

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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**MEMORANDUM**

**TO:** Hon. David G. Campbell, Chair  
Committee on Rules of Practice and Procedure

**FROM:** Hon. Donald W. Molloy, Chair  
Advisory Committee on Criminal Rules

**RE:** Report of the Advisory Committee on Criminal Rules

**DATE:** December 8, 2017

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**I. Introduction**

The Advisory Committee on Criminal Rules met on October 24, 2017, in Chicago, Illinois. There are no action items. This report discusses the following information items:

- The Committee's continued consideration of draft rules implementing the CACM Guidance and other options to protect cooperators;
- The Federal Judicial Center's preparation of materials concerning complex criminal litigation;
- A suggestion to amend Rule 32 concerning the provision of presentence reports (PSRs);
- A suggestion to amend Rule 43 to permit the court to sentence by videoconference; and

- A suggestion to revise Rule 16 to provide additional pretrial discovery concerning the testimony of expert witnesses.

Finally, in lieu of a formal hearing, the Rule 16.1 Subcommittee invited Professor Daniel McConkie to make a statement and answer questions on proposed Rule 16.1, which has been published for public comment.

## **II. Draft Rules to Implement CACM's Guidance Concerning Cooperators**

The main topic for discussion at the meeting was the report of the Cooperator Subcommittee. The Subcommittee had drafted multiple alternative sets of rules amendments to implement CACM's Guidance concerning cooperators. The Subcommittee's Chair, Judge Kaplan, summarized the Subcommittee's report, including:

- Amendments designed to implement CACM's Guidance exactly as the Guidance was written, without change;
- Amendments omitting CACM's requirement for bench conferences in every case during the plea and sentencing hearings;
- Amendments omitting the bench conferences and sealing the entirety of various documents that may refer to cooperation, rather than requiring bifurcation and the filing of sealed supplements to each document;
- Amendments omitting the bench conferences and directing these documents to be submitted directly to the court and not filed, rather than filed under seal; and
- Amendments designed to implement CACM's Guidance and to supplement it with additional amendments that might be deemed necessary or desirable to carry out CACM's approach and objectives ("CACM plus").

These five options were discussed in detail in a memorandum from the reporters, which included as appendices side-by-side charts allowing comparison of the changes required for each approach. That memorandum and the appendices are included as Tab B. Judge Kaplan noted that the Subcommittee had earlier drafted yet another set of amendments directing that documents that may refer to cooperation be added to the PSR rather than filed with the court, but the Task Force on Protecting Cooperators (which Judge Kaplan also chairs) had rejected that approach.<sup>1</sup> A side-by-side comparison of all five options noted above appears in a chart included as an attachment to this report.

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<sup>1</sup> A variety of concerns were expressed about the PSR approach. It would reduce transparency, alter the character of the PSR, and impose new responsibilities and burdens on Probation Officers.

Additionally, Judge Kaplan stated that the Subcommittee had worked on, but had not completed, a new draft Rule 49.2 taking a different approach: limiting remote access to categories of documents that frequently refer to cooperation, but retaining full access to those documents at the courthouse.

Judge Kaplan informed the Committee that after multiple telephone conferences to discuss and refine the various sets of amendments based on the CACM Guidance, the Subcommittee had voted unanimously to advise the Committee that:

- (1) the Subcommittee believes that the CACM rules package included in its report would accurately implement CACM's Guidance; and
- (2) the Subcommittee does not recommend the adoption of that CACM rules package or any of the other alternative sets of rules amendments designed as variations on CACM's Guidance.

Although there was no dissent from these conclusions in the Subcommittee, there were two abstentions. Judge Kaplan abstained because of his role as chair of the Task Force. Mr. Wroblewski abstained, stating that the Department of Justice had not reached a final position on these issues.

After Judge Kaplan's presentation and a detailed discussion of the various amendments, each member of the Committee had the opportunity to state his or her views on the two questions before the Committee:

- (1) whether the CACM rules package would fully implement CACM's Guidance, and
- (2) whether the Committee should recommend to the Standing Committee the adoption of the CACM rules package drafted by the Subcommittee or the adoption of any of the alternative variations on those rules amendments.

On the first question, all members of the Committee endorsed the view that the CACM rules package drafted by the Subcommittee would faithfully implement CACM's Guidance.

On the second question, no member of the Committee spoke in favor of adopting that package of amendments. The statements of each member are summarized on pages 8-19 of the draft minutes, which are included as Tab C. Several main themes emerged. First, all Committee members agreed that the threat to cooperators is a serious problem that must be addressed. Second, members were strongly opposed to CACM's recommendations requiring bench

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Additionally, some of the materials including information about cooperation (such as plea documents, transcripts and Rule 35 materials) are normally produced and filed after the preparation of the PSR.

conferences in every case at the plea and sentencing hearings. Third, many members expressed the view that the CACM Guidance goes too far. Some members characterized the amendments necessary to implement that guidance as a dramatic sea change in the rules. Others opposed a solution based on secrecy in judicial proceedings, and described the CACM amendments as shifting from the current culture of transparency to a culture of secrecy. Some members were concerned that the Federal Judicial Center's survey did not provide a sufficient empirical basis for CACM's recommendations. Several members expressed the view that it was not appropriate to make dramatic across-the-board legislative changes. Rather, the situation called for more modest changes, as well as continuing to monitor and to learn from the experience in various districts before imposing national solutions.

Many members also expressed the view that administrative changes might substantially reduce the need for amendments to the Rules of Criminal Procedure, and that those non-rules options should be explored first. The Task Force working group has developed recommendations for changes by the Bureau of Prisons (BOP) that should help to reduce inmates' use of court records to identify and target cooperators. Additionally, another Task Force working group was considering changes in the CM/ECF system that would make it more difficult for anyone to identify cooperators from the court's records. Mr. Wroblewski, for example, stated that the Department was not sure rule amendments are the best approach and was very hopeful that the BOP and CM/ECF working groups will offer solutions that would significantly reduce the problem.

Although no member expressed the view that the Committee should endorse the CACM rules, a motion was made and seconded to defer action on the Subcommittee's recommendations until the Committee had more information on possible changes at BOP facilities and in the CM/ECF systems. This motion failed on a voice vote.

The motion to adopt the Subcommittee's recommendation to oppose the CACM rules (and all of the variations on those rules) passed with two no votes. Judge Kaplan and Mr. Wroblewski abstained.

The Committee also voted unanimously to hold in abeyance any final recommendation on the Subcommittee's alternative approach of limiting remote public access, reflected in its working draft of new Rule 49.2. Judge Kaplan explained that the new Rule's approach of limiting remote access overlapped to a degree with proposals under consideration by the Task Force's CM/ECF working group. Although the Committee deferred action on any new remote access rule, members provided feedback to the Subcommittee on its working draft of Rule 49.2.

### **III. Federal Judicial Center Initiatives Concerning Complex Criminal Litigation**

The Committee heard a report from the Rule 16.1 Subcommittee, chaired by Judge Kethledge, which had been charged with exploring with the Federal Judicial Center (FJC) the possibility of developing a manual on complex criminal litigation that would parallel the

Manual on Complex Civil Litigation. At the FJC's request, the Subcommittee prepared a short list of topics it considered important to include in such a manual. Ms. Laural Hooper, senior research associate at the FJC, explained that the FJC will develop a special topics webpage focusing exclusively on complex criminal litigation, which will initially include materials that it has already prepared in a more user-friendly fashion. No decision has been made yet whether all of the materials originally prepared for judicial audiences will be available to the public. Many new FJC publications are made available online, rather than in hard copy, and are prepared by outside academics and lawyers, rather than in house. The FJC is willing to take the next steps on developing the manual, including getting input on new topics, from a broader group.

#### **IV. New Rules Suggestions**

The Committee discussed three new rules suggestions.

First, Judge Molloy brought to the Committee's attention a suggestion concerning the provision of PSRs to defendants that the Committee deemed related to its ongoing consideration of protection of cooperators. Rule 32(e)(2) now provides:

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.

Judge Molloy reported that in his district Probation Officers were receiving requests from defendants for copies of their PSRs. There was concern that those making such requests might have been facing pressure to provide materials that could reveal whether they had cooperated. The Committee discussed the history of Rule 32(e)(2), which deliberately granted the right to receive the PSR to the defendant (as well as counsel), in order to increase the chances that incorrect information would be identified and corrected. Members noted, however, that in practice PSRs are served only on counsel, not on the defendant. In light of the concerns that the provision of PSRs directly to defendants might contribute to the problem of threats and harm to cooperators, the question whether Rule 32(e)(2) should be revised was referred to the Cooperator Subcommittee.

Second, the Committee considered a suggestion from Judge Donald Walters that it consider amending Rule 43 to allow sentencing by videoconference. He proposed that unless the defendant objects and shows good cause, a judge should be allowed to conduct a sentencing hearing from a remote location, appearing in the courtroom via videoconference. Committee members agreed that there is a significant difference between sentencing by videoconference and sentencing in person. When both the defendant and the judge are in the courtroom, the judge can better determine whether the defendant understands the proceedings and has not been forced or threatened. Moreover, sentencing is the most human thing judges do, and it has very grave consequences for the defendant. Members also noted unusual situations where, under the existing rule, a court has conducted sentencing with a remotely located defendant, when the

*defendant* preferred to appear by videoconference rather than in person. Accordingly, the Committee decided not to pursue the proposed amendment.

The Committee decided to table a third proposal, by Judge Jed Rakoff, to amend Rule 16 to bring pretrial disclosure of the testimony of expert witnesses in criminal cases closer to the pretrial discovery now provided in civil cases. The Committee was informed that the Evidence Committee would be taking up questions regarding the admissibility of expert testimony, and it decided to defer further consideration of Judge Rakoff's proposal for the time being.

#### **V. Comments on Proposed Rule 16.1**

Finally, in lieu of a holding formal hearing (which been cancelled) the Committee heard from Professor Daniel McConkie, regarding proposed Rule 16.1. Professor McConkie expressed his support of the general direction taken in the published rule, suggested that the rule be revised to require that the parties confer "in good faith" and report back to the court, and answered several questions from Committee members.

**Side by Side Example Rule Amendments–Variations on CACM Procedures**  
**November 2017**

| <b>Full CACM Procedures: Sealed Supplements &amp; Courtroom Restrictions</b>   | <b>CACM Sealing; No Courtroom Restrictions</b>  | <b>Whole Document Sealing; No Courtroom Restrictions</b>  | <b>No Document Filing; No Courtroom Restrictions</b>  | <b>CACM Plus/Complete</b>   |
|--|---|---|---|---|
| <b>Rule 11</b>   | <b>Rule 11</b>  | <b>Rule 11</b>  | <b>Rule 11</b>  | <b>Rule 11</b>  |
| <b>(c) Plea Agreement Procedure.</b>   | <b>(c) Plea Agreement Procedure.</b>  | <b>(c) Plea Agreement Procedure.</b>  | <b>(c) Plea Agreement Procedure.</b>  | <b>(c) Plea Agreement Procedure.</b>  |
| <p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> 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.</p> <p><b><u>(B) Bench Conference Required.</u></b> [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.</p> | <p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> 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.</p> | <p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> 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.</p> | <p><i>(2) Disclosing <u>and Submitting</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> 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.</p> | <p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) In Open Court.</u></b> 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.</p> <p><b><u>(B) Bench Conference Required.</u></b> [In every case.] The disclosure must include a bench conference. <b>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.</b></p> <p><i>[NOTE: 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. 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.]</i></p> |

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|---|--|---|--|--|
| <p><b>[Rule 11(c)(2) cont]</b></p> <p><b>(C) Filing the Agreement.</b> The parties must file the plea agreement.<sup>1</sup> 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.</p> <p style="text-align: center;">* * *</p> | <p><b>(B) Filing the Agreement.</b> 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.</p> <p style="text-align: center;">* * *</p> | <p><b>(B) Filing the Agreement.</b> The plea agreement must be filed under seal. The agreement must remain under seal indefinitely until the court orders otherwise.</p> <p style="text-align: center;">* * *</p> | <p><b>(B) Submitting the Agreement.<sup>2</sup></b> 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].</p> <p style="text-align: center;">* * *</p> | <p><b>(C) Filing the Agreement.</b> 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.</p> <p><b>(D) Filing Submissions Concerning the Agreement.</b> 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.</p> <p style="text-align: center;">* * *</p> <p><i>[NOTE: 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.]</i></p> |

<sup>1</sup> 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.

<sup>2</sup> 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.

## Side by Side Example Rule Amendments–Variations on CACM Procedures November 2017

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|--|--|--|---|--|
| <b>Rule 11</b>   | <b>Rule 11</b>                               | <b>Rule 11</b>   | <b>Rule 11</b>  | <b>Rule 11</b>   |
| <b>(g) Recording the Proceedings.</b>  | <b>(g) Recording the Proceedings.</b>        | <b>(g) Recording the Proceedings.</b>  | <b>(g) Recording the Proceedings.</b>   | <b>(g) Recording the Proceedings.</b>  |
| <p><b>(1) In General.</b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) Inquiries and Advice.</b> 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).</p> <p><b>(3) Bench Conference.</b> 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.</p> | <p><u><i>(no change)</i></u><sup>3</sup></p> | <p><b>(1) In General.</b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) Inquiries and Advice.</b> 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).</p> <p><b>(3) Filing Under Seal.</b> If the <del>proceedings required by Rule 11(c)(2)</del> are transcribed, the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</p> | <p><b>(1) In General.</b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) Inquiries and Advice.</b> 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).</p> <p><b>(3) No filing.</b> [Unless the court orders otherwise,] the recording or transcript of the plea proceeding must not be filed with the court.<sup>4</sup></p> | <p><b>(1) In General.</b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) Inquiries and Advice.</b> 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).</p> <p><b>(3) Bench Conference.</b> 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.</p> <p><i>[NOTE: 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.]</i></p> |

<sup>3</sup> 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.

<sup>4</sup> As noted in our memorandum, a no filing rule for transcripts would require changes in the Judicial Conference’s policy, and perhaps also legislation.

**Side by Side Example Rule Amendments–Variations on CACM Procedures**  
**November 2017**

| <b>Rule 32</b><br><b>(g) Submitting the Report; Written Memoranda.</b>   | <b>Rule 32</b><br><b>(g) Submitting the Report; Written Memoranda.</b>  | <b>Rule 32</b><br><b>(g) Submitting the Report; Written Memoranda.</b>  | <b>Rule 32</b><br><b>(g) Submitting the Report; Written Memoranda.</b>   | <b>Rule 32</b><br><b>(g) Submitting the Report; Written Memoranda.</b>   |
|--|---|---|--|--|
| <p><b><u>(1) Report.</u></b> 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.</p> <p><b><u>(2) Memoranda.</u></b> 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:</p> <p><b><u>(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</u></b></p> <p><b><u>(B) a statement that there has been no cooperation.</u></b></p> <p style="text-align: center;">* * *</p> | <p><b><u>(1) Report.</u></b> 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.</p> <p><b><u>(2) Memoranda.</u></b> 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:</p> <p><b><u>(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</u></b></p> <p><b><u>(B) a statement that there has been no cooperation.</u></b></p> <p style="text-align: center;">* * *</p> | <p><b><u>(1) Report.</u></b> 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.</p> <p><b><u>(2) Memoranda.</u></b> 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.</p> <p style="text-align: center;">* * *</p> | <p><b><u>(1) Report.</u></b> 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.</p> <p><b><u>(2) Memoranda.</u></b> Any written sentencing memorandum must be submitted directly to</p> <ul style="list-style-type: none"> <li>• <u>the sentencing judge,</u></li> <li>• <u>counsel of record for the government, and</u></li> <li>• <u>counsel of record for the [individual] defendant in the underlying prosecution.</u></li> </ul> <p>The memorandum must not be filed with the court.</p> <p style="text-align: center;">* * *</p> | <p><b><u>(1) Report.</u></b> 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.</p> <p><b><u>(2) Memoranda.</u></b> 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:</p> <p><b><u>(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</u></b></p> <p><b><u>(B) a statement that there has been no cooperation.</u></b></p> <p><b><u>(3) Filing Presentence Report.</u></b> 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.</p> <p style="text-align: center;">OR, as alternative</p> <p><b><u>(3) No Filing of Presentence Report.</u></b> 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.</p> <p><i><u>[NOTE: CACM’s Guidance does not mandate filing or sealing of the presentence report].</u></i></p> |

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|--|---|---|---|---|
| Rule 32  | Rule 32                                 | Rule 32   | Rule 32                                       | Rule 32   |
| (i) Sentencing <sup>5</sup>  | (i) Sentencing                          | (i) Sentencing                                    | (i) Sentencing                                | (i) Sentencing  |
| <p style="text-align: center;">* * *</p> <p><i>(4) Opportunity to Speak</i></p> <p style="text-align: center;">* * *</p> <p><b>(C) <del>In Camera</del> Proceedings <u>In Camera or at the Bench.</u></b></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> [In every case,] <u>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></p> | (no change)                             | (no change)                                       | (no change) <sup>6</sup>                      | <p style="text-align: center;">* * *</p> <p><i>(4) Opportunity to Speak</i></p> <p style="text-align: center;">* * *</p> <p><b>(C) <del>In Camera</del> Proceedings <u>In Camera or at the Bench.</u></b></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> In every case, sentencing must include a conference [in camera or] at the bench. <u>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.</u></p> <p style="text-align: center;">* * *</p> <p><i>[NOTE: 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.]</i></p> |

<sup>5</sup> 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.

<sup>6</sup> As noted in our memorandum, a no filing rule for transcripts would require changes in the Judicial Conference’s policy, and perhaps legislation.

**Side by Side Example Rule Amendments–Variations on CACM Procedures**  
**November 2017**

| Full CACM Procedures: Sealed Supplements & Courtroom Restrictions | CACM Sealing; No Courtroom Restrictions | Whole Document Sealing; No Courtroom Restrictions | No Document Filing; No Courtroom Restrictions | CACM Plus/Complete  |
|---|---|---|---|---|
|   |   |   |   | <p><b>[Rule 32, cont.]</b></p> <p><b><u>(l) Written References to Cooperation.</u></b></p> <p><b><u>(1) By a Party or Victim.</u></b> 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.</p> <p><b><u>(2) By the Judge.</u></b> 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.</p> <p><i><u>[NOTE: 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:</u></i></p> <ul style="list-style-type: none"> <li>• <i><u>objections to the PSR</u></i></li> <li>• <i><u>evidence submitted by victims and parties for sentencing</u></i></li> <li>• <i><u>notice by the court under Rule 32(h), and</u></i></li> <li>• <i><u>summaries under Rule 32(i)(B).</u></i></li> </ul> <p><i><u>CACM’s Guidance does not address any of these items. This shows what a rule might look like if the same “sealed supplement” approach were followed for all of these items. Also, this places these changes in a new subsection for Rule 32, rather than an amendment subdividing existing Rule 32(g) or (i).]</u></i></p> |

## Side by Side Example Rule Amendments—Variations on CACM Procedures November 2017

| 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.  | Rule 35. Correcting or Reducing a Sentence.   |
|---|--|--|--|---|
| (b) Reducing a Sentence for Substantial Assistance.   | (b) Reducing a Sentence for Substantial Assistance.  | (b) Reducing a Sentence for Substantial Assistance.  | (b) Reducing a Sentence for Substantial Assistance.                                  | (b) Reducing a Sentence for Substantial Assistance.   |
| <p style="text-align: center;">* * *</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> | <p style="text-align: center;">* * *</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> | <p style="text-align: center;">* * *</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> | <p style="text-align: center;">* * *</p> <p><u>no change; see Rule 49 below)</u></p> | <p style="text-align: center;">* * *</p> <p><u>(3) Sealing.</u> A motion, <u>an order, and related documents under Rule 35(b)</u> must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> <p><i>[NOTE: 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. This version provides for sealing of orders and related documents.]</i></p> |

## Side by Side Example Rule Amendments–Variations on CACM Procedures November 2017

| Full CACM Procedures: Sealed Supplements & Courtroom Restrictions   | CACM Sealing; No Courtroom Restrictions  | Whole Document Sealing; No Courtroom Restrictions | No Document Filing; No Courtroom Restrictions | CACM Plus/Complete  |
|---|--|---|---|---|
| <b>Rule 47</b>  | <b>Rule 47</b>                           | <b>Rule 47</b>                                    | <b>Rule 47</b>                                | <b>Rule 47</b>  |
| <b>(b) Form and Content of a Motion.</b>  | <b>(b) Form and Content of a Motion.</b> | <b>(b) Form and Content of a Motion.</b>          | <b>(b) Form and Content of a Motion.</b>      | <b>(b) Form and Content of a Motion.</b>  |
| <p>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.</p> <p><u>(no change)</u><sup>7</sup></p> | <p><u>(no change)</u></p>                | <p><u>(no change)</u></p>                         | <p><u>(no change; see Rule 49 below)</u></p>  | <p><b>(1) In Writing.</b> 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.</p> <p><b>(2) Contents and Support.</b> A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.</p> <p><b>(3) Motions for Sentence Reduction.</b> Any motion for a sentence reduction under [Rule 35,] 18 U.S.C. §3553(e), [or U.S.S.G. §5K1.1],<sup>8</sup> together with supporting documents, must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><i>[NOTE: CACM’s Guidance makes no pro-vision for sealing § 3553(e) and §5K motions. This version 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.]</i></p> |

<sup>7</sup> 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).

<sup>8</sup> 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.”

**Side by Side Example Rule Amendments–Variations on CACM Procedures  
November 2017**

| <b>Full CACM Procedures: Sealed Supplements &amp; Courtroom Restrictions</b> | <b>CACM Sealing; No Courtroom Restrictions</b> | <b>Whole Document Sealing; No Courtroom Restrictions</b> | <b>No Document Filing; No Courtroom Restrictions</b>   | <b>No Remote Access</b>                                     |
|--|--|--|--|---|
| <b>Rule 49</b>   | <b>Rule 49</b>                                 | <b>Rule 49</b>   | <b>Rule 49<sup>9</sup></b>   | <b>Rule 49</b>  |
| <i><u>(no change)</u></i>  | <i><u>(no change)</u></i>                      | <i><u>(no change)</u></i>                                | <p><b><u>(b) Filing.</u></b></p> <p><b><u>(1) When Required; Certificate of Service.</u></b><br/> <del>Ordinarily, a</del>Any 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. <b><u>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</u></b></p> <ul style="list-style-type: none"> <li>• <b><u>the sentencing judge.</u></b></li> <li>• <b><u>counsel of record for the government, and</u></b></li> <li>• <b><u>counsel of record for the [individual] defendant in the underlying prosecution.</u></b></li> </ul> <p><b><u>The motion must not be filed with the court.</u></b></p> | <i><u>(no change; see proposed amendment Rule 49.2)</u></i> |

<sup>9</sup> Changes shown to proposed amendment sent to the Judicial Conference in August. New material dealing with cooperators is shown in red.

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# TAB 3B

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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,<sup>1</sup> 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

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<sup>1</sup> 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. 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. 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.

#### Arguments in favor.

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<sup>2</sup>) 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.

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<sup>2</sup> 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.<sup>3</sup> It is now well established that the First Amendment right of public access applies<sup>4</sup> to both the plea<sup>4</sup> and sentencing phases<sup>5</sup> of a

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<sup>3</sup> 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.")

<sup>4</sup> *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.")

<sup>5</sup> *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.*<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

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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<sup>6</sup> *Press-Enterprise II*, 478 U.S. at 16 (footnotes omitted and emphasis added).

<sup>7</sup> 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).

<sup>8</sup> *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 512 (1984).

criminal cases. As explained in our First Amendment memo,<sup>9</sup> 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,<sup>10</sup> 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).<sup>11</sup> 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.<sup>12</sup> This provided a sufficient basis to deny a journalist's motion to unseal.<sup>13</sup> 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.<sup>14</sup>

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."<sup>15</sup> 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.<sup>16</sup> It would also undermine important functions served by public access in these proceedings.<sup>17</sup>

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<sup>9</sup> 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)).

<sup>10</sup> *United States v. Sonin*, 167 F. Supp. 3d 971, 978–83 (E.D. Wis. 2016).

<sup>11</sup> *United States v. Doe*, 63 F.3d 121, 129–30 (2d Cir. 1995).

<sup>12</sup> *United States v. Doe*, 629 F. App'x 69, 72–73 (2d Cir. 2015).

<sup>13</sup> *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).

<sup>14</sup> See, e.g., *id.* at \*1, 6 (noting that various items had been sealed and some later unsealed).

<sup>15</sup> *Alcantara*, 396 F.3d at 199 (quoting *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988)).

<sup>16</sup> 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.<sup>18</sup> 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](http://www.njd.uscourts.gov/sites/njd/files/Protocol%20for%20Disclosure%20of%20Sentencing%20Materials_0.pdf).

<sup>17</sup> *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.”).

<sup>18</sup> 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.<sup>19</sup> The practice of not mentioning cooperation in open court seems to be common in a number of districts.<sup>20</sup>

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.<sup>21</sup> 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 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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<sup>19</sup> 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)).

<sup>20</sup> 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.*

<sup>21</sup> 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.<sup>22</sup>

*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.<sup>23</sup>

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<sup>22</sup> *United States v. Rodriguez*, 725 F.3d 271, 278 (2d Cir. 2013).

<sup>23</sup> 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*.”<sup>24</sup> 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,<sup>25</sup> or after the trial or when the danger that prompted the confidential conference has passed.<sup>26</sup> Other approaches have also been noted.<sup>27</sup>

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.

<sup>24</sup> LAFAVE ET AL., *supra* note 7, § 23.1(d) at text accompanying note 174.

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

<sup>26</sup> *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-trial release of transcripts”).

<sup>27</sup> 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),<sup>28</sup> 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.<sup>29</sup>

### 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.<sup>30</sup> 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.<sup>31</sup>

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<sup>28</sup> *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.”).

<sup>29</sup> *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*.”)

<sup>30</sup> See Beale and King, *supra* note 3.

<sup>31</sup> 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.<sup>32</sup> The Eleventh Circuit has held that the maintenance of a public and a sealed docket is inconsistent with the public's right of access.<sup>33</sup> Citing the decision of the Eleventh Circuit, the Second Circuit agreed that there is a qualified First Amendment right of access to docket sheets.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> Finally, a sealed docket (or in this case, a sealed master event) prevents the public from presenting objections to the sealing of individual documents.<sup>37</sup>

*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."<sup>38</sup> 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"); see also *United States v. Mendoza*, 698 F.3d 1303, 1306–07 (10th Cir. 2012) (discussing history of open and public dockets).

<sup>32</sup> 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).

<sup>33</sup> *United States v. Valenti*, 987 F.3d 708, 715 (11th Cir. 1993).

<sup>34</sup> *Hartford Courant Co.*, 380 F.3d at 96.

<sup>35</sup> *Id.* at 93–94.

<sup>36</sup> *Id.* at 95–96.

<sup>37</sup> *Id.* at 96 (citing *Valenti*, 987 F.3d at 96).

<sup>38</sup> *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,<sup>39</sup> 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.”<sup>40</sup> 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 . . . .

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<sup>39</sup> See *supra* text accompanying note 2 (citing figures on percentage of defendants receiving 5K1.1 departures).

<sup>40</sup> 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.

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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.<sup>41</sup> It is unclear whether that analysis would extend to transcripts, which are generally prepared for the use of the parties, rather than the court.<sup>42</sup> 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

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<sup>41</sup> See *infra* text and notes 52–54.

<sup>42</sup> 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,<sup>43</sup>

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<sup>43</sup> *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.<sup>44</sup> 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.<sup>45</sup> We are aware of only one case—Chief Judge Ron Clark's decision in 2015<sup>46</sup>—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.

<sup>44</sup> *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008).

<sup>45</sup> 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)).

<sup>46</sup> *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.<sup>47</sup>

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,<sup>48</sup> 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.<sup>49</sup>

*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,<sup>50</sup> 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

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<sup>47</sup> 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).

<sup>48</sup> See *supra* text accompanying note 31.

<sup>49</sup> See *supra* text accompanying notes 32–37.

<sup>50</sup> 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.<sup>51</sup>

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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<sup>51</sup> 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.”<sup>52</sup>

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.”<sup>53</sup> 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.<sup>54</sup>

#### **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

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<sup>52</sup> *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.”).

<sup>53</sup> *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.”)

<sup>54</sup> *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.<sup>55</sup>

#### 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.<sup>56</sup>

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.<sup>57</sup>

The common law right of access is also applicable to sentencing memoranda. In *United States v. Kravetz*,<sup>58</sup> 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

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<sup>55</sup> 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)).

<sup>56</sup> 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.

<sup>57</sup> See generally Beale and King, *supra* note 3.

<sup>58</sup> 706 F.3d 47, 57–58 (1st Cir. 2013).

conviction, to which we have found the common law right of access applicable.”<sup>59</sup> 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.”<sup>60</sup> 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,<sup>61</sup> 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.<sup>62</sup>

*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,<sup>63</sup> 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

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<sup>59</sup> *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.

<sup>60</sup> *Id.* at 56–57 (citations, internal quotation marks, and alterations omitted).

<sup>61</sup> See *supra* text accompanying note 31.

<sup>62</sup> See *supra* text accompanying notes 32–37.

<sup>63</sup> See *supra* text accompanying note 38.

Court via a confidential letter submitted to the courtroom Deputy Clerk.”<sup>64</sup> 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.<sup>65</sup>

As noted above in connection with the alternative of not filing plea agreements,<sup>66</sup> 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.<sup>67</sup>

*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.<sup>68</sup> In those districts, sealing could be of particular importance.

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<sup>64</sup> Baerman, *supra* note 18 (responses from New Jersey and the Northern District of New York to Question 4).

<sup>65</sup> *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).

<sup>66</sup> *See supra* text accompanying notes 51–54.

<sup>67</sup> *See supra* text accompanying notes 52–54.

<sup>68</sup> 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,<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> 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

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<sup>69</sup> See Baerman, *supra* note 18 (describing responses to Question 3).

<sup>70</sup> See *supra* text accompanying notes 51–54.

<sup>71</sup> *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.<sup>72</sup>

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<sup>73</sup> 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.”<sup>74</sup> 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.<sup>75</sup> Not filing Rule 35(b) motions would raise the same First Amendment and common law right to public access issues.

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<sup>72</sup> 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”).

<sup>73</sup> See U.S. Sentencing Comm'n, *supra* note 68 (stating districts in two circuits account for approximately half of all Rule 35(b) motions).

<sup>74</sup> Baerman, *supra* note 18 (describing responses to Question 3).

<sup>75</sup> 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(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.<sup>76</sup> 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.<sup>77</sup> In rejecting a newspaper's request to unseal the government's

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<sup>76</sup> 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.")

<sup>77</sup> *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.<sup>78</sup>

There is precedent for continued sealing after the conclusion of an investigation or prosecution. Applying the First Amendment analysis, courts have declined post-conviction

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<sup>78</sup> *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.<sup>79</sup>

### 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.”<sup>80</sup> 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

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<sup>79</sup> 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).

<sup>80</sup> *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.<sup>81</sup> 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.<sup>82</sup>

Unlike the version previously considered by the Subcommittee, which was placed within Rule 49.1(c),<sup>83</sup> 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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<sup>81</sup> 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.

<sup>82</sup> 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.

<sup>83</sup> 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.<sup>84</sup> The burdensome effort here would include not only travel to the courthouse but having one's identity recorded when accessing the court record.<sup>85</sup> Files accessed at courthouse terminals can be tracked electronically,<sup>86</sup> 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

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<sup>84</sup> 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).

<sup>85</sup> 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.").

<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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

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<sup>87</sup> 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.

<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup>

Requiring identification to access court documents is feasible.<sup>92</sup> 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.<sup>93</sup>

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<sup>89</sup> 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).

<sup>90</sup> 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”).

<sup>91</sup> 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”).

<sup>92</sup> 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.

<sup>93</sup> 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,<sup>94</sup> and at least two federal courts have done so for plea and sentencing related materials.<sup>95</sup>

#### 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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup>

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.”<sup>99</sup> Section 205(c) provides,

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<sup>94</sup> 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).

<sup>95</sup> 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.”).

<sup>96</sup> 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,

<sup>97</sup> *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.”)

<sup>98</sup> CACM survey, at 87 (“Incarcerated Defendants, or friends/family members on their behalf, regularly request copies of their plea agreement and sentencing documents.”).

<sup>99</sup> 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,<sup>100</sup> and many cases have upheld the requirement of identification for entry into federal courthouses without a specific showing of need.<sup>101</sup> 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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<sup>100</sup> 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.”).

<sup>101</sup> *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.<sup>102</sup> 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,<sup>103</sup>
  - the effectiveness of alternative non-rules procedures to protect against threats and harm,<sup>104</sup> and
  - the interaction between those other procedures and any changes in the rules;
- the policy favoring transparency in judicial proceedings;

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<sup>102</sup> 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.

<sup>103</sup> 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.

<sup>104</sup> 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;<sup>105</sup>
- 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.<sup>106</sup>

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<sup>105</sup> 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.

<sup>106</sup> 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**

| <b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>  | <b>CACM Sealing; no courtroom restrictions</b>   | <b>Whole Document Sealing; no courtroom restrictions</b>  | <b>No Document Filing; no courtroom restrictions</b>   |
|---|--|---|--|
| <b>Rule 11</b>  | <b>Rule 11</b>   | <b>Rule 11</b>  | <b>Rule 11</b>   |
| <b>(c) Plea Agreement Procedure.</b>  | <b>(c) Plea Agreement Procedure.</b>   | <b>(c) Plea Agreement Procedure.</b>  | <b>(c) Plea Agreement Procedure.</b>   |
| <p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> 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.</p> <p><b><u>(B) Bench Conference Required.</u></b> [In every case,] <u>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.</u></p> | <p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> 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.</p> <p><b><u>(B) Filing the Agreement.</u></b> <u>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.</u></p> <p style="text-align: center;">* * *</p> | <p><i>(2) Disclosing <u>and Filing</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> 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.</p> <p><b><u>(B) Filing the Agreement.</u></b> <u>The plea agreement must be filed under seal. The agreement must remain under seal indefinitely until the court orders otherwise.</u></p> <p style="text-align: center;">* * *</p> | <p><i>(2) Disclosing <u>and Submitting</u> a Plea Agreement.</i></p> <p><b><u>(A) Disclosure In Open Court.</u></b> 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.</p> <p><b><u>(B) Submitting the Agreement.</u></b><sup>1</sup> <u>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].</u></p> <p style="text-align: center;">* * *</p> |

<sup>1</sup> 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**

| <b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>  | <b>CACM Sealing; no courtroom restrictions</b> | <b>Whole Document Sealing; no courtroom restrictions</b> | <b>No Document Filing; no courtroom restrictions</b> |
|---|--|--|--|
| <b>Rule 11(c)(2) continued</b>  |  |  |  |
| <p><b><u>(C) Filing the Agreement.</u></b> The parties must file the plea agreement.<sup>2</sup> 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.</p> <p>* * *</p> |  |  |  |

<sup>2</sup> 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

| <b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>   | <b>CACM Sealing; no courtroom restrictions</b> | <b>Whole Document Sealing; no courtroom restrictions</b>  | <b>No Document Filing; no courtroom restrictions</b>   |
|--|--|---|--|
| <b>Rule 11</b>   | <b>Rule 11</b>                                 |   | <b>Rule 11</b>   |
| <b>(g) Recording the Proceedings.</b>  | <b>(g) Recording the Proceedings.</b>          | <b>(g) Recording the Proceedings.</b>   | <b>(g) Recording the Proceedings.</b>  |
| <p><b>(1) <u>In General.</u></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) <u>Inquiries and Advice.</u></b> 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).</p> <p><b>(3) <u>Bench Conference.</u></b> If the bench conference required by Rule 11(c)(2) is transcribed, <b>the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</b></p> | <p><b><u>(no change)</u></b><sup>3</sup></p>   | <p><b>(1) <u>In general.</u></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) <u>Inquiries and advice.</u></b> 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).</p> <p><b>(3) <u>Filing under seal.</u></b> If the bench conference required by Rule 11(c)(2) is transcribed, <b>the transcript must be filed under seal and must remain under seal indefinitely until the court orders otherwise.</b></p> | <p><b>(1) <u>In general.</u></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) <u>Inquiries and advice.</u></b> 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).</p> <p><b>(3) <u>No filing.</u></b> [Unless the court orders otherwise,] the recording or transcript of the plea proceeding must not be filed with the court.<sup>4</sup></p> |

<sup>3</sup> 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.

<sup>4</sup> 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**

| <b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>  | <b>CACM Sealing; no courtroom restrictions</b>  | <b>Whole Document Sealing; no courtroom restrictions</b>   | <b>No Document Filing; no courtroom restrictions</b>   |
|---|---|--|--|
| <b>Rule 32</b>  | <b>Rule 32</b>  | <b>Rule 32</b>   | <b>Rule 32</b>   |
| <p><b><u>(g) Submitting the Report; Written Memoranda.</u></b><br/> <b><u>(1) Report.</u></b> 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.<br/> <b><u>(2) Memoranda.</u></b> 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:<br/> <u>(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</u><br/> <u>(B) a statement that there has been no cooperation.</u><br/>                     * * *</p> | <p><b><u>(g) Submitting the Report; Written Memoranda.</u></b><br/> <b><u>(1) Report.</u></b> 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.<br/> <b><u>(2) Memoranda.</u></b> 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:<br/> <u>(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</u><br/> <u>(B) a statement that there has been no cooperation.</u><br/>                     * * *</p> | <p><b><u>(g) Submitting the Report; Written Memoranda.</u></b><br/> <b><u>(1) Report.</u></b> 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.<br/> <b><u>(2) Memoranda.</u></b> 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.<br/>                     * * *</p> | <p><b><u>(g) Submitting the Report; Written Memoranda.</u></b><br/> <b><u>(1) Report.</u></b> 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.<br/> <b><u>(2) Memoranda.</u></b> Any written sentencing memorandum must be submitted directly to<br/> <ul style="list-style-type: none"> <li>• <u>the sentencing judge,</u></li> <li>• <u>counsel of record for the government, and</u></li> <li>• <u>counsel of record for the [individual] defendant in the underlying prosecution.</u></li> </ul> <u>The memorandum must not be filed with the court.</u><br/>                     ...</p> |

**Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures**

| <b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>   | <b>CACM Sealing; no courtroom restrictions</b> | <b>Whole Document Sealing; no courtroom restrictions</b> | <b>No Document Filing; no courtroom restrictions</b> |
|--|--|--|--|
| <b>Rule 32</b>   | <b>Rule 32</b>                                 | <b>Rule 32</b>   | <b>Rule 32</b>                                       |
| <p>(i) Sentencing<sup>5</sup></p> <p>...</p> <p>(4) Opportunity to Speak</p> <p>...</p> <p>(C) <del>In Camera</del> Proceedings <u>In Camera or at the Bench.</u></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> <u>[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></p> | <p>(no change)</p>                             | <p>(no change)</p>                                       | <p>(no change)<sup>6</sup></p>                       |

<sup>5</sup> 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.

<sup>6</sup> 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**

| <b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>   | <b>CACM Sealing; no courtroom restrictions</b>  | <b>Whole Document Sealing; no courtroom restrictions</b>   | <b>No Document Filing; no courtroom restrictions</b> |
|--|---|--|--|
| <b>Rule 35. Correcting or Reducing a Sentence.</b>   | <b>Rule 35. Correcting or Reducing a Sentence.</b>  | <b>Rule 35. Correcting or Reducing a Sentence.</b>   | <b>Rule 35. Correcting or Reducing a Sentence.</b>   |
| <p><b>(b) Reducing a Sentence for Substantial Assistance.</b><br/>* * * * *</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> | <p><b>(b) Reducing a Sentence for Substantial Assistance.</b><br/>* * * * *</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> | <p><b>(b) Reducing a Sentence for Substantial Assistance.</b><br/>* * * * *</p> <p><u>(3) Sealing.</u> A motion under Rule 35(b) must be filed under seal. The motion must remain under seal indefinitely until the court orders otherwise..</p> <p><del>(3)</del> <u>(4) Evaluating Substantial Assistance.</u> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <u>(5) Below Statutory Minimum.</u> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> | <p><u>(no change; see Rule 49 below)</u></p>         |

**Appendix A: Side by Side example rule amendments August 2017 (revised) – variations on CACM procedures**

| <b>Rule 47</b>   | <b>Rule 47</b>                                 | <b>Rule 47</b>   | <b>Rule 47</b>                                       |
|--|--|--|--|
| <b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>   | <b>CACM Sealing; no courtroom restrictions</b> | <b>Whole Document Sealing; no courtroom restrictions</b> | <b>No Document Filing; no courtroom restrictions</b> |
| <p><b>(b) Form and Content of a Motion.</b> 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.</p> <p><i>(no change)</i><sup>7</sup></p> | <i>(no change)</i>                             | <i>(no change)</i>                                       | <i>(no change; see Rule 49 below)</i>                |

<sup>7</sup> 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 <sup>8</sup>   | Rule 49  |
|--|--|--|--|--|
| <b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b> | <b>CACM Sealing; no courtroom restrictions</b> | <b>Whole Document Sealing; no courtroom restrictions</b> | <b>No Document Filing; no courtroom restrictions</b>   | <b>No Remote Access</b>                              |
| <u>(no change)</u>   | <u>(no change)</u>                             | <u>(no change)</u>                                       | <p><b><u>(b) Filing.</u></b></p> <p><b><u>(1) When Required; Certificate of Service. Ordinarily, aAny 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</u></b></p> <ul style="list-style-type: none"> <li><b><u>· the sentencing judge,</u></b></li> <li><b><u>· counsel of record for the government, and</u></b></li> <li><b><u>· counsel of record for the [individual] defendant in the underlying prosecution.</u></b></li> </ul> <p><b><u>The motion must not be filed with the court.</u></b></p> | <u>(no change; see proposed amendment Rule 49.2)</u> |

<sup>8</sup> Changes shown to proposed amendment sent to the Judicial Conference in August. New material dealing with cooperators is shown in red.  
Committee on Rules of Practice and Procedure | January 4, 2018

# 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  |
|---|--|--|
| <b>Rule 11</b>  | <b>Rule 11</b>   |  |
| <b>(c) Plea Agreement Procedure.</b>  | <b>(c) Plea Agreement Procedure.</b>   |  |
| <p data-bbox="197 626 621 691"><b>(2) <u>Disclosing and Filing a Plea Agreement.</u></b></p> <p data-bbox="226 734 642 766"><b><u>(A) Disclosure In Open Court.</u></b></p> <p data-bbox="197 773 642 984">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.</p> <p data-bbox="218 1026 525 1058"><b><u>(B) Bench Conference</u></b></p> <p data-bbox="197 1065 642 1351"><b><u>Required.</u></b> [In every case,] <u>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.</u></p> | <p data-bbox="722 626 1155 659"><b>(2) <u>Disclosing a Plea Agreement.</u></b></p> <p data-bbox="697 701 1155 912"><b><u>(A) In Open Court.</u></b> 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.</p> <p data-bbox="697 954 1142 1279"><b><u>(B) Bench Conference Required.</u></b> [In every case,] <u>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.</u></p> | <p data-bbox="1209 662 1654 912">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.</p> <p data-bbox="1209 954 1659 1205">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.</p> |

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

| <b>Full CACM procedures including courtroom restrictions</b>  | <b>CACM plus/complete</b>  | <b>Notes</b>   |
|---|--|--|
| <b>Rule 11(c)</b>   | <b>Rule 11(c)</b>  |  |
| <p><u>(C) Filing the Agreement.</u> 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.</p> <p>* * *</p> | <p><u>(C) Filing the Agreement.</u> 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.</p> <p><b><u>(D) Filing Submissions Concerning the Agreement.</u></b> 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.</p> <p>* * *</p> | <p>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.</p> <p>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.</p> |

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

| <b>Full CACM Procedures: sealed supplements &amp; courtroom restrictions</b>   | <b>CACM plus/complete</b>   | <b>Notes</b>  |
|--|---|---|
| <b>Rule 11</b>   | <b>Rule 11</b>  |   |
| <b>(g) Recording the Proceedings.</b>  | <b>(g) Recording the Proceedings.</b>   |   |
| <p><b>(1) <i>In General.</i></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) <i>Inquiries and Advice.</i></b> 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).</p> <p><b>(3) <i>Bench Conference.</i></b> <u>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.</u></p> | <p><b>(1) <i>In General.</i></b> The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.</p> <p><b>(2) <i>Inquiries and Advice.</i></b> 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).</p> <p><b>(3) <i>Bench Conference.</i></b> <u>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.</u></p> | <p>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.</p> |

## Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)

| Full CACM procedures including courtroom restrictions  | CACM plus/complete   | Notes  |
|--|--|--|
| <p><b>Rule 32</b></p> <p><b><u>(g) Submitting the Report; Written Memoranda.</u></b><br/> <b><u>(1) Report.</u></b> 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.<br/> <b><u>(2) Memoranda.</u></b> 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:<br/>             (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<br/>             (B) a statement that there has been no cooperation.<br/>           * * *</p> | <p><b>Rule 32</b></p> <p><b><u>(g) Submitting the Report; Written Memoranda.</u></b><br/> <b><u>(1) Report.</u></b> 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.<br/> <b><u>(2) Memoranda.</u></b> 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:<br/>             (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<br/>             (B) a statement that there has been no cooperation.<br/> <b><u>(3) Filing Presentence Report.</u></b> 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.<br/>             OR, as alternative<br/> <b><u>(3) No Filing of Presentence Report.</u></b> 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.</p> | <p>CACM’s Guidance does not mandate filing or sealing of the presentence report</p> <p>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.</p> <p>If the Subcommittee prefers the no filing approach to PSRs, it might be accomplished by CACM guidance rather than a Rules change.</p> |

|   |                           |              |
|---|---------------------------|--------------|
| <b>Full CACM procedures including courtroom</b> | <b>CACM plus/complete</b> | <b>Notes</b> |
|---|---------------------------|--------------|

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

| <b>restrictions</b>   |   |  |
|---|---|--|
| <p><b>Rule 32</b></p> <p><b>(i) Sentencing</b></p> <p>...</p> <p><b>(4) Opportunity to Speak</b></p> <p>...</p> <p><i>(C) Proceedings in Camera or at the Bench.</i></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> <u>[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.</u></p> | <p><b>Rule 32</b></p> <p><b>(i) Sentencing</b></p> <p>...</p> <p><b>(4) Opportunity to Speak</b></p> <p>...</p> <p><i>(C) Proceedings in Camera or at the Bench.</i></p> <p><b>(i) In General.</b> Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).</p> <p><b>(ii) Bench Conference Required.</b> <u>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.</u></p> | <p>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.</p> |

**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   |   |
|   | <p><b><u>(1) Written References to Cooperation.</u></b><br/> <b><u>(1) By a Party or Victim.</u></b> 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.</p> <p><b><u>(2) By the Judge.</u></b> 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.</p> | <p>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:</p> <ul style="list-style-type: none"> <li>• objections to the PSR</li> <li>• evidence submitted by victims and parties for sentencing</li> <li>• notice by the court under Rule 32(h), and</li> <li>• summaries under Rule 32(i)(B).</li> </ul> <p>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.</p> <p>Also, Column 2 places these changes in a new subsection for Rule 32, rather than an amendment subdividing existing Rule 32(g) or (i).</p> |

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

| Full CACM procedures including courtroom restrictions  | CACM plus/Complete   | Notes   |
|--|--|---|
| <p><b>Rule 35. Correcting or Reducing a Sentence.</b></p>  | <p><b>Rule 35. Correcting or Reducing a Sentence.</b></p>  |   |
| <p><b>(b) Reducing a Sentence for Substantial Assistance.</b><br/>                     * * * * *</p> <p><b>(3) <i>Sealing.</i></b> A motion under Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <b>(4) <i>Evaluating Substantial Assistance.</i></b> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <b>(5) <i>Below Statutory Minimum.</i></b> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> | <p><b>(b) Reducing a Sentence for Substantial Assistance.</b><br/>                     * * * * *</p> <p><b>(3) <i>Sealing.</i></b> A motion, <b>an order, and related documents under</b> Rule 35(b) must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> <p><del>(3)</del> <b>(4) <i>Evaluating Substantial Assistance.</i></b> In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.</p> <p><del>(4)</del> <b>(5) <i>Below Statutory Minimum.</i></b> When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.</p> | <p>CACM’s Guidance does not require that Rule 35 <i>orders</i> or <i>memoranda</i> be filed under seal, nor does it address the obvious import of a sealed entry after sentencing followed by an order reducing sentence.</p> <p>The CACMplus /Complete version in Column 2 provides for sealing of orders and related documents.</p> |

**Appendix B: Side by Side CACM and CACM Plus/complete (revised 9/27/2017)**

| <b>Rule 47</b>   | <b>Rule 47</b>  | <b>Rule 47</b>   |
|--|---|--|
| <b>Full CACM procedures including courtroom restrictions</b>   | <b>CACM plus/complete</b>   | <b>Notes</b>   |
| <p><b>(b) Form and Content of a Motion.</b> 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.</p> <p><u>(no change)</u></p> | <p><b>(b) Form and Content of a Motion.</b><br/> <u>(1) In Writing.</u> 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.<br/> <u>(2) Contents and Support.</u> A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.<br/> <u>(3) Motions for Sentence Reduction.</u> Any motion for a sentence reduction under [Rule 35,] 18 U.S.C. §3553(e), [or U.S.S.G. §5K1.1],<sup>1</sup> together with supporting documents, must be filed under seal, and must remain under seal indefinitely until the court orders otherwise.</p> | <p>CACM’s Guidance makes no provision for sealing § 3553(e) and §5K motions.</p> <p>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.</p> |

<sup>1</sup> 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.

1           (a) *In General.* Unless the court orders [or these rules provide]  
2           otherwise, access to an electronic file is authorized only as provided in (b),  
3           (c), and (d).

4           (b) *By the Parties and Their Attorneys.* A party and the party's  
5           attorney may have remote electronic access to any part of the case file that is  
6           not under seal or other restriction that bars access by that party.

7           (c) *By Others.* Any other person may have the following electronic  
8           access to a document that is not under seal or other restriction barring the  
9           person's access:

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

14                   (2) remote [electronic] access only to:

15                           (i) the docket maintained by the court;

16                           (ii) the indictment or information; and

17                           (iii) an opinion, order, judgment, or other

18                           disposition of the court.

19           (d) *By an Attorney in Another Case.* An attorney in another  
20           criminal case in the same district [circuit] may, without a court order, have  
21           remote electronic access to a document sealed under [Rules 11, 32, or 35] if  
22           the attorney:

23                   (1) is a registered user of the court’s electronic filing system;  
24                   (2) has filed a notice of appearance the other case and seeks  
25                   to use the document in that case; and  
26                   (3) files [under seal] in the case from which the document is  
27                   sought a signed certificate that:  
28                               (i) states that the attorney has a case-related need to  
29                               review the requested document; and  
30                               (ii) gives the name and docket number of the case in  
31                               which the attorney will use it.

# TAB 3C

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## ADVISORY COMMITTEE ON CRIMINAL RULES

### MINUTES

October 24, 2017, Chicago, Illinois

#### I. ATTENDANCE

The Criminal Rules Advisory Committee (“Committee”) met in Chicago, Illinois, on October 24, 2017. The following persons were in attendance:

Judge Donald W. Molloy, Chair  
Judge James C. Dever III  
Donna Lee Elm, Esq.  
Judge Gary Feinerman  
Mark Filip, Esq.  
James N. Hatten, Esq.  
Judge Denise Page Hood  
Judge Lewis A. Kaplan  
Professor Orin S. Kerr  
Judge Raymond M. Kethledge  
Justice Joan L. Larsen  
Judge Bruce McGivern  
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)  
Professor Catherine T. Struve, Associate Reporter, Standing Committee (by telephone)

The following persons were present to support the Committee:

Rebecca A. Womeldorf, Esq., Chief Counsel, Rules Committee Staff  
Laural L. Hooper, Esq., Federal Judicial Center  
Julie Wilson, Esq., Rules Committee Staff  
Patrick Tighe, Esq., Law Clerk, Standing Committee  
Shelly Cox, Rules Committee Staff

## **II. CHAIR'S REMARKS AND OPENING BUSINESS**

### **A. Chair's Remarks**

Judge Molloy thanked the staff for the arrangements for the meeting, then welcomed Judge David Campbell, the Chair of the Standing Committee, and two new members of the committee: Federal Defender Donna Lee Elm and Magistrate Judge Bruce McGivern.

Judge Molloy also recognized two guests who were asked to introduce themselves: Catherine M. Recker, representing the American College of Trial Lawyers, and Professor Daniel S. McConkie, who had submitted a written statement on the proposed amendment creating Rule 16.1.

### **B. Approval of Draft Minutes**

Discussion identified several typographical errors in the minutes of the Committee's Spring meeting. The Committee voted to approve the draft minutes with the proviso that the reporters would correct any errors noted by members or identified by the reporters.

### **C. Status of Rules Amendments and Pending Legislation**

Ms. Womeldorf reported on status of the proposed amendments to Rules 12.4, 49, and 45. The Judicial Conference met in September and approved those Rules, which have been transmitted to the Supreme Court. If transmitted by the Court to Congress by May 1, 2018, the Rules would become effective in December 1, 2018, absent Congressional action.

Ms. Wilson discussed the chart at Tab 1D, which included pending legislation that would directly amend the Federal Rules. She said there had been no further action on the proposals to repeal the amendments to Rule 41 and also mentioned the "Back the Blue Act," which would amend Rule 11 of the 2254 Rules. This legislation is being monitored.

Ms. Wilson also discussed legislation that would not directly amend the rules but would require some clarification after passage. The Safe at Home Act, which involves programs by states providing a designated address for use instead of the person's actual physical address, would require courts to accept the designated addresses for litigation, mail, and service. The "Article I Amicus and Intervention Act" would potentially limit or deny the House of Representative's ability to appear as an amicus or intervene in pending cases. Although there is no intent to circumvent the Rules Enabling Act, the bill raises drafting issues that could potentially work to enlarge the appeal time. The Administrative Office is communicating with staffers on the Hill, and will continue to monitor all of this legislation.

Discussion focused on the bills to repeal the amendments to Rule 41. The chart in the agenda book lists bill numbers and sponsors. In response to questions about the Department's experience in using the new provisions, Mr. Wroblewski noted that Rule 41(b)(6)(B) had been employed in a case involving a large botnet, and that the use of the new authority under the

amended rule is becoming fairly routine. To his knowledge, the new provisions have not yet been challenged in court.

### **III. COOPERATORS SUBCOMMITTEE REPORT**

#### **A. Background**

Judge Molloy reminded the Committee of its charge from the Standing Committee: (1) to draft the Rules necessary to implement the changes recommended by CACM, and (2) to advise the Standing Committee whether those Rules should be adopted. Judge Campbell agreed and commented on the schedule going forward. The Committee's final recommendations are not needed until the Standing Committee's June meeting. It would, however, be very useful to provide the Standing Committee with a sense of the Committee's thinking at the January meeting, and allow the Standing Committee to provide feedback. After thanking the reporters and the members of the Cooperators Subcommittee for their work, Judge Molloy turned the discussion over to the Cooperators Subcommittee Chair Judge Lewis Kaplan, who is also chairing the Cooperator Task Force (TF).

Judge Kaplan stated that the Subcommittee had completed its work on drafting a slate of draft amendments that would be necessary to implement the CACM Guidance. The Subcommittee has also been working on a proposal to limit remote access; this proposal is not yet in final form, but the Subcommittee is seeking input from the Committee at this meeting. He noted the limited remote access approach is not a CACM proposal.

Judge Kaplan noted that the TF is not as far along as the Subcommittee, which has a much narrower focus. The TF has a Bureau of Prisons (BOP)/Marshal's Service working group (chaired by Judge St. Eve). This working group has made terrific progress, and it expects to make final recommendations to the TF for changes at the BOP. He noted that the proposed changes to BOP procedures and practices, by themselves, would be a major step forward, because the most serious manifestations of the problem occur in BOP facilities. The TF also has a CM/ECF working group (chaired by Judge Philip Martinez), which is working to identify options for changing the CM/ECF system to make an individual's cooperation less readily apparent than it is now in many districts on CM/ECF. The CM/ECF working group has tentatively identified for more careful consideration one option that overlaps in part with an approach the Subcommittee has been considering for some time.

Turning to the work of the Subcommittee, Judge Kaplan praised the reporters for their outstanding work, as well as the members of the Subcommittee, all of whom worked very hard on this problem. He reported that the Subcommittee began by comparing drafts of three different rules-based approaches to the cooperator problem. The first approach responded to the Standing Committee's charge to draft rules that would implement the CACM Guidance. The second option was to route most of the documents concerning cooperation to the presentence report (PSR), taking advantage of the traditional privacy accorded PSR to respond to First Amendment

issues and other concerns that might be raised by the CACM approach. After receiving input from the TF, the Subcommittee decided not to move forward with that option. It would have significantly changed the character of the PSR, put the Probation Officers in an uncomfortable role, and required the insertion of materials created long after the preparation of the PSR. That option is off the table. The remaining option (discussed later) is limiting remote access.

## **B. Discussion of Rules implementing the CACM Guidance**

Judge Kaplan then turned the Committee's attention to the amendments implementing the CACM Guidance. He noted the Subcommittee unanimously agreed that its draft amendments to Rules 11(c)(2) and (3), 11(g), 32(g), 32(i), and 35(b) would fully implement the CACM Guidance. Additionally, the Subcommittee developed other options, which are shown in Appendix A, Tab 2A. The first column shows the draft amendments implementing the CACM Guidance, and the other columns show variations on what CACM proposed. The Subcommittee also identified other documents and events not covered by CACM's Guidance that could reveal information concerning cooperation, and it drafted additional amendments that would plug these holes in the approach CACM is advocating. Those amendments are in Tab 2B.

After a great deal of deliberation, the Subcommittee concluded, without dissent, that it was not prepared to recommend the adoption of any of these rules changes. The reasons for that recommendation, Judge Kaplan explained, are well stated in the reporters' memoranda in the agenda book, especially the memorandum at Tab 2B. He mentioned a few highlights.

Judge Kaplan explained that the Subcommittee was quite negative on the CACM proposal that would have changed plea and sentencing procedures in the courtroom, requiring bench conferences in every case. The TF generally had the same view on this point. He noted a series of objections. First, these bench conferences would not prevent observers in the courtroom—whom no one is proposing to exclude—from determining who is and is not cooperating. The parties' body language would be different and the bench conferences would be longer when there was a discussion of actual cooperation, as compared to a brief statement there was no cooperation in this case. A second concern was that the defendant's right to be present at sentencing would create security issues for these bench conferences. Some members also took the view that especially at sentencing, channeling all discussion of cooperation to a bench conference would impair the defense, breaking up and interrupting the presentation counsel would otherwise make. There was also a concern that these conferences would be unnecessarily time consuming and burdensome. And what about the public's right of access and the First Amendment? For all of these reasons, the Subcommittee rejected this approach without exception.

Judge Kaplan then turned to the third approach considered by the Subcommittee: limiting remote access. The Subcommittee's draft of a proposed Rule 49.2, p. 157 of the Agenda Book, is a work in progress. The concept is to limit remote access but allow anyone who visits the courthouse and shows identification to see any unsealed portion of the file in a criminal case.

This approach is being followed now in at least two districts. The Subcommittee's working draft allows the parties and their attorneys to have remote electronic access to any part of the file that is not sealed or restricted as to that party. There is bracketed language about codefendants. The Subcommittee has wrestled with the proper approach to access by other attorneys. This draft (which the Subcommittee has not adopted), allows any attorney with ECF registration to have remote access to any part of the file that is not sealed or restricted, and it gives the public remote access to the indictment, docket, and judicial orders, paralleling Civil Rule 5.2(c)(2).

Judge Kaplan noted that the Subcommittee had not resolved which attorneys should get full remote access. Should it be only the attorney for the party, all attorneys who appear in the case, all attorneys who are counsel of record in some criminal cases, all attorneys who have CM/ECF registration, or all attorneys period? This is a very difficult problem. It raises the issue how far we can trust attorneys not to give cooperation information to their clients.

At its last meeting, the Subcommittee ultimately decided to put Rule 49.2 on the back burner because the TF's CM/ECF working group is developing an option with common elements. The lead option under consideration by the CM/ECF working group is something called the plea and sentencing folder (PSF) approach, which resembles the procedure used in the District of Arizona. Judge Kaplan described the current form of that proposal. There would be a PSF on the docket in every criminal case. The existence of the folder would show up on PACER, but its contents would not be listed or available on PACER. Admitted attorneys, including attorneys not involved in the case in question, could see the contents of the folder. Further, an individual judge or a district by local rule could require that particular documents or categories of documents in the folder be sealed or otherwise restricted so that an attorney without access to that restricted or sealed document could not discern its existence or open it. It is technically feasible to create a PSF, because the District of Arizona is now doing something similar, but we do not yet know whether the rest of the mechanics are within the current capabilities of the CM/ECF system.

Judge Kaplan noted that the variation permitted in CM/ECF working group's current proposal—allowing each district or each judge to make its own decision about which documents to seal, and which attorneys would get access—meant there would be no uniform national procedure. In contrast, Rule 49.2, if adopted, would create a uniform national approach.

Judge Kaplan said the TF working group had not yet focused on access by the press. Although procedures define the press for purposes of access to the Supreme Court and other proceedings, in the contemporary world any rules governing press access would have to consider how to treat not only traditional press outlets, but also individual bloggers.

Judge Kaplan concluded by stating several questions on which he hoped there would be discussion. First, does the Committee agree that the draft amendments would implement the CACM recommendation? Second, does the Committee endorse the Subcommittee's

recommendation not to support any of the amendments that would implement the CACM guidance? Finally, what are the Committee's thoughts about limiting remote public access?

At Judge Molloy's request, Professors Beale and King walked the Committee through the alternative approaches. The amendments implementing the CACM Guidance appear first on pages 153-55, and then again in the first column of the comparison chart beginning on page 199. These rules are the final version of the Subcommittee's best effort to implement exactly what CACM recommended. The second column, beginning on page 199, omits the courtroom rules requiring bench conferences in every case at the plea and sentencing phase. The third column substitutes sealing of the whole document instead of dividing them into two different documents. The fourth column follows the practice in some districts, including the Southern District of New York, of tendering these documents to the court but not filing them. Judge Kaplan explained that in the Southern District those documents are retained by the U.S. Attorney's office as exhibits. The reporters noted that all of these rules say sealing is indefinite, implementing CACM's policy of overriding local rules that say sealed documents must be unsealed after a certain period of time.

Rule 11(c). Professor Beale noted that although the CACM Guidance did not explicitly state that all plea agreements should be filed, the Subcommittee assumed that such a national policy was implicit in the Guidance, and it is reflected in the proposed amendment to Rule 11 in columns 1, 2, and 3. Column 4 shows the no filing approach, and does not include this proposed provision.

Rule 11(g). Judge Campbell noted that column 3 should reference the whole plea proceeding because there is no bench conference. The reporters agreed with this correction.

Members discussed the question whether the provision on permanent sealing would conflict with Circuit rules. For example, when a case goes to the Ninth Circuit, the record is unsealed unless there is a showing of good cause that it should remain sealed. Members noted variations in other circuits. Judge Campbell commented that if the Committee were to go forward with rules requiring permanent sealing, the Appellate Rules Committee should consider whether any changes would be needed to avoid a conflict.

A member who stated that he was generally against sealing observed that draft rules would at least require the courts of appeals to do a case-by-case analysis on the question whether something should remain sealed. The reporters responded that CACM's approach would reverse the current the current presumption: the parties would have to make the showing to unseal.

Rule 32. Rule 32(i) in column one implements the CACM requirement of a bench conference in every sentencing proceeding, and 32(g)(2) requires all sentencing memoranda to have a public part and a sealed supplement. The third column seals entire memorandum, and in the fourth column the sentencing memorandum is submitted directly to the judge and is not filed.

Rule 35. The amendment in column one seals all Rule 35 motions. For the no filing option, Rule 49, which governs motions, would be amended. On page 206, language is added to Rule 49 requiring any motion for sentencing reduction under Rule 35, 18 U.S.C. § 3553(e), or U.S.S.G.5K1.1 to be submitted directly to the judge and not be filed.

Taken together, these amendments reflect CACM Guidance precisely.

Any additional changes that go beyond CACM's Guidance to implement CACM's general approach and goals are covered in the "CACM plus" rules, Appendix B, pp. 209-16. Judge Molloy noted that the CACM plus rules add provisions that would implement CACM's goal of making sure there were no gaps revealing cooperation. Judge Kaplan stressed that the CACM plus rules are important. They demonstrate the efforts of the Committee and the Subcommittee to give the fullest consideration to CACM's goal of protecting cooperators and the means that might accomplish it. We all share the same goal here, which is to do whatever we reasonably can to protect cooperators.

Rule 11(c)(2)(B) CACM plus, p. 209. In addition to saying that there must be a bench conference, this states explicitly that any reference to cooperation must take place at the conference and not in open court. CACM Guidance is not explicit, and to be clear that extra language might be helpful.

Rule 11(c)(2)(D) CACM plus, p. 210. Subcommittee members had observed that written memoranda regarding plea agreements are filed in some cases, and they may refer to cooperation. To parallel the requirement that sentencing memoranda have a sealed supplement, this amendment does the same with memoranda regarding the plea agreement, plugging this gap. For example, submissions may be made when there is some disagreement about a term in the agreement, or a concern the plea agreement might be rejected. This amendment also addresses victim submissions, which are not covered by the CACM Guidance; they would also have to include a sealed supplement containing any information regarding cooperation.

Rule 11(g) CACM plus, p. 211. Since the practice in some districts might be to file a recording of the plea proceedings rather than a transcript, this adds a provision seal those recordings.

Rule 32(g) CACM plus, p. 212. Nothing in Rule 32 now requires the PSR to be filed, and according to the outstanding study prepared by the Rules office, many (perhaps most) districts do not file PSRs. Because it was clear that the CACM Guidance assumed the PSR would be filed under seal, we added a provision giving two alternatives: filing the PSR under seal, or not filing it. Either of which would protect the information about cooperation, but to fulfill the CACM approach it would be beneficial to have one amendment or the other.

Rule 32(i) CACM plus, p. 213. The amendment supplements the requirement of a bench conference at which cooperation may be discussed, adding an explicit bar on references to cooperation in open court, similar to the bar added under Rule 11.

Rule 32(l) CACM plus, p. 214. This provision would limit what the parties and victim could do with written information mentioning cooperation, applying CACM's approach of requiring both a public part and a sealed supplement, so that all cases would look alike. Additionally, if the judge gives notice under Rule 32(h) about an intended departure, those notices if filed must include a public part and a sealed supplement.

Rule 35(b)(3) CACM plus, p. 215. The proposed amendment extends the requirement of permanent sealing to orders and any related documents, in addition to the motions themselves that are covered by the CACM guidance.

Rule 47, CACM plus, p. 216. Like Rule 35 motions, the amendment requires motions for sentence reductions made under 18 U.S.C. § 3353(e) and Sentencing Guideline 5K1.1 to be filed under seal.

The reporters explained that taken together, the CACM plus amendments try to fill what the Subcommittee identified as the gaps in CACM's recommendations. Gaps are also relevant when considering the potential efficacy of the CACM Guidance rules we are considering to safeguard cooperator information. If there are significant gaps in the CACM Guidance, the rules implementing the Guidance will probably be less effective. CACM's recommendation for sealing Rule 35 motions is a good example. It did not address similar motions for sentencing reductions under 18 U.S.C § 3553 and U.S.S.G. 5K1.1. The CACM plus rules seek to fill the remaining gaps, though it is not possible to prevent all disclosures of cooperation. For example, a cooperating defendant may have to testify in open court. You can never do everything, but this tries to buttress the protection. In doing so, it creates more secrecy, moving more information out of the public domain in order to achieve the objectives of the CACM recommendations.

Members discussed whether Rule 32(l)(1) would be in tension with the Victims' Rights Act. Does the victim have right to know about cooperation? Would the amendment affect victims' substantive rights? The Act does not address documents or filings. Professor King read the Act aloud, noting that it provides the right to be informed in a timely manner of any plea bargain. Members questioned whether the victim has a right to be informed of all of the terms of the plea bargain, which may include cooperation.

Judge Molloy then asked each member to give his or her view of the amendments drafted by the Subcommittee.

A judicial member expressed a variety of concerns about the CACM rules. The problem with the required bench conferences is that anyone in the courtroom can see that there is a long conversation going on for some defendants and not for others. None of the amendments addresses the situation where a person pleads guilty earlier than everyone else, and that defendant's absence at subsequent proceeding may be seen as an indication of cooperation. This member also raised concerns about transparency and the public's right to know what is happening. It is not clear whether any of the sealing procedures apply once a cooperating witness testifies. In the member's district, sentencing memoranda are not filed in many

cooperation cases. They are given to probation, the judge, and the other side; they are kept in the judge's file, but are not public records. The court may also seal the record at sentencing, but there is the potential for everything to come out at some point. No option seems to balance this perfectly. If the Committee makes no recommendation, there will be variation in how sealing and in court procedures will be handled. In addition, the dangers for people in prison arise not only from their other codefendants but also from people who think cooperators should be penalized or ostracized.

Another judicial member premised his remarks by saying everyone takes this problem very seriously. There seem to be some concrete things the BOP can do to address this problem. But the only solution that can come from the courts is secrecy, which is not something the courts can offer. Constitutionally, it is just not the way we do business, but it would really be the only contribution we could offer. Accordingly, the member favored recommending that the CACM amendments not be adopted. This is not a problem that we can fix by amending the Criminal Rules.

Mr. Wroblewski emphasized that the Department of Justice is very much concerned about the dangers to cooperators. The FJC report was a huge contribution to the discussion. The Department is not, however, certain that rules amendments are the best approach. It is very hopeful that the TF and especially the BOP and CM/ECF working groups can offer solutions that will make a dramatic contribution and significantly reduce the problem. The Department is not seeking increased secrecy, because secrecy is already present. The parties routinely do not file documents concerning cooperation. For example, another member noted that defense lawyers often redact sentencing memoranda, do not file them, or seal them. But the current efforts to use secrecy to protect cooperators are very haphazard, and can be circumvented by people interested in doing harm. The Department hopes that the CM/ECF architecture can be revised to bring the current redactions and secrecy into a form that will eliminate or greatly reduce the ability to circumvent the current rules and do harm to cooperators. The Department hopes the BOP and CM/ECF working groups can address these problems in a non-rules way and make a significant contribution. BOP has been involved with that working group for many months and has been as cooperative as it possibly can be. He expected the TF recommendations will be very helpful and will be largely adopted by the BOP over time. There are some issues with union rules and the BOP's ability to adopt recommendations, but once the TF comes out with its recommendations that process will begin and we are hopeful that we can actually implement most of those. For those reasons, the Department abstained from the votes on all of these rules at the subcommittee level. We hope that these problems will be addressed in other ways that will be successful.

After complimenting the reporters on their work, another member said that in order to fully implement CACM's recommendations and goals it would be necessary to adopt something like the CACM plus rules. These procedures would be draconian, creating second sets of books and secret proceedings. He strongly opposed that approach. He objected to calling the current approach haphazard. The Supreme Court requires a case-by-case approach to sealing records.

The current system relies on judges in individual cases to weigh the need for secrecy and sealing against the public's right to know. He endorsed that approach. We need judges to do what is right in an individual case, rather than a legislative type solution. The CACM rules attempt to change rights, substantive rights. The member added that it would be better to revise the union rules within BOP than to amend the Rules of Criminal Procedure. The concern about misuse of the PSRs should focus on access in the prisons and what the BOP and the marshals can do to protect cooperators. The member appreciated the candor of the FJC report, which stated that it is impossible to identify the empirical effect of any policy individually, or in combination with other policies, on the amount of reported harm to cooperators. The CACM proposals are not data-driven. They propose secrecy in the courts based on fear not data. At an earlier meeting, another member said that even one death of a cooperator is too many, but that is not a reason to sacrifice the core values of the system. We should not alter the requirement that individual judges must make the decision to seal in individual cases, and we should not seek to change the constitutionally based procedures required by the Supreme Court. This is a serious problem. There are things that can and should be done, and they are primarily the responsibility of the Executive branch. The member was pleased to hear from Mr. Wroblewski that the executive branch is undertaking that. The member expressed concern that TF does not have representation from the defense bar, and wondered why that was so. He hoped the TF would take proper action, and once those changes had been implemented we can see how successful they have been in accomplishing the goals.

Judge St. Eve, the Standing Committee liaison, expressed the view that the proposed rules closely adhere to the CACM recommendations, and complimented the reporters for their work. After spending a lot of time with the TF and talking to people at the BOP, she believed cooperators are being targeted to some extent because of their cooperation status, especially in the high security facilities. She did not, however, support the proposed CACM rules because they go too far. With regard to Rule 11, she noted that the Seventh Circuit disfavors any kind of sealing, and was unlikely to accept the bench conference procedure and limitations on what is available on the docket. She drew a distinction between changing procedures in the courtroom and making changes in the docket. She stated that the PSR approach was unworkable, and strongly opposed by Probation Officers, who did not want to be custodians of these significant documents. Keeping documents in the PSR rather than the court record could cause all sorts of issues later in certain cases.

Another judicial member echoed the praise of others for the work of the reporters, and Judge Kaplan for his leadership on the Subcommittee's work. The rules drafted by the Subcommittee do track what CACM called for, which would be a dramatic sea change in the Rules of Criminal Procedure. Agreeing with other speakers, the member said that the CACM rules raise tremendous transparency problems. The member was glad to hear that the CM/ECF working group had focused on some of the issues concerning remote access. For this member, the desirability of moving forward with the remote access approach was an open question, in large measure because of the uncertainty about its effectiveness and the absence of empirical

information. At most, it seems likely the changes would improve things at the margins. It is not possible to eliminate danger to cooperators, who can be identified in many other ways (such as the disclosures required by *Brady* and by *Giglio* when someone testifies). In addition, there is no way to control disinformation, such as the belief that anyone who has made bail must be cooperating. These proposed rules show us what the CACM Guidance would require, and it is not something that we should support as a Committee. The member was opposed to adopting any of these proposed CACM rules.

The next member to speak, a practitioner, echoed the thanks to all the people who worked on the very helpful materials. This is a real issue and the system has a moral duty to try to protect cooperators, broadly speaking, without abridging anyone's rights. Being a cooperator is a very vulnerable position. Just as prison officials owe duties to someone in a captive setting, this is sort of that squared. Without cooperators it would be very difficult to successfully prosecute many senior people who engage in sociopathic conduct. That's why prisoners are working so assiduously to try to stop cooperators. This is a very difficult problem because we are working at the margins, and the main risk factors seem very difficult to address through this sort of system. Although he agreed that one death is too many in this setting, the proposed approach doesn't seem to move the ball forward. He hoped other avenues would lead to some concrete proposals. Individual judges are not reluctant to deal with this issue, but giving hundreds of district judges only general instructions to "do your best" without some structure and some uniformity won't work. He hoped that some tools could be made available at least presumptively to produce a more coherent landscape, rather than leaving everything up to the discretion of each individual district judge. The member said the bottom line is that the CACM approach does not move the ball forward enough and has multiple problems. At a minimum, we should table it and see what the future holds in other areas to make things better.

The Committee's clerk of court liaison said he was focused on how the proposed rules would be implemented. He agreed that it would be a sea change in how the courts do business, going from the default of transparency to a default of concealment. The culture of the courts, the training for the clerks' offices, and the system we use for our records are not designed for that new default. They are designed for transparency. Denying rather than granting access involves work. There are many steps to sealing a document. Once a judge says seal a document, somebody has to identify the document, place it under seal, define an access user group, and maintain that user group. When you are dealing with sealing as an exception this is not a big problem. But if we require every one of these various things to be sealed, that will create an opportunity for many mistakes. It would also be a change of mindset. When electronic filing was implemented, there was a huge amount of training. The CACM rules would require at least parallel training. It is important to keep in mind that the universe of users on EMECF is much broader than just attorneys. The overwhelming majority of those doing the filing are paralegals and staff. The responsibility for sealing would not be borne, generally, by attorneys, but by all of the staff members with whom registered attorney users have shared their logins IDs and

passwords. The clerks have no way to identify those people because the login and password remain the same.

The clerk of court liaison also commented on the need to distinguish between access on PACER, and a court's CM/ECF system. The parties could think that references to remote electronic access refer to CM/ECF access rather than the broader access in PACER. If a defendant complains he does not have access, clerks do not want to have to explain to him the difference between CM/ECF and PACER access. Down the road as we move toward more universal electronic filing, this problem will increase because more people who are not attorneys will have accounts.

From the implementer's perspective, this is an architectural issue. The current CM/ECF system is not designed to do what everybody is trying to facilitate, and trying to adapt it through human intervention is a recipe for disaster. He dreaded the idea that somebody else would have control of his court's records. He had always believed he was the custodian of the court's records. The no filing idea of farming records out to probation or not filing things is frightening. He had always thought that if you go to the archives you get a case file. Everything is there, but that would not be the case with some of these suggestions (the PSR and no file options). From an implementer's perspective, it would take a tremendous human effort to implement these procedures.

A judicial member stated that the Subcommittee's draft rules properly and faithfully implement the CACM guidance. He urged that to the extent we can, we should amend the rules to make it more difficult for bad people to identify cooperators and harm them. The fact that any rules-based approach won't solve the problem entirely should not be a reason to take no action. If we can save 15 of the 30 cooperators who might be killed, those 15 will be very happy. If we are unable to solve the problem completely, we should at least work to solve it incrementally. There are First Amendment and transparency concerns that we need to take very seriously. It may be that the CACM Guidance would cut into the muscle and the bone of the First Amendment, and is not something that we want to do. There must be some measure that we can take, perhaps less drastic than what CACM has proposed, that will move the ship in the right direction. The First Amendment is not a suicide pact, and it is also not a homicide facilitation pact. The First Amendment should not get in the way of modest common-sense improvements to help protect the cooperators that are so essential to the operation of the criminal justice system. We should see what the TF and BOP come up with. They should be the first movers, and then we should take stock and evaluate whether we can add anything through rules amendments.

A judicial member commented that it might make a great deal of sense to see what the TF and BOP come up with before imposing rules amendments. The member's state courts are just bringing electronic filing on line, so they have no experience with these issues. They would benefit from the Committee's discussions. For the matters on the table now, the proposal to defer action and then make modest rather than dramatic changes makes a great deal of sense.

Another member endorsed the idea of careful and modest changes rather than dramatic ones given the difficulty of knowing what might work, the First Amendment issues, and the great difficulties and cost of implementing any proposal. The best approach is treading carefully and looking for modest solutions, rather than overarching ones.

The next judicial member began by thanking the reporters, stating that the memoranda are extraordinarily helpful and he was persuaded that the Committee should not recommend the CACM rules changes. The member presides over many change of plea proceedings. Doing a private bench conference in each would be difficult, and the plusses would not outweigh the minuses in that situation. By local rule the member's district does include a sealed supplement to every plea agreement. He noted that there was a question whether that would withstand a constitutional challenge, noting it has never been challenged in the district. In the district's experience, it has been successful and practical, but he could not say whether there is (or ever could be) any data-driven proof that it actually prevented anyone from being hurt or having their cooperation revealed. The member agreed with prior comments that there are serious problems in the prisons that should be addressed, but that is only part of the problem in the member's district, Puerto Rico. In the past 10 years, people were murdered on two occasions on the same corner near the courthouse. Both were defendants who were out on bail, had just met with a probation officer then walked out of the courthouse. The member did not know, but presumed they were cooperating, and the bad guys were there waiting for them. There are also threats to families of people who are presumed to be cooperators, and lots of bad stuff goes on in prison. So, at least in Puerto Rico, attacks occur on in the street as well. This certainly affects cooperators, but it also has a negative effect on the criminal justice system and other defendants as a whole. People who would cooperate and might get a lower sentence do not do so because they are afraid of what is going to happen to them and their families if they cooperate. In Puerto Rico, the problem extends beyond cooperation to the safety valve. Many people in the district decline to use safety valve, which quite often is not onerous. You sit down with an agent and you say what it is you may or may not know, and you may get two points off your sentence. Yet many defendants decline to do so because they see that as cooperating. Judges would like to use the safety valve to go below the mandatory minimums, but these individuals are afraid to use the safety valve and will not do so.

A practitioner member stated that the CACM proposal is seriously problematic for all the reasons that had been discussed. The member highlighted just a few problems. One is the required bench conference where the parties would inform the court whether there had been cooperation or not. The materials noted that it might be necessary to extend the bench conference when there has been no cooperation so that would not be obvious to observers. The member expressed concern that this would go beyond being secretive to the court being deceitful, which is very problematic. Second, it would be awkward to require defense counsel at sentencing to tell the judge that the defendant did *not* cooperate. A defense attorney would not normally tell the court what the defendant had not done that might be beneficial to the community, because it would cast the defendant in a negative light. Counsel should not be thrust

into that role. Many of the problems do arise in the prisons, and BOP can and should address them. The member's district includes a large prison complex, including one entire prison is devoted to cooperators. That does not prevent prisoners from killing each other there. The other problem BOP has to deal with is that prisoners in protective custody do not have access to the full range of programming, which is problematic for people serving long sentences. The reporters' memos were terrific, and the draft rules are faithful to what CACM wanted. The member was not in favor of the CACM proposal, but noted if it were adopted it should be CACM plus, which addresses some problems CACM didn't identify.

Judge Kaplan noted that his responsibility as TF chair is to attempt, if possible, to reach an appropriate and mutually acceptable ground between CACM and the Committee. For that reason, he had abstained in the Subcommittee and said he would do so again at this stage.

Judge Campbell said he found the members' comments, the work of the reporters, and the work of the subcommittee very valuable. He agreed that the draft rules are faithful to CACM's proposal, and they do a great job of illustrating what would have to happen in the Rules of Criminal Procedure if CACM's Guidance were implemented. CACM plus is particularly helpful in showing that if you really want to accomplish what CACM says, there has to be a very extensive change in the way in which the rules are currently structured.

Responding to the question how it would be appropriate for the Committee to proceed, Judge Campbell said it would be entirely appropriate for the Committee to say to Standing, "We've done what you asked, and we fleshed out different rules drafts that would accomplish CACM. Here they are. We don't recommend that any of them be adopted." It will be very helpful to have all of those drafts in hand to understand what it would really require to carry out CACM's recommendations. Judge Campbell said that he did not disagree with the comments identifying problems with the procedures recommended by CACM. When they were considered in his district, a committee of district judges, magistrate judges, defense attorneys and prosecutors concluded that it was not possible to make the courtroom part of CACM's recommendations work, for all of the reasons that have already been discussed. His district routinely seals cooperation related documents, which could raise a First Amendment issue. They put all cooperation-related documents in one place in the docket, and when looking at the docket you cannot distinguish between cooperators and noncooperators. But his district concluded that the full CACM package would not work.

Judge Campbell thought it was well worth considering Rule 49.2 and trying to help in some degree by limiting remote access. If the CM/ECF working group comes up with a means of configuring the dockets so that cooperators would not be identifiable, he suggested it might make sense to have the Rules Committee attempt to draft a rule amendment to implement that system. The Rules approach would have several advantages. First, this Committee would be terrific body from which to get input. He was not sure the CM/ECF working group has the same broad representation. Second, a rule amendment would have the great benefit of publication, public comment, and review by the Standing Committee, the Judicial Conference, the Supreme

Court, and finally Congress. So you get much broader input. He He was not sure if there would be a jurisdictional issue. CACM may take the view that that CM/ECF is their territory, and they ought to be the ones to make any tweaks to make the dockets uniform. This would have to be discussed with the CACM chair. But it was an open question in his mind about whether this Committee should consider and at least give input on any proposed solution to change the docket to eliminate clues to cooperation. In his district, they accomplish this with a master sealed event included on every docket sheet. Anything related to cooperation is filed there in the docket, and sealed as it would be in its own place. But someone looking at the docket sheets can't identify cooperators. All of the docket sheets look the same. CM/ECF is considering something similar and whether there is a more automated way to do it. Judge Campbell expressed some concern about leaving that decision entirely to the CM/ECF working group and losing the input of this Committee and as well as public comment.

Judges Kaplan and St. Eve discussed the interplay between the TF working groups and the proposed rules changes. Judge St. Eve said the CM/ECF working group was looking at possible changes in the CM/ECF system, and its ultimate recommendation would go to the TF. Because this is a TF working group (not a CACM committee), it could come back to this Committee. Judge Kaplan commented that it was fair to say that the Rules Subcommittee has simply put the Rule 49.2 draft on hold pending developments in the TF. It is wide open for the issue to come back here.

Judge St. Eve was asked to comment on activity at BOP. She said that it has not yet done anything. Everyone at BOP has been completely cooperative with working group members over a period of several months, and the TF working group has come up with a lengthy list of recommendations for BOP. This includes making all cooperation documents contraband at BOP facilities; at present only PSRs are contraband. At its meeting this summer, the TF discussed and approved about a dozen recommendations to BOP. BOP has not yet taken any action. It is waiting for the TF's final recommendation before starting to implement any of the recommendations. BOP supports our recommendations, but many of them require action by the BOP union. They think it is better to come to the union with a complete slate of recommendations, rather than taking them up on a piecemeal basis, and they are more likely to get union approval if they come with the blessing of the TF and the Judicial Conference. Then they could say these recommendations have been blessed, we are seeking to implement them, and now we need the union to sign on. Nothing has happened yet, but BOP is aware of and supports the recommendations. This will go back to the TF meeting again in January. Judge St. Eve was not sure whether the TF would take any final action at that point.

Judge Kaplan briefly reviewed the highlights of the TF recommendations concerning BOP:

1. Limit transmission to BOP inmates of certain case documents including plea agreements, sentencing memoranda, docket sheets, 5K motions and transcripts.

2. Preclude possession of court documents in BOP facilities outside of an area designated by the warden.
3. Encourage the BOP to punish inmates who are pressuring other inmates for papers.
4. Require that probation officers transmit case docs to BOP inmates consistent with the above guidance. [That really means sending to the warden who would make them available in the secure location]
5. Require that court reporters transmit transcripts to inmates in the same way
6. Consider use of various electronic means of limiting access from within the institutions
7. Impose limits on pretrial detainees' continued possession of case documents once they are designated
8. Collect data on harm to cooperators.

... there are recommendations with regard to designations ...

#### 11. Modify and enter contracts with private prisons consistent with BOP procedure

Judge Molloy expressed concern that there was no empirical basis for making the connection between cooperation and harm. The FJC survey is not the equivalent of empirical data. When he and Judge St. Eve visited with the BOP, they consistently pointed out that cooperation is of two kinds: cooperation before you are sent to prison and cooperation while you are in prison. The latter is unconnected to anything that would be filed in a court or show up on the docket sheet.

Judge Campbell responded to the comments about the lack of empirical data. He agreed that we do not have case specific data that on whether certain individuals were attacked or threatened because they were cooperators. The problem of lack of empirical data affects all of the rules committees. When changes are proposed, there is seldom empirical data to support them, and generally we cannot get it. Collecting truly reliable empirical data in the judicial system is a very difficult undertaking, and the Federal Judicial Center has limited resources for this purpose. In his view, the Rules Enabling Act was designed to operate on the collective wisdom of people like the committee members who are on the ground working with these kinds of issues, plus the public comment process—not on the basis of hard empirical data. He also noted that the anecdotal information from the FJC survey and the information from BOP, taken together, provide a pretty strong indication that there is a link between judicial procedures and threats to cooperators. We are not likely to have a stronger link. There are other good reasons to say the CACM proposal is problematic, but he resisted the idea of basing a decision not to move forward on the absence of empirical data.

Judge Molloy responded that on the day an assault occurs the BOP has a great deal of information about the institution and about the level or degree of the assault, but nothing that would tie the fact that the person is a cooperator with the assault. We also know that if an inmate is in a penitentiary or a high security facility there is a much greater likelihood of injury or death than if they are in a camp or moderate to low level prison. Perhaps part of the solution might be for BOP, as a matter of practice, to investigate whether persons who have been assaulted in prison had cooperator before, or after, they reached the prison.

A judicial member asked for clarification of the word “table.” Did the suggestion of tabling envision a distinction between a motion to oppose adoption of the CACM rules at this time and a motion to table?

The member who suggested tabling said he did see a distinction. If the motion opposing adoption meant the CACM rules are dead and buried, there is a distinction. And if opposed means not now, but maybe we’ll come back to it, he would prefer to table. The substance of what he would support is to put this aside and then come back to it after the group on prisons tells us what it is going to do.

A member commented that he would like to oppose the CACM recommendations and table the Rule 49.2 issue.

Judge Molloy stated that the issue is whether the Committee was going to adopt the recommendation of the Subcommittee to tell the Standing Committee here is the package of the rules implementing the CACM Guidance and we think none of them should be adopted.

Judge Kaplan suggested that we should first have a motion to adopt the Subcommittee’s recommendation, and then if someone moved to table that would be voted on. He noted his opposition to tabling, because we already know what the BOP is going to do.

A judicial member said that consistent with the spirit of the Committee’s discussions it should reject the CACM rules, making it clear that this Committee does not (as we understand them now) remain open to adopting them after the BOP or the TF does something later. To the contrary, we think these particular proposals are a bad idea, but we remain open to other means that we could explore after action by the task force or other bodies.

A judicial member moved to oppose adoption of the CACM rules, and to defer final action on any 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. The motion was seconded.

Another judicial member agreed with the proposal to put aside 49.2, but suggested deferring action on the CACM proposals. He agreed that he could not imagine a situation in which the Committee would accept all aspects of CACM’s recommendations. But after BOP makes its final determination there may be certain aspects of the CACM proposal that we might think are good incremental measures. So he moved to put aside any up or down vote on the

CACM rules, which could be revisited in light of the BOP's final actions on the TF's recommendations.

Judge Kaplan said that if there was a second to the motion to table, it should be voted on.

A member asked if there was any appetite in the group to consider the CACM rules one by one, noting that he had more problems with some than others. When asked if he could identify some that were beneficial, he responded yes, though he was not certain that they would be constitutional.

There was a suggestion of a friendly amendment, that we reject the CACM rules but defer action on the remote access or any other potential rule amendment, for example rules implementing changes in CM/ECF, rather than limiting ourselves to the just the remote public access.

After the motion to table was seconded, members asked for clarification. Was it expressing agnosticism about the CACM rules?

A member supporting the motion responded that it was not agnosticism in the sense of no view about anything about any of the CACM proposals. It was, instead, a more modest step than saying we are not prepared to adopt any of this. If nothing comes to bear fruit in the future, there may be pieces of this that merit further consideration as a possible alternative, perhaps tweaked. The motion to table would not signal that the entire project should be thrown into the trash heap unless there is something completely different. He supported that approach, which is a more modest and flexible than complete rejection. He honestly did not know how many other alternatives people can come up with that are unrelated to CACM's proposals. There is only so much space in which to operate.

Judge Kaplan expressed his opposition to the motion to table. The Subcommittee has considered each and every part of the CACM recommendation, including each and every thing that we could imagine ought to have been included in it, but wasn't. The Subcommittee then concluded, without dissent, that it was not prepared to recommend adoption of the package or any of the variations. Action by the Rules Committee with respect to that proposal is a very important input for the TF, which has been waiting for this recommendation, one way or the other, for a very long time. This is not a criticism, but the process has taken time. To table it now lays the ground work for an argument that the TF should wait with respect to various alternatives, to see whether there are rules solutions. We have spent well over a year looking for rules solutions. The Subcommittee's view is that there is no rules solution to be found on the landscape that we are now familiar with. Of course, given time it is possible someone may have a brand new idea, or CACM could return and say given where we are now, let's do these one or two things. We are always open to consider that again. He advocated trying to play the hand of cards we've been dealt.

A judicial member observed that some members seemed to be worried about a preclusive effect. It is hard for a new member to understand how much of a preclusive effect our voting this package down would have on something in the future, What if the BOP comes up with something, implements it, and there are still many cooperators dying?

Judge Molloy responded that if there are suggestions for rules changes the Committee has an obligation to consider them. If this Committee adopted the Subcommittee recommendation to reject the entire package it has worked on for over a year, someone can come along later (either a member of CACM or some other individual or interest group) and suggest a similar change, perhaps to Rule 11. He thought there would be no preclusive effect other than the matters that our Subcommittee has considered.

Judge Campbell agreed. Other committees have decided not to act or rejected a proposal, and then revisited it a couple of years later. However, in his experience most committees do not come back too quickly after they have put a lot of effort into something. Perhaps in light of this vote we should not reopen the same issues at the next meeting, but there is no bar on a member of this Committee asking to reopen and revisit at the next meeting.

Professor Coquillette agreed that there is no preclusive effect. Anybody on the Committee can raise this again. Professor King observed that this Committee has considered the same rule multiple times. It can come back in the various ways that have already been discussed. That said, Professor Beale expressed the hope that the Committee would not repeat the discussion of the very same thing at the very next meeting.

Mr. Wroblewski noted that DOJ is not waiting for BOP to act; BOP is part of the DOJ. DOJ is waiting for the CM/ECF proposals, which it thinks have a chance of addressing many of the relevant concerns in a non-rules way. DOJ would abstain. It wants to see what CM/ECF and the BOP recommendations come out of the TF, and we believe those are significant steps for addressing a genuine problem.

Judge Kaplan observed that there was a broad consensus at the TF about the BOP recommendations, and he asked Mr. Wroblewski for his sense of how these recommendations are going to come out. Mr. Wroblewski responded that he was focused on a second element, changing of the architecture of the CM/ECF perhaps along the lines of what is going on in Arizona. DOJ thinks that the BOP and the CM/ECF approaches, in combination, could be the solution for now, for the foreseeable future. It would reserve the right to come back, if the CM/ECF does not make any changes, or if we think those are not sufficient.

The motion to table any final recommendation on the CACM rules failed on a voice vote.

The Committee then turned back to the motion to oppose the CACM rules as well as the variations drafted by the Subcommittee, and to defer final action on the alternative approach of limiting remote access. A member moved to sever the two portions of the motion, and the motion to sever was seconded and passed by a voice vote.

The motion to adopt the Subcommittee's recommendation to oppose the CACM rules proposals in all forms passed with two no votes. Judge Kaplan and Mr. Wroblewski abstained.

The motion to hold in abeyance any final recommendation regarding Rule 49.2 passed unanimously.

### **C. Discussion of draft Rule 49.2**

At Judge Molloy's request, Professor King explained the Rule 49.2 proposal. The most recent version is on p. 157 of the agenda book. This approach avoids the First Amendment problems that arise from limiting all access to plea and sentencing documents, allowing the same access that was available before the internet. Before online access, anyone who wanted to see a document had to go to the courthouse. The proposed rule was modeled on Civil Rule 5.2, which limits remote access in order to protect confidential information such as social security numbers. The proposal is premised on the idea that if it is acceptable to limit remote access in the Civil Rule, it should be equally acceptable under the First Amendment to limit remote access to protect cooperators in criminal cases. The first part of the rule designates who has access to an electronic file. Subsection (b) provides for access by the parties and their attorneys, and subsection (d) access by the public. The Subcommittee reviewed the options for defining and distinguishing the press from the public and decided not to draft special provisions for press access.

In general, parties and their attorneys can have remote electronic access to anything that is not under seal or otherwise restricted in a way that bars access by the person seeking access. We added a reference to other restrictions because we were informed by our clerk liaison and others that sealing is not the only way that electronic access is restricted under the CM/ECF system. For example, if something is filed ex parte, the party that files it has access, but the other parties do not. Whenever a party files a document, the party has the option of restricting access to certain individuals or groups. We wanted to make sure that the rule reflected not only sealing, but also any other restriction placed on access. Attorneys can have access to any of it as well, under subsection (c). That was a policy choice by the Subcommittee. Under (d) the public can have electronic access only to the indictment, the docket, and an order of the judge. If the public or a non-attorney seeks access to another part of the case file, that person must go to the courthouse and provide the clerk with identification in order to get that access. The Subcommittee has not completed its work on Rule 49.2.

Judge Molloy noted that although the Committee has tabled a decision on 49.2, it would be helpful to get comments to guide the Subcommittee.

A member expressed opposition to the proposal because of it affects the poor and those unable to travel to the courthouse and without surrogates who can travel for them. He compared their plight to his own ready access through Law360, which can be set to provide him with updates on anything filed in selected cases. Since subscribers to such services could have full access, the only people who would be hurt are poor people who lack this access.

Professor Beale noted that if the proposed rule were adopted, it would no longer permit remote access by services such as Law360. The Subcommittee's assumption is that the press and subscription services would not go to the courthouse every day to see what is filed in every case.

Professor King commented that when the Subcommittee discussed giving all attorneys access it recognized that most organizations, media or otherwise, will have legal counsel. So simply by using counsel's login, any organization (whether it is Whosarat, or Fox News, or CNN, or NPR) could use the attorney-access clause to set up any kind of trolling device they can manage. That is something to consider if we get to the point of crafting a policy on who has remote access. If it is limited to attorneys, it is not limiting very much if organizations all have attorneys.

Judge Campbell raised a question about Rule 49.2(d)(2)(i), which allows the general public to have remote access to "the docket maintained by the court." He understood that one of the main reasons for limiting remote access was that prisoners would have family members or gang members on the outside go on PACER and look at dockets to determine whether individuals were cooperators. Even if documents revealing cooperation were sealed, the sealing itself served as a red flag indicating cooperation. So how well would 49.2 protect cooperators if (d)(2)(i) allows remote access to the docket?

Professor King responded that the Subcommittee was concerned about a decision of the Eleventh Circuit holding that it was unconstitutional to have part of the docket that is not public. The subcommittee also assumed (at least some members did) that the TF working group on CM/ECF would be handling docket creation issues, so that whatever docket was produced after the TF was done would be the docket the public could access.

Judge Campbell reiterated that his concern was whether (b)(2) undercut the purpose served by limiting remote access and requiring members of the public who might be seeking information about cooperation to visit to the courthouse under (d)(1).

Professor Beale responded that the Subcommittee used Civil Rule 5.2 as a model, and it allows electronic access to the docket, although other materials are private. However, it is not perfectly analogous because of the red flag problem in the criminal context. Probably that should have been in brackets too because we were already waiting on the CM/ECF working group. Is there some solution that could come from that? If not, then this would mean that some things available online would have the red flag problem.

Professor King commented that in addition to basing (d)(2)(i) on Civil Rule 5.2, there was at least some discussion of what the public expects it should be able to see. The docket sheet is critical because it shows what going on in the case: how far along is it, whether there has there been a decision, etc. Access to the docket is not only an important part of Rule 5.2, it is also an important part of transparency.

Judge Campbell expressed concern that if the TF does not devise a system that cloaks cooperation material on the docket, then it would serve little purpose to adopt Rule 49.2 if it included (d)(2)(i). If we are not accomplishing the goal or protecting people by limiting the ability to scan the dockets on PACER, why limit remote access at all? If we are going to accomplish that, we ought to drop (d)(2), and say go to the courthouse. On the other hand, if the CM/ECF working group comes up with a uniform docket that does not give those clues, we may not need to limit remote access. People going on PACER would not be able to tell by scanning the docket who is cooperating. So, either changes to CM/ECF will solve the problem, or limiting remote access could do so, but only if we delete (d)(2).

In response to the question whether he thought it would be necessary to drop all of (d)(2), or just (d)(2)(i), Judge Campbell said it would be necessary to consult clerks and others. But certainly at least access to the docket.

The Committee's clerk of court liaison explained that there are subscription services that data mine CM/ECF and report out almost instantly when documents are filed. He predicted these services would strongly oppose Rule 49.2 because it would totally undermine their business model. They no longer come to the courthouse because they have the electronic access. He agreed that under (d)(2), the filings are enumerated so you would know if anything is missing, and you are seeing everything that goes on. Moreover, he thought it may cause confusion to talk about PACER in (b) and about the court's electronic filing system in (c). He could imagine someone coming in under (b) and demanding a login in and password to get electronic access. Since only PACER access is contemplated under (b), that would be confusing. It might be necessary to add something in the Note or otherwise to refer to (b) as PACER access in contrast to (c), which provides for registered users of the court's electronic filing system.

A member observed that under the Rules Enabling Act, 28 U.S.C. § 2072, a rule cannot abridge substantive rights, which could include economic rights of business organized to assimilate court filings for the public and the bar. Another member responded that he doubted that there is a substantive right to any business model a service adopts out of self interest.

A member drew attention again to lines 7, 8, and 9, saying they were at the heart of the issue: who should get largely unrestricted access to court filings in criminal cases? That issue is before both this Committee and the CM/ECF working group. How narrowly or broadly should access be defined? Because if you make it very wide, that greatly reduces the benefit of limiting remote access. But if you make it too narrow, you have other serious problems.

Another member agreed that for purposes of the Rules Enabling Act that there is no right to any particular business model. He asked if he was correct in understanding that some districts are now restricting online access and making people come to court and present identification. Professor King said two districts have this procedure in place now. The member then observed that limiting remote access seems a practical step, noting it was hard to believe that the Constitution that allowed this system in the 1990s prohibits it now. The issue is finding the

balance between letting people have access without making it too readily available. It is essential to keep in mind that there are attacks on people who are cooperating. We need to find a balance.

Another member observed that this seems like the kind of problem where individual districts are trying different approaches, and the Committee should draw on their experience, determining what works and what does not work before considering a one-size-fits-all answer under the Rules. It seems to be a classic empirical question as to what actually stops people, and what is too much of a burden to stop this harmful conduct.

The reporters explained that three districts now restrict remote access. The Eastern District of North Carolina has a policy about sealing and restricting remote access to plea and sentencing documents. If you come to the courthouse, you can have access to those. Additionally, criminal defense lawyers can certify they need remote access for representation in a criminal case. Two districts in Texas also limit remote access, but the reporters thought this was not limited exclusively to plea and sentencing agreements. One option would be to designate a category of documents that have restricted access and lift that particular restriction for in-person activity. In contrast, Rule 49.2 does not break up categories, but says this is what you get online and everything else you have to come for in person.

Judge Campbell related the approach in the District of Arizona. Every criminal docket has as the third or fourth docket entry a master sealed event. All criminal dockets look the same in this respect. Cooperation addenda to plea agreements, 5K1.1 motions, sentencing memoranda that discuss cooperation, and anything related to cooperation goes into the master sealed event. The dockets in every case look the same because they all have a master sealed event. That practice was adopted to eliminate the red flags from the docket itself. The master sealed event is sealed under CM/ECF like any sealed document. The Arizona district courts have not focused on the First Amendment issue yet. If that is a First Amendment problem, the docket could still be structured the same way but with judges making individual decisions on whether it should be sealed and, if so, what would go in there. If CM/ECF were to come up with something like that, there would be no need to limit remote access, because there would be no clues on the docket and no public access to sealed documents.

Professor Coquillette commented that the FJC could assist in analyzing the experience in the courts that have restricted remote access. He likened this to the pilot projects on initial disclosure and accelerated dockets.

Professor Beale provided some additional information on the districts that limit remote access and require you to come into the courthouse. In addition to the Eastern District of North Carolina (already discussed), as noted on p. 248 of the agenda book the Western District of Texas, El Paso Division, implemented this system recently. The reporters spoke to representatives of that court by telephone, and they said it is working well but they have very few people who want to come in and see anything. And the Northern District of Texas responded to a TF survey saying it limited remote access. So those three districts we identified as using

practical obscurity. There are several relevant questions. One question is whether you have to show identification if you come to the courthouse to view case files. Another is whether it would be possible to track what individuals viewed at the courthouse. Judge St. Eve said it would be so useful to learn what parts of the file people wanted to see. If you do have to show ID to see a file and later it is possible to track what files you viewed, it might be possible for the government to connect the dots if someone whose file you had viewed was subsequently attacked. This also depends on what else is available remotely to anybody online, as Judge Campbell had noted. So, all of those are in play in trying to design something under Rule 49.2.

The Committee's clerk liaison expressed a concern about the language of Rule 49(b)(2) which states parties and their attorneys "may have remote electronic access." Professor King said she understood his concern to be that this language (which is now present in Civil Rule 5.2), might carry with it the connotation that not only must the court not block electronic access, but that the court must take affirmative steps to provide electronic access. Although this argument seems not to have arisen under Civil Rule 5.2, it might be possible to revise the language to make this clearer. Clarifying language might, however, generate opposition at the Standing Committee, because it would diverge from Civil Rule 5.2 and might even suggest a negative inference about Rule 5.2. However, if this is a potential problem, the Civil Rule could be amended as well. In his experience, those who are most interested in having remote access will focus on this and view it as a right to remote access.

Professor Beale reminded the Committee that it had recently had a discussion about what "may" meant in the context of Rule 5 of the 2254 and 2255 Rules, and the style consultants were very clear about what "may" means throughout the rules. So that would be one of the things to watch out for, it is not just Rule 5.2 of the Civil Rules, but throughout the rules "may" has a certain meaning. We should be cognizant of not creating contrary implications. That is definitely something to keep our eye on.

A member raised one more technical point about the relationship between (b) and (c); (b) says a party's attorney can access any part of the case file, and (c) says any attorney who is registered can access any part of the case file. It would seem unnecessary to have the reference to the party's attorney in (b), because by definition they are going to be in the larger group in (c). If you had this content, (b) could be the parties, and (c) could be all attorneys. The reporters agreed that the overlap could be eliminated if all registered attorneys are given full access.

#### **IV. Disclosure of the PSR to the Defendant; Rule 32(e)(2) (17-CR-C)**

Judge Molloy noted the issue whether the Probation Officer must give the PSR directly to a defendant had been raised in his district, and he asked the reporters to provide background. The reporters provided information on the development of Rule 32(e)(2) in the Agenda book, beginning p. 257. A process of gradual evolution began in 1983. Initially, the PSR was an internal court document that defendants and their counsel were not allowed to see. In 1983, the rule was amended to allow the defendant and counsel to read the document, but they could not

have their own copy. The next step was to provide them with a right to receive copies that they had to return. Eventually the Rule provided a right to receive the PSR with no further restrictions.

The Committee deliberately granted individual defendants (as well as counsel) the right to receive the PSR. In 1983, when Rule 32 was amended to permit the defense to read the report, the Committee emphasized that the PSR should go to both the defendant and his counsel, in order increase the likelihood that erroneous information would be noted and corrected. Because defendants often know more about the information that goes into the PSR than counsel, they need to be able to review the PSR themselves to identify any errors.

The Committee also recognized the possibility that a defendant's possession of his PSR may sometimes be dangerous, and this issue is mentioned in the Committee Notes. In 1989 when Rule 32 was revised to give the defense the right to receive copies of the PSR and to eliminate the requirement that these copies be returned, this danger was mentioned in the Committee Note. The Note stated that when retention of the report in a local detention facility might pose a danger, the district court could direct that the defendant not personally retain a copy in that facility. Despite the Committee's recognition of the potential for problems if PSRs made it into the detention facility, the Rule itself required that the PSR be provided to the defendant. Thus, the Rule balanced the danger against the need for defendants to review the draft PSR to get ready to consult with counsel. Another Committee Note recognized that access to PSRs within these institutions would fall beyond the Committee's rulemaking powers.

Judge St. Eve's discussions with BOP had highlighted the tension between the need for defendants awaiting sentencing to review sentencing documents such as the PSR to insure the accuracy of that process, and the danger that sentencing documents may be misused and cooperators threatened. There may be technological fixes that were not available when the rule was drafted and revised. BOP is exploring options such as having kiosks where defendants would be able to look at their own information but not print it, show it to others, or post it.

Since 1989, when the defense got access to the PSR, it has been the Committee's view that it is important for both the defendant and his counsel to have a right to that document. The question now is whether now the situation has changed enough because of threats that the Rule should be amended. For example, the Rule could provide that the PSR should go to counsel and be discussed with the defendant. Should a subcommittee be tasked with an in-depth review of this issue?

A member asked if the reporters had any further insight into why the rule was amended to eliminate the requirement that the defense return the copies of the PSR. The reporters did not. They had reviewed the relevant Committee Notes, but deferred further review of the minutes and other records until after the Committee determined whether it wished to take this matter up.

Discussion turned to the question of the practice under the rule. One judge commented that in his district the practice is to send it only to the attorney. Then under Rule 32(i)(1)(A) the

court has to confirm at sentencing that the defendant and counsel conferred, and the court makes sure that the defendant saw the PSR. The reporters noted they had made some initial enquiries, and could learn more if the issue were referred to a subcommittee for in-depth review. Do defense lawyers always share documents that are served on them with their clients? If this is viewed as part of counsel's duty in representing clients, that might provide the foundation for a rule that the PSR should be provided to counsel, who would then share it with the defendant.

A practitioner member noted that there are pro se defendants in the system, and the member had thought that was why the rule referred to sending the PSR to the defendant. Then if you are housed in CCA, a federal BOP facility, you are not allowed to have your PSR, and you will have to have that kiosk or the law library or somewhere you could check out and look at those documents. The member also noted that there is new ABA standard for the defense that is much more particularized and calls for talking to your client about what is in the PSR.

Two practitioner members said they were unaware of any case in which the PSR had been sent directly to their clients. When a lawyer represents a client, he serves as the client's agent and can receive service on his behalf. All of the practitioner members agreed that this is how the system now works. It does not require direct service on represented defendants.

Professor Beale noted that there might still be a need to revise the rule, so that it conforms to the practice. Judge Molloy agreed, noting that there are now "jailhouse lawyers" demanding that the Probation Service provide PSRs directly to individual defendants, and this practice may spread. Professor Beale agreed that when you serve a represented party you generally serve the lawyer. However, she did not think that is what was envisioned by Rule 32(e)(2), which directed that copies go both the lawyer and the client. A judicial member commented that when he was a practicing defense attorney he would always receive two copies of the report. Until this discussion, he had never known why he got two copies of the report.

Judge Molloy concluded the discussion, saying that he would refer this matter to the Cooperators Subcommittee because it might fit hand and glove with the issues they are dealing with.

## **V. Complex Criminal Litigation Manual**

After our mini conference on how to deal with complex criminal matters, there was a suggestion that it would be useful to have a manual for complex criminal cases, similar to the Manual for Complex Civil Litigation prepared by the Federal Judicial Center (FJC). This issue was referred to Judge Kethledge's Rule 16.1 Subcommittee.

Judge Kethledge stated that the FJC said they think they would happy to assist, but they asked that we make suggestions for topics that might be included in such a manual. The Subcommittee had a telephone conference to consider topics, and the list it came up with is reflected on p. 271 of the materials. We also learned then that the FJC now generally contracts this sort of work out to private lawyers and academics, rather than preparing it in house. The

FJC is also moving toward putting materials online rather than providing hard copies. Judge Kethledge noted that after consideration and discussion with the reporters he did not think there was much more for the Committee to do on this proposal. Given its small size and composition, the Subcommittee would not be well suited to guiding this project.

Professor Beale expressed enthusiasm for some of the changes being made by the FJC, such as putting materials directly online so that they will be readily accessible and can be updated frequently. The materials are also being reorganized and presented in a more user-friendly fashion. If the Committee feels this would be a useful project, the FJC would be willing to take the next steps, such as getting input on the most important topics from a broader group. She then invited Ms. Hooper to add her thoughts.

Ms. Hooper explained that the FJC will develop a special topics webpage focusing exclusively on complex criminal litigation. At the outset, it will be posting some of the publications it has done on national terrorism cases, our resource guide for managing death penalty litigation, and the manual on recurring problems in criminal trials. In addition, the FJC will review material that has been distributed at the magistrate and district judge workshops over the past few years, and may post those as well. The FJC will also be looking for guidance on new topics that could be developed and posted on the website.

Ms. Hooper said that it was not yet clear whether all of these materials would be available to the public as well as judges. At some of these workshops, judges participate with the understanding that the material will only be available to other judges; broader access to those materials is something that the FJC will have to work out.

Judge Campbell suggested that Judge Molloy's innovative procedures in the WR Grace prosecution should be considered for the website. This was a complex criminal case, and Judge Molloy used some innovative techniques, such as requiring the government to make certain pretrial disclosures at certain times, a ruling affirmed by the Ninth Circuit. Judge Campbell stated this technique has been invaluable in the Ninth Circuit to move criminal trials along and prevent surprise.

Another member stated that adequate funding for complex cases involving indigent defendants was an important topic. If there are a large number of codefendants, there will usually be CJA lawyers as well as federal defenders. In preparing the ESI protocol, they put CJA funding in as the first issue. These are really big and expensive, so the courts have to find ways to fund them adequately.

## VI. OTHER RULES SUGGESTIONS

### A. Sentencing by Videoconference (17-CR-A)

Judge Donald E. Walter wrote the Committee suggesting an amendment to allow the option of sentencing by videoconference, where the judge would be at a remote location but defendant and all counsel would be in the courtroom.

Professor Beale introduced the proposal, noting that Rule 43 now specifies when a defendant must be present; Judge Walter's proposal is that unless the defendant objects and shows good cause, the court would have the option of sentencing by videoconference. The proposal raises the question whether it a good idea to allow sentencing by videoconference and, if so, under what circumstances. The reporters' memorandum recounted the Committee's prior consideration of videoconferencing. Under Rule 43(b)(2), if an offense is punishable by a fine and a sentence of no more than one year, defendants have the option of having the arraignment, plea, trial and sentence done in absentia. In 2011, when the Committee was considering technology changes, it agreed also to allow sentencing by videoconferencing in these misdemeanor cases. The Committee concluded it would be desirable to allow a defendant who might otherwise choose to be sentenced in absentia to have the option of being sentenced by videoconferencing. But there was no support for further extending video sentencing. She noted that the memorandum describes some of the reasons why courts have concluded that videoconferencing is not the equivalent of in-person presence and may raise significant constitutional issues. The question for the Committee is whether to refer the proposal to a Subcommittee for more in-depth study.

In response to Judge Molloy's request for comments, multiple judicial members explained why they opposed an extension of sentencing by videoconference. There is a significant difference between proceedings conducted by videoconferencing and those done in person. One member noted that a judge who is in the same courtroom with the defendant can better determine whether the defendant understands the proceedings, and whether the defendant has been forced or threatened. Another noted that both the parties and the judge should be in the courtroom because there are such grave consequences for the individual defendant. A judicial member agreed, because "sentencing is the most human thing" that judges do. It is valuable to be in the same room as the defendant, because that allows the judge to understand the defendant in a way that would not be possible in a videoconference.

Members noted that the rules currently provide some flexibility, allowing judges and lawyers to work things out in unusual cases. Rule 43(c)(1)(B) now states that a defendant may be "voluntarily absent" at sentencing. There may be times when a defendant prefers not to come to court for sentencing. For example, a practitioner member described a case in which a defendant cooperated with the government and was out on bail when he was sentenced to time served by a video link to his home in Japan. Unlike the current rule, which anticipates that a defendant could

be “voluntarily absent,” Judge Walter’s provision would allow the judge to elect to conduct the sentencing by videoconference unless the defendant objects and can show good cause.

Judge Campbell observed that current Rule 43(c) contemplates waiver only by behavior, rather than other forms of waiver. He wondered if the rule needed to be more explicit. Professor Beale responded that there had been no indication of a need for revision or clarification of Rule 43(c). Professor King noted that one may forfeit a right to be present by not raising it, adding that a written waiver requirement might make it more difficult to waive the right to be present. She also noted that although most of the Federal Rules do not include specific waiver provisions, you can waive the rights provided by the rules or stipulate that they won’t apply, with the court’s permission.

At the conclusion of the discussion, Judge Molloy stated that he would write to Judge Walter informing him that the Committee had considered his suggestion, reviewed the history of Rule 43, and concluded that no change in the rule is warranted.

**B. Pretrial Disclosure of Expert Witness Testimony (17-CR-B)**

Judge Molloy asked Mr. Wroblewski to comment on Judge Jed Rakoff’s proposal for more pretrial disclosure of the testimony of expert witnesses. Over the last year, Wroblewski had worked closely with Judge Rakoff and the National Commission on Forensic Science, a federal advisory commission with authority only to advise the attorney general. The Commission recommended that the attorney general change the Department’s discovery practices, and its recommendations were adopted by then Deputy Attorney General Sally Yates. The new DOJ procedures are very similar to the civil rule. Both have different disclosure requirements, one a summary and the other more detailed, depending on the type of expert the party is hiring. If the party hires an expert for a particular case, a more detailed summary is required. Given the new DOJ policy, Wroblewski thought that amending the Criminal Rules to parallel the civil discovery rules would not make much difference in most cases. Wroblewski disagreed with the suggestion that without a rule prosecutors would not follow that guidance. Federal prosecutors get discovery training every year. This year there is discovery training on expert witness testimony for all 6,000 criminal prosecutors.

Mr. Wroblewski informed the Committee that within a few days the Evidence Rules Committee would be holding a discovery conference and considering issues relevant to expert forensic evidence in criminal cases. Since the rules of admissibility might be amended, and the Department has adopted the recommended procedure and is training its prosecutors on the practice, he suggested that the Committee should defer action on Judge Rakoff’s proposal.

A motion to table Judge Rakoff’s suggestion was made, seconded, and approved by a voice vote.

## VII. Discussion of Rule 16.1, Pretrial Discovery Conference

Judge Molloy introduced Professor Daniel McConkie, who had requested an opportunity to testify after the hearing had been cancelled. McConkie's written comments were not received in time for inclusion in the agenda book, but had been distributed to members. Judge Kethledge, chair of the Rule 16.1 Subcommittee, and Judge Molloy welcomed Professor McConkie and invited him to make a few comments.

Professor McConkie said he regretted not providing his comments before the Committee completed its work on the draft published for public comment, but he expressed the hope that they would still be useful. In summary, an amendment is warranted and the Committee's draft goes in the right direction, taking criminal discovery closer to civil discovery. Requiring the parties to confer about discovery would help them to regulate themselves. This requirement would help prosecutors, who generally want to comply with their discovery obligations but may find it hard to do so when they are not sufficiently familiar with the defense case. In his experience as an Assistant United States Attorney, Professor McConkie found it easier to comply with his discovery obligations if he spoke directly to defense counsel, and just had a conversation. It was not generally necessary to have a very long conversation.

Although Professor McConkie favored the adoption of the proposed rule, he also suggested a few "tweaks" for the Committee's consideration.

The first change Professor McConkie suggested was requiring that the conference be conducted in "good faith." He recognized that the Committee had discussed whether to include this language and decided not to do so. But he was concerned the Rule as written seems to be completely "voluntary," and it provides no remedy if one of the parties just goes through the motions of conferring. A good faith requirement would be helpful.

Professor McConkie also suggested going beyond the Committee's proposed "bare-bones rule," moving closer to the Civil Rule by requiring the parties to have a more structured discussion about what, when, and how discovery needs to be turned over. Finally, the parties should be required to submit a proposed order for the court. It is good practice to have a discovery order. It helps prosecutors fulfill their duties, and it helps the district court to enforce discovery obligations that are already in the rules and required by the Constitution.

In response to a question how his proposal would affect existing local rules and standing orders, some of which have a great deal of detail, Professor McConkie stated that it would change the practice if the local rules required less than the proposed national rule, but would not preclude local rules that now require more. He noted that the Committee has previously recognized that Rule 16 is not the only authority a judge has to regulate discovery, and accordingly his proposal would not defeat any local initiatives to regulate discovery in creative ways.

A practitioner member noted that as published the Committee Notes to Rule 16.1 reference the ESI protocol, which includes a report back to the court. Since the protocol already covers the report, it may not be necessary for the rule to require it. Also, the member noted, a report may be necessary only in the large discovery cases that need management.

Professor Beale observed that the Committee Note says that parties should be looking at best practices, giving the ESI protocol as an example. This builds in flexibility. The best practices could be a more or less detailed list or a report back to the judge. The proposed rule does not otherwise tie the hands of individual districts or judges. The Committee had concluded there was no need for a good faith requirement, but Professor McConkie had suggested this would be a more serious signal to the parties. Professor Beale asked whether members had experience with counsel not fulfilling their obligations in good faith, and if this is indeed an issue.

A practitioner member noted he had initially favored adding the phrase “good faith,” largely because it is in the Civil Rules, but he had been persuaded it was not necessary. The conversation reminded him, however, of the importance of requiring counsel to talk in real time to each other, which adds some gravitas to the meet and confer. He regretted the Standing Committee’s decision to delete the requirement for an in-person meeting from the Rules Committee’s proposed draft, and to allow conferences by telephone or Skype. Not explicitly requiring “good faith” is acceptable, but would be more satisfactory if the two parties always talked to each other in person. Deleting the requirement of a face-to-face meeting makes the conference a less meaningful event.

Professor King noted the requirements of “good faith” and meeting in person are related in another way. The Committee omitted “good faith” despite the fact that it created an inconsistency with Civil Rule 26. Later the Standing Committee deleted the requirement that the conference be in person, allowing it to be by telephone, in part to be consistent with the Civil Rule. Following that logic, she noted, would support adding “good faith” to the Criminal Rule.

Responding to a question about the effect of including “good faith,” Professor McConkie said had not done empirical work to see if the inclusion of the phrase had an effect on civil proceedings. A practitioner member doubted that it was necessary to include the words “good faith” in the Criminal Rule, noting that experience of practitioners during the discovery stage is now better in criminal than in civil cases, despite the inclusion of the words “good faith” in the Civil Rules. Moreover, in both civil and criminal cases he agreed the experience is better when counsel are speaking to one another.

Professor Beale noted that this discussion would be very helpful to the Rule 16.1 Subcommittee when it reviewed any other comments received during the notice and comment period.

## VIII. NEXT MEETING

Judge Molloy concluded the meeting with a reminder that the Standing Committee was meeting in January and the Rules Committee would be meeting in Washington, D.C. on April 24, 2018. He also thanked the reporters and the rules staff.

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