 3 of Appendix A we show an amendment to Rules 11(c)(g)(iii) accomplishing whole document sealing for plea hearings. Sealing the whole transcript would reduce the administrative burden, but make it much more difficult to defend the procedure if it were challenged under First Amendment or the common law right to access judicial documents, especially since transcripts of plea and sentence would be unavailable *in every case*, including the majority of cases that do not involve a cooperator,[39] without a prior showing of need or notice and opportunity for media and the public to object.

Not filing the transcripts. Not filing the transcripts of plea and sentencing hearings would accomplish the same secrecy as sealing, and this approach does not require the adoption of amendments requiring bench conferences in all cases. In Column 4 of Appendix A we show amendments to Rule 11(c)(g)(iii) taking this approach.

At present, filing is required by the directive in Volume VI of the *Guide to Judiciary Policy* at 290.20.20.4 requiring court reporters to "file with the clerk of court for the records of the court a certified transcript" of all proceedings "requested and prepared."[40] A change in this policy would require action by the Judicial Conference of the United States, and CACM would likely play a significant role in the consideration of any change.

Moreover, legislative action might also be required. Title 28 U.S.C. § 753(b) provides:

> The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court . . . .
>
> . . . . .

[39] *See supra* text accompanying note 2 (citing figures on percentage of defendants receiving 5K1.1 departures).
[40] Section 290.20.20 of the *Guide to Judiciary Policy* (vol. 6) provides:

(a) Transcripts Requested by Parties
Court reporters must promptly transcribe the proceedings requested by a judicial officer or a party who has agreed to pay the fees established by the Judicial Conference, and any proceedings that a judge or the court may direct. 28 U.S.C. § 753(b).

(b) Transcripts Filed with the Court
The reporter must also file with the clerk of court for the records of the court a certified transcript of all proceedings requested and prepared. The certified transcript, which may be in electronic format or hard copy as determined by the court, must be filed with the clerk of court concurrently with, but no later than three working days after delivery to the requesting party pursuant to 28 U.S.C. § 753(b).

> The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.
>
> . . . . .
>
> The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

Although this statute might be interpreted to require only that the reporter "deliver" but not file the transcript, that narrow interpretation would be in tension with the concluding statutory directive that the transcript in the clerk's office "be open to inspection by any person without charge." Thus, although we show a "no filing" amendment to Rule 11(g) in Column 4 of Appendix A, adoption of that approach would require a change in JCUS policy, and perhaps also amendment of § 753(b).

Assuming that the necessary groundwork could be laid by changes in the *Guide to Judiciary Policy* and perhaps to § 753(b), there would be several disadvantages to this approach.

First, removing these critical documents would impair the functionality of the court's records for purposes of the appeals process and preserving the integrity of the records of the case. (Presumably these transcripts, like plea agreements in some districts, would be maintained by the United States Attorney's Offices.) Second, the public and the press would lose an important source of information for monitoring the courts and criminal justice practices. Also, defense counsel in other cases would lose access to resources they may need to defend their clients. Keeping the transcripts out of the court system would make it even more difficult for the press, public, and defense counsel to access them than if they were sealed, for there is always the possibility that a court might agree to unseal them. (Indeed, those seeking access might have no idea where the documents were being maintained and how they might seek access.) Finally, a no filing procedure for transcripts might also face challenges under the First Amendment or common law right of access, which courts have found to be applicable to some documents that have not been filed with the courts.[41] It is unclear whether that analysis would extend to transcripts, which are generally prepared for the use of the parties, rather than the court.[42] On the other hand, those cases generally involved a challenge to not filing certain documents on a case-by-case basis, rather than the decision to withdraw from public access a category of documents that contain a detailed record of the courts' functioning.

C. Requiring All Plea Agreements to Have a Sealed Supplement

CACM's Guidance requires that every plea agreement "shall have both public portion and a sealed supplement, and the sealed supplement shall either be a document containing any

[41] *See infra* text and notes 52–54.
[42] *See infra* text and note 53 regarding the functional test for determining whether documents are subject to the presumptive right to public access.

discussion of or references to the defendant's cooperation or a statement that there is no cooperation agreement." This aspect of the CAMC Guidance is reflected in the amendment to Rule 11(c)(3)(C) shown in Column 1 of Appendix A.

Advantages.

This requirement serves several purposes. It prevents those who access the court's records from using plea agreements to determine whether an individual defendant cooperated or to discover specific details of his cooperation. It also ensures that all dockets in criminal cases nationwide look the same, eliminating the red flag problem. Coupled with CACM's other recommendations, it would shut off many of the common methods of determining cooperation from the courts' records. Moreover, since the government is necessarily involved in the preparation of all plea agreements, the Department of Justice is well positioned to ensure that all plea agreements are properly constructed to meet this requirement. It should be possible to achieve virtually universal compliance with this mandate without imposing any burden on the courts. And, once institutionalized, this procedure should not impose a major burden on the parties. Finally, using a sealed supplement maintains public and press access to all aspects of plea agreements other than cooperation terms.

Further, it concerns a document—an agreement between the prosecution and defense concerning cooperation—that might be said to lack the long historical pedigree of other documents that have traditionally been regarded as part of the court's records and therefore subject to a right of public access.

This aspect of the CACM Guidance could be adopted with the CACM's other recommendations, but it does not depend upon them and could stand alone.

Disadvantages.

Approximately 97% of defendants in the federal system plead guilty, most of them with plea agreements. The sealed supplement would deprive the press, the public, victims, and defense counsel in other cases of information about who is and is not cooperating, what form cooperation takes, racial or gender biases in cooperation practices, geographic variation in cooperation practices, etc. Indeed, the very purpose of this procedure is to disguise who has and has not cooperated, making it impossible for the public to assess whether the government has negotiated an agreement in an individual case that is too harsh or too favorable, or to assess whether the agreement in an individual case is consistent with agreements in other similar cases.

An across-the-board procedure sealing all cooperation agreements would be subject to challenge under the First Amendment and the common law right of access to court documents. Many courts have held that the public has a presumptive right of access to plea agreements,[43]

[43] *United States v. DeJournett*, 817 F.3d 479, 485 (6th Cir. 2016) ("[T]he public has a constitutional right to access plea agreements . . . ."); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) ("[T]here is a first amendment right of access to plea agreements . . . ."); *Oregonian Publ'g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1466 (9th Cir. 1990) ("[T]he press and public have a qualified right of access to plea agreements and related documents . .

and the Ninth Circuit has held the right covers a plea agreement's cooperation addendum.[44] Of course this qualified right may be overcome, but the decisions of the Supreme Court and many more recent lower court decisions require both case-specific findings regarding the need to restrict access and narrow tailoring when courts are considering sealing material that is presumptively subject to public access.[45] We are aware of only one case—Chief Judge Ron Clark's decision in 2015[46]—holding across-the-board sealing is necessary to protect the admittedly critical interest in protecting cooperators.

Use of a sealed supplement in all cases will also adversely affect the defense function. It will handicap defense counsel in negotiating pleas because they cannot determine which cases are comparable. Similarly, counsel may also wish to rely on a comparison to the court's resolution of other cases in making arguments in favor of a current client. Indeed, because 18 U.S.C. 3553(a)(6) requires the court to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," research of this nature may be a required element of effective assistance of counsel. Having a separate sealed

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. ."); *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) ("[W]e conclude there is a right of access to plea hearings and to plea agreements."); *In re Washington Post Co.*, 807 F.2d at 390 ("[W]e hold that the First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves.").

We found no contrary authority. We note, however, that an early decision by the Tenth Circuit, *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985), rejected a claim that the First Amendment right applies to sealed plea bargain documents. The First Amendment was not the principal focus of the case. The court stated that the question presented was "whether the common law right of access to court records extends to the sealed plea bargain of a criminal defendant now enrolled in the witness protection program of the United States Marshal's Service." *Id*. at 706. Acknowledging the common law right to inspect and copy judicial records, the majority concluded that the district judge had not abused his discretion in balancing the competing interests and striking the balance in favor of the defendant's safety. *Id.* at 708–09. Judge McKay dissented from this portion of the court's opinion, concluding that there had been no showing that the plea bargain would provide information about the defendant's current location, and thus the public's right of access had not been overcome. *Id*. at 711. But in a brief paragraph the court also rejected the defendant's constitutional arguments under the First and Sixth Amendments, noting that *Press Enterprise I* and *Waller* did not overrule or question *Nixon*, which it found to be the governing authority for court documents. *Id*. at 709. The *Hickey* decision, however, pre-dated *Press-Enterprise II* and the court reached its conclusion without applying the "experience and logic" test.

[44] *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008).

[45] *See, e.g.*, *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984) (constitutional "presumption of openness" may be overcome only if restrictions are essential to preserving a "compelling governmental interest, and [are] narrowly tailored to serve that interest."); *Alcantara*, 396 F.3d at 199 ("Before closing a proceeding to which the First Amendment right of access attaches, '[a] district court must make 'specific, on the record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" (citations omitted)); *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993) ("in determining whether to close a historically open process where public access plays a significant role, a court may restrict the right of the public and the press to criminal proceedings only after (1) notice and an opportunity to be heard on a proposed closure; and (2) articulated specific 'findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest'" (citations omitted)).

[46] *United States v. McCraney*, 99 F.Supp.3d 651 (E.D. Tex. 2015).

supplement also increases the risk of *Brady* violations when there are two documents to disclose not one.[47]

We noted one other issue when we compared CACM's recommendations for plea agreements with its recommendations concerning sentencing. CACM's Guidance requires every sentencing memorandum to have a sealed supplement that includes references to or discussion of cooperation or a statement that there was none. In earlier discussions, Subcommittee members agreed that parties also file memoranda in connection with the plea, and they may include references to cooperation. Plea memoranda are not covered in CACM's Guidance, and this could provide a means of identifying cooperators even if all plea agreements have sealed supplements. Accordingly, an amendment to Rule 11(c)(3) requiring plea memoranda to include a plea supplement is shown in Column 2 of Appendix C (CACM Plus).

Alternatives.

Case-by-case determination whether to seal all or part of a plea agreement. Sealing is currently permitted when the court makes case specific findings of need and narrow tailoring. But if there is public access to the docket and it shows a sealed plea agreement, case-by-case sealing does not solve the red flag problem. As noted above,[48] the Task Force is trying to determine whether any changes can be made in the docket that would mitigate the red flag problem.

Master sealed event. The option of creating a master sealed event on the docket sheet of every criminal case for all cooperation-related documents may eliminate the red flag problem created by sealing only information in cases of cooperators, but raises concerns under the First Amendment, as noted earlier.[49]

Redaction. Like case-by-case sealing, case-by-case redaction of plea agreements supported by specific findings would avoid access and First Amendment challenges and would not be apparent from looking at the docket alone. However, as discussed above,[50] redaction would be more time consuming than sealing and would allow identification of cooperators by anyone able to see the redactions.

Sealing all plea agreements in their entirety. This option would avoid the need to bifurcate each agreement and create a sealed supplement even in cases in which there has been no cooperation. We show an amendment to Rule 11(c)(3)(C) sealing the entirety of all plea agreements in Column 3 of Appendix A. However, we noted above our assumption that once the practice of creating sealed supplements becomes institutionalized it should not be difficult or burdensome for the parties to comply. If that assumption is correct, we see little to recommend

[47] For one example of the fallout from inadvertent failure to disclose such a supplement, see *United States v. Dvorin*, 817 F.3d 438 (5th Cir. 2016).
[48] *See supra* text accompanying note 31.
[49] *See supra* text accompanying notes 32–37.
[50] *See* supra text accompanying note 38.

this option. It provides no greater protection to cooperators, but blocks access public and defense access to substantially more material in the majority of federal criminal cases.

Not filing plea agreements. This is the practice of a few districts, most notably the Southern District of New York, where plea agreements are shown to the district judge, not filed, and retained by the U.S. Attorney's Office. We show an amendment to Rule 11(c)(3)(C) implementing this practice in Column 4 of Appendix A. This procedure might be seen as sidestepping the First Amendment and common law rights of access to judicial documents, since by design these documents are not made part of the judicial record. But strong concerns have been expressed by Committee members about deliberately excluding a critical document from the official record of the court in a majority of federal cases. The clerk of each district court carefully maintains the integrity of the court's record; no similar protection exists for documents that are never filed.

Moreover, not filing the plea agreement may lead to incomplete compliance with 28 U.S.C. § 994(w), which requires the chief judge of each district to submit to the Sentencing Commission in every case "any plea agreement" (as well as the written statement of reasons for sentence, the judgment and commitment order, and the presentence report). It appears, however, that this does not always occur at present.[51]

Importantly, not filing plea agreements and other documents used by judges in adjudicating the case and making judicial decisions, and then denying access to those unfiled documents, may violate the common law right of access to court records. As the Third Circuit explained recently, a document's coverage by the qualified common law right of access does not turn only upon whether the document is or is not formally filed in the case record.

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[51] When we contacted the Commission to ask how plea agreements from the Southern District of New York reach the Commission, we received the following e-mail response:

> We have not been aware of the [non-filing] practice that you describe in SDNY. Based on your inquiry, we examined the SDNY data from FY16, and focused on cases in which the court indicated (on the SOR) that the case involved a departure under USSG 5K1.1 for substantial assistance. We find that in over 80% of those cases no plea agreement was submitted to the Commission. In fact, the court reported those cases to us as ones involving a "straight" plea. This is certainly incorrect.
>
> My reading of 28 USC 994(w)(1) is that the court is required to submit "any plea agreement" to the Commission. That statute is not limited to only those documents that were entered into the docket. So there may be an issue here. We'll have to discuss this further internally before the Commission takes a position, but it does appear that the supposition that you and Brent had as to how SDNY would address the statute is not what is happening.

Email from Glenn Schmitt to Sara Beale, August 18, 2017 (on file with author).

Plea agreements are not public while in the hands of the Commission, but researchers are able to access them by special letter agreement negotiated with the Commission pursuant to statute. *See, e.g.*, Susan R. Klein, Aleza S. Remis, & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 83, 83 n.61 (2015) ("Professor Klein entered into a Cooperation Agreement with the United States Sentencing Commission (USSC) that gave her access to all written plea agreements entered in the federal courts" pursuant to 28 U.S.C. § 995(a)(6)–(7) (2012)).

> The fact of filing is one point to consider but it cannot be the sole basis for applying the right of access. The test is more functional than that. "[T]he issue of whether a document is a judicial record should turn on the use the court has made of it rather than on whether it has found its way into the clerk's file." . . . To be considered a judicial record, to which the common law right of access properly attaches, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document."[52]

Similarly, the First Circuit held that the presumptive common law right of access applied to letters sent directly to the court by third parties, because they were meant to affect the judge's sentencing determination and thus "take on the trappings of a judicial document under the common law."[53] And in a child pornography prosecution, a district court held that there was a presumptive right of public access to victim impact letters provided to the court by probation and not docketed, though that right could be limited by the victims' privacy interests.[54]

D. Requiring Any Sentencing Memorandum to Have a Public Portion and a Sealed Supplement

CACM's Guidance treats sentencing memoranda like plea agreements, requiring that they be subdivided into sealed and non-sealed documents. It provides:

> In every case, sentencing memoranda shall have a public portion and a sealed supplement. Only the sealed supplement shall contain (a) any discussion of or references to the defendant's cooperation including any motion by the United States under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1; or (b) a statement that there has been no cooperation. There shall be no public access to the sealed supplement unless ordered by the court.

In Column 1 of Appendix A, we show an amendment to Rule 32(g) that would implement this requirement.

Advantages.

This aspect of CACM's Guidance blocks access to another source of frequent references to cooperation, and it does so in a manner that makes all cases look identical, with no red flags

[52] *North Jersey Media Group Inc. v. United States*, 836 F.3d 421, 435 (3d Cir. 2016) (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)) (finding no right of public access to conspirator letter submitted at sentencing where it played "no part in the judicial function or process," and "was intended as an aid to the defense, not as an aid to the judge in rendering a decision or for some other judicial purpose.").
[53] *United States v. Kravetz*, 706 F.3d 47, 58 (1st Cir. 2013) (quoting *United States v. Gotti*, 322 F. Supp. 2d 230, 249 (E.D.N.Y. 2004). *Compare United States v. Kushner*, 349 F. Supp. 2d 892, 904 (D.N.J. 2005) (holding that the presumption of access under common law applies most strongly to "documents that directly impacted and were crucial to the district court's exercise of its Article III duties" but with less strength to discovery materials or sentencing letters, which "potentially have far less relevance to the court's functioning. The strength of the presumption as to these documents should fall toward the weaker end of the continuum, until not at all.")
[54] *United States v. Morrill*, 2014 WL 1381449, at *1 (D. Mass. April 4, 2014).

signaling cooperation. The Guidance appears to cover not only "memoranda," but also any substantial assistance motions made under either the Guidelines or § 3553(e). Most cooperation cases will involve such a motion. (Rule 35(b) motions are discussed below.)

This aspect of the Guidance limits access only to materials relating to cooperation, preserving remote access by the public to other sentencing memoranda and motions.

Moreover, a uniform policy of sealing cooperation motions and memoranda may be reassuring to individuals considering cooperation, and the government has a strong and legitimate interest in obtaining cooperation in future cases.[55]

Disadvantages.

The proposed procedure is overbroad. It would seal pleadings concerning information about cooperation or lack of cooperation even in cases in which the defendant's cooperation or lack of cooperation is well known or has already been revealed in open court.[56]

By prescribing sealing across the board, the policy requires no case specific findings, and it provides no advance notice and opportunity to object in individual cases. As we have noted above and described in greater detail in our First Amendment memo, the Supreme Court has required case specific findings and recognized the importance of providing notice and considering objections to proposals to seal proceedings that are presumptively subject to the First Amendment right of access.[57]

The common law right of access is also applicable to sentencing memoranda. In *United States v. Kravetz*,[58] the First Circuit held that the common law right of access applied to sentencing memoranda and third-party letters filed with the court for sentencing. The court reasoned that sentencing memoranda "bear directly on criminal sentencing in that they seek to influence the judge's determination of the appropriate sentence," and that there was "no principled basis for affording greater confidentiality as a matter of course to sentencing memoranda than is given to memoranda pertaining to the merits of the underlying criminal

[55] *See United States v. Armstrong*, 185 F. Supp. 3d 332, 336–37 (E.D.N.Y. 2016) ("[W]here release of information 'is likely to cause persons in the particular *or future* cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access.'") (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)).

[56] The Ninth Circuit disagreed with a somewhat similar argument made by a district court in a recent case. The district court had refused to seal documents involving a 5K motion, reasoning that "striking references in the docket to a motion and section of the Guidelines that will undoubtedly be mentioned in open court during the defendant's sentencing makes little sense." *United States v. Doe*, 2017 WL 3996799, at *2 (9th Cir. Sept. 12, 2017). But the Court of Appeals stated: "The CCACM Report verifies that orally pronouncing a sentence, including references to § 5K1.1, does not jeopardize defendants in the same way as memorializing someone's cooperation in publicly accessible documents that easily may be viewed online," and that the "district court's order did not recognize this distinction." *Id.* at *6.

[57] *See generally* Beale and King, *supra* note 3.

[58] 706 F.3d 47, 57–58 (1st Cir. 2013).

conviction, to which we have found the common law right of access applicable."[59] Public access to such memoranda "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system" and "may serve to check any temptation that might be felt by either the prosecutor or the court to seek or impose an arbitrary or disproportionate sentence; promote accurate fact-finding; and in general stimulate public confidence in the criminal justice system by permitting members of the public to observe that the defendant is justly sentenced."[60] The court remanded for a document-by-document balancing analysis and redaction if necessary. This analysis seems to leave little room for an across-the-board rule requiring sealing of a section of each sentencing memorandum.

Alternatives.

Case-by-Case Sealing, As discussed above in connection with the sealed transcripts and sealed plea agreements,[61] sealing is clearly permitted by existing precedent when supported by case specific findings but does not solve the red flag problem created when a sealed document appears on some docket sheets but not others.

Master sealed event. The option of creating a master sealed event on the docket sheet of every criminal case into which all cooperation-related documents would go may eliminate the red flag problem created by sealing only information in cases of cooperators, but raises concerns under the First Amendment, as noted earlier.[62]

Redaction. Case-by-case redaction of sentencing memoranda would withstand First Amendment challenges and would not be apparent from looking at the docket alone. But, as discussed above,[63] redaction would be more time consuming than sealing and would allow identification of cooperators by anyone able to see the redactions..

Not filing sentencing motions and memoranda concerning cooperation. Some courts have attempted to protect cooperator information by showing to the court but not filing sentencing memoranda (and motions) concerning cooperation, or by filing them with restricted status on the CM/ECF system. For example, in the Task Force survey one district reported that "Sentencing Memoranda are submitted directly to the Judge and are NOT docketed," and another reported that "information concerning any cooperation or assistance provided by the Defendant will not be included in sentencing memoranda or other filed documents, but furnished to the

[59] *Id.* at 56. It explained:

> Sentencing memoranda, which contain the substance of the parties' arguments for or against an outcome, are clearly relevant to a studied determination of what constitutes reasonable punishment. Thus, like substantive legal memoranda submitted to the court by parties to aid in adjudication of the matter of a defendant's innocence or guilt, sentencing memoranda are meant to impact the court's disposition of substantive rights.

[60] *Id.* at 56–57 (citations, internal quotation marks, and alterations omitted).
[61] *See supra* text accompanying note 31.
[62] *See supra* text accompanying notes 32–37.
[63] *See supra* text accompanying note 38.

Court via a confidential letter submitted to the courtroom Deputy Clerk."[64] Several other districts reported that they file sentencing memoranda (or memoranda mentioning cooperation) under restricted access, which permit access only by the court, probation, and all parties, or may be even more limited.[65]

As noted above in connection with the alternative of not filing plea agreements,[66] providing a document directly to the judge instead of filing it does not insulate from scrutiny under the First Amendment and common law right of access. That doctrine has been applied to material submitted directly to the judge in connection with sentencing, which is subject to the public right of access if it was meant to affect the judge's sentencing determination.[67]

Exempting cases without plea agreements. To avoid restrictions on access in cases that go to trial or involve "open" pleas with no plea agreements, the amendments to Rule 32(g) in Column 1 of Appendix A could be more narrowly tailored. One option would be to add the following text shown in brackets: "If a written sentencing memorandum is filed with the court [in a case resolved by a plea of guilty or nolo contendere/plea agreement], it must have a public portion and a sealed supplement. . . ."

E. Sealing Rule 35(b) Motions

CACM's Guidance also requires that "[a]ll motions under Rule 35 of the Federal Rules of Criminal Procedure based on the cooperation with the government shall be sealed and there shall be no public access to the motion unless ordered by the court." We implement that recommendation by an amendment to Rule 35(b) as shown in Column 1 of Appendix A.

Advantages.

Because Rule 35(b) deals exclusively with motions for sentencing reductions based on cooperation, persons seeking information about cooperators will necessarily be interested in any motion filed under this rule. Sealing these motions is much more targeted than other aspects of CACM's recommendations. It affects only cases in which there has been cooperation, and blocks general access only to the details of that cooperation and the government's resulting sentencing recommendation. Although post-trial Rule 35(b) motions are far less common than pre-sentencing substantial assistance motions under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), they are used frequently in a few districts.[68] In those districts, sealing could be of particular importance.

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[64] Baerman, *supra* note 18 (responses from New Jersey and the Northern District of New York to Question 4).
[65] *See, e.g.*, *id.* (citing responses of the Western District of North Carolina, the District of Maryland, the Northern District of Texas, and the Western District of Michigan).
[66] *See supra* text accompanying notes 51–54.
[67] *See supra* text accompanying notes 52–54.
[68] U.S. Sentencing Comm'n, The Use of Federal Rule of Criminal Procedure 35(b) 9 (2016) (noting that district courts within the Fourth and Eleventh Circuits account for 49.3 percent of Rule 35(b) reductions).

Disadvantages.

Unfortunately, sealing a Rule 35(b) motion blocks access to the details of a defendant's cooperation, but not to the fact that he did cooperate. Indeed, the presence of such a motion on the docket is a red flag signaling that the defendant has cooperated. The motion and resentencing process itself may also provide disclosure when the defendant is removed from prison and brought to court. And if the defendant is successful in obtaining a sentence reduction under Rule 35(b), the court will impose a new and lower sentence, which itself will be recorded on the docket and serve as a very strong signal that the defendant cooperated. Thus sealing Rule 35(b) motions is unlikely to prevent third parties who can access the docket from learning of an individual's cooperation. And inmates who are imprisoned with the defendant may also be able to learn of his cooperation by observing his absence from the prison in order to cooperate and later to be resentenced.

CACM's recommendation may also be under inclusive, leaving other sources of information in the court's records. Unlike CACM's Guidance concerning plea agreements and sentencing, the Guidance concerning Rule 35(b) motions does not appear to reach briefs/memorandum filed in support of/opposition to a Rule 35(b) motion, nor does it require that the transcript of any hearing on the motion be sealed. Thus the court's records in Rule 35(b) cases will contain other documents describing or referring to the defendant's cooperation. To remedy this gap, we provide an amendment to Rule 35(b) in Column 2 of Appendix C (CACM Plus) that requires **"**A motion, an order, and related documents under Rule 35(b)" to be filed under seal.

Although a number of districts now provide that the government may seal all Rule 35(b) motions without the need to file a motion,[69] there may also be a First Amendment or common law right of access to Rule 35(b) motions absent a case-specific showing of the need for sealing. As noted above, it is well established that the sentencing process is subject to the First Amendment, and courts have held that the public has a presumptive right of access under the First Amendment or the common law.[70] Although few cases have focused specifically on Rule 35(b) motions, the Ninth Circuit found a right of public access to Rule 35(b) submissions, and a California district court found a right of access to Rule 5K1.1 motions, which present similar issues.[71] Assuming that the courts will hold that Rule 35(b) motions are subject to a presumptive right of access, that right could be overcome by case specific information about threats of harm to a cooperator. But the courts would have to break new ground to uphold an across-the-board rule authorizing sealing. One difficulty in responding to such a challenge is the fact (as noted) that sealing the motions leaves open many other sources of information in the court's records concerning a defendant's cooperation. Some courts have found that the public's right to access

[69] *See* Baerman, *supra* note 18 (describing responses to Question 3).
[70] *See supra* text accompanying notes 51–54.
[71] *CBS, Inc. v. U.S. Dist. Ct. for the Cent. Dist. of Cal*., 765 F.2d 823, 825–26 (9th Cir. 1985) (finding right of access in rule 35(b) submissions); *United States v. Morales*, 2015 WL 2406099, at *2 (S.D. Cal. May 19, 2015) (finding right of access to 5K1.1 motions).

cannot be overcome, even where there is a legitimate interest such as privacy or security, if sealing cannot be effective because there are other available sources of the same information.[72]

CACM's Guidance could be expanded to include memoranda concerning Rule 35(b) motions and transcripts of hearing on those motions to block some other sources of information, but substantially broadening the scope of sealing in that fashion would also make it even more difficult for such procedures to withstand a constitutional or common law challenge.

Alternatives.

Requiring a shell document in every criminal case. We previously drafted but did not present to the Subcommittee an amendment requiring the government to file a sealed shell document containing any Rule 35 motion or stating there was no Rule 35 motion in every case within one year of the date of sentencing. Such a shell document—which would parallel the approach CACM has recommended for the plea agreement—would make it impossible to identify cooperators from the docket sheet, since every case would show a sealed entry. Two concerns led us not to include this proposal. First, the concentration of Rule 35 motions in just a handful of districts[73] may not justify imposing a burden on U.S. Attorneys' Offices and clerks in the majority of districts where Rule 35 motions are rare. Second, it would be difficult and burdensome to enforce such a provision. Particularly in light of the fact that the defendant's resentencing would signal that he had cooperated, this proposal did not seem to be warranted.

Not filing. The Task Force survey of district court clerks found that "[s]everal courts reported that the motions are not filed, but provided to the Judge and noted on the Statement of Reasons form."[74] Not filing Rule 35(b) motions is contrary to Rule 49(b)(1), which requires that any paper that must be served must be filed. Accordingly, we show an amendment to Rule 49.1(b)(1) in Column 4 of Appendix A.

We have noted above the constitutional and common law right of access issues raised by not filing other document that may mention cooperation, such as plea agreements and sentencing memoranda.[75] Not filing Rule 35(b) motions would raise the same First Amendment and common law right to public access issues.

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[72] *See, e.g.*, *United States v. Key*, 2010 WL 3724358, at *3 (E.D.N.Y. Sept. 15, 2010) (despite death threats because of defendant's cooperation, sealing of all materials related to cooperation not warranted because person making threats already had access to these materials); *United States v. Strevell*, 2009 WL 577910, at *5 (N.D.N.Y. Mar. 4, 2009) (unsealing various sentencing memoranda because fact of defendant's cooperation, "like the genie, has long been out of the bottle").

[73] *See* U.S. Sentencing Comm'n, *supra* note 68 (stating districts in two circuits account for approximately half of all Rule 35(b) motions).

[74] Baerman, *supra* note 18 (describing responses to Question 3).

[75] *See supra* text accompanying notes 41–42, 52–54, 67.

F. Permanent Sealing

CACM's Guidance states that "[a]ll documents, or portions thereof, sealed pursuant to this guidance shall remain under seal indefinitely until otherwise ordered by the court on a case-by-case basis." In Column 1 of Appendix A, we have added language to Rules 11(c)(3)(C), 11(g)(3), 32(g)(2), and 32(g)(2), 32(i)(4)(ii), and 35(b)(3) to implement this recommendation.

Advantages.

The danger to cooperators continues (or intensifies) throughout their imprisonment, especially for those assigned to maximum-security prisons. To address the problem of threats and harm to federal prisoners who have cooperated, it is essential for sealing (or other restrictions on access to cooperation information) to continue throughout the time an individual is serving his sentence. For example, the Task Force found that problems often arise when inmates are transferred to a new institution.

Accordingly, CACM's Guidance provides for continued sealing unless the court orders otherwise on a case-by-case basis. Assuming the press or others were aware that a document was sealed, this would allow them to seek a fact-specific determination on the need for continued sealing. Assuming a case and fact-specific determination of need is required by the First Amendment and common law right of access cases, at least this approach provides the opportunity for such a determination after the fact, though not at the time of sealing.

CACM's Guidance also responds to local rules on sealing that may endanger inmates. Local rules in several districts set a standard time for unsealing, sometimes a short period likely to run before many defendants complete their sentences.[76] Although the parties in those districts may be successful in seeking to extend sealing for cooperators in individual cases, amending the rules to incorporate CACM's Guidance on this point would better protect inmates sentenced in those districts.

CACM's Guidance will also encourage others to cooperate. In weighing the need for continued sealing, some courts have given substantial weight to the government's need to secure cooperation in other cases.[77] In rejecting a newspaper's request to unseal the government's

[76] Examples of districts that place a sunset period on sealing, unless the court orders sealing continued, include: *Standing Order 09-SO-2. In Re: Sealing of Plea Agreements and Substantial Assistance Motions* (E.D.N.C. 2009) ("Upon the expiration of two years from the date of the filing of the order or other resolution of the substantial assistance motion sealed by operation of this standing order, such motion and order shall be unsealed, unless the presiding judge in the case extends the sealing order."); U.S. Dist. Ct. Rules N.D. Tex., LCrR 55.4 (2008) ("Unless the presiding judge otherwise directs, all sealed documents maintained on paper will be deemed unsealed 60 days after final disposition of a case. A party that desires that such a document remain sealed must move for this relief before the expiration of the 60-day period."); U.S. Dist. Ct. Rules W.D. Va., Gen. R. 9(d)(5) ("As for any other sealed documents, the documents will be unsealed 120 days from the date of entry of the sealing order, unless the sealing order provides otherwise.").

[77] *In re Motion for Civil Contempt by John Doe*, 2016 WL 3460368, at *5–6 (finding that the government has a "unique interest in keeping documents relating to cooperation sealed, even after an investigation is complete," because release might cause others in the future to resist cooperation).

sentencing letters concerning cooperation, one court explained the need to consider not only the risk of harm to the individual defendant but also the potential damage to the government's ability to secure cooperation in the future:

> [T]he government retains a unique interest in keeping documents relating to cooperation under seal even after a given investigation is completed. If we limit the government interest in protecting documents to a narrow interest in the secrecy of ongoing investigations, we fail to acknowledge how profoundly the federal criminal justice system relies on cooperators. As the Second Circuit has recognized, where release of information "is likely to cause persons in the particular *or future* cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access.
>
> The central role of cooperation in the federal criminal justice system is evident from the federal statute and Sentencing Guidelines, which permit the court to impose sentences below the mandatory minimums for cooperators. No other mitigating factor receives that level of deference. This sentencing policy achieves two goals—it gives the government leverage to investigate and prosecute the conspiracies that the federal criminal justice system targets, and it gives the court a means of acknowledging the cooperating defendant's contribution to the administration of justice, often at substantial risk to himself.
>
> . . . Harm to cooperating defendants is distressingly, if not surprisingly, common. A potential cooperator must weigh the possibility of a reduced sentence against a very real risk of harm to himself and his loved ones. Many defendants refuse to cooperate because of these risks; others withdraw their cooperation.
>
> For this reason, the government's ability to secure current and future cooperation from defendants depends on the government's ability to convince them to accept some risk, and on its ability to minimize this risk where it can. To this end, the government must be able to represent to cooperators that it can and will make efforts to keep the nature and scope of cooperation confidential. Of course, a cooperator's identity may emerge at trial, if one occurs, or at sentencing, as it did here. It may be gleaned from the appearance of sealed entries on the docket sheet. Nonetheless, the government should be able to make a good-faith representation to a cooperator, at the time cooperation is initiated, that it will take reasonable efforts to protect him from retaliation. It cannot make this representation if it believes the court will routinely unseal government submissions detailing cooperation upon a third-party request once the proceedings have concluded. [78]

There is precedent for continued sealing after the conclusion of an investigation or prosecution. Applying the First Amendment analysis, courts have declined post-conviction

[78] *United States v. Armstrong*, 185 F. Supp. 3d 332, 336–37 (E.D.N.Y. 2016) (footnote and citations omitted).

requests to unseal material related to cooperation that had been sealed or redacted after a case-specific showing of need.[79]

Disadvantages.

Coupled with CACM's across-the-board approach—which seals a variety of materials (plea agreements and hearings, sentencing memoranda and hearings, and Rule 35 motions)—making permanent sealing the default would remove a very significant amount of information from the press and public in perpetuity, even in cases in which there has been—and could not be—any showing of a case-specific need for sealing. As the Second Circuit has explained in an unpublished opinion, a party seeking to overcome the public right of access to sentencing proceedings "bears a heavy burden" which "increases the more extensive the closure sought," and when the party "seeks to seal *totally and permanently*, the burden is heavy indeed."[80] It is unclear whether this burden can be met when the only reason to seal in the majority of cases is to disguise cooperation in a small fraction of the cases.

Additionally, although the Guidance is not clear on this point, it can be read as requiring a person seeking to unseal materials to carry the burden of demonstrating that sealing is no longer required. If that is what is intended, it would reverse the burden the Supreme Court has established for restricting access to materials that are presumptively available to the public. Not only would it dispense with a showing of case-specific need to protect information before sealing, by requiring a showing of case-specific need to unseal it would reverse the constitutional presumption of openness, substituting instead a presumption of secrecy.

Finally, the First Amendment requires sealing to be narrowly tailored, and we are not sure whether CACM explored other less restrictive options in between blanket permanent sealing and sealing only upon a specific showing of need. These might include, for example, requiring a reexamination of the sealing policy under the new rules after a period of 3 or 5 years, or requiring Bureau of Prisons to provide the sentencing court with notice when a defendant completes his term of supervised release, which could trigger either unsealing (absent a contrary order of the court) or a reexamination of the need for continued sealing.

II. Limiting Remote Access: New Rule 49.2

At its last phone conference, the Subcommittee considered the text of a possible rule to limit remote access to certain records in criminal cases, while preserving full access at the courthouse. Although not all members of the Subcommittee expressed support for this approach (indeed both defense members expressed a preference for no limitations on access), the

[79] *See, e.g., In re Motion for Civil Contempt by John Doe*, 2016 WL 3460368, at *5–6 (finding that the government has a "unique interest in keeping documents relating to cooperation sealed, even after an investigation is complete," because release might cause others in the future to resist cooperation); *United States v. Park*, 619 F. Supp. 2d 89, 94 (S.D.N.Y. 2009) (denying newspaper's argument that because "redactions lack specificity and more than a year has passed since Park was re-sentenced" document should be unsealed).
[80] *United States v. Doe*, 356 Fed. Appx. 488, 490 (2d Cir. 2009) (citation omitted).

Subcommittee made some decisions on the features that should be included if a rule prohibiting remote access is proposed.[81] The language in the attached draft (Appendix C) reflects the decisions made during that call, as well as several changes requested by the style consultants to eliminate inconsistent phrasing and duplicate language, and to improve the structure and flow of the provisions. The reporters declined to adopt several other changes suggested by the style consultants because they would affect the substance of the proposed rule.[82]

Unlike the version previously considered by the Subcommittee, which was placed within Rule 49.1(c), [83] the present version is a new free-standing Rule 49.2. Rule 49.1(c) currently provides that actions under § 2241 that relate to a petitioner's immigration rights are governed by Civil Rule 5.2. The style consultants correctly noted that the reference to Rule 5.2 brings into play all of the provisions in Rule 5.2, not merely those dealing with remote access. Accordingly,

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[81] The draft includes the following decisions made by the Subcommittee at its last call:

(1) All defendants, represented or not, should have remote access to the documents in their case files.

(2) When a case includes multiple defendants, the rule should ensure that ex parte documents and documents restricted when filed are not available to parties whose access is barred.

(3) Misdemeanors should not be exempted from the rule, but districts should be encouraged to consider exempting case categories (such as petty offenses on a national seashore) for which the district concludes unlimited remote access would not generally pose a risk of harm to suspected cooperators and family members. The Committee Note should make clear that such local rules are permitted by the introductory "Unless" clause in line 1. Tailoring in this fashion could be helpful if the rule were challenged under the First Amendment or the E-Government Act.

(4) The public should have remote access to all indictments and informations, but more information is needed from DOJ concerning whether the few districts (including SDNY) would be willing to give up their unique charging policies that make a superseding indictment a red flag for cooperators.

(5) The rule should provide the same remote access to the public and the press; the rule anticipates that courts retain the discretion to expand press access in high-interest cases, just as they currently entertain motions by the press seeking to unseal documents.

(6) The rule should permit defense attorneys in other criminal cases to have remote access to plea and sentencing documents if they certify that they need the documents to represent another defendant. The rule should not attempt to prescribe how defense counsel could use the document.

[82] The following changes were not included:

(1) In line 8, style suggested "party's access." We restored it to access by the "person."

(2) In lines 3–5, style asked why the rule departed from Civil Rule 5.2. The Subcommittee decided the rule must be party specific so that one defendant's information is not accessible to another defendant, and so that information available to only one side or the other remain so. In contrast, because Rule 5.2 was designed to protect confidential information from non-parties, there was no reason to limit access by parties themselves.

(3) In line 27, style suggested the certification must state the case-related need; this would be a major change from requiring only that an attorney certify that she has a need, and would potentially reveal the defense strategy.

[83] Rule 49.1(c) provides that actions under § 2241 that relate to a petitioner's immigration rights are governed by Civil Rule 5.2, which includes limitations on remote access in both immigration and social security cases. We initially placed the new provision within Rule 49.1(c) to put all limitations on remote access together and to avoid the relettering that would have been necessary if the new provision was added as a separate section where it would logically be placed in Rule 49.1.

they suggested that it was not appropriate to place the new provisions within 49.1(c). We agreed. We first considered adding a new subsection at the end of Rule 49.1, but concluded that the complexity and importance of the proposed amendment warranted a new rule. Because Rule 49.1(c) will continue to govern in § 2241 cases involving a petitioner's immigration rights, new Rule 49.2 begins "Unless the court orders [or these rules provide] otherwise," and the Committee Note will draw attention to Rule 49.1(c).

Like Civil Rule 5.2(c), new Rule 49.2 is a compromise between unlimited access (which allows viewing and downloading documents remotely through PACER or at a courthouse terminal) and sealing or not filing at all (which denies access completely, both online and in person). This compromise approach creates two levels of *remote* access to documents not filed under seal or otherwise restricted: (1) full access on line for parties and their counsel and (2) limited access for everyone else only to the docket, the charge, and the court's opinions and orders. The Rule retains public access to other documents in person at the courthouse terminal.

The general idea of this approach is one of "practical obscurity," a term used by the Supreme Court in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 770 (1989), to describe protection for information that was previously disclosed to the public, but would require a burdensome amount of time and effort to obtain.[84] The burdensome effort here would include not only travel to the courthouse but having one's identity recorded when accessing the court record.[85] Files accessed at courthouse terminals can be tracked electronically,[86] and users could be put on notice of this fact as well.

The draft rule does depart from Civil Rule 5.2(c), which places similar limitations on remote access in social security and immigration cases, in several respects:

(1) The deterrent effect of requiring a trip to the courthouse is enhanced with a requirement of showing identification, signing in, or other steps that might be required by the Judicial Conference.

(2) Limitations on access are expressly party and person-specific; in multi-defendant cases, each defendant has full access only to his own file, and not to that of all

[84] The Court held that the privacy interest in maintaining the "practical obscurity" of documents that have at one time been disclosed outweighs the FOIA-based public value of additional disclosure. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

[85] *See* Caren Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 971 (2009) (arguing that "raising the costs of access can slow this process and lessen the risks of cooperators' identities being discovered online. To the extent that placing limits on electronic access could protect even a small number of cooperating defendants from unnecessary exposure, and more importantly, reassure prosecutors and courts that cooperation bargains can be conducted more openly, it is still worth attempting.").

[86] As one respondent explained in response to the Task Force survey of clerks, the records of use by persons at the courthouse terminal "could be maintained by the log files at PACER." The respondent noted that his office has previously had to use these log files from PACER and found that they "keep accurate and complete records of who accesses what document and at what time," and "[t]his technology could be used to help track back in case of cooperation harm." Baerman, *supra* note 18 (response to Question 14 from Northern District of Illinois).

codefendants; ex parte documents and documents filed with restricted access remain unavailable to any party or parties whose access is barred.

(3) Language expressly denying access to files that are sealed "or otherwise restricted" has been added to recognize that access restrictions separate from sealing are often placed upon documents when they are filed in CM/ECF.[87] While some local rules bar parties from filing something under seal without permission from the court, others allow parties to file a document under seal on their own.

(4) Other criminal defense attorneys are provided remote access to specified restricted documents upon filing a certification.

(5) In addition to the docket and the court's orders, those seeking information at the courthouse may access any indictment or information filed on the docket.

Advantages.

If used as an *alternative* to routine sealing, bench conferences, or not filing, the primary advantage of restricting only remote access is that it preserves the press and public access to court records and proceedings in criminal cases that has traditionally been available. It also avoids many of the administrative burdens and costs of bench conferences, separate sealed supplements for plea agreements, sentencing and plea submissions, and plea and sentencing transcripts.

Civil Rule 5.2 provides a strong foundation and precedent for proposed Rule 49.2. Rule 5.2(c) restricts remote access in social security and immigration cases, and Rule 49.1(c) already makes those limitations applicable to § 2241 actions that relate to immigration rights.[88] Using Rule 5.2(c) as a model for Rule 49.2 has at least four benefits. First, although the limits on access in Rule 5.2(c) have not been challenged under the First Amendment, commentators have

[87] The CM/ECF system allows the filer or clerk to assign one of several different access levels to a given document. Jim Hatten, our clerk of court liaison, informs us these levels are:

- Non-public users and public terminals,
- Non-public,
- Ex-parte,
- Private (court user only),
- Sealed, and
- Applicable Party.

Local rules and custom may modify or regulate the use of these various levels. This means documents that are part of the case file but not "sealed"—including those filed as "Non- public," "Ex-parte," or "Private,"—are also be barred from public access. Some local rules added the phrase "or otherwise restricted" when referring to documents under seal and we adapted that idea for this draft.

[88] *See, e.g.*, *Crossman v. Astrue*, 714 F. Supp. 2d 284, 290 (D. Conn. 2009) (Kravitz, D.J.) (discussing and defending Civil Rule 5.2—"In order to review any other part of the unsealed case file, non-parties have to physically go to the courthouse where it is stored. Thus, even if Mr. Pirro's clients choose not to redact their filings at all, they are still provided some degree of privacy through the relative inaccessibility of the case file.").

generally agreed that Rule 5.2(c) meets First Amendment and common law access standards.[89] Rule 49.2 should as well, since it allows access to all unsealed criminal case materials at the courthouse, providing the press and the public the same access they had from the founding through the Internet age.[90] Second, although the online access restrictions under Rule 5.2 have not been challenged under the E-Government Act, if Rule 5.2 is valid under the Act, similar restrictions in the Criminal Rules should be as well. Third, in approving Civil Rule 5.2, the federal courts and Congress have already endorsed the approach of limiting remote access to sensitive information in court files rather than sealing them. Finally, clerks' offices are familiar with how Civil Rule 5.2(c) works. Expanding this well-understood process to additional documents may generate fewer mistakes and less confusion than adopting an entirely new process.[91]

Requiring identification to access court documents is feasible.[92] The proposed text provides that a local rule will specify the identification required, or in the alternative, that the Judicial Conference will do so. This allows for adaptation as technology and identification methods change over time.

The present draft accommodates the needs of criminal defense attorneys, allowing them to have remote access to all unsealed/unrestricted materials in other cases in order to defend other clients if they provide a signed certification of need.[93]

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[89] Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 21–24 (2013) (noting "many cases support the concept of "practical obscurity," which usually involves off-line limitations to accessing information"). *See also* Morrison, *supra* note 85, at 956; Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135, 160 (2009).

[90] *See also* Winn, *supra* note 89, at 160 (stating that this "intermediate system of access, reflected in the new privacy rules, appears to comply with the constitutional and common-law right to public access," in that "it merely recreates certain aspects of the system of practical obscurity of the former paper based system—which, perforce, met constitutional muster").

[91] *See* Baerman, *supra* note 18, (responses to Question 12) (District of Vermont: "it probably is most efficient to follow the Social Security Case protocol when handling certain documents. This method will save court time (i.e. the extra steps/processes required to protect certain information for certain documents could be reduced by making them not readily available) and would help protect against any possible mistakes which inadvertently disclose cooperating information."); *id.* (Southern District West Virginia: "this process would make it easier for the Court to comply without unnecessary sealing").

[92] Of districts responding to a CACM survey, one district, the district of Maryland, stated that it requests identification to access records at the clerk's office. Baerman, *supra* note 18 (responses to Question 13). Identification is also requested in the Western District of Texas. There, the process was described as follows: Those seeking access to documents at the terminal must note in a log the date, name, time requested, time viewing complete, and affiliation (e.g., CJA, bonding company, media, family members, members of public). If it is an individual known to the clerk's office employee, generally there is no further identification information required. If it is a member of the public, clerk's office staff requests picture identification. Once satisfied that the person is the person she claims to be in the log, no copy is made of the id. The staff member then steps out to the public terminal and unlocks it with a password. Telephone Conversation with Mike Maiella, Operation Supervisor for the District Court for the Western District of Texas, July 10, 2017.

[93] This provision is based on a 2009 standing order in the Eastern District of North Carolina. *Standing Order 09-SO-2*, *supra* note 76.

Finally, several states have adopted this "practical obscurity" approach with their court filings to protect sensitive information,[94] and at least two federal courts have done so for plea and sentencing related materials.[95]

Disadvantages.

The risk that documents containing cooperation information will get into the wrong hands is higher with this option than with the sealing or no-file options, because documents concerning cooperation will remain available at the courthouse for those who show identification. The assumption that showing identification in person at the clerk's office would deter some would-be PACER users from seeking that information is untested.[96] Even with an identification requirement, anyone could show identification, access the information, then relay it to those inside the prison or post it on the internet. Conceivably, someone could start a business that looks up records at courthouses for a fee.[97] If a defendant persuades a family member that he needs a copy of his plea agreement to avoid attack, then showing identification may be unlikely to deter that family member from attempting to help.[98]

Like the other options, the restrictions on remote access may generate costly litigation initiated by those objecting to the restrictions. As noted above, we believe that limiting remote access while preserving in person access stands on much firmer constitutional ground than blanket sealing, and likely would be upheld under existing First Amendment and common law access precedent. Unique to the remote access limitations, however, would be challenges under the E-Government Act. Section 205 of that Act imposes a general requirement that courts "make any document that is filed electronically publicly available online."[99] Section 205(c) provides,

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[94] Telephone conversation with Thomas Clarke, National Center for State Courts, August 2, 2017. *See also Okla. Supreme Court Bars Internet Access to Filed Documents*, 5 No. 8 ANDREWS PRIVACY LITIG. REP. 13 (April 2008); Lynn Sudebek, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 119–20 (2006) (recommending this approach).

[95] The Western District of Texas, El Paso Division has implemented this system recently, and initial reports are that it has been working well. However, court personnel noted that there had been few requests to view information. *See* Telephone Conversation, *supra* note 91. The Northern District of Texas has also adopted this approach. Baerman, *supra* note 18, summary count of responses to Question 11 (noting "Texas Northern has issued a Special Order that places limits on public PACER access to documents that reveal cooperation."). At one time, the approach was advanced by the Department of Justice. *See* Morrison, *supra* note 85, at 960 (describing earlier DOJ proposal for "tiered electronic access, restricting certain documents to that defendant's counsel and the government, making others available to a broader group of counsel, and releasing a third category to the general public.").

[96] In the Northern District of Texas where some documents are available only at the courthouse, but there is no identification requirement, the clerk's office staff reported to CACM that "We have had individuals specifically looking for cooperator information in the lobby in this district." Baerman, *supra* note 18,

[97] *See* Morrison, *supra* note 85, at 970 (discussing proposal to limit PACER access without any identification requirements: "nothing prevents a motivated individual from physically visiting the clerk's office and reviewing the court files of a suspected cooperator. Equally, a more enterprising version of Whosarat.com might send runners to the courts to scan criminal case information into mobile devices for subsequent dissemination online.")

[98] CACM survey, at 87 ("Incarcerated Defendants, or friends/family members on their behalf, regularly request copies of their plea agreement and sentencing documents.").

[99] E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (2002) (44 U.S.C. § 3501 et seq.).

however, that "[d]ocuments that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online," *id.* § 205(c)(3), and that rules may be enacted under the Rules Enabling Act procedures "to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically," *id.* § 205(c)(3)(A)(i). Any rules promulgated under this authority must "take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security." *Id.* § 205(c)(3)(A)(iii). Although there is no precedent to indicate how that statute will be construed, we believe that the limitations in the rule would probably withstand an E-Government Act challenge. If Rule 5.2(c), which adopts a similar approach, is valid under the E-Government Act, then Rule 49.2 should be also.

Requiring identification to access court documents is a novel procedure that may attract challenge as well, but is probably constitutional. We could find no case law on the question whether requiring identification for access to court documents would be constitutionally problematic. The REAL ID Act already requires showing compliant identification to gain access to federal buildings, including courthouses,[100] and many cases have upheld the requirement of identification for entry into federal courthouses without a specific showing of need.[101] On the other hand, the constitutionality of the added identification requirements for document access are not certain. The security concerns animating restrictions on those who enter courthouses are different than those underlying an identification requirement for document access. Also, as pointed out in an earlier memo, although courts have upheld under the Sixth Amendment an identification requirement before entry into criminal proceedings within a courthouse, these decisions applied a "relaxed" test instead of the more exacting test usually applied to courtroom closures under *Waller v. Georgia*, 467 U.S. 39 (1984), and most also noted a case-related reason.

Even apart from litigation, the limited remote access approach is sure to generate opposition from those who believe in preserving free and open public access to the judicial system and court records. As compared to filing under seal or never filing, it does allow some access to documents that would otherwise be secret and completely unavailable to the press, public, victims, and researchers. But as compared to the traditional approach of requiring case-by-case justification before sealing documents in criminal cases—still followed in many

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[100] REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (2005); Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272 (Jan. 29, 2008) ("DHS does not believe that the REAL ID Act or the implementing regulations will impede the public's Constitutional rights. Once REAL ID is in effect, an individual presenting a driver's license to access a Federal courthouse must use a REAL ID driver's license to do so. However, that individual may present other documents, or may not be required to present identification at all, depending on the courthouse's pre-existing identification policies.").

[101] *E.g.*, *United States v. Smith*, 426 F.3d 567, 574 (2d Cir. 2005); *United States v. Cruz*, 407 F. Supp. 2d 451, 452 (W.D.N.Y. 2006) (finding that United States Marshals Service's practice of requiring photographic identification of all visitors to courthouse did not violate defendant's constitutional right to a public trial).

districts—limiting remote access significantly impacts transparency and the practical ability of the public, press, and researchers to monitor federal criminal cases.

Like the other options, the remote access approach also entails additional time and resources by Clerk's Offices. We cannot predict how much demand there will be for these documents at the courthouse by people willing to submit to the identification process. If the demand is significant, additional terminals and staff to check and record the identification of those who come to request documents at the courthouse may be needed.[102] Limiting remote access may also require reconfiguring remote access rules, and other changes to PACER to inform users of the new restrictions. And, like the other options, it would require districts and individual judges to adapt any local rules and orders that conflict with the new restrictions.

III. Concluding Remarks

We have attempted to list the advantages and disadvantages of the various options discussed so far by the Subcommittee, using information available at this point from the ongoing work of the Task Force. If additional information becomes available before the conference call (concerning, for example, the configuration of docket sheets), we will bring that to the Subcommittee's attention.

To assist the Subcommittee in evaluating whether to recommend adoption of amendments implementing the CACM Guidance, and whether to recommend any of the alternatives including limiting remote access with a new Rule 49.2, we include here a brief summary list of the issues.

- the need to restrict access to information to protect against threats and harm to cooperators, and
    - the effectiveness of each Guidance procedure to protect against threats and harm,[103]
    - the effectiveness of alternative non-rules procedures to protect against threats and harm,[104] and
    - the interaction between those other procedures and any changes in the rules;
- the policy favoring transparency in judicial proceedings;

[102] The U.S. Marshal's service already checks identification at the courthouse entrance, so there may be a more efficient solution that would incorporate this process.

[103] As noted on page 1, many other sources of information about cooperation will remain, and indeed none of the options completely prevents the use of court records to confirm or deny cooperator status. For example, none restricts a defendant's right to request copies of documents in his own case file or retain documents initially furnished to him by his attorneys, and then to share those documents as he pleases.

[104] Even perfect enforcement of any BOP regulation barring possession of such papers by inmates would not prevent defendants who obtain documents from their attorney prior to entering BOP custody from sharing those documents with another who can later relate the information by telephone or other means with those interested in it. In addition, mistakes by court staff administering restrictions have been reported to us in several districts.

- potential constitutional challenges under the First Amendment;[105]
- potential challenges under the common law right of access to court records;
- potential challenges to Rule 49.2 under the E-Government Act;
- the impact on the representation of criminal defendants;
- increased administrative and security burdens and additional costs for courts, clerks, marshals, Bureau of Prisons, Sentencing Commission;
- the impact on the integrity and completeness of case records; and
- the impact on the ability of the press, scholars, and the public to track and monitor activity in federal criminal cases.[106]

[105] Although we do not focus on this issue in this memo, the proposed procedures also implicate the Sixth Amendment right to a public trial. *See* Beale and King, supra note 3, at 5–8.

[106] If access to individual case documents is barred, it may still be possible for the Sentencing Commission to collect and report detailed anonymized data on the use of cooperation, but that would entail additional costs and delay compared to the real-time access currently available through court records.

APPENDIX A

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Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures

Full CACM Procedures: sealed supplements & courtroom restrictions	**CACM Sealing; no courtroom restrictions**	**Whole Document Sealing; no courtroom restrictions**	**No Document Filing; no courtroom restrictions**
Rule 11	**Rule 11**	**Rule 11**	**Rule 11**
(c) Plea Agreement Procedure.	**(c) Plea Agreement Procedure.**	**(c) Plea Agreement Procedure.**	**(c) Plea Agreement Procedure.**
(2) ***Disclosing and Filing a Plea Agreement.***	***(2) Disclosing and Filing a Plea Agreement.***	***(2) Disclosing and Filing a Plea Agreement.***	***(2) Disclosing and Submitting a Plea Agreement.***
(A) Disclosure In Open Court. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.	**(A) Disclosure In Open Court.** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.	**(A) Disclosure In Open Court.** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.	**(A) Disclosure In Open Court.** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.
(B) Bench Conference Required. [In every case,] The disclosure must include a bench conference at which the government must disclose any agreement by the defendant to cooperate with the government or must state that there is no such agreement.	**(B) Filing the Agreement.** The plea agreement must be filed [with the court/in the record]. The agreement must include a public portion and a sealed supplement that contains any discussion of or references to the defendant's cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until the court orders otherwise. *** * ***	**(B) Filing the Agreement.** The plea agreement must be filed under seal. The agreement must remain under seal indefinitely until the court orders otherwise. *** * ***	**(B) Submitting the Agreement.**[1] The plea agreement must be submitted directly to the Sentencing Judge, the United States Probation Department, and all counsel of record for the government and the defendant who signed the agreement, and not filed [with the court/in the record]. * * *

[1] Alternatively, no amendment would be required if CACM promulgated a national no filing rule. Action by CACM might be appropriate because (1) the current rules do not speak to what should and should not be filed, and (2) CACM guidance can be provided much more rapidly than a rules amendment.

Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures

Full CACM Procedures: sealed supplements & courtroom restrictions	CACM Sealing; no courtroom restrictions	Whole Document Sealing; no courtroom restrictions	No Document Filing; no courtroom restrictions
Rule 11(c)(2) continued			
(C) Filing the Agreement. The parties must file the plea agreement.[2] The agreement must include a public part and a sealed supplement that contains any discussion of or references to the defendant's cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until the court orders otherwise. * * *			

[2] The CACM Guidance appears to assume that plea agreements will be filed, though that procedure is not universal. Our drafts in Columns 1 to 3 reflect that interpretation of the Guidance. Requiring all plea agreements to be filed will create the national uniformity in docket sheets that CACM has concluded is necessary to fully protect cooperators. However, the CACM guidance is not explicit on this point, and it would be possible to revise these columns to refer to plea agreements "if filed." We note also that the CACM Guidance did not specifically address written submissions by the parties concerning pleas, and our amendments do not address such submissions. But in early discussions Subcommittee members indicated such pleadings are fairly common, and we have included written submissions concerning pleas in Appendix B, which shows amendments that might supplement the Full CACM approach to implement its goals.

Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures

Full CACM Procedures: sealed supplements & courtroom restrictions	**CACM Sealing; no courtroom restrictions**	**Whole Document Sealing; no courtroom restrictions**	**No Document Filing; no courtroom restrictions**
Rule 11	**Rule 11**		**Rule 11**
(g) Recording the Proceedings.	**(g) Recording the Proceedings.**	**(g) Recording the Proceedings.**	**(g) Recording the Proceedings.**
(1) *In General.* The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. **(2) *Inquiries and Advice*.** If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c). **(3) *Bench Conference*.** If the bench conference required by Rule 11(c)(2) is transcribed, the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.	***(no change)***[3]	**(1) *In general.*** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. **(2) *Inquiries and advice*.** If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c). ***(3) Filing under seal.*** If the bench conference required by Rule 11(c)(2) is transcribed, the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.	**(1) *In general.*** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. **(2) *Inquiries and advice*.** If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c). ***(3) No filing.*** [Unless the court orders otherwise,] the recording or transcript of the plea proceeding must not be filed with the court.[4]

[3] Alternatively, a rule could require the government to identify portions of the plea transcript that might prove or disprove cooperation and either redact or file those portions under seal. This proposal does not include such a rule.

[4] As noted in our memorandum, a no filing rule for transcripts would require changes in the Judicial Conference's policy, and perhaps also legislation.

Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures

Full CACM Procedures: sealed supplements & courtroom restrictions	**CACM Sealing; no courtroom restrictions**	**Whole Document Sealing; no courtroom restrictions**	**No Document Filing; no courtroom restrictions**
Rule 32	**Rule 32**	**Rule 32**	**Rule 32**
(g) Submitting the Report; Written Memoranda. **(1) Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. **(2) Memoranda.** If a written sentencing memorandum is filed with the court, it must have a public part and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The supplement must contain: (A) any discussion of or reference to the defendant's cooperation, including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1] or (B) a statement that there has been no cooperation. * * *	**(g) Submitting the Report; Written Memoranda.** **(1) Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. **(2) Memoranda.** If a written sentencing memorandum is filed is with the court, it must have a public portion and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise.. The sealed supplement must contain: (A) any discussion of or reference to the defendant's cooperation including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1 or (B) a statement that there has been no cooperation. * * *	**(g) Submitting the Report; Written Memoranda.** **(1) Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. **(2) Memoranda.** If a written sentencing memorandum is filed with the court, it must be sealed. The memorandum must remain under seal indefinitely until the court orders otherwise. * * *	**(g) Submitting the Report; Written Memoranda.** **(1) Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them. **(2) Memoranda.** Any written sentencing memorandum must be submitted directly to · the sentencing judge, · counsel of record for the government, and · counsel of record for the [individual] defendant in the underlying prosecution. The memorandum must not be filed with the court. …

Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures

Full CACM Procedures: sealed supplements & courtroom restrictions	CACM Sealing; no courtroom restrictions	Whole Document Sealing; no courtroom restrictions	No Document Filing; no courtroom restrictions
Rule 32	**Rule 32**	**Rule 32**	**Rule 32**
(i) Sentencing[5] … ***(4) Opportunity to Speak*** … *(C) ~~In Camera~~ Proceedings <u>In Camera or at the Bench</u>.* <u>**(i) In General**</u>. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4). <u>**(ii) Bench Conference Required. [**In every case,] Sentencing must include a conference at the bench for discussion of the defendant's cooperation or lack of cooperation with the government. The transcript of this conference must be filed as a sealed addendum to the sentencing transcript. The addendum must remain under seal indefinitely until the court orders otherwise.</u>	***(no change)***	***(no change)***	***(no change)***[6]

[5] The CACM Guidance did not reference PSRs—though they frequently include information about cooperation—perhaps because PSRs are not universally filed and when filed are already universally sealed. Thus we do not include them in Columns 1 to 4. A revision to Rule 32(i) that would require a PSR, if filed, to be filed under seal is included in Appendix B, which CACM Plus amendments.

[6] As noted in our memorandum, a no filing rule for transcripts would require changes in the Judicial Conference's policy, and perhaps legislation.

Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures

Full CACM Procedures: sealed supplements & courtroom restrictions	**CACM Sealing; no courtroom restrictions**	**Whole Document Sealing; no courtroom restrictions**	**No Document Filing; no courtroom restrictions**
Rule 35. Correcting or Reducing a Sentence.	**Rule 35. Correcting or Reducing a Sentence.**	**Rule 35. Correcting or Reducing a Sentence.**	**Rule 35. Correcting or Reducing a Sentence.**
(b) Reducing a Sentence for Substantial Assistance. * * * * * ***(3) Sealing.*** A motion under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise. ***~~(3)~~ (4) Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance. ***~~(4)~~ (5) Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.	**(b) Reducing a Sentence for Substantial Assistance.** * * * * * ***(3) Sealing.*** A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise. ***~~(3)~~ (4) Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance. ***~~(4)~~ (5) Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.	**(b) Reducing a Sentence for Substantial Assistance.** * * * * * ***(3) Sealing.*** A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise.. ***~~(3)~~ (4) Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance. ***~~(4)~~ (5) Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.	***(no change; see Rule 49 below)***

Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures

Rule 47	Rule 47	Rule 47	Rule 47
Full CACM Procedures: sealed supplements & courtroom restrictions	**CACM Sealing; no courtroom restrictions**	**Whole Document Sealing; no courtroom restrictions**	**No Document Filing; no courtroom restrictions**
(b) Form and Content of a Motion. A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit. ***(no change)*** [7]	***(no change)***	***(no change)***	***(no change; see Rule 49 below)***

[7] The reporters' initial subcommittee discussion draft included an amendment to Rule 47(b)(1) that provided: "Any motion for reduction of sentence under 18 U.S.C. §3553(e) or U.S.S.G. §5K1.1 must filed under seal." Although we believe that the failure to seal these documents would undermine CACM's goals, we omitted this provision from Columns 1 to 4 because of the Subcommittee's tentative decision this spring to come forward with one proposal that implemented all of CACM's recommendations but no additional provisions. Similar language, does, however, now appear in Column 2 of Appendix B (CACM plus/complete).

Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures

Rule 49	Rule 49	Rule 49	Rule 49[8]	Rule 49
Full CACM Procedures: sealed supplements & courtroom restrictions	**CACM Sealing; no courtroom restrictions**	**Whole Document Sealing; no courtroom restrictions**	**No Document Filing; no courtroom restrictions**	**No Remote Access**
(no change)	***(no change)***	***(no change)***	**(b) Filing.** **(1) *When Required; Certificate of Service.*** Ordinarily, a~~A~~ny paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing. But a motion for a sentencing reduction under Rule 35(b), 18 U.S.C. §3553(e), or U.S.S.G. §5K1.1 [and supporting documents] must be submitted directly to · the sentencing judge, · counsel of record for the government, and · counsel of record for the [individual] defendant in the underlying prosecution. The motion must not be filed with the court.	***(no change; see proposed amendment Rule 49.2)***

[8] Changes shown to proposed amendment sent to the Judicial Conference in August. New material dealing with cooperators is shown in red.

APPENDIX B

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Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

This chart shows the first column of Appendix A (intended to implement the CACM guidance strictly) side by side with a set of amendments that would add additional changes that might be required to effectuate the goals of the CACM guidance. The "CACM plus/complete" column illustrates such changes. The Subcommittee was opposed generally to amendments that went beyond what was expressly required by CACM guidance. This side by side shows specifically what those additional changes might be. New material is highlighted.

Full CACM procedures including courtroom restrictions	**CACM plus/complete**	**Notes**
Rule 11	**Rule 11**	
(c) Plea Agreement Procedure.	**(c) Plea Agreement Procedure.**	
(2) *Disclosing and Filing a Plea Agreement.*	**(2) *Disclosing a Plea Agreement.***	CACM guidance mandates bench conferences for prosecutor to state whether or not the defendant cooperated, but does not regulate the discussion of cooperation in open court during plea proceeding by anyone.
(A) Disclosure In Open Court. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.	**(A) In Open Court.** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.	
(B) Bench Conference Required. [In every case,] The disclosure must include a bench conference at which the government must disclose any agreement by the defendant to cooperate with the government or must state that there is no such agreement.	**(B) Bench Conference Required.** [In every case,] The disclosure must include a bench conference. Any discussion of or reference to the defendant's cooperation or lack of cooperation with the government must take place at this conference and not in open court.	CACM guidance literally would allow the parties to discuss or refer to the defendant's cooperation or lack of cooperation in open court, so long as they disclosed the agreement or made the required statement at the bench.

Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

Full CACM procedures including courtroom restrictions	**CACM plus/complete**	**Notes**
Rule 11(c)	**Rule 11(c)**	
(C) Filing the Agreement. The plea agreement must be filed [with the court/in the record]. The agreement must include a public portion and a sealed supplement that contains any discussion of or reference to the defendant's cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until the court orders otherwise. * * *	**(C) Filing the Agreement.** The plea agreement must be filed [with the court/in the record]. The agreement must include a public portion and a sealed supplement that contains any discussion of or reference to the defendant's cooperation with the government or states that there was no cooperation. The supplement must remain under seal indefinitely until otherwise ordered by the court. **(D) Filing Submissions Concerning the Agreement**. If a written submission concerning the plea agreement is filed, the submission must include a public part and a sealed supplement. The supplement must contain any discussion of or references to the defendant's cooperation or lack of cooperation with the government. The supplement must remain under seal indefinitely until otherwise ordered by the court. * * *	Subcommittee discussion confirmed that parties do file memoranda in connection with plea proceedings that may discuss cooperation or lack of cooperation. Such memoranda are not addressed by CACM guidance. This shows what a rule might look like if the same "sealed supplement" approach were followed for plea memoranda as well as the agreement itself.

Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

Full CACM Procedures: sealed supplements & courtroom restrictions	**CACM plus/complete**	**Notes**
Rule 11	**Rule 11**	
(g) Recording the Proceedings.	**(g) Recording the Proceedings.**	
(1) *In General.* The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. **(2) *Inquiries and Advice*.** If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c). **(3) *Bench Conference*.** If the bench conference required by Rule 11(c)(2) is transcribed, the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.	**(1) *In General.*** The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. **(2) *Inquiries and Advice*.** If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c). **(3) *Bench Conference*.** If filed, any recording or transcript of a bench conference required by Rule 11(c)(2) must be filed under seal and must remain under seal indefinitely until the court orders otherwise.	The rule contemplates a recording. CACM's guidance referenced transcripts only. If it is possible that a recording could be filed in addition to or instead of a transcript, the words "recording or" may need to be included.

Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

Full CACM procedures including courtroom restrictions	CACM plus/complete	Notes
Rule 32	**Rule 32**	
(g) Submitting the Report; Written Memoranda. **(1) Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any un-resolved objections, the grounds for those objections, and the probation officer's comments on them. **(2) Memoranda.** If a written sentencing memorandum is filed with the court, it must have a public part and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The sealed supplement must contain: (A) any discussion of or reference to the defendant's cooperation including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1] or (B) a statement that there has been no cooperation. * * *	**(g) Submitting the Report; Written Memoranda.** **(1) Report.** At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any un-resolved objections, the grounds for those objections, and the probation officer's comments on them. **(2) Memoranda.** If a written sentencing memorandum is filed with the court, it must have a public part and a sealed supplement. The supplement must remain under seal indefinitely until the court orders otherwise. The sealed supplement must contain: (A) any discussion of or reference to the defendant's cooperation including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1] or (B) a statement that there has been no cooperation. **(3) *Filing Presentence Report.*** If filed, the presentence report and appended documents must be filed under seal. The presentence report must remain under seal indefinitely until the court orders otherwise. OR, as alternative **(3) *No Filing of Presentence Report.*** The presentence report [and appended documents] must be submitted directly to the sentencing judge, counsel of record for the government, and counsel of record for the [individual] defendant in the underlying prosecution, and must not be filed with the court.	CACM's Guidance does not mandate filing or sealing of the presentence report Two options creating new subdivision (g)(3) are shown to codify the current practice in every jurisdiction of allowing no public access to PSRs. The first requires sealing, and the second that the PSR not be filed. If the Subcommittee prefers the no filing approach to PSRs, it might be accomplished by CACM guidance rather than a Rules change.

Full CACM procedures including courtroom	CACM plus/complete	Notes

Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

restrictions		
Rule 32	**Rule 32**	
(i) Sentencing … ***(4) Opportunity to Speak*** … *(C) Proceedings in Camera or at the Bench.* **(i) In General**. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4). **(ii) Bench Conference Required. [**In every case,] Sentencing must include a conference at the bench for discussion of the defendant's cooperation or lack of cooperation with the government. The transcript of this conference must be filed as a sealed addendum to the sentencing transcript. The addendum must remain under seal indefinitely until otherwise ordered by the court.	**(i) Sentencing** … ***(4) Opportunity to Speak*** … *(C) Proceedings in Camera or at the Bench.* **(i) In General**. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4). **(ii) Bench Conference Required.** In every case, sentencing must include a conference [in camera or] at the bench. Any discussion of or reference to the defendant's cooperation or lack of cooperation with the government must take place at this conference and not in open court. The [recording or] transcript of this conference must be filed as a sealed addendum to the sentencing transcript. The addendum must remain under seal indefinitely until the court orders otherwise.	CACM's Guidance requires that every sentencing include a bench conference at which the parties may discuss cooperation or lack of cooperation, but does not regulate any mention of cooperation or lack of cooperation in open court during sentencing by anyone. Although the intent to bar any public mention of this subject is implicit in CACM's Guidance, the Guidance text taken literally would allow the parties to discuss or refer to the defendant's cooperation or lack of cooperation in open court, so long as they also discuss it at the bench. Because one or more participants in a sentencing hearing may want references to cooperation (or lack of it) to be on the record, it may be necessary to be more explicit. Subsection (ii) illustrates one option for more clarity.

Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

Full CACM procedures including courtroom restrictions	CACM plus/Complete	Notes
Rule 32	**Rule 32**	
	(l) Written References to Cooperation. **(1) By a Party or Victim.** If a party or victim files a written submission regarding sentencing [with the court/ in the record], it must include a public portion and a sealed supplement. The sealed supplement must contain any discussion of or references to the defendant's cooperation or lack of cooperation with the government [including any references to a government motion under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1]. "Submission" includes sentencing memoranda, objections under Rule 32(f), and evidence submitted under Rule 32(i)(2). The supplement must remain under seal indefinitely until the court orders otherwise. **(2) By the Judge.** If a written notice under Rule 32(h) or summary under Rule 32(i)(B) is filed [with the court/ in the record] it must include a public portion and a sealed supplement. The sealed supplement must contain any discussion of or references to the defendant's cooperation or lack of cooperation with the government. The supplement must remain under seal indefinitely until the court orders otherwise .	CACM's Guidance provides for sealed supplements to sentencing memos. But a number of other items sometimes filed in connection with sentencing may mention cooperation or lack of it. These include: · objections to the PSR · evidence submitted by victims and parties for sentencing · notice by the court under Rule 32(h), and · summaries under Rule 32(i)(B). CACM's Guidance does not address any of these items. Column 2 shows what a rule might look like if the same "sealed supplement" approach were followed for all of these items. Also, Column 2 places these changes in a new subsection for Rule 32, rather than an amendment subdividing existing Rule 32(g) or (i).

Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

Full CACM procedures including courtroom restrictions	CACM plus/Complete	Notes
Rule 35. Correcting or Reducing a Sentence.	**Rule 35. Correcting or Reducing a Sentence.**	
(b) Reducing a Sentence for Substantial Assistance. *** * * * *** ***(3) Sealing.*** A motion under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise. ***~~(3)~~ (4) Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance. ***~~(4)~~ (5) Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.	**(b) Reducing a Sentence for Substantial Assistance.** *** * * * *** ***(3) Sealing.*** A motion, an order, and related documents under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise. ***~~(3)~~ (4) Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance. ***~~(4)~~ (5) Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.	CACM's Guidance does not require that Rule 35 *orders* or *memoranda* be filed under seal, nor does it address the obvious import of a sealed entry after sentencing followed by an order reducing sentence. The CACMplus /Complete version in Column 2 provides for sealing of orders and related documents.

Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

Rule 47 **Full CACM procedures including courtroom restrictions**	Rule 47 **CACM plus/complete**	Rule 47 **Notes**
(b) Form and Content of a Motion. A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit. ***(no change)***	**(b) Form and Content of a Motion.** ***(1) In Writing.*** A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. ***(2) Contents and Support.*** A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit. ***(3) Motions for Sentence Reduction.*** Any motion for a sentence reduction under [Rule 35,] 18 U.S.C. §3553(e), [or U.S.S.G. §5K1.1],[1] together with supporting documents, must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.	CACM's Guidance makes no provision for sealing § 3553(e) and §5K motions. The CACM plus/complete version in Column 2 amends rule 47 to require the government to file such motions under seal. Rule 35 is added in brackets here as an option for replacing or supplementing the amendment to that Rule requiring the motion to be filed under seal.

[1] There is no statutory requirement for a "motion" expressing the government's support for a substantial assistance departure under § 5K1.1. Thus the Sentencing Commission may have the authority to provide that (1) no "motion" is required, and (2) the government must request consideration of a substantial assistance departure by other means, such as a letter to the court, that would not be filed. Action by the Commission would not, however, affect requests for substantial assistance for departures under 18 U.S.C. §3553(e), which requires a government "motion."

APPENDIX C

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APPENDIX C

Rule 49.2. Limitations on Remote Access to Electronic Files.

(a) *In General.* Unless the court orders [or these rules provide] otherwise, access to an electronic file is authorized only as provided in (b), (c), and (d).

(b) *By the Parties and Their Attorneys.* A party and the party's attorney may have remote electronic access to any part of the case file that is not under seal or other restriction that bars access by that party.

(c) *By Others.* Any other person may have the following electronic access to a document that is not under seal or other restriction barring the person's access:

(1) [electronic] access to any part of the case file at the courthouse, after providing the clerk with identification [required by local court rule] [consistent with any standards established by the Judicial Conference of the United States], and

(2) remote [electronic] access only to:

(i) the docket maintained by the court;

(ii) the indictment or information; and

(iii) an opinion, order, judgment, or other disposition of the court.

(d) *By an Attorney in Another Case.* An attorney in another criminal case in the same district [circuit] may, without a court order, have remote electronic access to a document sealed under [Rules 11, 32, or 35] if the attorney:

(1) is a registered user of the court's electronic filing system;

(2) has filed a notice of appearance the other case and seeks to use the document in that case; and

(3) files [under seal] in the case from which the document is sought a signed certificate that:

(i) states that the attorney has a case-related need to review the requested document; and

(ii) gives the name and docket number of the case in which the attorney will use it.

TAB 2C

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MEMO TO: Cooperators Subcommittee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Limitation on Remote Electronic Access and Next Steps

DATE: July 11, 2017 (revised Sept. 27, 2017)

This memorandum provides information needed for the Subcommittee's upcoming phone conference on Tuesday, July 18, 2017, at 1 pm Eastern Time. The Subcommittee has until the end of September to complete its task of forwarding to the Committee rules changes that would implement the CACM recommendations and any other options, along with its own recommendations. The July 18th phone conference will be devoted primarily to a discussion of an option limiting remote access. We understand that the Task Force is not inclined to pursue rules changes based on the PSR approach, and it has asked the Rules Committee to focus on the CACM changes and limits on remote access. The Subcommittee will need at least one additional phone conference in August or early September to decide what it will recommend to the Committee, i.e., amendments implementing the CACM recommendations, amendments limiting remote access, or reliance on administrative measures but no rules changes. The last portion of this memo includes a chart that shows each of CACM's recommendations and the options.

I. INTRODUCTION TO THE REMOTE ACCESS RULE

The text of a possible rule to limit remote access is attached as the last page of this memorandum. It takes a fundamentally different approach than the CACM/sealing approach, limiting only remote (online PACER and court website) access instead of all access. As noted in earlier memoranda, the proposal is premised on two ideas: that the incidence of threats and harm to cooperators increased significantly at least in part because of ubiquitous remote access to the court records that disclose cooperation, and that there is substantial value in allowing at least the traditional level of public access to federal judicial records in criminal cases.

The draft is modeled on Civil Rule 5.2(c), which presently limits remote access to immigration and social security cases, as well as Rule 49.1(c) (which incorporates Civil Rule 5.2(c) to limit remote access to any filing that relates to the petitioner's immigration rights in an action under 28 U.S.C. § 2241). Using Civil Rule 5.2 as a model not only furthers consistency in style and terminology, it helps to ensure that court interpretations of specific terms apply to both rules, and that any future court challenges to one rule can inform challenges to the other.

The draft places the new restrictions on criminal cases in 49.1(c). [1] This placement emphasizes the similarity between Civil Rule 5.2 and the new rule, allows all limitations on remote access to appear together, and avoids the relettering necessary if the new provision was added as a separate section.

Civil Rule 5.2 and the draft of Criminal Rule 49.1(c) attached are both premised on the assumption that at least some of those who now access sensitive information using PACER would not attempt to procure that information in person at the courthouse. The major differences between this draft and Civil Rule 5.2 are: 1) remote access is limited to [pro se defendants and] attorneys only, with represented defendants having only that access provided to the public; 2) the deterrent effect of requiring a trip to the courthouse is enhanced with a requirement of showing identification; 3) language expressly denying access to files that are sealed or otherwise restricted has been added; and 4) in addition to the docket and the court's orders, those seeking information at the courthouse may access the indictment or information. These differences and several other issues are addressed below.

II. ISSUES

A. Scope of the rule: Electronic files, paper files, requests for mailed copies.

The proposed rule, like Civil Rule 5.2, limits access to electronic files only. It does not on its face regulate access to hard copies of papers that may be retained in case files at the Clerk's office. [2] If a filing is retained in paper *and* electronically filed, then arguably it falls within the rule. If a filing is retained in paper form *only* at the courthouse, it must be filed under seal or other restriction to block access by a person requesting a copy of that paper. Expanding the rule to block access to hard copies would transform the rule from one limiting access to electronic files into a de facto sealing rule, well beyond the scope of Civil Rule 5.2.

Civil Rule 5.2 does not state expressly whether "access to an electronic file" includes a person's request to the clerk's office to mail to that person a hard copy of a file that the court has stored electronically. Some concerns have been raised about defendants requesting copies of their plea and sentencing documents in this way. If the phrase "access to an electronic file" lifted from Civil Rule 5.2 does *not* include this type of access, then asking for a copy to be mailed (or even asking for an electronic file to be printed and handed over) would be an easy end-run around the rule's restrictions. If the Subcommittee believes additional language is warranted to eliminate this possible interpretation, we can work on that. [We did not find any case law addressing this issue under Civil Rule 5.2] On the other hand, we are not sure whether the response to defendants' letters requesting documents in their files should be regulated by the Federal Rules of Criminal Procedure. We believe some courts are developing internal procedures for dealing with these requests, and this may be something the Task Force is considering or should consider.

B. Access by represented defendants.

Civil Rule 5.2 gives remote access to both a party and that party's attorney, but this draft provides access only to the attorney when the defendant is represented. A represented defendant has remote access to only those parts of his case that the public can see under the

draft rule: the docket, the charge, and the court's orders.

Limiting full remote access to attorneys only is intended to reduce the opportunity for others to pressure a defendant into procuring a copy as proof of non-cooperation. If defendants have remote access, others could pressure them to produce such documents or to share their login information. Barring access to the defendant would allow the defendant to say, "I don't have a copy and can't get one."

Some may be concerned about this departure from Civil Rule 5.2, which allows full remote access to parties. However, the reasons for limiting remote access are different in the two contexts. Rule 5.2 was designed to protect confidential information from non-parties, [3] there was no reason to limit access by parties themselves. In this context, there is such a reason. Also, filings in criminal cases are served on a defendant's attorney, not the defendant,[4] so a represented defendant already relies on his attorney for documents. Indeed, we understand that defense counsel may be ethically required to provide clients with a copy of everything they file unless there is a court order limiting that obligation. (And in Social Security cases, it is likely that many of the claimants are proceeding pro se.) The proposed rule also guarantees every defendant at least as much access to his case files as he had prior to the adoption of remote electronic access – it provides that a represented defendant, like anyone else, may come to the courthouse and get a copy of anything in the case after showing identification.

The draft rule says nothing about what defense attorneys may do with files accessed remotely. We are attempting to learn more about how defense attorneys customarily deal with filings, and whether they provide paper copies to their clients. If attorneys consistently refused to provide to their clients electronic or paper copies of documents that might prove or disprove cooperation, the restriction on remote access would be more effective protection against use of these files by those interested in finding out whether the defendant is a cooperator. If attorneys instead provide copies of such documents to their clients (as they may be ethically obligated to do), then limiting remote access to attorneys will not keep these documents from defendants themselves, who could in turn share them with others denied PACER access. Even perfect enforcement of any new BOP regulation barring possession of such papers by defendants in custody would not address this if, prior to entering BOP custody, the defendant shares a document with another who can later relate the information by phone or other means to those interested in finding out whether the defendant is a cooperator.

C. Access by pro se defendants.

Unlike represented defendants, pro se defendants require access to their case files. The issue here is whether they should have *remote* access to electronic files.

It is important when considering this issue to recognize the difference between e-filing privileges and remote electronic access. Rule 49 prohibits pro se defendants from using CM/ECF so they can't e-file or e-serve or receive service through that system. Remote access is different; PACER can be used by anyone with a credit card, and allows a user to view and download a copy of what is already filed. At least some of the reasons for

declining to extend to pro se defendants e-filing privileges – such as the concern they could mislabel a document, e-file in others' cases, miss NEFs – do not have anything to do with accessing documents on PACER. A pro se defendant who cannot e-file may very well wish to use PACER to obtain documents, as PACER often allows access more quickly and at less cost than requesting documents by mail or in person at the courthouse.

If pro se defendants were denied remote access, they would still receive paper service when documents were first filed. To seek additional copies they would retain access through mail request and in person at the courthouse, avenues that have historically been constitutionally adequate. On the other hand, a rule that only those defendants who exercise the constitutional right to defend themselves must bear the extra costs and delays associated with obtaining documents in person or by mail may at the very least generate litigation. Claims could include arguments that the restriction violates equal protection, or unduly burdens the right to self-representation. If the subcommittee is concerned about this, it may prefer to provide remote access to pro se defendants as well, so that option is presented in brackets.

Presumably the PACER system can be modified or configured in ways that allow access to pro se defendants but not represented defendants. If not, that should be considered as well.

D. Which cases?

Between the "Unless a court orders otherwise," and "access to …" clauses in Civil Rule 5.2, there is a phrase that identifies the type of action regulated. The draft revisions to Rule 49.1 omit this from the same location, and place the phrase "criminal case" in a new subheading instead.

Several committee members have suggested that a rule limiting access should apply only to that subset of cases in which threats and harm to cooperators are most prevalent. Reasonable attempts to narrowly tailor restrictions on press and public access would respond to any constitutional challenges, and might reduce implementation costs. Approaches to narrowing include: 1) excluding cases in which threat or harm to cooperators is not a problem; 2) identifying and focusing on cases in which this is a particular problem, or 3) some combination of the two. Some possible bases for limitations are:

- *by geography.* The Federal Judicial Center study found that the problem is pervasive, so this is not likely to be a useful limitation.
- *by crime type.* Committee members have suggested that white collar offenses do not generate this problem. But we are not sure whether it possible to identify white collar offenses, for example, that would not also be crimes committed by organized crime participants.
- *by security level of institution.* Although the BOP Task Force Subcommittee concluded that threats/harm to cooperators is not a problem in lower security institutions, prisoners are reclassified and moved around. Moreover, initial intake into BOP may involve temporary incarceration in maximum or medium security institutions for classification, so even prisoners who are moved to lower security institutions may be

subjected to threats. Any attempt to narrow the restrictions on this basis might need to be coordinated with administrative changes by BOP to be effective.

- *Felony, misdemeanor*. There may be less need to protect cooperators who are convicted of misdemeanor offenses. As far as we are aware, this question has not been examined in the research. If there is no basis to be concerned about misdemeanor defendants, then their cases should not be swept into any restrictions designed for serious offenses.

E. Adding "only" to first sentence.

Although an earlier draft included the word "only" in the first sentence, it would be a change from the language of Civil Rule 5.2. We believe the change is not needed or justifiable. The word "only" appears later in the draft rule, on line 12 "remote access *only* to the following":" That phrase conveys the same limitation as the phrase in Civil Rule 5.2 ("but not any other part of the case file"), but it is moved *before* the list of items accessible. We moved it from where it appears in Civil Rule 5.2, because there it appears as a dangling phrase, which the style guide for the Federal Rules does not allow.

F. Not under seal or otherwise restricted.

There was some concern expressed that the terms "case file" or "full record" in Rule 5.2 might include sealed documents. To address this concern, and make it crystal clear that nothing in the rule permits either remote or in courthouse access to documents that are sealed, language has been added excepting files "under seal or other restriction …" The reason we included the "other restriction" phrase requires some explanation.

The CM/ECF system allows the filer or clerk to assign one of several different access levels to a given document. Jim Hatten, our Clerk liaison informs us these levels are:

- Non-public users and public terminals,
- Non-public,
- Ex-parte,
- Private (court user only),
- Sealed, and
- Applicable Party.

Local rules and custom may modify or regulate the use of these various levels. This means that some documents that are part of the case file but not "sealed" – including those filed as "Non- public," "Ex-parte," or "Private," – are also be barred from public access. Some local rules added the phrase "or otherwise restricted" when referring to documents under seal[5] and we adapted that idea for this draft.

In some districts, a filing may be sealed only partially and remain available to the parties in the case and their attorneys, but some local rules specifically define sealing as barring access to anyone but court personnel. Lines 6 and 7 specify that an attorney for the government or the defendant has access unless the sealing or restriction is one that denies

access to that party.

Arguably, none of this language about sealing or restrictions is necessary if sealing and restrictions are already included in the clause at the beginning of the rule, "Unless the court orders otherwise." We thought that clause would include court ordered sealing on an individual case or document basis, but it is not clear that it would cover local court practices of filing presentence reports as "private" for example, or restriction levels chosen by the party who files a document. Another concern is whether adopting different terminology for criminal cases would create unwanted negative inferences when courts interpret Civil Rule 5.2.

G. At the courthouse; public terminal

Civil Rule 5.2 does not specify where in the courthouse (at the Clerk's Office) or by what manner (through the public terminal) electronic files may be accessed, so this draft doesn't either. Many local rules implementing Civil Rule 5.2 include the phrase "at the public terminals at the courthouse" or reference the Clerk's Office, but we thought that particularly with the requirement that access is authorized only after providing identification to the clerk, the rule is unlikely to generate arguments that the rule guarantees the right to use PACER on one's own device while situated somewhere in the courthouse, instead of using the public terminal to access the electronic file. Our research has revealed no civil cases in which such an argument has been made.

H. Documents subject to public remote access.

An earlier draft of this rule was identical to Civil Rule 5.2 in that it limited remote access by the public to the docket and court orders in the case only. It was suggested that we add the initial indictment or information, but we were unclear why only the initial and not later charging documents should be available. Should all indictments and information be available to the public online? Are there other documents that should be routinely accessible to the public online?

I. "Public" docket

Civil Rule 5.2 uses the phase "docket maintained by the court," which we have adopted. We considered and rejected a suggestion to add the word "public" before docket for three reasons.

First, it seems to emphasize the idea that there are non-public dockets. Second, the CM/ECF working group is considering options of formatting docket sheets that may affect this part of the rule. Finally, by placing the under seal/other restriction phrase where it modifies all three items – docket, charge, and orders – the draft already bars access to sealed or restricted dockets. Depending on the working group's recommendation, it is possible that we will need to revisit this language.

J. Identification required – what type.

The discussion of a remote access rule so far has included a requirement that a person seeking documents in criminal cases not only come to the courthouse, as under Civil Rule 5.2, but also show a picture identification. The assumption is that this would prompt some of those who would otherwise procure information from PACER to give up seeking that information. The Western District of Texas, El Paso Division has implemented this system recently, and initial reports are that it has been working well. However, court personnel noted that there had been few requests to view information.

There are at least three issues to think about regarding this requirement. First, the technological evolution of identification techniques might warrant language that could accommodate the replacement of photo identification by fingerprints, retinal scans, facial recognition, and other alternative techniques. Second, the type of identification should be something that anyone interested in reviewing records would possess, to avoid undue or unintended restrictions on access. Third, and related, the identification requirement should be one that will withstand constitutional challenge. To address the first two issues, instead of prescribing a specific requirement for every court, the alternative in brackets allows for a local rule to specify the identification required.

On the constitutionality of conditioning access to court records upon showing identification, we are aware of no cases examining this issue, which is not surprising since the only court that does impose this requirement only recently put this system in place. [6] Based on the limited research we have been able to complete, several federal and state decisions have upheld similar restrictions on entry into courtrooms for public proceedings when challenged as a violation of the defendant's Sixth Amendment right to a public trial. However these decisions found the restrictions constitutional after using an analysis the Supreme Court has yet to address, [7] applying to these "partial closures" a "relaxed" test instead of the more exacting test usually applied to courtroom closures under *Waller v. Georgia,* 467 U.S. 39 (1984). [8] Most also noted a case-specific reason to be concerned about security. [9] Additional research on this particular issue would be prudent if the Subcommittee decides to include this feature in the proposed rule.

K. Retaining records of identification.

The deterrent and enforcement function of the identification requirement depends on retention of the identification information along with information about which case was accessed on what date. Nothing in the rule details how that information is to be retained. If this system were adopted, CACM could develop recommendations for implementation.

L. Expanding remote access to other defense attorneys.

Defense counsel have expressed concern that losing access to plea agreements and sentencing information in other defendants' cases would handicap the representation of their clients. A standing order limiting access to plea agreements in the Eastern District of North Carolina speaks directly to this issue. [10] A possible version tailored to our rule appears below, and could be inserted as a new subsection (C):

(C) An attorney who has filed a notice of appearance in another criminal case in [the same District/Circuit], may have [remote electronic access] [electronic access at the courthouse] to [any document sealed under Rule_____] for use in that other criminal case, without necessity of a court order, if the attorney files [under seal] in the case from which the document is sought a signed certification stating that

(i) there is a case-related need to review the requested document,

(ii) the name and number of the case in which the attorney will use the document requested; and

(iii) [(iii) that the attorney will not reveal the document or its contents, other than as part of a sealed filing in that case.]

Alternatively, the provision could specify what needs to go in a motion for court order allowing remote electronic access, but that would mean that every time a defense attorney seeks this information to defend her client she must first obtain a court order.

M. Special access for media representatives.

Some members concerned about restricting remote access to the press suggested that the rule be tailored to limit remote access for non-media public, and retain access for members of the press. After researching efforts to distinguish between these two groups of people, we recommend that such a distinction not be attempted. There are statutes, rules, and regulations that contain definitions of the press that could be adapted to this rule. [11] However, preliminary research reveals that rules regarding access to court records do not now distinguish between the press and the public, and we do not advise this approach for several reasons: 1) the scope and definition of the media or press vary as technology changes, 2) the distinction could be burdensome to administer if qualified PACER users would have to secure permission in advance, and the PACER my require modification to accommodate the new distinction; 3) members of the press have access at courthouse anyway like the public, and 4) the press is not bound by enforceable rules of professional responsibility like attorneys; indeed restrictions on what the media can do with information they acquire are largely prohibited under the First Amendment.

N. E-government and first amendment concerns.

One reason to borrow language from Civil Rule 5.2 is added assurance that the criminal rule would comply with the E-Government Act and the First Amendment if Civil Rule 5.2 does. There is no case law yet addressing a challenge to Civil Rule 5.2 under either the Act or the First Amendment.

As discussed in an earlier memorandum prepared for the Committee's spring meeting, Section 205(c) of the E-Government Act imposes a general requirement that courts "make any document that is filed electronically publicly available online." Section 205(c) provides,

however, that "[d]ocuments that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online," Id., § 205(c)(3), and that rules may be enacted under the Rules Enabling Act procedures "to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically." Id., § 205(c)(3)(A)(i). Any rules promulgated under this authority must "take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security." Id., § 205(c)(3)(iii). Under the E-Government Act, the Rules Enabling Act process is the mechanism for harmonizing the Congressional goal of making court documents available online with the need to protect "privacy and security concerns." [12]

As to a potential First Amendment challenge to the proposed restriction on remote access, there is no case law on point. Supporting the constitutionality of the proposal is the absence of challenges to Civil Rule 5.2, and the argument from the spring meeting memorandum that (except for the identification requirement), the proposal allows access to all criminal case materials at the courthouse, "giv[ing] the press and the public the same access they had from the time of the founding until the beginning of the 21st Century."

O. Costs of implementation.

Arguments for and against the various options for addressing the cooperator issue will invariably include concerns about the costs of implementation. Every option has its own costs. This proposal requires additional time and resources to be spent by Clerk's Offices checking and recording the identification of those who come to request documents at the courthouse. It may require the provision of additional terminals and staff. It requires reconfiguring remote access rules, and other changes to PACER to inform users of the new restrictions. It also requires districts and individual judges to adapt any local rules and orders that conflict with the new restrictions.

III. NEXT STEPS

After its review of the proposed text of Rule 49.1, the Subcommittee will need to turn to its recommendations regarding the alternatives. These recommendations will be influenced by the options developed by the various Task Force working groups.

The chart below provides a brief description of each of CACM's recommendations, noting which would require an amendment to the Rules of Criminal Procedure and which can be dealt with by other means. In brief, we understand that the Task Force will recommend that BOP take a variety of administrative measures that will reduce the availability in prison of court records showing cooperation, and may reduce pressure on inmates to provide such information. Additionally, the CM/ECF working group is still attempting to develop options that would make it impossible for remote users to see documents showing cooperation or red flags indicating such documents exist. We expect Judge Kaplan and Judge St. Eve will provide a further update in the call.

CACM Interim Guidance – Rules Options

CACM Interim Guidance	*Comments*
1. Plea agreements - sealed supplement in every case	PSR approach has little support on Task Force; other alternatives to be considered: • Seal all plea agreements • Seal all plea agreements in some classes of cases • Rely exclusively on limited remote access and BOP changes
2. Sentencing memoranda - sealed supplements in every case	• Ditto
3. Plea transcripts - sealed supplements in every case	• Ditto or • Rely on possible change of CACM policy to eliminate current requirement for filing of transcripts.
4. Sentencing transcripts	• Ditto
5. Seal all Rule 35 motions	Alternatives: • Seal only on court order in individual cases
6. PSRs and other sealed documents requested by inmates - sent only to wardens for review by requesting inmate in private area. No retention of copies.	Not a rules issue. Task Force addressing with BOP.
7. Clerks asked for copies of docket entries to provide statement describing sealed supplement policy	Not a rules issue, but proposal assumes sealed supplement approach which the Committee may not recommend.
8. Indefinite sealing of sealed documents	If broad sealing rules are adopted, consider sunset provision on sealing.
9. *Brady-Giglio* obligations unaffected	Not rules issue; no objection.
10. Opinions to avoid identifying cooperators where possible	Task Force will address.

[1] As discussed at pages 30-32 of the Reporters' memorandum of August 24, 2017, later drafts place the provisions on remote access in new Rule 49.2

[2] We understand from our clerk of court liaison, Jim Hatten, that even when documents are filed in paper they are converted to PDFs and filed electronically. Very few paper files are retained, at least in his district.

[3] As the Committee Note to Rule 5.2 explains:

> Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

[4] *See, e.g.*, proposed Rule 49(a)(2), which provides "when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party . . . ."

[5] The civil and criminal rules use "under seal" and "sealed," but "under seal" is more common. Local rules also have the same variation, sometimes using "sealed" sometimes "under seal." We also considered using "unsealed" as an adjective, but to avoid the suggestion that it must have been something that had been sealed previously, we used the present tense "is under seal." The Criminal Rules do not presently use the word "unsealed" as an adjective, although some local rules do. This may be a style choice.

[6] James Hatten, our clerk of court liaison, informed the reporters on March 2 that clerks from 75 districts responded to a CACM survey, and none reported collecting information about the identity of the persons who used court terminals.

[7] *See* Kristin Saetveit, *Close Calls: Defining Courtroom Closures Under the Sixth Amendment*, 68 STAN. L. REV. 897 (2016) (collecting authority).

[8] *United States v. DeLuca*, 137 F.3d 24, 32–35 (1st Cir.1998) (holding that requiring public spectators to present identification before entering the courtroom did not violate the Sixth Amendment right to public trial, where defendants were associated with past efforts to obstruct, and where members of the public actually attended); *United States v. Smith*, 426 F.3d 567, 570-76 (2d Cir. 2005) (upholding policy implemented after September 11 to protect federal buildings and courthouses that requires Marshals to check photo identifications of all individuals seeking access to federal buildings when the national alert level is yellow or orange, stating that government need not produce compelling record evidence that the goal of preventing a terrorist attack is advanced by requiring individuals to show photo identification, and that the district court's "common sense" conclusion that "[s]omeone who is forced to identify themselves is less likely to pose a threat than someone who is allowed to walk into the building without any at all" is sufficient); *Foti v. McHugh*, 247 Fed.Appx. 899, 901 (9th Cir.2007) (affirming dismissal of civil case, noting that government's identification policy did not violate appellants' constitutional rights because "[a]ppellants do not have a constitutional right to enter the federal building anonymously"); *United States v. Brazel*, 102 F.3d 1120 (11th Cir.1997) (when judge implemented

identification procedure based on observations that individuals had been coming into courtroom and fixing stares on witnesses and possibly government counsel, requirement that all persons entering the courtroom provide identification did not violate the Sixth Amendment right to a public trial; "[I]f the identification procedure can be said to have imposed a closure at all, it was 'partial,' as all persons wishing to enter the courtroom were allowed to do so provided they identified themselves as required, and the required identification was not especially arduous."); *see also United States v. Cruz*, 407 F.Supp.2d 451, 452 (W.D.N.Y.2006) (upholding practice of requiring photographic identification of all visitors to federal courthouse); *Haas v. Monier*, No. NH CA 08-169 MML, 2009 WL 1277740, at *7 (D.N.H. Apr. 24, 2009) (requiring Plaintiff to show photographic identification before allowing him to enter the courtroom did not violate his rights under the First Amendment); *Nguyen v. Runnels*, No. C03-0689CRB, 2003 WL 22939239, at *9 (N.D. Cal. Dec. 5, 2003) (finding not unreasonable state court decision rejecting sixth amendment challenge to requirement that before entering the courtroom, members of the public were required to state their names; to state their association with the parties and/or purpose for attending the trial; to present identification if available; and to submit to "wanding" with a hand-held metal detector and cursory search of their purses or bags); *Freitas v. Admin. Dir. of Courts*, 108 Haw. 31, 39–40, 116 P.3d 673, 681–82 (2005) (over dissent, finding that identification and sign-in procedure to enter license revocation proceeding was not unlawful when record included evidence that the costs associated with implementing other security procedures—i.e., metal detectors, x-ray machines, additional security guards—were not fiscally feasible, and that the identification procedure provided "a separate and beneficial deterrent effect" to any additional security procedures); *Williams v. State*, 690 N.E.2d 162 (Ind.1997) (holding, unlike the federal cases, that courtroom security procedures requiring that each person who was unknown to the officer at the door show identification and sign in did not amount to "exclusion" of anyone and, thus, did not implicate the right to public trial); *Commonwealth v. Maldonado*, 466 Mass. 742, 2 N.E.3d 145 (2014) (court's order requiring trial spectators to provide identification as condition of entry did not amount to full or even partial closure of courtroom in violation of defendant's right to public trial, in first-degree murder prosecution which, according to Commonwealth, involved a gang presence and threats to witnesses; once spectators identified themselves, they were allowed into the courtroom unless they were on the witness list).

[9] The exceptions included *Smith*, where the court found a terrorist threat to the courthouse justified the procedure even though there was no special showing of need in the defendant's particular case. *Smith*, 426 F.3d at 574 (noting that "findings must ordinarily support the 'particular courtroom closing ordered by the trial judge' . . . . Here, however, the fact that there is no evidence to suggest that special security measures were needed in Smith's "particular" trial for possession of a firearm by a convicted felon is beside the point. The security measures that caused a partial closure of Smith's trial were enacted to protect against a broad terrorist threat to the entire federal building. Smith does not contend anyone who was permitted to enter the federal building was restricted in any way from attending his trial."). *Freitas* also upheld a blanket rule for a specific type of proceeding

[10] A standing order in the EDNC provides:

> An attorney who has filed a Notice of Appearance in a criminal case in [the same district] files a signed Certification on a form provided by the Clerk stating that there is a case-related need to receive and review a copy of any document sealed by operation of this Standing Order, then the Clerk shall make that document available to the certifying attorney for use in the attorney's criminal case, without necessity of a court order. The Certification shall include the name and number of the case in which the attorney has filed a Notice of Appearance and it shall include a statement that there is a case-related need to receive and review a copy of a document sealed by operation of this Standing Order. The Clerk shall file the Certification in the file of the case from which the document is sought.

E.D.N.C Standing order on Sealing of Plea Agreements and Substantial Assistance Motions 09-SO-2 (08/28/2009); avail: https://www.nced.uscourts.gov/rules/so.aspx

[11] *See, e.g.*, U.S. Dist. Ct. R. S.D.N.Y., Berman-Media (to sit in press section of courtroom requires a NYPD press pass a demonstration that person is a press member through providing the name of the news organization that employs or retains person, a letter from the news organization attesting to such employment, and 6 of the individual's most recent news publications within the last 24 months); 5 U.S.C. § 552(a)(4)(A)(ii) (defining "representative of the news media" under fee provision as "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience"; also providing that "as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities," and a "freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by that entity;" listing as evidence of a solid basis a publication contract or the past publication record of the requester); 28 C.F.R. § 540.2(b) (regulating media access to BOP inmates: "person whose principal employment is to gather or report news for: a newspaper which qualifies as a general circulation newspaper in the community in which it is published, a news magazine which has a national circulation and is sold by newsstands and by mail subscription to the general public, a national or international news service, or a radio or television news program whose primary purpose is to report the news and of a station holding a [FCC] license"). On bloggers, see the collection of state authority at the National Conference of State Legislatures website: http://www.ncsl.org/legislators-staff/legislative-staff/information-officers/media-access-in-legislatures.aspx.

[12] The memo also stated:

> On one prior occasion referenced in its 2016 guidance, CACM concluded that denying remote access to plea agreements was not sufficient to protect cooperators. In 2008 the Department of Justice proposed "a uniform policy of removing all plea agreements from remote electronic public access through PACER." In response to a federal register notice CACM received 68 comments, which ran 4 to 1 against the DOJ proposal. In a report to the Judicial Conference, CACM stated that "Most of the comments favored retaining public access to plea agreements." CACM declined to adopt DOJ's recommendation, citing as one of its reasons "that the Department's proposal was inadequate in that it would prohibit public internet access to all plea agreements, including those that did not disclose cooperation, yet would simultaneously leave all plea agreements available to the public in the courthouses." Since the public comments favored "retaining public access to plea agreements," they would presumably not support sealing, which eliminates all access, both remote and at the courthouse, in all cases. On the other hand, at least at that time CACM concluded that denying remote access was not sufficient to protect cooperators.

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Rule 49.1. Privacy Protections for Filings Made with the Court.

* * * *

(c) ~~Immigration Cases.~~ Limitations on Remote Access to Electronic Files.

(1) ***Criminal Cases.*** Unless the court orders otherwise, access to an electronic file is authorized [only] as follows:

(A) ***Party attorneys [and pro se defendants].*** An attorney for the government or the defendant[, and a defendant not represented by an attorney,] may have remote electronic access to any part of the case file that is not under seal or other restriction that bars access by that party;

(B) ***Others.*** Any other person [including a defendant represented by an attorney] may have electronic access at the courthouse to any part of the case file that is not under seal or other restriction that bars access by the public after providing the clerk with government issued photo identification [ALT: identification required by local court rule] but may have remote electronic access only to the following, if not under seal or other restriction that bars access by the public:

(i) the docket maintained by the court,

(ii) the indictment or information, and

(iii) any opinion, order, judgment, or other disposition of the court,

(2) ***Immigration Cases.*** A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure Rule 5.2.

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Rule 5.2. Privacy Protection For Filings Made with the Court

(a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241,

(7) 2254, or 2255.

(c) LIMITATIONS ON REMOTE ACCESS TO ELECTRONIC FILES; SOCIALSECURITY APPEALS AND IMMIGRATION CASES. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) FILINGS MADE UNDER SEAL. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

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TAB 2D

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MEMO TO: **Cooperators Subcommittee**

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

RE: **Continuing Consideration of Draft Rule 49.2 Limiting Remote Electronic Access and Next Steps**

DATE: **September 5, 2017 (revised September 27, 2017)**

At the close of the conference call on August 31, the reporters were asked to revise proposed Rule 49.2 limiting remote access in order to address certain concerns noted below.

In the next call the Subcommittee will first address the various drafting issues, and then determine whether it favors recommending Rule 49.2 to the full Advisory Committee at the October meeting. In the first section below, we discuss the drafting issues. To aid the Subcommittee in addressing the second question—whether it recommends that Rule 49.2 be approved—in the second section below we reprint from our August 24 memo the discussion of the advantages and disadvantages of an approach that limits remote access.

I. Drafting Issues

The attached draft of Rule 49.2 includes our proposed resolution of the following issues raised by Subcommittee members during the last conference call:

Explicitly limiting Rule 49.2 to "criminal cases." There was some support for adding "in criminal cases" to the text of the rule, presumably because of concern that the limits might be applied in other cases, or that without this limiting language the public might misinterpret the proposed rule. Civil Rule 5.2(c) does spell out the types of cases (immigration and social security) to which its limits apply.

We recommend against adding "in criminal cases" to the text or title of Rule 49.2. First, because Federal Rule of Criminal Procedure 1(a) provides that "[t]hese rules govern the procedure in all criminal proceedings in the United States district courts," adding "in criminal cases" to Rule 49.2 is unnecessary.[1] Moreover, adding this phrase to Rule 49.2 might create a negative inference about other rules that lack this limiting language. For this reason, we believe the style consultants would strongly object to its inclusion.

Codefendant access. The Subcommittee wanted to ensure that the rule continued to allow access to case files by all codefendants (and their attorneys). We believe the prior draft of

[1] The Subcommittee has not considered whether procedures in § 2255 cases should be revised to protect cooperators. If the Subcommittee recommends Rule 49.2, it may wish to consider whether a similar approach should apply to § 2255 proceedings, which are generally governed by both the Rules of Civil and Criminal Procedure. *See* Rule 12 of the Rules Governing § 2255 Proceedings.

Rule 49.2 already allowed this, limiting access only when a document was filed under seal or with a restriction (*e.g.*, "ex parte" or "private") that would bar access by the particular party trying to see the document. Nevertheless, to make it clear that codefendants retain access, we have added three words in the new draft: "including a codefendant." It would be helpful if the Subcommittee could decide whether the additional language is needed, or whether a mention in the Committee Note would suffice to address this concern.

Hard copies. During the call, a concern was raised about people accessing documents at the courthouse terminal after showing their identification, and then asking the clerk's staff to print hard copies that they could take with them.

The current draft of Rule 49.2 does not prohibit making copies at the courthouse, and we recommend against adding such a prohibition for two reasons. First, existing technology would make it easy to defeat the purpose of such a rule. Individuals who view documents on the courthouse terminal can easily take pictures of the relevant pages with their phones. Second, even if the use of cell phones at the terminals were prohibited, barring copying raises concerns under the common law right of access and possibly the First Amendment. The common law right has historically encompassed not only the right to view, but also the right to copy information from public documents.[2]

Another related concern is that some of those denied remote electronic access to certain documents might write or call and request that the Clerk's office mail them hard copies of those documents, thus bypassing the requirements intended to promote practical obscurity: coming to the courthouse and presenting identification. We considered addressing this issue by adding language to the rule prohibiting the clerk from mailing or transmitting documents not available for remote pubic access. We decided against doing so for three reasons. First, this limitation would not fit easily within Rule 49.2, which governs electronic access, not mailing or sending copies. Second, a limitation of this nature may be unnecessary. Civil Rule 5.2(c), which limits

[2] The Supreme Court recognized the common law right to inspect and copy public records and documents in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). This common law right of access is often attributed to *Ex Parte Drawbaugh*, 2 App. D.C. 404 (1894) (stating that "any limitation of the right to a copy of a judicial record or paper . . . would probably be deemed repugnant to the genius of American institutions"), but dates back, in part, to the English common law right of access which originated in the fourteenth century. *See also In re Providence Journal Co.*, 293 F.3d 1, 17 (1st Cir. 2002) (citing *In re Application of Nat'l Broadcasting Co.*, 635 F.2d 945, 950 (2d Cir. 1980) ("Historically, the common-law right of access permitted the public to copy the contents of written documents."); *Gibson v. Peller*, 181 N.E.2d 376, 378 (1st Cir. 1962) ("There exists at common law the right to reproduce, copy and photograph public records as an incident to the common law right to inspect and use public records."); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981) (discussing the application of this common law right to videotape evidence, stating, "it is necessary to bear in mind that generally the right to copy has been considered to be correlative to the right to inspect"); *Moore v. Board of Chosen Freeholders*, 39 N.J. 26, 30, 186 A.2d 676, 678 (1962) (refusing to limit common law right of access to hand-copying, finding right includes the right to obtain photocopies of records).

For circuit precedent finding a First Amendment right to access and copy court records, *see* Meliah Thomas, Comment, *The First Amendment Right of Access to Docket Sheets,* 94 Cal. L. Rev. 1537, 1159 n.159 (2006) (compiling cases).

remote access to certain civil cases, does not address this issue, and we are unaware of any problems under that rule.[3] Third, a rule change would not be necessary. A prohibition on mailing or transmitting documents in criminal cases to persons who do not have remote access could be implemented administratively. In contrast, as we discuss below,[4] under the E-Government Act any restrictions on remote access to documents available at the courthouse must be promulgated through the Rules Enabling Act process.

The word "electronic" before access on lines 12, 15, and 19 has been highlighted to focus the Subcommittee's attention on whether it should be retained. Rule 5.2(c) refers to electronic access at the courthouse and remote electronic access in one long, somewhat awkward sentence.[5] Draft Rule 49.2 was restructured by the style consultants to include an introductory clause on lines 12–14 followed by the two subsections. If "electronic" is retained before "access" on lines 15 and 19, the question arises whether it is also needed on line 13. We suggest retaining it to ensure that this provision would not be interpreted more broadly than Rule 5.2(c). Also, we note that one of the major reasons to codify these changes in a rule—rather than an administrative policy—is to meet the requirements of the E-Government Act, which requires consideration through the Rules Enabling Act of any limit on remote electronic access. Being explicit about the limitation would help defend Rule 49.2 against challenges under the Act.

Attorney Access. During its latest deliberations, the Subcommittee decided that remote access to documents in all cases should be available to all registered attorneys without the requirement that they certify a need. The current draft accomplishes this, granting remote access to all registered attorneys, but importing language from (b) making it clear that this access does not include documents filed under seal or other restriction that bars access to that attorney.

Some on the Subcommittee call suggested that access be limited to criminal defense attorneys only, and we have added the limitation to criminal attorneys in brackets. If the rule were to provide remote access to all registered attorneys, it would provide much more access than required to respond to the Subcommittee's main concern: providing access criminal defense counsel need to represent their clients. Broadening remote access to all registered CM/ECF users might undercut the purpose of the proposed rule. Lawyers associated with most media organizations, interest groups, civil rights litigants, activist organizations, and political associations are likely to be registered users, and they may be interested in collecting and disseminating or reporting cooperator information. On the other hand, some registered users in civil cases may have a significant interest in remote access to documents in particular criminal

[3] As noted in our July memo to the Subcommittee: "We did not find any case law addressing this issue under Civil Rule 5.2." We also noted that some courts may be developing internal procedures for dealing with these requests.

[4] *See infra* text accompanying note 18.

[5] It reads:

> (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
>
> (A) the docket maintained by the court; and
>
> (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

cases. For example, civil litigation may be closely related to one or more criminal cases, and prohibiting remote access to a significant range of documents in such cases could significantly impinge on the effectiveness (or at least the efficiency of) the civil attorneys' representation in such cases.

If the Subcommittee decides to limit remote access only to attorneys who defend clients in criminal cases, it would be necessary to create a method for determining if a registered user has filed an appearance in a criminal case. We learned during the call that presently there is no method of distinguishing which registered attorneys have or have not ever entered an appearance in a criminal case.

There are at least two options to make this determination; each could be implemented administratively without any change in the rules. One method would be to require the attorney to file a certificate attesting to having a criminal client once before; for example, the attorney could be asked to enter the case number of one prior federal criminal case in which she appeared as counsel of record.[6] Another option might be to request a modification to the CM/ECF system that would facilitate identifying attorneys who have appeared in a criminal case in the past. (If the Subcommittee wishes to impose additional conditions, say, that the lawyer had to have appeared in a criminal case within the past ten years, or in a case in the same circuit, those conditions should be added to the text of the rule.)

II. Subcommittee Recommendation Regarding Rule 49.2~~1~~

Once the Subcommittee has resolved all of the drafting issues, its next task on the call will be to discuss and then vote on whether to recommend Rule 49.2. To assist in those deliberations, we reprint below from our August 24 memo the discussion of the advantages and disadvantages of the approach of limiting remote public access. (Note that we have not adjusted the footnote cross references to the remainder of our August 24 memo.)

Advantages.

If used as an *alternative* to routine sealing, bench conferences, or not filing, the primary advantage of restricting only remote access is that it preserves the press and public access to court records and proceedings in criminal cases that has traditionally been available. It also avoids many of the administrative burdens and costs of bench conferences, separate sealed supplements for plea agreements, sentencing and plea submissions, and plea and sentencing transcripts.

Civil Rule 5.2 provides a strong foundation and precedent for proposed Rule 49.2. Rule 5.2(c) restricts remote access in social security and immigration cases, and Rule 49.1(c) already

[6] One subcommittee member indicated that requiring an appearance in any federal criminal case would not work because of the need to research what is happening in other criminal cases before a client is indicted. But a one-prior-appearance requirement affects only the capacity to secure documents for an attorney's first criminal client; once the attorney has appeared in any criminal case, that attorney would be authorized from that moment on to access documents in all criminal cases.

makes those limitations applicable to § 2241 actions that relate to immigration rights.[7] Using Rule 5.2(c) as a model for Rule 49.2 has at least four benefits. First, although the limits on access in Rule 5.2(c) have not been challenged under the First Amendment, commentators have generally agreed that Rule 5.2(c) meets First Amendment and common law access standards.[8] Rule 49.2 should as well, since it allows access to all unsealed criminal case materials at the courthouse, providing the press and the public the same access they had from the founding through the Internet age.[9] Second, although the online access restrictions under Rule 5.2 have not been challenged under the E-Government Act, if Rule 5.2(c) is valid under the Act, similar restrictions in the Criminal Rules should be as well. Third, in approving Civil Rule 5.2, the federal courts and Congress have already endorsed the approach of limiting remote access to sensitive information in court files rather than sealing them. Finally, clerks' offices are familiar with how Civil Rule 5.2(c) works. Expanding this well-understood process to additional documents may generate fewer mistakes and less confusion than adopting an entirely new process.[10]

Requiring identification to access court documents is feasible.[11] The proposed text provides that a local rule will specify the identification required, or in the alternative, that the

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[7] *See, e.g.*, *Crossman v. Astrue*, 714 F. Supp. 2d 284, 290 (D. Conn. 2009) (Kravitz, D.J.) (discussing and defending Civil Rule 5.2—"In order to review any other part of the unsealed case file, non-parties have to physically go to the courthouse where it is stored. Thus, even if Mr. Pirro's clients choose not to redact their filings at all, they are still provided some degree of privacy through the relative inaccessibility of the case file.").

[8] Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 21–24 (2013) (noting "many cases support the concept of "practical obscurity," which usually involves off-line limitations to accessing information"); *see also* Morrison, *supra* note 85, at 956; Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 Fed. Cts. L. Rev. 135, 160 (2009).

[9] *See also* Winn, *supra* note 8, at 160 (stating that this "intermediate system of access, reflected in the new privacy rules, appears to comply with the constitutional and common-law right to public access," in that "it merely recreates certain aspects of the system of practical obscurity of the former paper based system—which, perforce, met constitutional muster").

[10] *See* Memorandum from Larry Baerman to the Task Force on the Protection of Cooperators Subcommittee on Docket Issues at 2 (Mar. 15, 2017) (on file with authors) (responses to Question 12) (District of Vermont: "it probably is most efficient to follow the Social Security Case protocol when handling certain documents. This method will save court time (i.e. the extra steps/processes required to protect certain information for certain documents could be reduced by making them not readily available) and would help protect against any possible mistakes which inadvertently disclose cooperating information."); *id.* (Southern District West Virginia: "this process would make it easier for the Court to comply without unnecessary sealing").

[11] Of districts responding to a CACM survey, one district, the district of Maryland, stated that it requests identification to access records at the clerk's office. Baerman, *supra* note 10 (responses to Question 13). Identification is also requested in the Western District of Texas. There, the process was described as follows: Those seeking access to documents at the terminal must note in a log the date, name, time requested, time viewing complete, and affiliation (*e.g.*, CJA, bonding company, media, family members, members of public). If it is an individual known to the clerk's office employee, generally there is no further identification information required. If it is a member of the public, clerk's office staff requests a picture identification. Once satisfied that the person is the person she claims to be in the log, no copy is

Judicial Conference will do so. This allows for adaptation as technology and identification methods change over time.

The present draft accommodates the needs of criminal defense attorneys, allowing them to have remote access to all unsealed/unrestricted materials in other cases in order to defend other clients if they provide a signed certification of need.[12]

Finally, several states have adopted this "practical obscurity" approach with their court filings to protect sensitive information,[13] and at least two federal courts have done so for plea and sentencing related materials.[14]

Disadvantages.

The risk that documents containing cooperation information will get into the wrong hands is higher with this option than with the sealing or no-file options, because documents concerning cooperation will remain available at the courthouse for those who show identification. The assumption that showing identification in person at the clerk's office would deter some would-be PACER users from seeking that information is untested.[15] Even with an identification requirement, anyone could show identification, access the information, then relay it to those inside the prison or post it on the internet. Conceivably, someone could start a business that looks up records at courthouses for a fee.[16] If a defendant persuades a family member that he needs a

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made of the id. The staff member then steps out to the public terminal and unlocks it with a password. Telephone Conversation with Mike Maiella, Operation Supervisor for the District Court for the Western District of Texas, July 10, 2017.

[12] This provision is based on a 2009 standing order in the Eastern District of North Carolina. *Standing Order 09-SO-2. In Re: Sealing of Plea Agreements and Substantial Assistance Motions* (E.D.N.C. 2009).

[13] Telephone conversation with Thomas Clarke, National Center for State Courts, August 2, 2017. *See also Okla. Supreme Court Bars Internet Access to Filed Documents*, 5 No. 8 ANDREWS PRIVACY LITIG. REP. 13 (April 2008); Lynn Sudebek, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 119–120 (2006) (recommending this approach).

[14] The Western District of Texas, El Paso Division has implemented this system recently, and initial reports are that it has been working well. However, court personnel noted that there had been few requests to view information. *See* Telephone Conversation with Mike Maiella, Operation Supervisor for the District Court for the Western District of Texas, July 10, 2017. The Northern District of Texas has also adopted this approach. Baerman, *supra* note 10, summary count of responses to Question 11 (noting "Texas Northern has issued a Special Order that places limits on public PACER access to documents that reveal cooperation."). At one time, the approach was advanced by the Department of Justice. *See* Caren Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 960 (2009) (describing earlier DOJ proposal for "tiered electronic access, restricting certain documents to that defendant's counsel and the government, making others available to a broader group of counsel, and releasing a third category to the general public.").

[15] In the Northern District of Texas where some documents are available only at the courthouse, but there is no identification requirement, the clerk's office staff reported to CACM that "We have had individuals specifically looking for cooperator information in the lobby in this district." Baerman, *supra* note 10.

[16] *See* Morrison, *supra* note 14, at 970 (discussing proposal to limit PACER access without any identification requirements: "nothing prevents a motivated individual from physically visiting the clerk's office and reviewing the court files of a suspected cooperator. Equally, a more enterprising version of

copy of his plea agreement to avoid attack, then showing identification may be unlikely to deter that family member from attempting to help.[17]

Like the other options, the restrictions on remote access may generate costly litigation initiated by those objecting to the restrictions. As noted above, we believe that limiting remote access while preserving in person access stands on much firmer constitutional ground than blanket sealing, and likely would be upheld under existing First Amendment and common law access precedent. Unique to the remote access limitations, however, would be challenges under the E-Government Act. Section 205 of that Act imposes a general requirement that courts "make any document that is filed electronically publicly available online."[18] Section 205(c) provides, however, that "[d]ocuments that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online." Also, under § 205(c)(3)(A)(i), rules may be enacted under the Rules Enabling Act procedures "to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically." Any rules promulgated under this authority must "take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security." § 205(c)(3)(A)(iii). Although there is no precedent to indicate how that statute will be construed, we believe that the limitations in the rule would probably withstand an E-Government Act challenge. If Rule 5.2(c), which adopts a similar approach, is valid under the E-Government Act, then Rule 49.2 should be also.

Requiring identification to access court documents is a novel procedure that may attract challenge as well, but is probably constitutional. We could find no case law on the question whether requiring identification for access to court documents would be constitutionally problematic. The REAL ID Act already requires showing compliant identification to gain access to federal buildings, including courthouses,[19] and many cases have upheld the requirement of identification for entry into federal courthouses without a specific showing of need.[20] On the other hand, the constitutionality of the added identification requirements for document access are

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Whosarat.com might send runners to the courts to scan criminal case information into mobile devices for subsequent dissemination online.")

[17] Baerman, *supra* note 10 at 87 ("Incarcerated Defendants, or friends/family members on their behalf, regularly request copies of their plea agreement and sentencing documents.").

[18] E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (2002) (44 U.S.C. § 3501 note).

[19] REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (2005); Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272 (Jan. 29, 2008) ("DHS does not believe that the REAL ID Act or the implementing regulations will impede the public's Constitutional rights. Once REAL ID is in effect, an individual presenting a driver's license to access a Federal courthouse must use a REAL ID driver's license to do so. However, that individual may present other documents, or may not be required to present identification at all, depending on the courthouse's pre-existing identification policies.").

[20] *E.g.*, *United States v. Smith*, 426 F.3d 567, 574 (2d Cir. 2005); *United States v. Cruz*, 407 F. Supp. 2d 451, 452 (W.D.N.Y. 2006) (finding that United States Marshals Service's practice of requiring photographic identification of all visitors to courthouse did not violate defendant's constitutional right to a public trial).

not certain. The security concerns animating restrictions on those who enter courthouses are different than those underlying an identification requirement for document access. Also, as pointed out in an earlier memo, although courts have upheld under the Sixth Amendment an identification requirement before entry into criminal proceedings within a courthouse, these decisions applied a "relaxed" test instead of the more exacting test usually applied to courtroom closures under *Waller v. Georgia*, 467 U.S. 39 (1984), and most also noted a case-related reason.

Even apart from litigation, the limited remote access approach is sure to generate opposition from those who believe in preserving free and open public access to the judicial system and court records. As compared to filing under seal or never filing, it does allow some access to documents that would otherwise be secret and completely unavailable to the press, public, victims, and researchers. But as compared to the traditional approach of requiring case-by-case justification before sealing documents in criminal cases—still followed in many districts—limiting remote access significantly impacts transparency and the practical ability of the public, press, and researchers to monitor federal criminal cases.

Like the other options, the remote access approach also entails additional time and resources by clerks' offices. We cannot predict how much demand there will be for these documents at the courthouse by people willing to submit to the identification process. If the demand is significant, additional terminals and staff to check and record the identification of those who come to request documents at the courthouse may be needed.[21] Limiting remote access may also require reconfiguring remote access rules, and other changes to PACER to inform users of the new restrictions. And, like the other options, it would require districts and individual judges to adapt any local rules and orders that conflict with the new restrictions.

[21] The United States Marshals Service already checks identification at the courthouse entrance, so there may be a more efficient solution that would incorporate this process.

(As of September 14, reviewed by style)

Rule 49.2. Limitations on Access to Electronic Files.

(a) ***In General.*** Unless these rules or a court order provides otherwise, access to an electronic file is authorized only as provided in (b), (c), and (d), and only if the item sought is not under seal or another restriction that bars access to whoever is seeking it.

(b) ***By the Parties and Their Attorneys.*** A party[, including a codefendant,] and the party's attorney may have remote electronic access to any part of the case file.

(c) ***By an Attorney in Another [Criminal] Case.*** An attorney who is a registered user of the court's electronic-filing system [and has filed a notice of appearance in any federal criminal case] may have remote electronic access to any part of the case file.

(d) ***By Others.*** Any other person may have the following access:

(1) [electronic] access to any part of the case file at the courthouse, after providing the clerk with identification [as required by local court rule] [consistent with any standards established by the Judicial Conference of the United States], and

(2) remote [electronic] access only to:

(i) the docket maintained by the court;

(ii) the indictment or information; and

(iii) an opinion, order, judgment, or other disposition of the court.

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TAB 3

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TAB 3A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 32(e)(2); 17-CR-C

DATE: September 23, 2017

This suggestion for an amendment arises from concerns Judge Molloy has received about the effect of Rule 32(e)(2) in cases involving cooperators. The rule provides:

> **(e) Disclosing the Report and Recommendation.**
>
> > **(1)** ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.
> >
> > **(2)** ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

The concern is that a rule requiring that inmates receive copies of their PSRs will exacerbate the problem of threats and harm to cooperators in prison. The Task Force on Protecting Cooperators has determined that inmates are often pressured to provide "their papers," i.e., court documents that would reveal whether the inmate cooperated. On its face, the rule gives the probation officer no discretion: the officer must provide the PSR not only to defense counsel, but also to the defendant. There is a waiver provision, but it focuses on "minimum period" of at least 35 days before sentencing.[1]

[1]We have not done a full review of the cases interpreting and applying the rule. Limited research found that when no disclosure was made or the disclosure was not timely, the courts generally focused on whether the error had been harmless. In light of the Rule 32(e)(2)'s clear command that the PSR be provided "to the defendant" as well as to "the defendant's attorney," it is not surprising that we found no cases holding that it was proper to withhold a PSR from the defendant.

The question for discussion in the October meeting is whether a subcommittee should be assigned to consider an amendment to Rule 32(e)(2).[2] For example, the Rule might be amended to provide that when defendants are represented by counsel, the probation officer must give the PSR to counsel, and counsel must review it with defendant.

To assist the Committee in making this determination, we describe below the history of the relevant provisions.

The Development of the Current Rule

The Committee Notes accompanying a series of amendments to Rule 32 reveal that requiring that the defendant be provided with his own copy of the PSR was intended to improve the accuracy of the sentencing process. Rule 32 was amended in a series of steps, beginning in 1983, that first gave the defendant (as well as his counsel) a right to read the PSR, then a right to receive copies of the PSR, which were required to be returned, and finally a right to receive the PSR with no further restrictions. From the outset there were certain exclusions from this disclosure which remain in the current rule.[3] For the Committee's convenience, the relevant portions of the Committee Notes are reprinted in the Appendix to this report; accordingly, we do not include footnotes for each quotation below.

In 1983, Rule 32 was amended to provide that both the defendant and his attorney must be given an opportunity "to read" most (but not all) portions of the PSR. The Committee Note stressed that the disclosure is to be made "to *both* the defendant *and* his counsel *without request*." (emphasis in original). The amendments were a response to the findings of a study of district court practices that concluded "the extent and nature of disclosure of the presentence investigation report in federal courts under current rule 32 is insufficient to ensure accuracy of sentencing information." The study found, inter alia, that only 13 districts were generally disclosing the PSR to both the defendant and counsel at least one day before sentencing. The Committee concluded:

> These findings make it clear that rule 32 in its present form is failing to fulfill its purpose. Unless disclosure is made sufficiently in advance of sentencing to permit

[2]A new subcommittee could be created, or the issue could be added to the agenda of the Cooperator Subcommittee.

[3]There were four exclusions from the report that the defense was allowed to read: (1) "any recommendations as to sentence," (2) disagnotic opinions if disclosure might seriously "disrupt" the defendant's rehabilitation, (3) "sources of information obtained on promise of confidentiality," and (4) other information that might "result in harm, physical or otherwise, to the defendant or other persons." These exclusions remain in the current rule. *See* Rule 32(d)(3) (carrying forward exclusions for certain diagnostic opinions, sources of confidential information, and information that might result in harm), and Rule 32(e)(3) (allowing direct the probation officer not to disclose the sentencing recommendation to anyone other than the court).

> the assertion and resolution of claims of inaccuracy prior to the sentencing hearing, the submission of additional information by the defendant when appropriate, and informed comment on the presentence report, the purpose of promoting accuracy by permitting the defendant to contest erroneous information is defeated.

The Committee Note explained the importance of allowing the defendant – as well as his counsel – to review the PSR:

> Finally, the failure to disclose the report to the defendant, or to require counsel to review the report with the defendant, significantly reduces the likelihood that false statements will be discovered, as much of the content of the presentence report will ordinarily be outside the knowledge of counsel.

The 1983 Rule also provided that unless the court ordered otherwise any copies of the presentence report that had been made available to the defendant, his attorney, or the government "shall be returned to the probation officer immediately following the imposition of the sentence or the granting of probation."[4] Finally, the Committee Note stated that the Committee had considered "[t]he issue of access to the presentence report at the institution, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power." The Note commented that "the Bureau of Prisons and the Parole Commission are free to make provision for disclosure to inmates and their counsel."

In 1989, Rule 32 was revised to require that the PSR be provided to both the defendant and his lawyer, and to abrogate the requirement that the copies so provided be returned. However, the Committee Notes reflect a concern that the defendant's continued possession of the PSR might be dangerous. The 1989 Committee Note stated:

> The amended rule does not direct whether the defendant or the defendant's lawyer should retain the presentence report. In exceptional cases where retention of a report in a local detention facility might pose a danger to persons housed there, the district judge may direct that the defendant not personally retain a copy of the report until the defendant has been transferred to the facility where the sentence will be served.

Amendments in 1994 and 2002 completed the process. In 1994, Rule 32 was amended again to address timing, adding the requirement that the probation officer disclose the PSR to the defendant, his attorney, and the government 35 days before sentencing. There was also a slight change in the provision regarding the recommended sentence, giving the court the authority to determine whether that portion of the report would be disclosed. Finally, in the restyling process completed in 2002, Rule 32 was reorganized, with the relevant provisions moving from (b) to

[4]Rule 32(c)(3)(E), prior to amendment by Pub. L. 98-473 (Oct. 12, 1984).

(c). In describing the obligation to provide the PSR, the restyled rule substituted "give" for "furnish."

APPENDIX
RELEVANT HISTORY OF RULE 32(e)(2)
(bold added)

1983 Amendments

* * * *

Rule 32(a)(1). Subdivision (a)(1) has been amended so as to impose upon the sentencing court the additional obligation of determining that the defendant and his counsel have had an opportunity to read the presentence investigation report or summary thereof. This change is consistent with the amendment of subdivision (c)(3), discussed below, providing for disclosure of the report (or, in the circumstances indicated, a summary thereof) to *both* defendant *and* his counsel *without request*. This amendment is also consistent with the findings of a recent empirical study that under present rule 32 meaningful disclosure is often lacking and "that some form of judicial prodding is necessary to achieve full disclosure." Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv.L.Rev. 1613, 1651 (1980):

> The defendant's interest in an accurate and reliable presentence report does not cease with the imposition of sentence. Rather, these interests are implicated at later stages in the correctional process by the continued use of the presentence report as a basic source of information in the handling of the defendant. If the defendant is incarcerated, the presentence report accompanies him to the correctional institution and provides background information for the Bureau of Prisons' classification summary, which, in turn, determines the defendant's classification within the facility, his ability to obtain furloughs, and the choice of treatment programs. The presentence report also plays a crucial role during parole determination. Section 4207 of the Parole Commission and Reorganization Act directs the parole hearing examiner to consider, if available, the presentence report as well as other records concerning the prisoner. In addition to its general use as background at the parole hearing, the presentence report serves as the primary source of information for calculating the inmate's parole guideline score.

Though it is thus important that the defendant be aware *now* of all these potential uses, the Advisory Committee has considered but not adopted a requirement that the trial judge specifically advise the defendant of these matters. The Committee believes that this additional burden should not be placed upon the trial judge, and that the problem is best dealt with by a form attached to the presentence report, to be signed by the defendant, advising of these potential uses of the report. This suggestion has been forwarded to the Probation Committee of the Judicial Conference.

Rule 32(c)(3)(A), (B) & (C). Three important changes are made in subdivision (c)(3): disclosure of the presentence report is no longer limited to those situations in which a request is made; **disclosure is now provided to both defendant and his counsel**; and disclosure is now required a reasonable time before sentencing. **These changes have been prompted by findings in a recent empirical study that the extent and nature of disclosure of the presentence investigation report in federal courts under current rule 32 is insufficient to ensure accuracy of sentencing information.** In 14 districts, disclosure is made only on request, and such requests are received in fewer than 50% of the cases. Forty-two of 92 probation offices do not provide automatic notice to defendant or counsel of the availability of the report; in 18 districts, a majority of the judges do not provide any notice of the availability of the report, and in 20 districts such notice is given only on the day of sentencing. In 28 districts, the report itself is not disclosed until the day of sentencing in a majority of cases. **Thirty-one courts generally disclose the report only to counsel and not to the defendant, unless the defendant makes a specific request. Only 13 districts disclose the presentence report to both defendant and counsel prior to the day of sentencing in 90% or more of the cases. Fennell & Hall, supra, at 1640-49.**

These findings make it clear that rule 32 in its present form is failing to fulfill its purpose. Unless disclosure is made sufficiently in advance of sentencing to permit the assertion and resolution of claims of inaccuracy prior to the sentencing hearing, the submission of additional information by the defendant when appropriate, and informed comment on the presentence report, the purpose of promoting accuracy by permitting the defendant to contest erroneous information is defeated. Similarly, if the report is not made available to the defendant and his counsel in a timely fashion, and if disclosure is only made on request, their opportunity to review the report may be inadequate. **Finally, the failure to disclose the report to the defendant, or to require counsel to review the report with the defendant, significantly reduces the likelihood that false statements will be discovered, as much of the content of the presentence report will ordinarily be outside the knowledge of counsel.**

The additional change to subdivision (c)(3)(C) is intended to make it clear that the government's right to disclosure does not depend upon whether the defendant elects to exercise his right to disclosure.

Rule 32(c)(3)(E) & (F). Former subdivisions (c)(3)(D) and (E) have been renumbered as (c)(3)(E) and (F). The only change in the former, necessitated because disclosure is now to defendant and his counsel.

* * * *

The issue of access to the presentence report at the institution was discussed by the Advisory Committee, but no action was taken on that matter because it was believed to be beyond the scope of the rule-making power. Rule 32 in its present form does not speak to this issue, and thus the Bureau of Prisons and the Parole Commission are free to make provision for disclosure to inmates and their counsel.

1989 Amendments

* * * *

The language requiring the court to provide the defendant and defense counsel with a copy of the presentence report complements the abrogation of subdivision (E), which had required the defense to return the probation report. Because a defendant or the government may seek to appeal a sentence, an option that is permitted under some circumstances, there will be cases in which the defendant has a need for the presentence report during the preparation of, or the response to, an appeal. This is one reason why the Committee decided that the defendant should not be required to return the nonconfidential portions of the presentence report that have been disclosed. Another reason is that district courts may find it desirable to adopt portions of the presentence report when making findings of fact under the guidelines. They would be inhibited unnecessarily from relying on careful, accurate presentence reports if such reports could not be retained by defendants. A third reason why defendant should be able to retain the reports disclosed to them is that the Supreme Court's decision in *United States Department of Justice v. Julian*, 486 U.S. 1 (1988), 108 S.Ct. 1606 (1988), suggests that defendants will routinely be able to secure their reports through Freedom of Information Act suits. No public interest is served by continuing to require the return of reports, and unnecessary FOIA litigation should be avoided as a result of the amendment to Rule 32.

The amended rule does not direct whether the defendant or the defendant's lawyer should retain the presentence report. In exceptional cases where retention of a report in a local detention facility might pose a danger to persons housed there, the district judge may direct that the defendant not personally retain a copy of the report until the defendant has been transferred to the facility where the sentence will be served.

* * * *

1994 Amendments

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Subdivision (b). Subdivision (b) (formerly subdivision (c)), which addresses the presentence investigation, has been modified in several respects.

* * * * *

Subdivision (b)(6), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's presentence report. Subdivision (b)(6)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(6)(A). Under that new provision (changing former subdivision (c)(3)(A)), the court has the discretion (in an individual case or in accordance with a local rule) to direct the probation officer to withhold any final recommendation concerning the sentence. Otherwise, the recommendation, if any, is subject to disclosure. The prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5).

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TAB 3B

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From: [redacted]
Sent: Friday, May 12, 2017 3:37 PM
To: [redacted]
Cc: [redacted]
Subject: Rule 32(e)(2)

Sara and Nancy,
Recently an issue came up that might impact either a rule amendment in light of the CACM cooperator issue, or an issue to consider at our next meeting. [redacted] A defendant in Billings has raised an objection under Rule 32(e)(2) that he was not personally given a copy of the PSR. You can surmise why he wants the report, either because the rule requires that or because someone wants him to produce his "papers". Without consideration of harmless error this is what the rule says:

"The probation officer **must** give the presentence report ***to the defendant***, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this ***minimum period***."

It doesn't seem like there is much wiggle room in the language of the rule. In our district, up to this point, the rule has been honored in the breech. The rule if followed will obviously impact the presentence issue of the availability of "papers" in jails and perhaps create a problem with the solution suggested to have the PSR available only in the Warden's office or defined location. Waiver seems to address the 35 day rule as opposed to what three people get the PSR.

Don

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TAB 4

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Federal Judicial Center Manual for Complex Criminal Litigation

DATE: September 28, 2017

As part of the response to the issues that arise in complex criminal prosecutions, the Rule 16.1 Subcommittee was asked to develop a list of topics that might be included in a manual that would parallel the Federal Judicial Center's Manual for Complex Civil Litigation.

The Subcommittee held a teleconference call during which it identified the following topics to be of particular interest:[1]

Topic	Notes
CASE TYPES	[Assuming national security and death penalty covered by adequately elsewhere]
Multi-defendant cases generally	Appropriate coordination between defendants, joint defense agreements, discovery issues, joinder and severance issues (e.g., two or more juries, Bruton), evidentiary issues (e.g., when relevant for one but not the other), competing motions (e.g., one wants mistrial another doesn't)
Complex "Enterprise" crimes	RICO, VICAR, CCE, complex frauds, and money laundering
Very high profile cases	Sealing, anonymous juries, pretrial publicity, voir dire, extra alternates, handling press, jury sequestration and security, post-trial juror management
ISSUES	
An overview of the differences between civil and criminal cases	
Discovery, general	E-discovery; practices from various districts; should not repeat ESI protocol
Case management, generally	Early case management – key pointers
Cross border issues	Statutes of Limitations, Fifth Amendment privilege, taking testimony abroad
Electronic surveillance, wiretaps	Fourth Amendment and minimization analyses
Forfeiture, Restitution	And other sentencing issues arising in multiple defendant, complex cases
Jury instructions	early on in the case, can drive discovery

[1] Additional topics were identified by individual members and might also be included: Rule 12 (more motions must be made pretrial); exhibits (who handles and keeps if potential appeal); and detention questions, especially post-conviction (how burdens apply and shift by context and crime of conviction).

To explore how this list might fit with the priorities and resources of the Federal Judicial Center ("FJC"), the reporters spoke with James Eaglin, the Director of the FJC's Research Division, and Laural Hooper, Senior Researcher in that division, who staffs the Criminal Rules Committee. Mr. Eaglin explained that the publication procedure has changed since the publication of the Manual for Complex Civil Litigation.

Several aspects of the new procedure will affect the proposed project. First, there has been a shift towards the production of more narrowly focused monographs. So, rather than a single comprehensive manual,[2] the FJC would more likely produce publications focused on specific items on the list developed by the Subcommittee. Second, many of the authors of new publications are not full time FJC staffers, but rather academics or practitioners with whom the FJC contracts. If the project moves forward, one role for the Committee might be to help identify candidates to take on particular projects. Third, publications are generally being moved online, where they can be more readily updated periodically.

Mr. Eaglin also suggested that the FJC could survey federal judges, prosecutors, defenders, and assigned counsel to determine what issues it would be most helpful for the FJC to focus on. The Committee could review the survey results, so that it could continue to work with the FJC on developing publications.

[2] Because the new publication would likely not be comprehensive, it would not include topics dealt with in other specialized FJC publications, such as those dealing with terrorism prosecutions and death penalty cases.

TAB 5

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TAB 5A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 43; Video participation by defendant at sentencing (17-CR-A)

DATE: September 25, 2017

Judge Donald E. Walter has written to suggest that Rule 43 be amended to allow the option of sentencing by video conference "absent a *timely* objection, for good cause shown, by the defendant." He writes that the suggested revision "would allow for maximizing judicial efficiency and economy, while maintaining the fairness, integrity, and solemnity of the criminal proceeding."[1]

The question for discussion at the October meeting is whether this suggestion should be assigned to a Subcommittee for further consideration. We provide below information that may be helpful to the Committee in making that decision.

Discussion

A. Current Rule 43

Rule 43 now requires the defendant to be present from the initial appearance through the trial and the sentence with only very limited exceptions for corporations, misdemeanor defendants, and defendants who are initially present for trial but waive the right to be present by voluntarily absenting themselves or for disruptive behavior that requires their removal.

The rule provides (emphasis added):

> **(a) When Required.** Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:
>
> (1) the initial appearance, the initial arraignment, and the plea;

[1]Judge Walter also suggests that despite rulings to the contrary by five circuits (cited in his letter), this suggestion may be consistent with the current rule: the defendant is "present" in the courtroom, though the judge is presiding by video conference from another location.

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

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

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

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

(c) Waiving Continued Presence.

(1) ***In General.*** A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) ***Waiver's Effect.*** If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

B. Prior Consideration of Videoconferencing at Sentencing

The Committee most recently considered the desirability of permitting video teleconferencing at sentencing in 2011. When Rule 43 was amended as part of a package of technology-related revisions, the Committee considered whether to allow video teleconferencing during various phases of adjudication. Although many members were initially opposed to allowing video teleconferencing for any purpose, the Committee ultimately proposed the addition of the language in Rule 43(b)(2) that now expressly permits plea, trial, and sentencing to occur by video teleconferencing in misdemeanor cases. (Before this amendment, Rule 43(b)(2) already provided that these misdemeanor proceedings could occur in the defendant's absence.) The Committee was informed that defendants charged with minor offenses (such as traffic offenses in a federal park during a vacation trip) would often prefer to plead guilty and be sentenced in absentia rather than travel a long distance to be present in the courtroom. The Committee concluded that proceeding by video teleconference would be preferable to proceeding in the defendant's absence. The Committee Note states:

> **Subdivision (b).** This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's

permission. The amendment allows participation through video teleconference as an alternative to appearing in person or not appearing. Participation by video teleconference is permitted only when the defendant has consented in writing and received the court's permission.

C. Current Law Regarding Videoconferencing at Sentencing

The appellate courts have consistently held that a defendant's participation by video teleconferencing does not satisfy the requirement in Rule 43(a) that the defendant be "present."[2] As the Second Circuit stated in *United States v. Salim*, 690 F.3d 115, 121 (2d Cir. 2012):

> Although it is an issue of first impression in this circuit, every federal appellate court to have considered the question has held that a defendant's right to be present requires physical presence and is not satisfied by participation through videoconference. *See United States v. Williams*, 641 F.3d 758, 764-65 (6th Cir. 2011); *United States v. Torres-Palma*, 290 F.3d 1244, 1245-48 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 301, 303-04 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228, 235-39 (5th Cir. 1999), *cert. denied*, 528 U.S. 845, 120 S. Ct. 312, 145 L. Ed. 2d 99 (1999). *But see Navarro*, 169 F.3d at 239-42 (Politz, J., dissenting) (opining that the defendant's sentencing by videoconference did not violate his right to be present).

The decisions highlight the difference between physical presence and presence by video teleconference. In *Navarro*, 169 F.3d at 239, the court explained:

> There is a gravity to the sentencing process because the defendant will be deprived, possibly indefinitely, of his liberty. Sentencing a defendant by video conferencing creates the risk of a disconnect that can occur because "[t]he immediacy of a living person is lost." *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993) (considering whether video depositions are as good as live testimony). "In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life." *Id.* In light of the value of face-to-face sentencing, we find the logic in the Notes to Civil Rule 43 to be equally applicable to Criminal Rule 43–i.e., transmission cannot be justified by showing that it is inconvenient for the defendant to attend the sentencing.

The *Lawrence* court made a similar point, 248 F.3d at 304:

> The government maintains that district courts should have the discretion to permit

[2]These cases arose before the effective date of the amendment to Rule 43(b)(2) or involve felony charges not subject to the 2011 amendment.

> video teleconferencing when circumstances warrant it. The rule reflects a firm judgment, however, that virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it. *See* Fed. R. Crim. P. 43; *see also* Fed. R. Crim. P. 43 advisory comm. 1974 n. (making clear that closed circuit television is not the same as actually being in the courtroom).[3]

Not only does a defendant's participation in sentencing by video conference without consent contravene Rule 43, absent consent by the defendant it may violate the Constitution. *See, e.g.*, *Williams,* 641 F.3d at 764 ("criminal defendants have a constitutional right to be present at sentencing," collecting authority); *United States v. Bryant*, 643 F.3d 28, 32 (1st Cir. 2011) ("it is settled that the defendant himself has a right to be present at both his trial and his sentencing; there are constitutional bases for this right, as well as common-law precedent. . . .").[4]

Admittedly, the specific proposal before the Committee appears to contemplate that the judge – not the defendant – will appear by video conference. The concerns about face-to-face interaction, however, are present if either the judge or defendant is only present via video screen.

---

[3]Similarly, one commentator emphasized the importance of the defendant's in-person allocution, stating:

> Sentencing without having the defendant physically present in court is problematic. At sentencing, the court must take a measure of the defendant and the defendant's crime. If the defendant deserves leniency or if the defendant's crime is not as serious as others violating the same statute, the court may be persuaded to impose a sentence at the lower end of the available range . . . In addition, the defendant is entitled to address the court personally and should be entitled to stand before the court, face-to-face with the judge who is imposing the sentence. As the Supreme Court noted in *Green v. United States*, a defendant may speak effectively, "with halting eloquence," in a way that defense counsel cannot.

Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TULANE L. REV. 1089, 1151 (2004) (citations omitted) (citing *Green v. United States*, 365 U.S. 301 (1961); *see also* Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution at Sentencing*, 65 ALA. L. REV. 735 (2014) (reporting result of survey of federal judges regarding allocution, including responses concerning the purposes of allocution). It should be noted, however, that "Despite the widespread acceptance of at least a limited right to allocution, the Supreme Court has not yet decided whether silencing a defendant who wishes to speak at sentencing is constitutional error." LAFAVE, ISRAEL, KING & KERR, 6 CRIM. PROCEDURE § 26.4(g) (4th ed.).

[4]*Contrast United States v. Ornelas*, 828 F.3d 1018 (9th Cir. 2016) (no violation of Rule 43 or Constitution when defendant was voluntary absent from sentencing). And at least one state court has upheld sentencing by video conferencing. *State v. Porter*, 755 S.W.2d 3, 4-5 (Mo. Ct. App. 1988) (affirming a sentence imposed by video); Mo. Ann. Stat. § 561.031 (permitting appearance by two-way video conferencing for sentencing following a guilty plea).

TAB 5B

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
4200 United States Court House
300 Fannin Street
SHREVEPORT, LOUISIANA 71101-3059

CHAMBERS OF
DONALD E. WALTER
DISTRICT JUDGE

PHONE: (318) 676-3175
FAX: (318) 676-3179

May 26, 2017

Honorable Judge Donald W. Molloy
Senior United States District Judge
Advisory Committee on Criminal Rules, Chair
Russell E. Smith Federal Building
201 East Broadway Street, Room 360
Missoula, MT 59802

Judge Molloy:

I write to you in your capacity as the Chair of the Advisory Committee on Criminal Rules, to respectfully suggest a revision to Federal Rule of Criminal Procedure 43, which would allow for sentencing by video conference. As you know, the text of Rule 43, "Defendant's Presence," currently reads, in part:

> **(a) When Required**. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:
>
> . . .
>
> **(3)** sentencing.
>
> . . .
>
> **(c) Waiving Continued Presence**.
>
> . . .
>
> **(2) Waiver's Effect**. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Fed. R. Crim. P. 43.

As you also know, at least five circuits have concluded that a defendant's electronic "presence" by video conference does not satisfy Rule 43(a)'s requirement that a defendant be present at sentencing. *See e.g. United States v. Williams*, 641 F.3d 758, 764 (6th Cir. 2011); *United States v. Salim*, 690 F.3d 115, 122 (2d Cir. 2012); *United States v. Torres-Palma*, 290 F.3d 1244, 1245 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001); and *United States v. Navarro*, 169 F.3d 228, 239 (5th Cir. 1999). While I respect the factors and analysis underlying the relevant jurisprudence, I believe there to be good cause for a revision that allows the option of sentencing by video conference, absent a *timely* objection, with good cause shown, by the defendant. Although the current rule arguably makes room for same, through the waiver provision at Rule 43(c)(2), I would suggest a revision that allows space for electronic presence of a defendant, via video conferencing technology, to fit within the very definition of "presence."

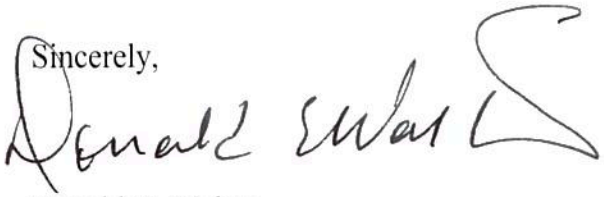
Indeed, in a recent concurring opinion written solely to admonish a lower court's decision to conduct a telephonic sentencing, Fifth Circuit Judge Edith Jones implied that there is room for such a revision, when she made a distinction between sentencing by telephonic conferencing and sentencing by videoconferencing: "Perhaps this measure was viewed as a simple extension of the practice of conducting sentencing by videoconferences. . . . Sentencing by telephonic conferencing goes far beyond videoconferencing in its lack of dignity and detachment from the moral drama of the criminal justice system." *United States v. Ramos-Gonzales*, No. 16-41353 (5th Cir. May 24, 2017).

It is my position that such a revision would allow for maximizing judicial efficiency and economy, while maintaining the fairness, integrity, and solemnity of the criminal proceeding. As our government continues to face budgetary and staffing concerns at every level, such an allowance would considerably lessen the burden on the United States Marshal's Service, as well as the Bureau of Prisons, transport officers, judges and court staff.

In closing, I confess a personal "dog in this fight." I am an 81-year-old Senior Status Judge. I escape Louisiana heat by being in Maine all summer. This June and July, I have made arrangements, through Judge Torresen in Portland, to sentence approximately fifteen defendants by video conference. I have secured waivers from most of the defendants in order to proceed. As to the others, either I will have to fly back to Louisiana or put off sentencing until October. In my past life, as an advocate, I would argue that the defendant is present; only the judge is absent. *See Ramos-Gonzales*, (Jones, J., concurring) ("In [videoconference] proceedings, the judge presides from another location, while the defendant, together with his or her family, and the AUSA are present in the court of conviction.").

I thank you for your time and consideration.

Sincerely,



Donald E. Walter

TAB 6

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TAB 6A

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Pretrial disclosure of expert testimony (17-CR-B)

DATE: September 26, 2017

Judge Jed Rakoff, co-chairman of the National Commission on Forensic Science, has written to suggest that the Committee consider amending Rule 16(a)(1)(G) to parallel Civil Rule 26(a)(2)(B) governing pretrial disclosure of the testimony to be given by expert witnesses.

Judge Rakoff explained that the provisions of Rule 16 are couched in much vaguer language than the parallel provisions of Rule 26 of the civil rules, and the result is (as the caselaw and everyday experience both attest) that the pretrial expert disclosures in federal criminal cases are frequently much more minimal than the comparable expert disclosures in civil cases. This poses a serious problem: counsel are frequently blindsided by expert testimony given in criminal cases. Judge Rakoff also noted that research has tied inaccurate expert testimony to wrongful convictions, including those later exposed by DNA testing.

These concerns led the National Commission on Forensic Science overwhelmingly to approve a recommendation to the Department of Justice that the Department, notwithstanding the vague language of Rule 16, voluntarily agree to make the same kind of disclosures in federal criminal cases as Rule 26 of the Federal Civil Rules mandates in civil cases. Although the Department accepted this recommendation and issued a memorandum to federal prosecutors, that memorandum does not have the force of law. Moreover, Judge Rakoff expressed concern that there has been and likely will continue to be very wide variance among U.S. Attorney's Offices, and even among individual AUSAs, as to how much or little has to be disclosed before an expert witness is called to testify in a federal criminal case. Seeing no reason why pretrial disclosure of expert testimony should be any more restricted in criminal than civil cases, he recommends an amendment to Rule 16 to parallel Civil Rule 26(a)(2)(B). Judge Rakoff's suggestion would also affect all government experts, not just the forensic experts addressed by the National Commission and the Department's new guidance to prosecutors. Disclosure by the government under Rule 16(a)(1)(G) is triggered by a defense request, which in turn triggers a reciprocal obligation for defense discovery under Rule 16(b)(1)(C). Judge Rakoff did not address defense discovery.

The question before the Committee is whether to appoint a subcommittee to undertake a full examination of this suggestion. We describe below previous committee action on the rule that may be relevant. Judge Rakoff's transmittal email, the report of the National Commission, and the memorandum from Deputy Attorney General Sally Yates are provided below.

Previous Committee Action

The difference in the scope of pretrial disclosure concerning expert witnesses arose in 1993, when both the Civil and Criminal Rules were amended to address this issue.[1] Rule 16(a)(1)(G) requires disclosure by the government of only a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. It further specifies that "The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." As Judge Rakoff has explained, these summaries may be produced by the prosecutor, not the witness, and in some instances are extremely short and general (a paragraph or two).

In contrast, Civil Rule 26(a)(2)(B) requires that an expert witness who is expected to testify at trial must provide a "written report," and it describes in greater detail what this report must include.[2] It provides:

[1]As the Committee's June 1991 report to the Standing Committee explained at page 2: "The proposed amendments [to Rule 16] would generally parallel similar provisions in Federal Rule of Civil Procedure 26 and would expand discovery to both the defense and the government." This point was also emphasized in the committee note as published, which stated that the addition of the subdivision that is now (b)(1)(G) "tracks closely with similar language in Federal Rule of Civil Procedure 26 . . . . ."

[2]For a subgroup of witnesses, only a summary is required in civil cases. A witness is not required to provide a written report if he has not been "retained or specially employed to provide expert testimony in the case" or his duties as the party's employee do not "regularly involve giving expert testimony." In these circumstances, Civil Rule 26(a)(2)C) requires only disclosure stating:

> (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
>
> (ii) a summary of the facts and opinions to which the witness is expected to testify.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

At the time of publication for public comment in 1990, the Civil and Criminal provisions concerning expert discovery were parallel, but after publication the Criminal Rule was revised at the urging of the Department of Justice. The minutes from the Committee's April 1992 meeting (provided below) state that the Department "expressed strong opposition to the amendment" as published. The Department's representative to the Committee stated there had been no real problems requiring the amendment. But the amendment would cause difficulties if the government did not know in advance of trial which witnesses it would call, especially summary witnesses. Later in the discussion, the representative also expressed concern that the amendment would require the government to present its theory of the case to the defendant before trial.

The language ultimately adopted was presented in a motion to narrow the amendment to respond to the Department's concerns. After the Committee deadlocked 5 to 5 on this vote, the chair voted in favor of the revision, breaking the tie.

The language adopted in 1993 was restyled in 2002 (which resulted in relettering the provision in question).

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TAB 6B

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From: [redacted]
Sent: Sunday, July 23, 2017 9:01 PM
To: John Siffert
Subject: Pre-Trial Expert Discovery

Dear John,

Following up on our conversation of the other evening, and writing to you in your capacity as a member of the federal criminal rules committee, I would like to suggest that Rule 16 of the federal criminal rules be amended so that experts are required by Rule 16 to make the same sort of detailed pre-trial reports and disclosures as are required in federal civil cases by Rule 26 of the Federal Rules of Civil Procedure. As it stands now, the expert discovery provisions of Rule 16 of the criminal; rules are couched in much vaguer language than the parallel provisions of Rule 26 of the civil rules, and the result is (as the caselaw and everyday experience both attest) that the pre-trial expert disclosures in federal criminal cases are frequently much more minimal than the comparable expert disclosures in civil cases. Since it is obvious that one cannot meaningfully challenge an expert's testimony without substantial pre-trial discovery, the result is that counsel are frequently blindsided by expert testimony given in criminal cases. This may be part of the reason why, according to the Innocence Project, inaccurate expert testimony was a factor in over half of the wrongful convictions later reversed by DNA testing done by the Innocence Project. And, according to the National Registry of Exonerations maintained by the University of Michigan, of the more than 2,000 criminal convictions reversed since 1989 on the basis of post-conviction factual exoneration, the single largest factor common to the wrongful convictions was inaccurate expert testimony.

In June of 2016, the National Commission on Forensic Science overwhelmingly approved a recommendation to the Department of Justice that the Department, notwithstanding the vague language of Rule 16, voluntarily agree to make the same kind of disclosures in federal criminal cases as Rule 26 of the federal civil rules mandates in civil cases. The NCFS recommendation is attached below. In response, the Department issued a Memorandum in January of this year largely agreeing with that recommendation and, indeed, reminding federal prosecutors of prior DOJ memos suggesting much the same. That memo is also attached below. None of this, however, has the force of law, and high-level Department officials have admitted to me that, in fact, there has been very wide variance among U.S. Attorney's Offices, and even among individual AUSAs, as to how much or little has to be disclosed before an expert witness is called to testify in a federal criminal case. Even where very little was disclosed, moreover, the vagueness of Rule 16 has resulted in few defense counsel challenging even the most bare-bones expert disclosures and, in those few cases where such challenges have been made, they have very, very rarely succeeded: -- hence the need to revise Rule 16. At the same time, the Department's positive attitude, as reflected in its memo attached below, suggests that it would not strenuously oppose the suggested revision of Rule 16 (except perhaps to claim it was "unnecessary"). And, frankly, I cannot think of a single reason why the policy considerations that led the framers of Rule 26 to draft specific requirements for expert disclosures do not apply with the same or even greater force in the criminal context. Accordingly, the two rules should be made more or less identical.

Thank you for considering this proposal.

Jed Rakoff

NATIONAL COMMISSION ON FORENSIC SCIENCE

NIST National Institute of Standards and Technology U.S. Department of Commerce

Recommendations to the Attorney General
Pretrial Discovery

Subcommittee
Reporting and Testimony
Status
Adopted by the Commission

Date of Current Version	08/05/16
Approved by Subcommittee	11/05/16
Approved by Commission	21/06/16
Action by Attorney General	[*dd/mm/yy*] 05/01/17

Commission Action
On June 21, 2016, the Commission voted to adopt this Recommendation by a more than two-thirds majority affirmative vote (78% yes, 18% no, 3% abstain)

Recommendations
The National Commission on Forensic Science recommends that the Attorney General take the following actions:

- **Recommendation #1: The Attorney General should direct federal prosecutors, when they intend to offer expert testimony on forensic science test results and conclusions, to provide to the court and defense counsel, reasonably in advance of trial, a report prepared by this expert that contains:**
  - **(i) a statement of all opinions the witness will express and the basis and reasons for them;**
  - **(ii) the facts or data considered by the witness in forming them;**
  - **(iii) any exhibits that will be used to summarize or support them;**
  - **(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;**
  - **(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and**
  - **(vi) a statement of the compensation to be paid the witness.**

With three modifications, this Recommendation tracks Federal Rule of Civil Procedure 26(a)(2)(B). Because of speedy trial and case management concerns, "reasonably in advance of trial" has been substituted for the 90-days-before-trial disclosure requirement of the Civil Rule, but the Commission expects that "reasonably in advance of trial" will usually mean at least a few weeks before trial and with sufficient time for the defense to consult with and/or secure expert assistance. Also, although the Civil Rule requires "a *complete* statement of all opinions," the Recommendation excises the word "complete" in the belief that it is at best confusing and at worst

unnecessarily burdensome. Finally, the Commission intends that the listing requirement of (v) take effect prospectively, as not all forensic experts may have kept such lists in the past.

- **Recommendation #2: The Attorney General should direct federal prosecutors to allow the defendant full access to the expert's case record.**

As depositions of an adversary's expert witnesses are not permitted in federal criminal cases, access to the expert's underlying case record is proposed to mitigate the absence of discovery depositions and to allow the adversary party to examine the underlying data on which the expert's opinions are based (subject to any judicial protective order).

- **Recommendation #3: To the extent the aforementioned disclosures exceed what is presently required by federal law, the Attorney General should authorize federal prosecutors to condition such additional disclosures on the defense's agreeing to provide the same broad disclosures if the defense intends to offer forensic expert testimony.**

Federal Rule of Criminal Procedure 16(b)(1)(C) requires a defendant who intends to offer expert testimony to give the government the same kind of disclosure that the government is required to give the defendant under 16(a)(1)(G). But because the discovery proposed by the Commission's recommendations would go beyond what is required by 16(a)(1)(G), it seems only fair for the government, if it chooses, to condition such additional disclosure on the defendant's agreement that it will make the same broad disclosures if it intends to offer forensic expert testimony of its own (subject to any claim of privilege upheld by the court).

Commentary

The need for pretrial discovery of forensic evidence in criminal cases is critical—for both the prosecution and defense—because "it is difficult to test expert testimony at trial without advance notice and preparation."[1] Indeed, in a number of the cases in which convicted defendants were subsequently exonerated by DNA testing, the failure to disclose exculpatory forensic evidence played a role in the wrongful convictions.[2] There are many other advantages to comprehensive discovery as well. Even in the case of DNA, according to President Bush's DNA Initiative[3], "[e]arly disclosure can have the following benefits: [1] Avoiding surprise and unnecessary delay. [2] Identifying the need for defense expert services. [3] Facilitating exoneration of the innocent and encouraging plea negotiations if DNA evidence confirms guilt." These benefits likewise apply to other forensic evidence. Providing forensic science test results, opinions, and conclusions reasonably in advance of trial is also critical to facilitating a comprehensive and scientific review of the data. Such disclosures will allow opposing experts to sufficiently review the scientific findings to provide appropriate guidance to counsel and help form their own opinions.

Nevertheless, notwithstanding the great need for pretrial disclosure, discovery regarding forensic evidence intended to be offered in criminal cases is not required to be nearly as

[1] Fed. R. Crim. P. 16 (1975), advisory committee's note.
[2] *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 108 (2011).
[3] National Institute of Justice, President's DNA Initiative: Principles of Forensic DNA for Officers of the Court (2005).

expansive or as timely as in civil litigation. Ironically, this is despite the fact that, under federal law, experts can be deposed in civil cases but not in criminal cases, so that the need for substantial pretrial written disclosure would seem to be even greater in criminal cases than in civil cases if trial by ambush is to be avoided. Historically, this disparity has been justified on three grounds: substantial pretrial discovery in criminal actions will (1) encourage perjury, (2) lead to the intimidation of witnesses, and (3) be a one-way street because of the Fifth Amendment privilege against self-incrimination.[4] With forensic evidence, however, these traditional arguments against criminal discovery lose whatever force they might otherwise have. The first argument fails because "it is virtually impossible for evidence or information of this kind to be distorted or misused because of its advance disclosure."[5] Also, there is no evidence that the intimidation of experts is a major problem, both because in federal practice, the expert is often a government employee, and because the evidence can often be reexamined, if necessary, by another expert.[6] Finally, the Self-incrimination Clause, as presently interpreted by the Supreme Court, is not an impediment to the prosecution's obtaining pretrial discovery regarding forensic science that the defendant intends to offer.[7]

Although Federal Rule of Criminal Procedure 16(a)(1)(G) requires the government, on defendant's request, to provide a summary of a forensic expert's "opinions, the bases and reasons for those opinions, and the witness's qualifications," this provision, perhaps because of the aforementioned history, has often been narrowly interpreted by the government and the courts. By contrast, Federal Rule of Civil Procedure 26(a)(2) not only sets forth in much greater detail what disclosures regarding expert testimony must be made prior to trial but also provides that such disclosure, absent court order, must be made well in advance of trial. The need for meaningful and timely discovery in relation to expert testimony is particularly acute in the case of forensic science, where questionable forensic science has often gone unchallenged. The Commission is therefore of the view that the Attorney General, both as a matter of fairness and also to promote the accurate determination of the truth, should require her assistants to make pretrial disclosure of forensic science more in keeping with what the federal civil rules presently require than the more minimal requirements of the federal criminal rules. *See* Recommendation #1, above. Further, in the absence of depositions, the defendant should have access to the expert's case record. *See* Recommendation #2, above. Finally, to the extent permitted by law, the defense should also be reciprocally required to make these enhanced disclosures. *See* Recommendation #3, above.

It should be noted that the foregoing recommendations, designed to achieve the purposes summarized above, are a direct application to the particularities of *federal* practice of the Views Document on Discovery adopted by this Commission on August 11, 2015. Application to *state* practice might require different modifications.

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[4] *See* 2 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 252, at 36-37 (2d ed. 1982).

[5] Commentary, ABA Standards for Criminal Justice, Discovery and Procedure Before Trial 67 (Approved Draft 1970).

[6] 2 Wayne LaFave & Jerod Israel, Criminal Procedure § 19.3, at 490 (1984) ("Once the report is prepared, the scientific expert's position is not readily influenced, and therefore disclosure presents little danger of prompting perjury or intimidation.").

[7] *See* Williams v. Florida, 399 U.S. 78, 85 (1970) ("At most, the [discovery] rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial."); United States v. Nobles, 422 U.S. 225, 234 (1975) (compelled production of defense investigator's notes does not violate the Fifth Amendment because it involved no compulsion of the defendant).

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

January 5, 2017

MEMORANDUM FOR DEPARTMENT PROSECUTORS
DEPARTMENT FORENSIC SCIENCE PERSONNEL

FROM: Sally Q. Yates
Deputy Attorney General

SUBJECT: Supplemental Guidance for Prosecutors Regarding Criminal Discovery Involving Forensic Evidence and Experts

Forensic evidence is an essential tool in helping prosecutors ensure public safety and obtain justice for victims of crime. When introduced at trial, such evidence can be among the most powerful and persuasive evidence used to prove the government's case. Yet it is precisely for these reasons that prosecutors must exercise special care in how and when forensic evidence is used. Among other things, prosecutors must ensure that they satisfy their discovery obligations regarding forensic evidence and experts, so that defendants have a fair opportunity to understand the evidence that could be used against them.

In January 2010, then-Deputy Attorney General David Ogden issued a memorandum entitled *Guidance for Prosecutors Regarding Criminal Discovery* (the "Ogden Memo"), which provided general guidance on gathering, reviewing, and disclosing information to defendants.[1] Given that most prosecutors lack formal training in technical or scientific fields, the Department has since determined that it would be helpful to issue supplemental guidance that clarifies what a prosecutor is expected to disclose to defendants regarding forensic evidence or experts. Over the past year, a team of United States Attorneys, Department prosecutors, law enforcement personnel, and forensic scientists worked together to develop the below guidance, which serves as an addendum to the Ogden Memo.

All Department prosecutors should review this guidance before handling a case involving forensic evidence. In addition, any individuals involved in the practice of forensic science at the Department, especially those working at our law enforcement laboratories, should familiarize themselves with this guidance so that they can assist prosecutors when the government receives a request for discoverable material in a case. Thank you for your attention to this issue and for the work you do every day to further the proud mission of this Department.

[1] Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery*, January 4, 2010, available at http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/ogden_memo.pdf.

SUPPLEMENTAL GUIDANCE FOR PROSECUTORS REGARDING CRIMINAL DISCOVERY INVOLVING FORENSIC EVIDENCE AND EXPERTS[1]

Forensic science covers a variety of fields, including such specialties as DNA testing, chemistry, and ballistics and impression analysis, among others. As a general guiding rule, and allowing for the facts and circumstances of individual cases, prosecutors should provide broad discovery relating to forensic science evidence as outlined here. Disclosure of information relating to forensic science evidence in discovery does not mean that the Department concedes the admissibility of that information, which may be litigated simultaneously with or subsequent to disclosure.

The Duty to Disclose, Generally

The prosecution's duty to disclose is generally governed by Federal Rules of Criminal Procedure 16 and 26.2, the Jencks Act (18 U.S.C. §3500), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, §9-5.001 of the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment material.

Rule 16 of the Federal Rules of Criminal Procedure establishes three disclosure responsibilities for prosecutors that may be relevant to forensic evidence. First, under Fed. R. Crim. P. 16(a)(1)(F), the government must, upon request of the defense, turn over the results or reports of any scientific test or experiment (i) in the government's possession, custody or control, (ii) that an attorney for the government knows or through due diligence could know, and (iii) that would be material to preparing the defense or that the government intends to use at trial. Second, under Fed. R. Crim. P. 16(a)(1)(G), if requested by the defense, the government must provide a written summary of any expert testimony the government intends to use at trial. At a minimum, this summary must include the witness's opinions, the bases and reasons for those opinions, and the expert's qualifications. Third, under Fed. R. Crim. P. 16(a)(1)(E), if requested by the defense, the government must produce documents and items material to preparing the defense that are in the possession, custody, or control of the government. This may extend to records documenting the tests performed, the maintenance and reliability of tools used to perform those tests, and/or the methodologies employed in those tests.

Both the Jencks Act and *Brady/Giglio* may also come into play in relation to forensic evidence. For example, a written statement (report, email, memo) by a testifying forensic witness may be subject to disclosure under the Jencks Act if it relates to the subject matter of his or her testimony. Information providing the defense with an avenue for challenging test results may be *Brady/Giglio* information that must be disclosed. And, for forensic witnesses employed by the government, *Giglio* information must be gathered from the employing agency and reviewed for possible disclosure.

These are the minimum requirements, and the Department's discovery policies call for disclosure beyond these thresholds.

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[1] This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

The Duty to Disclose in Cases with Forensic Evidence and Experts

The Department's policy to provide discovery over and above the minimum legal thresholds applies to cases with forensic evidence. Rule 16's disclosure requirements – disclosing the results of scientific tests (16(a)(1)F)), the witness' written summary (16(a)(1)(G)), and documents and items material to preparing the defense (16(a)(1)(E)) – are often jointly satisfied when presenting expert forensic testimony, since disclosure of the test results, the bases for those results, and the expert's qualifications will often provide all the necessary information material to preparation of the defense. But, depending on the complexity of the forensic evidence, or where multiple forensic tests have been performed, the process can be complicated because it may require the prosecutor to work in tandem with various forensic scientists to identify and prepare additional relevant information for disclosure. Although prosecutors generally should consult with forensic experts to understand the tests or experiments conducted, responsibility for disclosure ultimately rests with the prosecutor assigned to the case.

In meeting obligations under Rule 16(a)(1)(E), (F), and (G), the Jencks Act, and *Brady/Giglio*, and to comply with the Department's policies of broad disclosure, the prosecutor should be attuned to the following four steps:

1. First, the prosecutor should obtain the forensic expert's laboratory report, which is a document that describes the scope of work assigned, the evidence tested, the method of examination or analysis used, and the conclusions drawn from the analyses conducted. Depending on the laboratory, the report may be in written or electronic format; the laboratory may routinely route the report to the prosecutor, or the prosecutor may need to affirmatively seek the report from the forensic expert or his or her laboratory. In most cases the best practice is to turn over the forensic expert's report to the defense if requested. This is so regardless of whether the government intends to use it at trial or whether the report is perceived to be material to the preparation of the defense. If the report contains personal information about a victim or witness, or other sensitive information, redaction may be appropriate and necessary. This may require court authorization if the forensic expert will testify, as the report likely will be considered a Jencks Act statement. (See the Additional Considerations section below.)

2. Second, the prosecutor should disclose to the defense, if requested, a written summary for any forensic expert the government intends to call as an expert at trial. This statement should summarize the analyses performed by the forensic expert and describe any conclusions reached. Although the written summary will vary in length depending on the number and complexity of the tests conducted, it should be sufficient to explain the basis and reasons for the expert's expected testimony. Oftentimes, an expert will provide this information in an "executive summary" or "synopsis" section at the beginning of a report or a "conclusion" section at the end. Prosecutors should be mindful to ensure that any separate summary provided pursuant to Rule 16(a) should be consistent with these sections of the report. Further, any changes to an expert's opinion that are made subsequent to the initial disclosure to the defense ordinarily should be made in writing and disclosed to the defense.

3. Third, if requested by the defense, the prosecutor should provide the defense with a copy of, or access to, the laboratory or forensic expert's "case file," either in electronic or hard-copy form. This information, which may be kept in an actual file or may be compiled by the forensic expert, normally will describe the facts or data considered by the forensic expert, include the underlying documentation of the examination or analysis performed, and contain the material necessary for another examiner to understand the expert's report. The exact material contained in a case file varies depending on the type of forensic analysis performed. It may include such items as a chain-of-custody log; photographs of physical evidence; analysts' worksheets or bench notes; a scope of work; an examination plan; and data, charts and graphs that illustrate the results of the tests conducted.

   In some circumstances, the defense may seek laboratory policies and protocols. To the extent that a laboratory provides this information online, the prosecutor may simply share the web address with the defense. Otherwise, determinations regarding disclosure of this information should be made on a case-by-case basis in consultation with the forensic analysts involved, taking into account the particularity of the defense's request and how relevant the request appears to be to the anticipated defenses.

4. Fourth, the prosecutor should provide to the defense information on the expert's qualifications. Typically, this material will include such items as the expert's curriculum vitae, highlighting relevant education, training and publications, and a brief summary that describes the analyst's synopsis of experience in testifying as an expert at trial or by deposition. The prosecutor should gather potential *Giglio* information from the government agency that employs the forensic expert. If using an independent retained forensic expert, the prosecutor should disclose the level of compensation as potential *Giglio* information; the format of this disclosure is left to the discretion of the individual prosecuting office.

Disclosure should be made according to local rules but at least as soon as is reasonably practical and, of course, reasonably in advance of trial. It is important that the prosecutor leave sufficient time to obtain documents and prepare information ahead of disclosure. When requesting supporting documents from a laboratory's file regarding a forensic examination, the prosecutor should consult the guidelines set by the laboratory for the manner in which discovery requests should be made, and for the time required for them to process and deliver the materials to the prosecutor. Further, if multiple forensic teams have worked on a case, the prosecutor should build in sufficient time to consult with, and obtain relevant materials from, each relevant office or forensic expert.

Additional Considerations

Certain situations call for special attention. These may include cases with classified information or when forensic reports reveal the identities of cooperating witnesses or undercover officers, or disclose pending covert investigations. In such cases, when redaction or a protective order may be necessary, prosecutors should ordinarily consult with supervisors.

Laboratory case files may include written communications, including electronic communication such as emails, between forensic experts or between forensic experts and prosecutors. Prosecutors should review this information themselves to determine which communications, if any, are protected and which information should be disclosed under *Brady/Giglio*, Jencks, or Rule 16. If the circumstances warrant (for example, where review of a case file indicates that tests in another case or communications outside the case file may be relevant), prosecutors should request to review additional materials outside the case file. At the outset of a case, prosecutors should ensure that they and all forensic analysts involved are familiar with and follow the Deputy Attorney General's memorandum entitled "Guidance on the Use, Preservation, and Disclosure of Electronic Communications in Federal Criminal Cases": http://dojnet.doj.gov/usao/eousa/ole/usabook/memo/dag_ecom.pdf.

Finally, when faced with questions about disclosure, prosecutors should consult with a supervisor, as the precise documents to disclose tend to evolve, based especially upon the practice of particular laboratories, the type and manner of documentation at the laboratory, and current rulings from the courts.